[The R.M.C. 803 session was called to order at 0905, 12 September 2019.]

MJ [Col COHEN]: The commission is called to order.

Trial Counsel, are all of the government counsel who were present at the close of the previous session again present?

CP [BG MARTINS]: Good morning, Your Honor. Yes.

MJ [Col COHEN]: All right. Thank you, sir.

I note that none of the accused are here this morning. We'll take that up momentarily.

Otherwise, from what I can see, Mr. Sowards, it appears that all of your team is once again present?

LDC [MR. SOWARDS]: Yes, Your Honor.

MJ [Col COHEN]: All right.

Ms. Bormann, it also seems that all of your team is present; is that correct.

LDC [MS. BORMANN]: That's correct.

MJ [Col COHEN]: And, Mr. Harrington, the same for you.

LDC [MR. HARRINGTON]: Yes, Judge.

MJ [Col COHEN]: And, Mr. Connell.

LDC [MR. CONNELL]: Your Honor, Captain Andreu is working on other commission business.

MJ [Col COHEN]: And, Mr. Ruiz, it appears there may be a

few people missing?

LDC [MR. RUIZ]: Yes, sir. Ms. Lachelier and Major Wilkinson and Commander Furry are working on other business.

MJ [Col COHEN]: All right. Not a problem. That's authorized, so. Thank you.

All right. As I indicated, good morning, everyone. We'll start off with any witnesses with respect to the absences of the accused.

I note that I recognize the witness as the same witness who testified yesterday. I remind you that you're still under oath. All right. Thank you.

LIEUTENANT COMMANDER, U.S. NAVY, was called as a witness for the prosecution, was reminded of her oath, and testified as follows:

DIRECT EXAMINATION

Questions by the Assistant Trial Counsel [Maj DYKSTRA]:

Q. Good morning, Commander.

A. Good morning, sir.

Q. Are you the same assistant staff judge advocate that testified yesterday?

A. Yes, sir, I am.

Q. Did you have the opportunity to advise the accused of their right to be present this morning?

A. I did.

ATC [Maj DYKSTRA]: Your Honor, permission to approach?

MJ [Col COHEN]: You may.

Q. Commander, I've just handed you what has been marked as Appellate Exhibits 660C, D, E, F, and G. Are those the forms that you used to advise the accused of their rights to be present this morning?

A. Yes, they are.

Q. And at what time did you advise the accused of their rights this morning?

A. I advised Khalid Shaikh Mohammad at approximately 6:13, Walid Bin'Attash at 6:30, alshibh at 6:05, Aziz Ali at 6:24, and al Hawsawi at 6:16.

Q. And in what language did you advise them?

A. I read all of the rights in English, and Bin'Attash read -- is the only one who had read along in the Arabic.

Q. And what did they tell you after you advised them?

A. They said nothing, but waived -- but signed the form.

Q. And lastly, do you have any question about the voluntariness of the -- of their choices to be here or not be here?

A. No, sir.

ATC [Maj DYKSTRA]: Thank you, Your Honor. No further

questions.

MJ [Col COHEN]: Thank you. May I have the exhibits, please.

WIT: Yes, sir.

MJ [Col COHEN]: Mr. Sowards, AE 660C purports to be a statement signed by your client. Have you had an opportunity to review that and do you have any questions?

LDC [MR. SOWARDS]: I have not reviewed that, Your Honor, but I'm familiar with the process, and I have no questions.

MJ [Col COHEN]: Okay. Would you like the opportunity to see this?

LDC [MR. SOWARDS]: No, thank you. I'm fine.

MJ [Col COHEN]: All right.

Ms. Bormann, AE 660D purports to be a statement signed by Mr. Bin'Attash on the Arabic form. Have you had the opportunity to review it, and do you have any questions?

LDC [MS. BORMANN]: First, thank you for the AE number because it wasn't on my copy. I've reviewed it, and I have no questions.

MJ [Col COHEN]: All right. Thank you, ma'am.

Mr. Harrington, AE 660E purports to be a statement signed by Mr. Binalshibh. Do you have any questions and have you had the opportunity to review it?

LDC [MR. HARRINGTON]: I have reviewed it, Judge. I have no questions.

MJ [Col COHEN]: All right. Thank you, sir.

Mr. Connell, AE 660F purports to be a statement signed by Mr. Ali. Have you had the opportunity to see the document and do you have any questions?

LDC [MR. CONNELL]: I have reviewed it. I have no questions.

MJ [Col COHEN]: All right. Thank you, sir.

Mr. Ruiz, AE 660G purports to be a statement signed by Mr. al Hawsawi. Have you had the opportunity to review it, and do you have any questions?

LDC [MR. RUIZ]: I have reviewed it, and I have no questions. Thank you.

MJ [Col COHEN]: All right. Thank you, sir.

I'll note the standing objection.

Lieutenant Commander, you are permanently excused.

WIT: Thank you, sir.

[The witness was excused.]

MJ [Col COHEN]: Based on the evidence presented and the documentation here, which I am now handing to the court reporters, the commission finds that Mr. Mohammad, Mr. Bin'Attash, Mr. Binalshibh, Mr. Ali, and Mr. al Hawsawi

have knowingly and voluntarily waived their right to be present at today's session.

