[The Military Commission was called to order at 1442, 28 May 2014]

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

Commander.

DDC [CDR MIZER]: Judge, I am sorry to delay things but in an effort to be responsive to your question on the motion dealing with military judge alone, we will be filing a motion to cite supplemental authority, one case, which is out of the illustrious Navy Marine Corps Court of Criminal Appeals, Jungbluth, which is 48 MJ 953. It will be the paper version of that this afternoon. I just wanted to alert the court of that for the proposition that an election for judge alone can occur after the venire has been seated.

MJ [COL POHL]: Is that a capital case?

DDC [CDR MIZER]: It is not, Judge. You asked me for authority, I am giving it to you, Judge.

MJ [COL POHL]: Okay.

LDC [MR. KAMMEN]: I am told there is no translation.

MJ [COL POHL]: No, Commander, I got -- I remember I had asked you two separate questions and you are answering a different question than I thought you were, but I see where

you are at.

DDC [CDR MIZER]: I had no authority, Judge. Now I am providing what limited authority there is.

MJ [COL POHL]: Okay. Thank you. 272.

ADDC [Capt JACKSON]: Good afternoon, again, Your Honor.

MJ [COL POHL]: Good afternoon.

ADDC [Capt JACKSON]: Your Honor, the factual predicate that forms the basis of defense motion 272 is the correlating motion 292 from the 9/11 case whereby a member of a defense team was contacted by the FBI and caused to sign a nondisclosure agreement.

The remedies requested by the defense in this motion are that you issue a similar order that you did in 292 admonishing any member, past or present, of the defense team to come forward if they have been contacted in any way by a governmental agency requesting information about the inner workings of the team, or specifically the FBI having them sign a nondisclosure agreement; and, secondly, that the government provide a statement of facts as to what portions, if any, of this FBI investigation actually impacted members of the Nashiri defense team.

Your Honor, we believe that this request is not unwarranted and that there is a good basis for requesting

this, just even to err on the side of caution, where this conflict of interest may arise in this case. And my understanding is that the prosecution does not object to the primary, the first requested relief from the defense whereby you issue a similar order for 272 as you did in 292.

And then aside from that, Your Honor, the defense is confident to rest on its motion.

MJ [COL POHL]: Thank you.

Trial Counsel? General Martins.

CP [BG MARTINS]: Good afternoon, Your Honor.

MJ [COL POHL]: Good afternoon.

CP [BG MARTINS]: We only know the facts averred in the pleading have been walled off from any investigation. The potential conflict that's described, to the extent Your Honor feels an order is -- there is a basis in fact that you are not doing a declaratory judgment here, we don't object to that same form of relief with regard to the issuance of an order admonishing members of the defense team to come forward to their counsel, senior counsel as I recall the order being, and notifying if they have been contacted based on the averments and the understandings, very limited understanding that we have got on the averments of the contact with the Ramzi Binalshibh team.

Was there another piece of relief you were seeking?

ADDC [Capt JACKSON]: The statement of facts regarding the investigation that was done by the FBI, if any part of that investigation implicated members of the al Nashiri defense team, that that should be made known to the defense.

CP [BG MARTINS]: Your Honor, on that aspect of the relief, I can't participate in this -- in anything having to do with that investigation and can't participate in arguing or opposing or approving of that relief or recommending approval of it.

I can say that I can inquire as to this what the appropriate mechanism might be and determine -- in the other case, I detailed special trial counsel to ensure that we were walled off from it. So with regard to that, I can say that I will -- I can make an inquiry.

But with regard to the first piece of relief, we do not oppose, if the commission finds it has got a basis in fact and that you are making the judgment not purely in the abstract and it's not just a declaratory anticipatory judgment, we would not oppose that relief.

MJ [COL POHL]: Okay. Thank you. Anything further?

ADDC [Capt JACKSON]: Very briefly, Your Honor. In issuing the order that's similar to AE 292's order, the

defense just wants to reiterate why there is actually a factual basis that warrants giving this order.

The defense can talk to other members of the defense team and say, if anybody has been contacted by the FBI, please come forward, but that's just not going to carry the same amount of weight. And in the situation where we are discussing where the personal interests of defense counsel or members of the defense team may be contrary or affected by our role and our responsibilities within this case, it is best to err on the side of caution in making any of those types of disclosures known. And it's going to take an order from this court in order for that to have weight behind it rather than just coming from the defense.

And this is no imposition, just to err on the side of caution to make sure that any of those outside communications, that they understand that the weight of the court is behind it and that they must come forward and disclose that for past or present defense team members.

MJ [COL POHL]: Now, the options in the order are to disclose it within the defense team.

ADDC [Capt JACKSON]: Yes, Your Honor.

MJ [COL POHL]: Or directly to the court if they are uncomfortable with doing that?

ADDC [Capt JACKSON]: Yes, Your Honor.

MJ [COL POHL]: Okay. I understand. Thank you.

That brings us to the 120, the unclassified discussion of 120. This is a government motion for reconsideration. General Martins.

CP [BG MARTINS]: Your Honor, the government requests that you reconsider your order of 14 April. The standard for a reconsideration being that the court should reconsider if either party shows no facts or a clear error in law which compels the court to change its position. Significant discretionary authority on the part of the commission to grant a motion for reconsideration and to reconsider in the context of discovery wherein the trial judge has the full authority to specify time, place and manner of discovery and to prescribe such terms and conditions that are in the interests of justice, that protect national security, and that safeguard witnesses. Also believe that this is authorized by the classified information procedures provisions of the Military Commissions Act which create procedures that will be vitiated if a reconsideration doesn't result in a more clear -- a clearer outlay of the rationale that was followed.

We are seeking a specific relief with the reconsideration, which is that you clarify your rationale with

regard to classified information discovery, provide us a rationale as to why the invocation of privilege, the claim of classified information privilege that we have made on a number of occasions with regard to these items, whether or not that is a proper invocation, and that you detail the rationale used and believe that is the appropriate relief.

I will start with facts, new facts. The government avers in its brief, its reply brief of last Wednesday, Your Honor, that the appropriate authority has now determined that extensive discovery already in possession of the defense with regard to things the accused experienced -- that is, interrogation techniques that were applied to the accused and conditions of the accused's detention -- will be re-marked display only, Abdul al Rahim al Nashiri, and thus are available to the defense. With regard to something it's repeated said was important, was the ability to talk to the accused about information received in discovery with him and thus be able to uncover as necessary extenuation, mitigation information.

Your Honor, as I go through this, if there is a particular provision of the rules or the law that we cite, is there any objection from the bench that we show some of these which have previously been cleared by the court security

officer and copy provided to counsel? These are copies of the CIPA and the rules in our briefs.