I know we will have some probably brief classified argument to the extent necessary with respect to AE 650 later this afternoon in an R.M.C. 806 hearing.

I would like now -- the government has presented it, there is no burden on this matter, so I expect that having heard from the government, if I need to hear additional, I'll hear whatever the classified portion of that is.

I'll give each of the defense counsel an opportunity to discuss the two specific issues, which is the statutory interpretation of whether or not that substituted evidentiary foundations can be done ex parte and then also what generally should be the criteria for -- that I should consider in the event that they are done ex parte or just in general.

That being said, then, it's approximately 0911 hours. I'd like to conclude today's morning -- this morning's session approximately 1140, 1145, allow the parties an hour and 15 minutes for lunch and afternoon prep, and reconvene this afternoon at 1300 in the 806 session.

We will then take all of the argument. Because it's more of a limited session, it's likely that we will finish this afternoon, but if for some reason as I did yesterday into

this morning, if for some reason we need to go into tomorrow morning, I would continue the 806 session into tomorrow morning because I want to make sure that I don't cut the issue short. All right.

That being said, Mr. Sowards, I will just start here in the front. The well is yours for this time period. Thank you.

LDC [MR. SOWARDS]: Thank you very much, Your Honor.

MJ [Col COHEN]: You're welcome, sir.

LDC [MR. SOWARDS]: In addressing the -- or, excuse me, raising the question of -- that the military judge did for the parties, we note at the outset an important consideration is just the process that brought us here, which is the military judge had a question, and what he did was to pose it to all the parties and ask for our responses.

And at the outset, I want to emphasize that to us, the importance of just that much of the process is that it reflects the importance to the adversarial process of having participation of all sides, to have the views expressed by people who have an interest, obviously a very important interest in the outcome of the proceedings. And it also reaffirms the best sort of process for adversarial proceedings to enable a judge or a decision-maker to make an informed and

reliable decision.

We also see the value of that, I think, in the -- is that a round of applause or is that the storm?

MJ [Col COHEN]: Yeah. Yes. You -- we are hearing some rain on the roof.

LDC [MR. SOWARDS]: Okay. But the value of this process and these proceedings, I think, was reinforced by the recent events yesterday and today, in that, I believe it was yesterday morning, the government in the context of AE 538, I made a representation to the military judge about the Department of Justice Inspector General's Report, which was released in May -- or prepared in May of 2008, and made the suggestion that it supported their position that there was no single program involving both FBI and CIA investigation -- or interrogations of the defendants.

And at least sitting over there, I took from that the suggestion that the Inspector General had investigated this and either was unable to conclude based on all of the information that there was that unitary program, or maybe even better for the government, had conclusively ruled it out.

But, in fact, in the introduction to the Inspector General's Report on page 2 of the investigation, they have the disclaimer that says, "With limited exceptions, we were unable

to and did not investigate the conduct or observations of FBI agents regarding detainees held at CIA facilities." And then they give several reasons why they were prevented from doing that. And I thought, in light of the representations made to the military judge, that disclaimer, that limitation on their report, really put the whole thing in a different light.

And I sort of imagined that if Your Honor were sitting in chambers for an ex parte proceeding and only one side came in and told you the first part of that without having someone else come in and explain the other part, that could substantially affect your decision in a way that would be detrimental to the defense.

And so I think that's -- and by the way, I just hasten to add that this is not a suggestion that anyone from the prosecution was being less than candid with you or misleading. It is, as I believe I mentioned, something like an over-400-page report; and some people, if you do what I do, sort of look at the table of contents and jump to the stuff that is of interest and sometimes don't bother with introductions.

But if you have somebody who has skin in the game and they want their side to be fairly represented, they have an incentive to conduct that sort of analysis and investigation

and share that information with a decision-maker.

I do think that a similar process has occurred with specific reference to 650.

Excuse me just one moment.

MJ [Col COHEN]: Yes, sir. Sir, if you need a place to roll out -- I know the side does pull out. I'm referring to a bottle of water that you just got.

LDC [MR. SOWARDS]: I was going to say, my reputation for clumsiness precedes me. Thank you very much on that.

But the court -- Your Honor asked a very straightforward question, very simple question, and that was whether you have the authority to consider on an ex parte basis government requests for either substituted evidentiary foundation, and then you made it specific, pursuant to 10 U.S.C. 949p-6(c)(2), or -- and/or did you have authority for ex parte consideration a motion for protective order, again pursuant to 10 U.S.C. 949, 3 **[sic]** . And I'll get to the questions later about reliability and a fair trial.

But our position, what we did was to -- and maybe it's overly concrete and pedestrian, but we went to those two statutes, because you were asking whether pursuant to those two statutes there was that authority or were you precluded from having that authority. And looking at just the plain

language of those statutes, the clear answer to your question is no, the military judge does not have such authority.

And our analysis, and further discussed in the briefing, in addition to resting on the plain language, says that if you want to look at the equally simple rules of statutory construction, buttressed by the compulsion of constitutional guarantees to a fair trial, you get to the same result.