MJ [COL POHL]: Go ahead if you want to.

CP [BG MARTINS]: So as we have outlined in Appellate Exhibit 120D, our basic motion had provided significant discovery to the defense within these categories that are part of 120C.

Actually, Sergeant G, can you please bring up -- bring up number 2, please. It is still showing a blank screen up top. Is it possible to publish to the screen, please?

MJ [COL POHL]: Sure, go ahead.

CP [BG MARTINS]: I think there is a bit of a delay. If you could pull up number 2, slide 2. There you go. Specific relief that we are seeking. So this isn't a request for a supplement, a supplemental briefing. We are seeking -- this is a motion seeking specific relief having to clarify the standard used.

So the new facts then, Your Honor, are the ability of the defense to show information to the accused that relates to the accused's own treatment, own experiences. This is part of over a thousand pages of information regarding the Central Intelligence Agency's former Rendition, Detention and Interrogation Program. Significant material that's been

provided will be able to be discussed with the accused and this is something that the defense has again, time and again, said they wish to be able to show the accused.

Another fact, Your Honor, is that we have indexed for the defense -- based on the ten categories laid out in your order of the 14th, we have provided indexing with regard to those ten categories of what they received, and indexing being a form of process that courts use. When you were discussing this matter in February, you spoke of wanting to get a word picture of what had been provided. And in the aftermath of that, it became clear that the response to the 75-paragraph request of August 2012 that you, from the bench, ordered in February, the government provided didn't get to that for you.

We have provided now an index in Appellate Exhibit 120G that describes what it is they received. I believe that is another fact, a new fact that merits, in this context, a reconsideration, a revisiting of 120C. And I'll talk about those facts in addition to the declassification effort that is underway in the context of the legal aspect of the motion whether there was a clear error in law. And as we have stated in the request for reconsideration, it's difficult to determine precisely where an error may have occurred. We

frankly need to see what the rationale was.

The order cites to Rule for Military Commission 1001 and Rule for Military Commission 1004, and then if you could go to slide 42, please, Sergeant G, we are now looking at 120C. It cites to various statutes, military commission rules and case law concerning discovery.

So there is an incantation, if you will, of law after having described the defense obligation to investigate for extenuation and mitigation, but there is no description then of particular aspects of the classified information procedures rules that bear upon it. And what is clear, if nothing else is clear from the case law, but a lot is clear with regard to this particular case, a trial judge dealing with classified information procedures and the national security classified information privilege must consider, must consider that classified information privilege and the sources and methods concerns when passing on matters of discovery.

And if you could go to slide 26. This is from the Yunis case, which is authoritatively cited in the Manual for Military Commissions, Military Commission Rule 505 and also Rule for Military Commissions 701 in describing the discovery obligation.

So citing CIA v. Sims, which though a Freedom of

Information Act case, is clearly brought into the context of a criminal proceeding by the Yunis court, our higher court, our Circuit Court of Appeals for the District of Columbia Circuit. So the same concerns described in the Sims case must inform analysis by the district court.

So this isn't an ordinary piece of analysis. CIPA is a procedural statute. If the procedures of CIPA are not complied with, the statute is vitiated. So it's not -- the actual tracking of how the process should work is critical to providing the protections the court stated must inform the analyses of trial courts in passing on the discoverability of classified information.

So we are in Section 4 of the statute, Military Commission Rule 505(f) principally, Rule of Evidence 505(f) ----

MJ [COL POHL]: General Martins, when we litigated this, the government denied the discovery requests based strictly on the discovery rules.

CP [BG MARTINS]: Your Honor, we have been citing classified information discovery rules throughout this. And I think -- I mean, your description of the prosecution's outline, if you go to our responses, we are citing classified information discovery rules.

MJ [COL POHL]: Just so I am clear on this, it is that -- one of the objections to the order is that apparently summaries wouldn't be permitted?

CP [BG MARTINS]: That's not -- yes. For instance, in the order, to put a fine point on it, in your paragraphs 5(i) and (j), you say unredacted, which on its face, again, Your Honor, in the context of discovery, we don't believe we have reached the point of clear error here because discovery is, as the Moussaoui court said, an interactive process, particularly in the classified information realm. But if by that order -- and we can only read your words -- but if by that order you are saying unredacted means unredacted, then we are specifically contravening the classified information procedures requirement that you shall allow us to request, at least, redactions.

So in that example, that's the most pointed one, where failing to acknowledge that the remedies provided to the people through their government to avoid the disclose-or-dismiss dilemma, which is at the heart of this act and the heart of the classified information procedures in the Military Commissions Act ----

MJ [COL POHL]: Okay, so just -- I see what your point is, in the fact that later on I say you must comply with Military Commission Rule of Evidence 505 ----

CP [BG MARTINS]: I think you would agree, Your Honor, that seems to say the parties abide buy the protective orders.

MJ [COL POHL]: We are reading the same thing differently, but I understand your confusion. I am just trying to figure out, on the classified material, your concern was the use of the terms in paragraphs 5(i) and 5(j) would seem not to give the government an opportunity to provide summaries?

CP [BG MARTINS]: We looked hard at this, Your Honor. There are places in the transcript where you say -- in acknowledging the force of the discussion relating, for instance, to matters that might be introduced in clemency, this broad notion in our capital proceedings, there are times where you say, well, the government has its remedies. And that gives us some thought that maybe by this you mean, well, come back to me, government, if this is going to result in a disclosure of classified information.

But I think within the four corners of that order, it's tough for us to get to the point that you are being informed by this analysis from Sims in the controlling precedent from our court.

MJ [COL POHL]: Okay, I understand that. Okay. Go ahead.

CP [BG MARTINS]: So going through the analysis and then applying these new facts, which we think again amply, within

the discovery context, where you have the authority to issue orders as this interactive process that is described by a court considering very similar questions, a capital case in Moussaoui as an interactive process -- if you could pull up number 41, please, Sergeant G.

So it's an interactive process. And the new facts that I have described allow for an interview of the accused that allows them to even show him information they have received in discovery. This is specifically what they were asking for. In the context of the analysis required by the classified information procedures in the Military Commissions Act, the first step is relevance.

And I think as, again, we reviewed the arguments in this, I think we -- there may have been a misunderstanding created that the government was saying relevance is some really high bar, basic relevance. We are not saying that at all. I mean, the standard for relevance, of course, from Rule 501 and our Rules of Evidence, information that has any tendency to make a fact of consequence to the determination of the action more or less probable, agree that's a pretty low bar and the courts routinely say that.