By contrast, the government's presentation yesterday, which I do acknowledge was technologically very impressive, but I believe erred in going far afield of the question Your Honor asked. And it seemed to go out in a very far direction and then try to come back to answer your question through a lot of inferences and assumptions. And we know the principle of Occam's razor, that if we eliminate all of the confusion and go with the more direct, unfetterred description of something or explanation of a problem, we probably have the more reliable answer.

But in any event, the government's reliance on Musacchio v. United States was highlighted and presented to the commission as a methodology of statutory construction on the way in which statutes should be construed. And I would just respectfully disagree with the prosecution, in that if

you look at that case and the language in particular that was highlighted and blown up in super-text that refers to examining, quote, the text, context, and relevant historical treatment, you will see that comes from a case called Reed Elsevier, Inc. v. Muchnick. And both of those cases, both ----

MJ [Col COHEN]: Do you happen to have a cite for that?

LDC [MR. SOWARDS]: I sure do, Your Honor. It is 559 U.S. 154 at 166 ----

MJ [Col COHEN]: Thank you.

LDC [MR. SOWARDS]: ---- a 2010 decision.

MJ [Col COHEN]: Thank you, sir.

LDC [MR. SOWARDS]: And I point to that case only because that is where the language actually comes from. And both cases deal with -- excuse me -- deal with the methodology or the test, the questions to be asked when a court is looking at the question of whether statutes of limitation are jurisdictional. And they talk about, you know, is there a plain statement, has Congress made a plain statement, how do we see whether they've made a plain statement, because often there are terms of limitation. But it doesn't further explain whether that's jurisdictional or not. So the court says, in those instances, text, context, and relevant historical

treatment.

What we suggest, and we briefed for the court, is that typically any issue of statutory construction begins with the plain language of the statute. If upon examination of the plain language there is some question of ambiguity, then there are other tools of statutory construction which are employed.

But what we can also do -- and I will tell you very briefly, when we construe the statute here -- or just actually read the statute here -- is also sort of stress test it, if we want to look at things such as text, context, and relevant historical treatment or any other rule of statutory construction. But our main point is you read the statute and the language is there. You really have to go no further.

But in doing that, there are two other considerations which I think assist us. The first is that this is a capital case, and all of the authority that we have discussed and will discuss has the same deficiency -- not deficiency, it's just the limited factual situation, in that none of them involves a capital case. Not even Mr. Moussaoui's case involves a capital case because he wasn't sentenced to death. And so you are sort of in the frontier here in deciding this case and deciding the -- reading the statute.

But I would caution that because this is a capital

case, there are any number of -- and you addressed this when we first met you -- notions of super due process or heightened need of reliability, which counsels that unless it is specifically authorized and, even better yet, judicially tested it is very sort of treacherous ground to start reading into a statute the ability to exclude the defense from the opportunity to be in the room and add to the completeness of the presentation being made to the military judge.

The second overall consideration is that these statutory provisions that we're dealing with address instances in which the defense has already for the most part come into possession of the evidence that the prosecution is seeking to prevent from being disclosed and/or we are at trial.

And when we look at all of the cases -- and I can talk about them briefly later to the extent Your Honor wants to. But if we look at all of the cases that were put up on the screen yesterday or reviewed in the prosecution's briefing that deal specifically with CIPA issues or the M.C.R.E. in our case, all of those cases deal with the point of the process in which the government is making discovery decisions.

There is only one case which those principles are then imported into the proceedings, and that's United States v. Marzook, and that's 435 F.Supp. 798 which the

government discussed with you yesterday. And that was sort of importing some of the Section 4 procedures under CIPA to control issues of heightened security need for the court to hear testimony, really, from foundational witnesses in an espionage -- or a foreign arrest case to test the reliability of a confession.

But the point is that all of these -- the source for those cases are all discussing the time at which the government, which we understand has a right to come to you, and, upon proper showing, make ex parte presentations about the sufficiency of substitutions. What we're dealing here with -- dealing with here in this instance is after they have done that and now we're talking about introducing the evidence that's going to the members.

So if we look at the plain language of 949-6(c)(2) **[sic]**, it provides that the -- in fact, mandates that, quote, The military judge shall permit counsel -- trial counsel to introduce, and then our relevant provision, a substituted evidentiary foundation, and again that word, pursuant to the procedures described in subsection (d). That's subsection (d) of 949-6. So as we look at the answer to Your Honor's question, the operative statutory provisions are then found in subsection (d) and particularly subsection (d)(3).

That in turn further mandates with the mandatory language that, quote, The military judge shall hold a hearing on the government's motion to proffer a substituted evidentiary foundation, shall hold a hearing on the government's motion, and that, quote, any such hearing shall be held in camera, and that's only if requested by a knowledgeable United States official with authority over classification decisions.

There's no dispute -- or I haven't heard any dispute with the notion that M.C.R.E. 505(b)(3), and just general -- general usage anyway, construes the meaning of an in camera hearing as one in which the parties are present but the public is excluded.

So in subsection (d)(3), the mandatory language is that the military judge hold -- hold a hearing on the motion, but do so in camera. And I've -- with the assistance of your staff, I wanted to show you -- this will be marked as 650N, and this the government has seen before. This is slide 19 from the presentation yesterday.