But the importance of that step, Your Honor, we would submit is not to determine whether that bar is reached

and you get to the next steps, which I will talk about, but it defines what it is we are talking about and we are arguing about. So that when we get to the point where the government uses its remedy, the people's remedy in the act, to ask for protection in the form of a summary, that there is -- the context provides an understanding of what might be an adequate summary. And if that step is glided over, all that follows fails to work under the act, fails to provide the protection both to the accused as to getting all of the noncumulative, relevant, helpful information that relates to a legally cognizable defense, rebuttal of the prosecution's case or to sentencing. That's the language in the act straight out of Yunis that not only provides that information, but also creates the context wherein which a substitution, a summary or a redaction could be adequate.

And so it was really for the first time in oral argument in February, because the defense still hasn't really cited it, the fact of consequence to the determination of the action that seemed to come out of that discussion was Rule 1001(c), this is our presentencing procedures rule; (1)(B), the matters in mitigation, which is defined in military practice broadly to include the presentation of matters to the panel that might serve as the basis for a

recommendation of clemency at a later point to the convening authority. And that specific fact of consequence was talked about a lot, but by focusing on that and on other specifically identified facts of consequence to the determination of this action, we can identify what might be appropriate later on. It particularly gets important when you consider what is cumulative or not cumulative.

You know, you are the one privy presumably to the defense theories, Your Honor. The act protects that as well. And this interactive process places you in the unenviable position of having to listen to two sides, both of which are keeping something from the other, as required by law or as enabled by law, and other things we are hearing about as important facts of consequence about which they seek more information, where they request it, the admissibility of subsequent statements of the accused.

Again, no citation to authority, but we are discerning from the discussion 10 U.S.C. 948r, the statutory provision, which does make the totality of the circumstances relevant, and thus the circumstances under which a prior statement had been made and the length of the passage of time and the different factors that are in that statute are facts of consequence to the determination of the action.

Defense counsel cited Skipper, a future dangerousness case in capital litigation, as an area where the treatment, the accused's record and confinement, what happened to the accused in confinement and whether that indicates future dangerousness, that that becomes a fact of consequence to the determination of the action again became sharpened and clear from the discussion.

Now, in Skipper, that's a situation where a prosecution was using future dangerousness as a nonstatutory aggravator. Here we have not placed the defense on any notice that we intended to argue in that regard or present any evidence in our -- in any sentencing case that may come to pass related to future dangerousness.

But this process of identifying specific facts of consequence then is what enables later on when we get into a discussion about how the task might be achieved of placing the defense in substantially the same position as it would have been. It can't be achieved unless we focus specifically on the fact of consequence to the determination of the action, and that aspect is only becoming clear as we talk about the specific areas, but continue to want that kind of specificity now that the defense can speak to the accused about the information they have received, and we hope to be able to get

that.

And I have to also say that the detailed discussion that we are hearing today about discovery is encouraging. The desire for investigation, for many other things, we believe ought to begin with a very careful look with what they have received and what they feel may be lacking after talking with their client.

The second step, Your Honor, is the claiming of the privilege and whether that claim of the privilege is adequate. The standard used by the Yunis court is whether it is merely colorable. And here in 120C there is no indication that the claims of privilege with regard to information -- again, now indexed to show you what we have provided and make clear what we have provided in 120G -- how that is inadequate. Is it colorable? Do you agree that it is properly claimed, and now you are surmounting it because no substitution is adequate, that that is what we seek in order to be able to understand how to use the remedies that are in the Military Commissions Act procedural provisions for classified information?

And then the third piece of the analysis, this discussion of materiality -- in the discovery rules, it's termed material, in Yunis it's helpful or material -- that is an objective helpfulness to the defense, that if the fact of

consequence has been carefully identified and the privilege has been analyzed and you find it is more than clearly colorable, then the act requires a process of considering, if we request them -- and we have, we have requested them on ten occasions in different installments -- whether or not the redactions, the substitutions, the summaries or the other type of substitute described in the act is an admission of relevant facts, whether those are adequate. And there is no indication in the order that the substitutions that we have provided are inadequate or whether the privilege was poorly claimed with it.

That what's we are seeking to ask you to reconsider in applying that standard and give us an idea of where you found our invocation inadequate or a substitution that we offered, a summary that we offered inadequate. And that's not just to create more process here, it's intended to move this along so we actually achieve the balance that's required of a trial court in this act and what Congress sought.

I want to just address one more point. If you could go to the slide 27, Sergeant G. What we see in the defense filings on this -- again, this began with a defense motion to compel -- is a statement that what they have gotten is inadequate, that it doesn't capture what they think the

information should have in it and wish to draw the court's attention to the Rezaq case, this is another D.C. Circuit case, and this is now on a direct appeal. So the question was whether the trial judge, in accepting the substitutions that had been provided, had erred because they lacked evidentiary richness and narrow integrity, that they were desiccated, that they somehow didn't capture what the defense wanted, to pack a punch presumably. And the court clearly stated that the information is what is discoverable, noncumulative, relevant, helpful in an objective sense information.

And this requires, in order to figure this out, Your Honor, we are not minimizing the difficulty of this task and have spent a lot of time trying to develop proposed summaries for it, this requires a lot of work and acknowledge that with regard to counsel and court, a lot of time spent in SCIFs working this.

If you could bring up slide 36. This is a recent case, CIPA case, Your Honor, not in our jurisdiction, but I think the court captures it well. This is the United States v. Brown. It's an Eastern District of North Carolina case that CIPA processes are tedious and time-consuming and requires significant amount of resources.

In order to comply wherever we could with the

commission's order in 120C, I personally have been supervising the indexing of the material which we anticipated the commission wanted, and although you didn't precisely use the word index, seemed to be what you were after on 2 February when that was earlier argued. And I can tell you, as you have found, it just takes a long time sitting, having this material there and doing what is really a wholistic analysis. Because you can't really figure out what might put the defense or what will put the defense in an adequate position or a substantially similar position unless you consider all that they have, and now we would submit, Your Honor, consider the fact that they can talk to the accused and show the accused the information that's already been provided to them in discovery about the treatment of the accused.

So the notion that it is perhaps impossible to say precisely what they are looking for, courts are sympathetic to this, and there has been some understanding of that in these proceedings. But by being able to speak to the accused, the Yunis court talks about that being an important ameliorating factor, the ability of actually talking to the accused.

Subject to your questions.

MJ [COL POHL]: No. I have no questions. Thank you.

Mr. Kammen.

LDC [MR. KAMMEN]: If perhaps I look befuddled, it's because one of the hallmarks of the prosecution is that the target keeps moving. And so what they argued in their brief seems to be considerably different than what they argued today. But let me begin, Your Honor, with what I think is germane, and let me present to the court what I have marked and offer into evidence as AE 1200, which the government has seen. Let me tender it, Your Honor. I would like to display it as well. That is a letter to the President on January 6 of this year from Senators Carl Levin and Dianne Feinstein. Senator Levin was the chairman of the Senate Armed Services Committee and Senator Feinstein is the chairman of the Senate Select Committee on Intelligence.

MJ [COL POHL]: Go ahead.

LDC [MR. KAMMEN]: I don't know what ----

MJ [COL POHL]: I'm sorry, you can publish it.

LDC [MR. KAMMEN]: Yes. And is it available -- it is available on this screen, I don't know if it's -- it's available? Okay, now.

What this letter -- in January, at least two major arms -- chairmen of two major senate committees, were urging the president to declassify all of the information concerning what, and I am quoting, the letter describes as the now

defunct CIA detention and interrogation program. And significantly for our purposes, the senators go on to say this situation, this overclassification, what I call the CIA stranglehold on the truth, the senators say needs to be resolved or the trial, and they were talking about the other case, needs to be shifted to an Article III federal criminal court. And quite candidly -- and they go on to say that the overclassification, the stranglehold on the truth is undermining the reputation of the military commissions with the American public and friends and allies, and the overclassification, the stranglehold on the truth, interferes with our country's long-delayed but important efforts to publicly shine a light on a misguided CIA program that President Obama rightfully ended five years ago.

Now, what they are asking for and what they are asking the president to do was to break the stranglehold that the CIA has on the truth is what the United Nations Special Rapporteur for Torture calls the Bush torture conspiracy. So there is no misunderstanding, and this was discussed publicly by Dr. Crosby, this affects this case because Mr. Nashiri suffers PTSD as a result of this physical, emotional and sexual torture to which he was subjected.

Now, your order in 120C, Your Honor, was very

significant and, in fact, was quite brave because it took a step -- a baby step, to be sure -- but a step towards breaking the stranglehold on the truth. But I want to be clear, and I know we all understand it, but I just feel like it needs to be said, our request in 120 was much, much broader. And you rejected 90 percent of our requests. You said, nope, not necessary. And what you granted doesn't make information public, it only gives information to people with security clearances who then, under appropriately controlled circumstances, can do what you found they need to do to provide effective assistance of counsel. And your order, quite candidly, was very, very clear: The government is ordered to produce X; the government is ordered to produce Y.

You know, there have been times, and certainly I don't want to pull the scab, but clearly in the motions to recuse, that was premised on things that we felt could possibly and realistically interfere with independence. And to be fair, and I really do want to be fair here, we have tried to think of an analogy, what's a comparable order of magnitude to the order you granted. And the closest thing we could come to, Your Honor, was Judge Sirica's order in the Watergate cases breaking the stranglehold on the truth that the Nixon White House was attempting to impose with its

various cover-ups. Quite candidly, with all the admiration I can possibly muster, that is the magnitude of your order. And that is the order that the government desperately wants you to rescind; to reassert, at their request, the stranglehold on the truth.

Now, in the motion to recuse, when you denied it, you effectively were saying to us and to the world, well, I can be independent. And there was another point where we were arguing -- you and I had a colloquy, I don't think it was on 120 -- and, you know, I said well, you know, we didn't get around to doing something because we just don't have enough bodies. And you said, "Are you saying you're ineffective?" And I said, "No, but the problem is the system, the way it is in this case with the lack of resources, nobody can be effective."

Well, your order is premised on providing effective assistance of counsel. So quite candidly, Your Honor, this is where the rubber meets the road, it's where the rubber meets the road in terms of what Senators Levin and Feinstein were talking about, about breaking the stranglehold on the truth, about protecting the reputation of military commissions, it's about whether or not we are really committed to providing effective assistance of counsel.

Now, there is another piece of this which the prosecution didn't respond to or didn't address, and that is what I think is a very significant procedural default. Earlier today, in another context, the prosecutors say, well, we have got to follow the process. Doing away with the rules is no -- is not appropriate. Well, I agree. The process to file a motion to reconsider requires a contemporaneous or prior pleading requesting permission and setting out, in a single paragraph, the new facts or new law.

The government did not do that, and I think that's in -- the government didn't do it. And the government says, well, it's a motion to reconsider, so we don't need to do that, because we are asking for some kind of relief. Well, if that's the standard, then there is no bar to any motion to reconsider. We could file a motion to reconsider every decision you have made without seeking any permission, without seeking any new facts or law. And let's be candid, in their motion they cited no new law. None.

Yunis was decided in 1989. Yunis was in their original brief. We discussed Yunis in the argument on 120 at great length. There is no new law cited.

Now, it has been an evolving target, but they procedurally defaulted. And that is significant, Your Honor,

because as we point out in our response and we have cited and attached as exhibits in our response one example when we filed a supplemental pleading and it was rejected by the staff because it didn't have the required statement.

In our motion concerning Ms. Hollander, 178, which is a supplement, we were required and did file the supplemental -- the required condition precedent because there was a new fact, the fact that she had resubmitted a new card and it was denied.

With respect again to our supplemental motion to recuse Your Honor, we cited a new fact, the discovery of the communication between the convening authority and the folks in the Army personnel.

So there is this condition precedent that they didn't follow. And if we are going to have these rules, we have got to have these rules. And the worst possible mark on the military commissions, what will continue to undermine any pretense of legitimacy is if we say, well, there are rules, but they really don't need to be followed; or, worse, yeah, there is one set of rules for the defense, you have got to jump through all these hoops, but gosh, when the prosecution really, really wants something, they don't have to comply.

Because the notion that a motion to reconsider

doesn't require new facts or law doesn't make sense. We could ask for motions to reconsider and motions to reconsider and motions to reconsider.

Procedural default, Your Honor, is so significant in the law that people have been executed because their lawyers procedurally defaulted on claims. People have had huge lawsuits thrown out because of procedural default. It is a standard. If there is a condition precedent that is required and a party doesn't comply with it in courts with rules, that's the end of the discussion.

So we think, Your Honor, that this motion should be summarily denied. Because of the procedural default, it doesn't -- it is procedurally defective. It didn't raise any new law, it raises no new real facts. And what it does, though, is say to Your Honor, okay -- because let's set the context of this.

Way at the beginning, the government said, we want to move aggressively on this 505 and we said -- and you said submit your defense, and we said we don't know our defense, we don't have discovery. Well, go ahead and do it anyway.

So now -- you know, then, two years later we argue 120, and you heard extensive arguments on both sides and you issued this order, which, as I said, was brave and courageous.