And I should say the people who are familiar with me in these proceedings are amazed that I'm doing anything remotely technical.

MJ [Col COHEN]: All right.

LDC [MR. SOWARDS]: So bear with me.

MJ [Col COHEN]: Not a problem.

LDC [MR. SOWARDS]: So this is the slide they presented to you and to the public yesterday. And on the left-hand side, we see blown up in big letters their characterization -- their characterization of what's going on in subparagraph (4). This is action on the motion.

And they say from this, you, the military judge -- and imagine if they were presenting this to you in camera, that you are to understand that 949p-6(d) in turn expressly -- expressly authorizes and requires the military judge to examine certain declarations certifying damage to national security on an ex parte basis. And that is absolutely correct. That is absolutely right, that if they want that in camera hearing, that means the public excluded, where we will be participating, they must present to you this declaration, which we understand you get to consider ex parte.

But that's not what the answer to Your Honor's question is. The answer to Your Honor's question is what I just read before, which is up above in paragraph (3), and that's the one that says, assuming they do that, the military judge shall hold a hearing on any motion, and any such hearing shall be held in camera.

And I will not bore you with this process, but at least what I was able to discern in going through the 50 slides that were presented to the military judge yesterday, you will not see the language in subparagraph (3) highlighted or underlined anyplace in here.

And so I think that in the presentation that was made to you yesterday, the prosecution perhaps, understandably looking for examples of ex parte proceedings, has overlooked a very significant portion of the statute mandating what you must do in answering your question.

But again, that also serves to, I think, emphasize the importance of the participation of both parties in working through a problem, particularly one as sometimes unscintillating as parsing a statute. Although again, I submit that it's pretty clear when you read that what's going on.

MJ [Col COHEN]: Mr. Sowards, if I may interrupt you ----

LDC [MR. SOWARDS]: Yes, sir.

MJ [Col COHEN]: ---- before I forget a question that I have for you. So assuming I accept this statutory construction because as I -- you're right, if I can read the statute and it makes sense on its face, I apply it as it's written.

Do you have currently -- and if you don't, that's fine -- notionally a construct of how this will work in a situation where the government can file a request for summaries and substitutions ex parte; I am precluded because it's filed ex parte of discussing what the actual nature of the filing is, in the same way that if you all requested a 949p-2 ex parte hearing, I also would not be able to disclose that to anyone, we know, without your permission; but yet, I hold an in camera hearing to discuss something that I can't necessarily disclose.

So how -- what are you all envisioning how this in camera hearing would work in an adversarial process?

LDC [MR. SOWARDS]: Sure. And if you could just back up one moment.

MJ [Col COHEN]: Absolutely.

LDC [MR. SOWARDS]: Yeah, you were saying the filing itself would be ex parte and we couldn't see it?

MJ [Col COHEN]: Well, I mean, so essentially it's me trying to put together the different ways things could come to me, right? So, for example, if we're just talking summaries and substitutions under the rule, which has happened in the commission in the past where those are filed ex parte -- or is that what you're saying, is that even the summaries and

substitutions themselves, not when we're talking about substituted evidentiary foundations, but the summaries and substitutions themselves, sometimes -- are you all limiting -- are you just following what I'm asking, which is just the substituted evidentiary foundation?

LDC [MR. SOWARDS]: Well, I focused on that because that was the question.

MJ [Col COHEN]: Yeah, yeah. That's the ----

LDC [MR. SOWARDS]: And if that leads to other questions -- again, I don't mean to keep doing a mantra here, but that's a perfect example of why it's great to have both parties there so when you have questions, they can answer things that, you know, they didn't know were at issue.

But I think again -- and this also is consistent with the government's sense of looking at things in context, that all of this is under four -- 949p-6.

MJ [Col COHEN]: Correct.

LDC [MR. SOWARDS]: And, let's see. If we look at 949p-6(b), they have a whole provision here on notice and use of classified information by the government, including notice to the -- to the accused -- we like to say actually notice to the defense, and I can explain that to the court later. But the point here is that, in one way, this looks very much like

standard kind of 505(h) procedures that we -- you know, that we did even earlier this week. The government says we have some information that we acknowledge is classified or, you know, even the substitutions are classified, we want to talk about how we're going to use it or not use it, and so they give notice to us, and you move on from there.

As I mentioned before, all the -- most of the stuff should be -- under the substitutions of evidentiary foundations, should be information of which we are already aware. But the provisions in (b)(1) with notice to the excused says -- I'm sorry, I keep saying that -- the accused says, quote, When the United States has not previously made the information available to the defense -- my edit -- in connection with the case, the information may be described by generic category.

So we're always doing -- you know, we're always dealing with this two or three levels removed, and the defense just has to suck it up and try to handle this. But they have provisions for that. And I'll get to maybe answer the -- well, maybe I can jump to that now.

The -- because the question of how you do what you're doing when you have the notice of the 949p-6(2) -- (c)(2)(B), and I think this reinforces the notion of why the whole

proceeding has to be in camera with the parties present, because what you're being asked to decide is whether the proposed redactions or substitutions provide us with the same ability to make a defense in the sense that it is reliable evidence and the redactions are consistent with affording the defendant a fair trial.