The cynical part of me thinks it's going to get you fired, because -- but I hope I am wrong in that regard. But it is, and I mean that very seriously, it is a brave and courageous order. That's why they want you to walk it back. That's why what they are basically saying to you is stay in your lane. So their motion to reconsider is not on the facts, it's, Judge, let's negotiate. We don't like this, so let's you and I negotiate. That's what this is.

Now, what are the things that they throw out? The thing that General Martins talked about is that we have created -- and I'm paraphrasing General Martins now -- a new classification of display to the accused. And I need to tell you, Your Honor, this has got our people who are knowledgeable about security law's head exploding.

Because what the government proposes is in some way that we have no idea how this occurred, information will remain classified, but somehow we are expected to display it to somebody who they claim is a suspected terrorist and who they claim is a suspected member of al Qaeda, who does not have a security clearance, who is not cleared to receive the information.

Now, everything I have learned about security law as a result of my involvement in this case has taught me, number

one, you can only share classified information with an individual who has a need to know; and, number two, if that individual has the requisite security clearance, which Mr. Nashiri most assuredly does not.

So the solution of display only is a meaningless solution, because as we know the law, we can't do it under the present circumstances. There are huge questions about this. Number one, does display only mean we can hold it up and show it to him even though it's -- and what I am holding up is just a piece of paper, it's not a classified document. It's -- these documents are not in Arabic, he doesn't read the language the documents are in. So showing him a document he can't read is meaningless.

Well, does display only mean we can read it to him with the interpreter? It's not clear. Does display only mean we can have an interpreter translate it and let him read it in a meeting room under our supervision? Does display only mean, well, it can be translated and, like other discovery that we are allowed to give him, take it back to his cell? Presumably not.

None of this is answered by this solution, this opening gambit in negotiations. And it can't be answered because it doesn't exist in classification law. It's

something they are making up. And we don't know who's making it up. Is it the prosecutors? Is it the classification authority?

This is the overarching problem, is that the classification in this case is being used to assist the prosecution and to keep a stranglehold on the truth, and it's just used willy-nilly. And we see examples of that virtually daily.

So there is another piece of this. If we show it to him, under whatever that might mean, we are committing a federal crime. It is against the law for us to show information to a person without the requisite security clearance. People are in prison for doing this. He can't give us immunity, and I don't think Eric Holder is going to give us blanket transactional immunity.

So the notion, oh, you can solve this problem, just reveal classified information to a suspected member of al Qaeda and it's all going to be good doesn't work. And I mean this very, very seriously. I have been practicing criminal law for over 40 years and the first rule I learned -- I mean this with all respect to Mr. Nashiri -- one of the first things I learned is if somebody has got to go to prison, it needs to be the client. And what they are proposing for us

to do is commit a crime. Not going to happen.

Now, they propose other diversions. Don't do this, Your Honor, don't enforce your brave, courageous order. Gosh, there is going to be this declassification of the executive summary. Well, I don't want to belabor that point. We touched on it earlier. The executive summary is, if you will, the tip of this iceberg that may or may not be germane. And the whole issue of declassification misses the point. Declassification means that the proverbial gas station attendant in Iowa can read it.

I think we have a little greater need to access to information than the average guy out on the street. You have found that. You found that when you found that these ten categories of information were necessary for the effective representation, that they were material and they were necessary.

Now, their language, and this maybe is a little bit unclear, so I know we will be discussing the whole SSCI report and some of the more specific needs tomorrow in the classified session, but it's really the same issue. To the extent they are saying wait on declassification of the whole report, why should we? We have clearances. Why should we jump -- wait on the redaction process that the CIA goes through is not really

-- you know, when you see the end product, it's not terribly helpful, and that will be discussed at more length tomorrow, is really how intrusive the redaction process is. So the declassification of the SSCI report is not a -- you know, that's just negotiations, Your Honor. That's what all this is.

Now, they say, okay, we will give you more summaries. This will be, again, addressed in the classified matter. But for two years or more, I don't know how many times when we have discussed this they have said these summaries are the greatest things in the world, they are completely adequate. We have gone through this. We know what we are doing. These are wonderful. Now apparently their position is, eh, apparently not so much. We realize they are not so good. We are going to try to make it better. It's going to be a long process. It will take us months, maybe years. We will finally get there. That's negotiations. That's because they don't like your brave, courageous order.

Then they talk about the indexes, and I guess they have filed with you something. We haven't seen them, so I guess it's really hard to tell and respond as to what these indexes are. But if it is just a listing of what they have really given us, well, you know, that will be something we

will just have to address at some future time. But again, that all came after the fact. And those were the new facts that aren't new facts, they are just negotiations. It is something they created. It is, oh, we will show you some indexes and please don't grant this order, please don't enforce this order, please don't do this.

The final thing they offer is that they will issue invitations for interviews. They will reach out to some folks whose names we don't know and they will invite them to come and be interviewed. And one of the things that they say is you don't need their training records because you will be able to talk to them.

Well, I don't know whether it's that people don't respect the prosecution, people are afraid of the defense, people just don't want to be bothered, but there are five people who we have requested interviews that -- who are going to be subpoenaed, or whatever passes for a subpoena in this process, who we are going to try and get on the stand, because they clearly have knowledge germane to this case. Those people are former President Bush, former Vice President Cheney, John Rizzo, Jose Rodriguez, and former President Clinton.

Now, last week the prosecutor sent us a notice

saying, well, yes, we reached out to those guys on your behalf and they basically aren't interested. These folks are willing to write articles in the New York Times, they are willing to write books, they are willing to give $100,000 speeches, they are willing to go on Fox and C-SPAN and talk about how wonderful all this is, but when it comes to sitting down and being subjected to the crucible of the truth of an interview, forget under oath, oh, no, I'm not doing that, and again maybe it's because the prosecutor doesn't ask right, maybe it's because they don't want to be bothered, maybe it's because they are afraid, maybe it's because it's easy to have press conferences and hard to be confronted with the hard questions.

But if these guys aren't willing to be interviewed, who is the guy who was in the room or the doctor you referred to in one of your paragraphs of your order or the psychologist? They are not going to be interviewed. So the notion that they will use their good offices to somehow assist is ridiculous. Not gonna happen. And then what will happen is a year from now, we will sit there and they will say we tried, they didn't want to talk to you, too bad. Let's go to trial. Sorry you don't have that information.

The prosecution says, well, maybe you didn't really respect the claim of privilege. Well, Your Honor, it's pretty

clear that you did. You clearly understood the importance of this, because as required in paragraph 8, you suggest -- you ordered that the parties will continue to comply with the protective order. Everybody knew what was at stake here. This was no secret. And having argued as forcefully as they knew how that you should deny 120 in its entirety, they come back and say, oh, well, you granted these ten categories, now we want to negotiate.

Now, the prosecutor also in their motion essentially says to you -- what's the language? -- the people's need to go forward without essentially having classified information be revealed. This came up in the Ghailani case, Your Honor, where Judge Kaplan simply said, fine, you have to make choices. If you want to offer Ghailani's statement, you have to give this information up, or otherwise you can't offer his statement.

So there is nothing in your order that will require them to dismiss this case, and their argument and suggestion that they will have to dismiss this case if you stand by your order is absolutely frivolous. But they may not be able to ask for the death penalty, because if you torture a guy, you can't kill him.

They may not be able to offer co-conspirator

statements, because if the statements were taken under torture, you can't use them.

They may not be able to, and they won't be able to, I think, offer into evidence Nashiri's clean team statement, because we have the right to litigate all of the events that led up to that as forcefully as possible in a motion to suppress, and there has been no secret about this. This is not something that was new in February when we argued this or April when we argued it. It was in February. There has never been any secret that we were going to challenge the admissibility of that statement. And they alluded to it in their brief where they say, yeah, this stuff is relevant for outrageous government misconduct.

In, I think it's Rochin v. California, they said you can't pump a guy's stomach for heroin because that's too close to the rack and screw. Well, let's just say it like this, Your Honor: The Supreme Court has said and the courts have acknowledged that there exists the case where the government misconduct was so profound and so intrusive and so contrary to American values that continued prosecution might not be warranted. And maybe this is the case, I don't know. But it's never been any secret that that was coming once we had the information we needed.

They may not be able to go ahead with the case and use Mr. Al Darbi as a witness, because I think he went through some of the same things. But they've got 66 hearsay statements they can try to use, and if you rule that they are admissible and if the jury hears that and says that convinces us beyond a reasonable doubt that Mr. Nashiri is guilty, he will be sentenced presumably to a long, long sentence, if not a life sentence.

So it's not that the case is going to go away; it's just maybe parts of the case go away. Maybe they can't kill him. But, you know, I was stunned when General Martins says, well, you know, that whole conditions of confinement in Skipper, that really doesn't have anything to do with that case -- of course, that's something they argued before that you rejected -- because we are not alleging future dangerousness.

Well, I guess what that means is they are going to argue to the jury, if Mr. Nashiri is convicted, we want you to kill a guy who we agree is harmless in the future. Is that really where we are?

Your order, Your Honor, is really quite clear. There is nothing unclear about paragraph (a), a chronology identifying where the accused was held between the date of his

capture and September 2006. Nothing mysterious about that. And (b), a description of how the accused was transported, and (c) and (d), including identities of medical personnel, examining and treating physicians, psychologists, et cetera. Copies of the standard operating procedures or guidelines. All of that is really, really clear. There is nothing mysterious about this.

And the notion, Your Honor, and what they say is, well, we don't know the standard you used. Nonsense. We spent hours arguing the standard. Is it relevant? Is it material? Is it necessary?

The only people who now say they don't understand the standard you used are them. And as you point out in your order, you used the standard they argued. You used their cases, their law. They know what it is. And then they have the arrogance, and it really is arrogant, to say okay, well, we are going to appeal if you want to persist in this. If you won't stay in your lane, if you won't pull back this order, if you are really going to be independent, we are going to appeal, but we would sure like you to write another order so that we can take -- you know, so we hope you mess up.

They got the order. It's not like the law of discovery is complicated. You have found this material is

necessary for the defense, it's necessary for our investigation. If they want to appeal that, the standard of review is abuse of discretion. And if the Court of Appeals says, by some magic reconstruction of federal criminal law, in military commissions somehow it's different, then we will deal with that. But this notion that somehow you haven't done it right is simply just a pretext for more negotiations.

I have never been a judge. Pretty clear. But one of the -- I don't know if it is a disadvantage or it's an advantage that people that I have seen grow up in the law, or in some cases people I have taught or people I have worked with have become judges, and a judge I know told me once, in the context it came up, that he was taught at judge school that when you write an order, you write what you mean and that you mean what you write. I don't know, I mean, whether that's something that is taught to Your Honor; I presume in some way or another, it is.

And what my friend said is, look, what it means is if I am going to issue an order, I sit down, I think about it, I write what I am going to direct the parties to do, and they can either comply, they can appeal, but I have got to mean it. You know, you don't get take-backs. And your order is clear. I presume you wrote what you meant, and the question is now do

you mean what you write.

They didn't comply with the procedures, they didn't set out any new facts, they certainly haven't set out any new law, and now they say, well, why don't you change it all, walk it back, stay in your lane, walk away from it.

Where would this country have been, Your Honor, had they gone to Judge Sirica and said, gosh, the White House really doesn't like this, walk this back, and he had done that? That's not what should happen. It shouldn't have happened there, and it shouldn't happen here. So this motion should stand. The government's request for reconsideration should be denied.

I'm sure that they will have new things, and we'll respond appropriately. Thank you.

MJ [COL POHL]: Thank you, Mr. Kammen. Trial Counsel?

CP [BG MARTINS]: Your Honor, we would move that the attachments to Appellate Exhibit 120D be submitted for consideration in this motion. These are the two letters from White House counsel.

MJ [COL POHL]: I will consider them. Go ahead.

CP [BG MARTINS]: Your Honor, among the more than a thousand pages of information pertaining to the CIA's former Rendition, Detention and Interrogation Program provided to

this defense without any judicial prompting, long before this day and long before this litigation on this motion, included amongst that are a finding by the Inspector General of the Central Intelligence Agency that unauthorized, improvised, inhumane interrogation techniques and detention had been used, including on the accused, with specifics, among other things, that the waterboard was used in November of 2002. This is material that has been provided.

The allowing -- even allowing for his client's unquestioned right to a zealous defense, the idea that defense counsel has a monopoly on what's courageous and what's patriotic, what's arrogant or not, would be offensive if it weren't just so wrong.

If you could pull up slide 45, please. Without in any way saying something negative about defense counsel, I would like to draw the court's attention -- can you bring up the El-Mezain provision? It should be slide 45 or 46.

DDC [CDR MIZER]: I'm sorry to interrupt, but may Captain Jackson be excused?

MJ [COL POHL]: Sure, if she needs to be.

DDC [CDR MIZER]: I'm sorry, General.