And again, we -- you know, we welcome certainly Your Honor's honest effort to stand in for us, but you have to understand that that is a very, well, unprecedented, stunning suggestion, that at a crucial time in the proceedings, that is in trial when you're bringing in evidence to -- and you're wondering the provenance of it, whether it's even admissible, that the judge has to pretend to wear two hats.

I think that would be completely inconsistent with the mandate of the Eighth Amendment as well as the due process clause and effective assistance of counsel to ask the judge to do that. In fact, I think it would actually border on a species of conflict of interest. That's, you know, without criticism of the judge, but you can imagine what you're being asked to do.

And again I think, you know, it comes back to the difference of somebody who up to that moment is supposed to be getting his or her mind into the mode of a -- of an impartial,

detached magistrate, and now suddenly has to become sort of an adrenaline-driven advocate who is trying to defend someone's life and look at all aspects of what could be wrong with this -- with this evidence.

The -- and just jumping ahead to those provisions of 949 -- I'm sorry, 949, 6(c)(2)(B), when you asked the question, and again, I made -- this is demonstrating my point, the answers that you've received to your questions about what factors should be considered also demonstrates exactly why the hearing has to involve all of these -- all of the parties, or certainly the defense. Because even though the briefing, both the government's and the defense, talks about general categories of considerations, big general categories and principles of confrontation and due process, and then maybe even gives categories under those themes, what it clearly indicates is that this is going to be an intensive, fact-specific, case-specific question and examination. And you're going to have to hear from the parties.

And again, that is why -- I mean, I don't know if that's why the -- why the congressional drafters used this language, but it's certainly consistent with the recognition that this has to be -- this has to be an in camera proceeding, and only then if the government thinks that public discussion

of it, much as we do with the 806, public discussion would somehow cause some harm.

But the other point is that one of the factors specified under 6(2) -- 6(c)(2)(B) is the reliability of the evidence. And while some of us have been -- or the defense naturally has been focused on the questions of fair -- fair trial, the question of the reliability of the evidence is itself part and parcel of the right to present a defense.

Just as in Crane v. Kentucky, the United States Supreme Court held that, even if the evidence was sufficient of a confession -- regarding a confession was sufficient to pass muster with the judge in terms of its voluntariness, the court recognized that lay jurors, and perhaps a group of 12, may come to a different conclusion looking at the same evidence. And that was with no disrespect to the trial judge. They simply said that, under your right to present a full defense, you get to present your concerns about the reliability of this evidence to the jury.

MJ [Col COHEN]: Yeah, and I agree with that. I mean, I think that is the state of the law with respect to -- you know, it is a matter that you all get to raise to the jury with respect to -- even if I find that it's voluntary, that you can still raise the voluntariness issue with respect to

the members and how much weight they should give those statements.

LDC [MR. SOWARDS]: Sure. So -- and then in pursuing that line of reasoning, it would sort of be inconsistent or make little sense to find out that we were excluded from a proceeding in which all of that was short-circuited so we had no idea what the underlying information or concerns were about the reliability of the evidence.

And let me give you one example of how this might play out. And again, this is not to excoriate the government or suggest bad motives, but, I mean, what it results in or could result in is misleading the members as to the reliability of the information in the sense that what could result is to have an FBI agent or a CIA agent who looks like a good, loyal American, somebody they relate to and can identify with and assume have certain standards of conduct testifying in the passive voice that this evidence was recovered from a certain location that makes it very incriminating for, example, Mr. Mohammad.

And what the members might not know is that before it got into that witness' hands, it passed through a number of people who perhaps were very shady and of questionable character. And again, without disparaging our many allies

around the country -- around the world, we know that, in fact, there are some state agencies that have a questionable reputation regarding human rights.

But that's not just, you know, the defense complaining about this. One of the cases we cited, Gardner v. Florida, talks about the importance not just from the due process perspective, but from an Eighth Amendment reliability perspective of avoiding situations in which a defendant has been kicked -- convicted or sentenced to death, in that case a sentencing issue, based on evidence that he had no opportunity, fair opportunity to refute or rebut.

And the thing that's interesting that the court focuses on is that, when a state agency -- and they weren't even talking about classified information, of course -- but when a state agency says that, for some legitimate reason, we have to give the protection of anonymity to sources of -- and methods of gathering information, the United States Supreme Court in Gardner said, but that's exactly the sort of opportunity that creates a risk of unreliable information because we don't know about the integrity of these people and the sources of your information.

The other part that concerns us, and we don't know how far the government would want to extend this, but the

section also -- in terms of substituted evidentiary foundation allows them to protect activities by which they obtain certain information. We don't know if what they want to do is part of their rolling ongoing after they have completed this disclosure of information, discovery, then protects certain particularly grievous instances of torture because it's somehow a protected activity.

It may be that they can have that discussion with you and convince you to protect that, but again, there is no reason why, and every reason for us to be in the room. No reason why we shouldn't be and many reasons why we should be in the room to help you through that process.

MJ [Col COHEN]: Let me ask you this.

LDC [MR. SOWARDS]: Yes, sir.

MJ [Col COHEN]: If I agree with the government that the in camera somehow should be referred to as ex parte, but I agree with you that defense input is necessary to understand what your concerns are about particular pieces of evidence, et cetera, if I was to take a methodology that said, okay, I will not take a look at any substituted evidentiary foundation requests until a final exhibit list is provided, and then I say, well, 949p-2 allows for pretrial conferences to discuss classified information, and then I sit down with each of the

defense teams individually and say let's go over these -- let's go over these exhibits that are not -- that are -- whether they're classified at the time or whether they're there, but we can discuss classified information that you all may have in your example, and I -- and everything is recorded and I take lengthy notes as to, okay, these are the concerns of Khalid Shaikh Mohammad's team with respect to the following pieces of evidence.

And then I go back, and then I have my ex parte with the government, and then I say this is what you guys want, and in doing so I have all of the reasons why you guys need -- you know, specific pieces of information. So essentially it requires -- it requires more work on my part, but it's -- p-2 by their own admission would allow me to theoretically do exactly that, would say I could take an exhibit list and sit down with you all in ex parte and discuss that exhibit list as long as I don't discuss, you know, anything the government is providing me, get all of your concerns, and then when I have to sit down as the judge, then, at least some effort to provide more fidelity and a better understanding of what those defense concerns are.

What do you -- what about that type of methodology? It's not ideal. It's not what I would want to do as a judge,

but if for some reason the law requires me to do that, that is -- that is a potential means of at least achieving the defense's concerns to the maximum extent possible while still protecting and following a potential statutorily-created ex parte conversation with the government on substituted evidentiary foundations.

LDC [MR. SOWARDS]: Sure. And I missed just in that why you thought the law required you to do that.

MJ [Col COHEN]: I haven't made a ruling, if I was to, but I was saying ----

LDC [MR. SOWARDS]: Sure.

MJ [Col COHEN]: ---- this is one of those hypotheticals of -- this is a potential methodology if they are correct ----

LDC [MR. SOWARDS]: Okay.

MJ [Col COHEN]: ---- there's still p-2 which allows me to have still pretrial conferences by -- and that's what they argued yesterday as well. I could sit down with the defense and have this classified information. I just couldn't tell you what specifically they asked me, but I could definitely sit down with an exhibit list, which is going to be required to be provided here very shortly, and go over every piece of evidence and what you guys' concerns are and we could even discuss in the classified setting what you guys are aware of

and would need to be -- what you all believe would be required for purposes of an evidentiary foundation and where you would want to challenge it.

LDC [MR. SOWARDS]: Sure.

MJ [Col COHEN]: Which I could then not disclose to anyone else either because that would be ex parte.

LDC [MR. SOWARDS]: Sure.

MJ [Col COHEN]: But you are correct. Ideally, a judge would never want to be in that position, but ----

LDC [MR. SOWARDS]: Right.

MJ [Col COHEN]: ---- the statute has to be -- the statute is what the statute is, and so ultimately that is potentially an outcome.

LDC [MR. SOWARDS]: Okay. Well, when I leave here today, I hope that you don't think ----

MJ [Col COHEN]: And I may not.

LDC [MR. SOWARDS]: ---- that's what the statute is. I would say ----

MJ [Col COHEN]: I just don't want to avoid the opportunity to ask you that question.

LDC [MR. SOWARDS]: Thank you very much. Because I think in some ways that the answer is circular, in that I would say, why would you want to go to all of that trouble? Why would

you want to do that? And your answer would be, well, because the statute requires me to do that.

But I think no, I think the statute specifically says, not only are you not required to do that, you are not allowed to do that.

MJ [Col COHEN]: Yeah.

LDC [MR. SOWARDS]: And they probably thought -- and again, when you're arguing in the interpretation in favor everybody who makes law are the greatest geniuses in the world and when you are arguing against it, you know, it's draftsman's error and all of that sort of stuff.

But the final product, I mean, there's a whole lot I do not agree is necessary ----

MJ [Col COHEN]: Okay.

LDC [MR. SOWARDS]: ---- about these statutes. But just taking them at their face, it is clear that someone has worked out an accommodation that says -- and again, when I started this morning, this isn't trial, okay? This is on the eve of trial or when we're ready to go to trial or at least some point after -- after the government has already had the opportunity to sit down with you in a closed room and make all of their arguments to you without fear of successful contradiction, correction or further explanation from the

defense. They have an open goal in terms of saying this is what we want by way of substitutions. That is the last time that this statutory scheme contemplates the judge wears two hats.

And all of the cases they have cited -- and again, I'm happy to discuss particulars, but the cases that say the -- and the -- including the Ninth Circuit talking about this is what the judge is required to do, other judges saying, oh, we hate this job, but gosh darn it, that's what CIPA tells us to do, they're talking about the Section 4 context before the discovery goes to -- goes to the defense.

MJ [Col COHEN]: Okay. Like I said, don't take -- that's the way I'm looking ----

LDC [MR. SOWARDS]: Well ----

MJ [Col COHEN]: ---- it's just -- as you indicated, the reason I specified this is so that I could ask questions in an open forum and let me go through anything that comes to my mind as to depending on what iteration I find.