CP [BG MARTINS]: It should be the most recent slide that you did, Sergeant G. Yes, here you go. This is a case that

we cited, Your Honor. This goes to this issue that defense raises from time to time that, hey, we have got a security clearance, we ought to be able to get anything that is at a particular level. And what it ignores, and it frankly validates the very concern that underwrites this, that just because you have a security clearance at a certain level doesn't mean that the authority seeking to protect the real source and method is obliged to show everybody that. It's encapsulated in the Executive Order 13526 in the need to know provision, but that is as much of a term of art. The court can provide the need to know in the form of a specific determination that something is noncumulative, relevant and helpful, but this is just an important distinction.

And what the Classified Information Procedures Act states and what this whole body of law is about, protecting real sources and methods, it is not -- I am not appealing in any way to bad faith on the defense. I don't have a monopoly on who is patriotic or courageous any more than they do. What I am saying is the structure of the system is that, an important respect, officials who are hearing cases as judges, defense counsel who are representing individual clients in some respects can't help themselves. They are not the ones who can be most best placed to determine whether something is

classified. And this quote is a court acknowledging that, a court acknowledging, in that case the Attorney General, this was a FISA context, could decide that somebody who had a clearance nevertheless shouldn't be getting a specific piece of information. So I need to address that because that comes up again and again, and it reflects a level of misunderstanding that is sort of at the heart of the problem in terms of access to specific facts and what the process is intending to protect, real sources and methods.

I also want to address this -- you know, he raised Skipper and clemency and so forth. Can you bring up slide 31, please? You know, he is misunderstanding something we stated rather clearly. I was not saying future dangerousness can't be a fact of consequence to the determination of the action. In fact, using that as a specific example of why we have to get granular on what is that fact of consequence, it is by -- this is from Skipper, citing to Eddings and Lockett, on something very analogous to our rule relating to clemency and the accused record in confinement be something considered in sentencing, a very broad standard, the defendant's character and record, but it provides the context within which to consider what is an appropriate substitute or at what point does that become so cumulative that it starts invading the

province of the sentencing authority to exercise reasoned, impartial sentencing authority.

And it's important, right? Because the idea of stepping on a mitigation case or saying that something is too far is not something we ordinarily do, particularly in a capital case. Point made. Understand that. So if there is going to be any limitation on that, what are going to be those cabining principles? You cannot find them. The Moussaoui court stands for nothing else in the CIPA context but saying that no substitutions are adequate can be an abuse of discretion. That's what that case stands for.

And so if you are going to, in some ways, curb a capital defendant's case, you have got to really be looking hard at what is it they want to offer that piece of evidence or information for. And that's where, if a substitute is going to be adequate, and the government is not saying it's always the case that there is an adequate substitute, not saying that at all, but if the court is going to find that in this context, we need to have explored the alternatives and the requests for substitutions and summaries have to have been searching. We have to have looked at indexes, we have to have looked at all of the stuff they have received and determine is their position substantially the same.

This isn't negotiation. This is about trying to do what the process, which is clear, calls for.

If you could pull up slide 22. This notion that somehow reconsideration doesn't happen or it is so unusual, this is the Yunis case itself. And, Your Honor, if one reads the procedural development of that case through the year 1988, defense trivializes Yunis's claim there. Yunis was actually looking to rebut a piece of the prosecution's case and looking for a potential defense of entrapment on the merits. On the merits, they are looking for something and the court says not material to the preparation of the defense -- or this is the appellate court does. Back at the trial level, the trial court asked for transcripts of Yunis' own statements, transcripts that included Yunis' own statements. They asked the government to provide an index and a summary. You see the basic tools in this process. When the court ordered production, the government moved for reconsideration. It's the appropriate thing to do. This isn't a supplement under your rules, it's a request for a reconsideration with unasked-for -- previously unasked-for relief in a procedural context that is distinct from any other that we have.

We are not saying that our previous summaries were inadequate. We are doing it in the course of this interactive

process with a honing of the issues with the commission regulating the time, place and manner of discovery.

Your Honor, in light of defense's citation to Ghailani, we would request that we be able to provide the precise context within which the prosecution in that case did not pursue introduction of certain statements and subsequent evidence.

MJ [COL POHL]: Are we at that point in this case?

CP [BG MARTINS]: Well, in light of the fact ----

MJ [COL POHL]: I mean, I believe the point was to illustrate there are other remedies, other potential remedies when the government gets an order they don't agree with.

CP [BG MARTINS]: I thought it would be helpful. It is something they cited and believe they got it wrong.

MJ [COL POHL]: If you want to submit it, go ahead.

CP [BG MARTINS]: And then on this whole issue of display only being unheard of, this is a reflection of why the need to really study the discovery that has been submitted is important. They have had this marking on material they have had for a long time in discovery and they haven't said this makes people's heads explode in the classification realm or it is illegal or they are going to go to jail. I would have liked to have heard this. They have had this. If you are

going to change the world, read the discovery that you have. And they have had that. And it's a reflection of the need for them to study the material and help us hone precisely what's relevant and helpful.

The last thing I will show Your Honor, if you can pull up slide 44. Your Honor, this is from the dissent in Ghailani -- I'm sorry, in Moussaoui. This is the dissent, now. It cites to Skipper, it talks about the accused's need to present a sentencing case, and I pointed out it's the dissent. So this is Judge Gregory giving you the argument that we have heard from defense counsel, and I just want to point out that's the dissent. This is a Court of Appeals finding an abuse of discretion for the holding that no substitution or that there was not a searching enough examination of potential substitutes.

Your Honor, this reconsideration is based on substantial new facts, it's based on a description of the appropriate standard that we would ask the commission to apply and believe it is fully called for by the law. That's all we seek you to apply is the law.

Thank you.

MJ [COL POHL]: Mr. Kammen.

LDC [MR. KAMMEN]: We argued all this. We argued all this

in February. We were largely in closed session. We got down in the weeds with respect to the insufficiency of the summaries. Been there, done that. No reason to go back and do it again. They argued maybe virtually the same thing in February. You know, they just want another bite of the apple, that's all this is, without ever complying with the rules, without the procedural complying with the condition precedent, just we don't like your order, and so we want to negotiate.

There can't be anything more clear than what you found that we needed. Look, this isn't about admissibility at trial. This is about allowing us to discover the universe of what evidence we may want to consider seeking admission of.

I think it is in John Rizzo's book, and I may be misquoting, but he talks about people who were watching the waterboarding of Nashiri being so upset they were vomiting. Well, if we had such person and he says -- describes this in detail, that might be something we would want to offer in evidence.

Now, they may say, whoa, that's not admissible. They may say, well, gosh, that's really not appropriate to present that witness, we need to do it another way, and that's a battle later on. But we at least at this point want to interview these people. We want the information you ordered.