LDC [MR. SOWARDS]: Yeah.

MJ [Col COHEN]: That's why I wanted to at least pose that while it was on my mind. Thank you.

LDC [MR. SOWARDS]: Sure. And to help you with that, Your Honor, with the -- in the Amawi case that the prosecution

relied on fairly heavily yesterday, that was a case in which -- and in fairness to the government, so we're clear about this, in which the Section 4 procedures were engrafted onto a Section 6 sort of finding; that is, the trial was underway and a complaint was that the judge was continuing to have the sort of ex parte hearings that he or she would be allowed to have in section -- under Section 4 pretrial discovery, which is comparable to our p-4 pretrial discovery.

And the response of the appellate court was to say, no, no, we've looked at this record -- and the only reason, you know, whether it was a good practice or not -- the only reason the judge was having ex parte sit-downs with the prosecution during trial was so the judge could be reminded of the rulings that had been made pretrial in the Section 4 context.

And of particular significance, as a result of these pretrial refreshers, the judge issued no rulings or orders as a result of that. So there was no substantive decision-making going on.

But the last point, then, and I will turn it over to my more well-versed colleagues on this point to hear from them, but I think it's very instructive to note -- because we're talking about context, and when you said, you know, it's

in camera, but maybe it could be ex parte and this sort of thing, is the significance of when we compare Section 3 with Section 4 up on the screen, is the fact that, again, it demonstrates that Congress knew the difference between in camera and ex parte, and made very conscious decisions for exactly the reasons we've just been discussing; and when there should be an ex parte opportunity for the government, that is to bring in a knowledgeable national security official versus when it had to be in camera affecting the substantial rights of the defense in making substantive decisions about the admission of evidence.

One other slide again to demonstrate this point, this is slide 27, which yesterday was -- get it all on here -- was represented to you as the successful results of the expedition to find the magic language, but unfortunately, it applies to an earlier part of the process under 505 and the procedures for cases involving classified information, and again, in formulating substitutions for material to be disclosed to the defense. But in any event, what the government has underlined for you is, the court shall hold such conference ex parte to the extent necessary to protect classified information from disclosure. And that's fine, to the extent necessary. That's a particular finding, that's not an absolute.

But the language before it, again, on -- highlighted or emphasized by the government was that the military judge shall conduct a classified, in camera pretrial hearing concerning the admissibility of classified information. So again, that doesn't say that in this pretrial, earlier stage they don't get to come in ex parte. All I'm saying is that the drafters of these rules and the statute realize there may be certain circumstances which justify shifting the in camera to an ex parte, but those are two different proceedings.

And I would leave you with the request -- or the observation that on page 5 of AE 650, which is the government's reply to our briefing, they say in no uncertain terms by their own terms, 649p-6(c) and 649p-3 **[sic]** expressly permit ex parte proceedings.

And I have found that -- not only is it contrary to what we've just been discussing with respect to the procedures under 649p-6(d), which expressly require in camera procedures, but 649p-3, the issuance of protective orders again concerning evidence that is already in the defense's hands, makes no mention of ex parte or in camera, and that's for the obvious reason that there's no legitimate national security or other reason to do that.

We already have the information, and, you know,

however -- you know, and I know they don't mean to insult us by saying that we have to be, you know, presumptively untrustworthy potential agents, what they're saying is it can't go out to anybody. And that's fine, and that's when you get to have ex parte proceedings. But under 649p-3, we already have the information. And the only question is to hammer out a protective order that doesn't lead to the problems that some of these protective orders have.

So what I would ask is, when the government, if it avails itself of the opportunity for rebuttal, if it could just in a clear and concise fashion direct Your Honor's attention to the statutes, not to interpretive inferences and other concerns, because we all understand the national security concerns, but if they could just look at 649p-6, and particularly subdivision (d), and 649p-3 and point us to where it is, quote, by their own terms, these provisions expressly permit ex parte proceedings.

Subject to any other questions you have, Your Honor.

MJ [Col COHEN]: No. It's helpful. The highlighting is -- was helpful as well to point me to areas where I need to go look at that. I appreciate that. Thank you.

LDC [MR. SOWARDS]: Okay. Thank you. May I approach? I promised them ----

MJ [Col COHEN]: All right. Thank you very much.

TC [MR. RYAN]: Excuse me, Your Honor. May I step out for a moment?

MJ [Col COHEN]: You may, Mr. Ryan. Thank you.

Good morning, Mr. Perry.

DC [MR. PERRY]: Good morning, Your Honor.

Judge, on behalf of Mr. Bin'Attash, I will not repeat what my colleague, Mr. Sowards, for Mr. Mohammad did. I think he captured a couple of our points. Clearly, we adopted their position in our brief.

In listening yesterday to trial counsel's presentation, I wanted to highlight a few things just as Mr. Sowards did about the cases that they cited and just reiterate and stress that all the cases that they cited, both in their briefing and in their presentation yesterday, are at its core CIPA Section 4 cases, which of course do expressly provide for an ex parte presentation by the government for the substitution of classified information.