Whether it becomes admissible and whether or not we have some of these fights about how it can be tailored is a different question, but that's not -- but we are not there now. This is discovery for us, to inform our investigation.

And look how it has morphed. When we argued 120 the last time, the prosecutor's argument was they don't get to investigate, they just have to accept what we give them and we're sorry your client gets killed. Now it's, oh, yeah, of course they have an obligation to investigate, we just want to do it on our terms. That's not what you ordered. We have been through this. Your order is clear. Produce this information.

We get to summaries later on if we choose to try to offer it. We will be discussing it tomorrow, presumably in the classified session again, as to why the summaries are inadequate, but we have done that. There is just nothing new here. And the new facts, the new don't do this, let's do that, we are supposed to wait on whatever is going to happen in the White House, which according to the newspapers, which may or may not be right, will be sometime this summer or fall for 500 pages. So the government says put the case on hold until fall for 500 pages. Or who knows how long it's going to take if you say, well, we will wait on the declassification of

several thousand pages of the SSCI report.

Well, they will produce more summaries but again, now we are back to two years ago. How do you consider summaries and the adequacy of summaries in the absence of our defense?

Now, we gave you this information two years ago, but if we are really going down that road, clearly it's a much more -- what we would give you today is much more different and much more focused than what we gave you two years ago. They don't know it. They don't know any -- you know, I mean, so if we are going down that road again, you know, if it is going to be this time-consuming process, that's fine. But then I don't want to be hearing about, oh, we have got to set hearing dates and we have got to do this and we have got to do that.

The fact is that -- how difficult it is to understand that what they are ordered to produce -- and I am looking at paragraph 120C or Charlie, subparagraph Charlie, for example, "All records, photographs, videos and summaries the government of the United States has in its possession which document the condition of the accused's confinement at each location." What's complicated about that? Give us all of it. Whether or not it becomes admissible, whether or

not -- let's say it's a thousand photographs. Well, you may say okay, you get to offer five from every location, not 500 from every location. That's fine. That's the control. But we need to know the universe, not just what they want to show us.

Remember that the agency underneath this, the people with their hands on the throat of the truth, have been caught lying to three different district courts; the 9/11 commission; according to what we read in the papers, the United States Senate; I'm going to guess, based on what I have seen, this commission; and who knows what else? And we also know that they intentionally and willfully, in violation of a court order, destroyed exculpatory evidence. And they say, well, let's do their bidding.

We have done this. We have had this fight. You have ruled. It's time. You know, keep your order in place. If they are going to appeal, let them appeal. That's the most efficient way to move forward. If the Court of Appeals says, Judge Pohl, you are wrong, we will see where we are there. If the Court of Appeals says, Judge Pohl, you are right, presumably they've got some hard choices to make.

But if we are to believe their letters from the White House, things may be overtaken by events and maybe this

will all be moot because maybe this will all be declassified, I don't know.

I just want to respond to one other thing very briefly, because they claim that, well, we have had given them stuff before that's classified that they can show to the accused. And I think I know what he is talking about, and he is absolutely wrong. The thing they are talking about is something that was provided to us in two forms, one classified and one unclassified, and what we discussed with the accused was the unclassified.

They still haven't answered the fundamental question, how is it that by some operation of fiat, the rules of classification somehow get erased in this court. And there is another problem with what they propose, Your Honor. They say, okay, you can share it with Mr. Nashiri. You can display it, whatever that all means. Does he have to sign a protective order? I presume not. What are his obligations? Let's say we display this to him or are allowed to read it to him or whatever; does he then have to be held in solitary confinement so he can't talk to anybody?

MJ [COL POHL]: Mr. Kammen, is that issue really before me now?

LDC [MR. KAMMEN]: It is, because they don't address the

obvious consequences of this.

MJ [COL POHL]: They are providing you, according to representations, a certain way to provide classified information to your client.

LDC [MR. KAMMEN]: A way that is not recognized in the law.

MJ [COL POHL]: I am with you there.

LDC [MR. KAMMEN]: Okay.

MJ [COL POHL]: You just want to know what are the conditions of this and what needs to be done, but that's not really the issue. I understand your concern, but is that the issue really before me?

LDC [MR. KAMMEN]: I think not because I think we never get to that issue because I think it should be summarily denied. I say this is the renegotiation. They say this is the new fact, aha, they can now share stuff.

And what I am saying is this new fact doesn't change anything and, in fact, makes things worse, because we have to give a client advice.

Now, one of the concerns, Your Honor, is this: Supposing -- and again hypothetically, because, you know, let's say that we do this and under circumstances that are appropriate he talks to somebody else, another person about

it, another inmate. Is he committing a federal crime? Does he build in aggravating circumstances where the government, if they learn of that, you know, if somehow they learn of that says, ladies and gentlemen of the jury, we gave Nashiri this classified information and he told somebody else so now you've got to kill him because he revealed classified information?

Or -- and again, then everyone will think this is farfetched, and it may well be, but supposing he is acquitted. Now, we have already raised the issue a long time ago. Well, if he is acquitted will he actually get to go home like he would in an Article III court, or at least be released? And they said that's -- we can't address that, you know, stay in your lane, that wasn't anything you needed to concern yourself with. But if we go down this road then and he is acquitted, are they going to say we have got to hold him here for the rest of his life because we gave him this classified information?

The solution they propose creates this huge set of problems. There are procedures under CIPA in which the government can create unclassified summaries. That's how CIPA -- how CIPA works, and we have been through this, is the defense gets -- cleared people get the underlying information, the document that says here is what happened. In Yunis, the

transcripts.

Then there is this interactive process where the parties, under the supervision of the court, create the summaries and the summaries are unclassified and the defendant can see the summaries.

That's not what's happening here. They want to skip the underlying stuff, say here are the summaries you get, good luck to you. Now they say, well, we are not going to declassify the summaries, they are still TS/SCI, but there is this one exception recognized in the law that creates all these huge collateral issues as though that somehow solves the problem.

Again, that's why your order should stand. There is no new facts, no new law, only solutions that aren't solutions, only solutions that they rejected when we argued it before; and then having lost, you having ruled, they say well, okay, now let's try this.

You ruled. You found that this material was necessary for effective investigation, and we just ask you to stand firm in your ruling.

MJ [COL POHL]: Thank you. Okay.

That covers all the issues that we are going to discuss this session in an open session. Tomorrow there is

going to be a closed session pursuant to Rule for Military Commission 806 to discuss classified materials.

The commission is in recess.

[The Military Commission recessed at 1627, 28 May 2014.]

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