And so in particular, what was noted earlier was that they were not capital cases as well. And that's a big concern. And that was our point in our briefing, is that at the end of the day, Your Honor, as Your Honor considers whether to look beyond, in our view, the plain language of the

statute and try to see if what Congress really intended was to insert an ex parte presentation here instead of an in camera presentation is you must look through the lens of the Constitution as well.

And that the Constitution in a capital case requires what we termed in our filing reliability plus. The government in its presentation and its briefing was talking about CIPA plus, which really, when you talk about it, is CIPA extra, something that CIPA actually doesn't allow, right? That's their whole point in their briefing, is that somehow Congress took a look at CIPA, took a look at 40 years of federal court jurisprudence and said we need to do a little bit extra in the Military Commissions Act of 2009.

What is actually based on the plain language of the statute -- and I think Mr. Sowards demonstrated this clearly -- is that's not what happened. And that if you look at the jurisprudence, there's a good reason for that.

When I was preparing for this, I took a step back and I even looked at secondary sources because it occurred to me, the government probably has tried to do this before, tried to use Section 6 of CIPA in an ex parte manner to the exclusion of the defense during the middle -- in the middle of trial. And the Amawi situation came up, obviously. But this has been

a concern of jurists and law professors ever since CIPA was enacted, that the defense would be excluded to the point that it would be to the detriment of the adversarial process.

And I came across a symposium that was put on in 2006 at Fordham Law School by a Professor Ellen Yaroshefsky, and this is 34 Hofstra Law Review 1063, and she details basically development of CIPA and how the concerns of both court and practitioners have been the exclusion of defense counsel in CIPA Section 4 situations and how that has impacted potential confrontation clause problems with the Sixth Amendment.

It never even occurs to her in that symposium to discuss the government excluding the defense counsel in ex parte presentations in CIPA Section 6 cases. Because in all situations, she details how the government avoids Section 6 -- CIPA Section 6 by doing the Section 4 route, because they don't want to have the defense counsel present, they're trying to avoid that situation. And in her modest proposal, her modest proposal at the end of that symposium is to reform CIPA to include defense counsel more robustly in CIPA Section 4, not 6, because that's already understood to be how CIPA Section 6 works.

At the end of the day, Your Honor, the government holds this privilege, this national security privilege that

they've invoked. And if at the end of the day the government has classified information that they just do not want to be discussed, even in an in camera setting with defense counsel, that's their privilege, right?

It is only through -- and this is what Mr. Sowards was talking about earlier. It's only through that in camera presentation that I think Your Honor could ever be fully apprised of why that classified information and the proposed substitution is inadequate.

But if at the end of the day the government does not accept Your Honor's ruling that that substitution is inadequate and that classified discovery needs to be disclosed, well, then, there are sanctions in place, and that is reflected in Section p(d) **[sic]** after the -- after the alternative procedure for disclosure of classified information, upon any determination by a military judge authoring **[sic]** the disclosure of specific classified information, the trial counsel may move that in lieu of disclosure, the military judge order a substitution for classified information. The substitution for such classified information is a summary or any other procedure.

But if at the end Your Honor determines that's not sufficient, that's not adequate, and you issue an order

denying that motion under subsection (a), (c) or (d) of p-6, then in p(f)(1), after, again, receiving a declaration by a knowledgeable United States official possessing authority to classify that information, you can issue sanctions.

All right, Government, you don't want that classified, you know, discovery or information to come out. I get that. It's your privilege. It's not Your Honor's privilege and certainly not ours. But then there are sanctions under p-6(f)(2), including dismissal, a finding against the United States on that particular issue, to which the excluded classified information relates, striking or precluding all or part of the testimony of the witness.

And so the Moussaoui case is a great example of this. The government relied on it somehow to say that ex parte presentations are okay. But what really happened procedurally in that interlocutory appeal was Judge Brinkema in the Eastern District of Virginia had determined that the proposed substitutions were inadequate.

The government appealed that decision, appealed that finding that they were inadequate, and the sanction imposed by Judge Brinkema. And what did the Fourth Circuit do? Well, it determined ultimately that Judge Brinkema erred, and it sent it back.

But here's what's the interesting part of Moussaoui procedurally: It sent it back to Judge Brinkema with expressed instructions for the parties to engage in an interactive process. That's a direct quote on page 453 of 382 F.3d in their Fourth Circuit decision. So it sent it back to them to have a discussion in an in camera setting involving classified information. It didn't send them back to say, Judge Brinkema, take another look at this on an ex parte basis.

So at the end of the day, Your Honor, when you're determining to go beyond the plain language of the statute and read something into p-6 that is not there, we are asking you to look at reliability plus through the lens of the Eighth Amendment, the Sixth Amendment, and Fifth Amendment in this capital case. And we adopt the position of Mr. Mohammad that, to answer your question bluntly, the statute does not provide for that process in either p-3 or p-6.

Subject to your questions.

MJ [Col COHEN]: Thank you. Give me just one second to review my notes here, please.

Do you believe that the concept of a substituted evidentiary foundation as listed in our 949p series is unique to the commissions as opposed to CIPA?

DC [MR. PERRY]: That the ex parte ----

MJ [Col COHEN]: That the -- that this language that there could be a substituted evidentiary foundation, in other words, how you lay the foundation, do you believe it's unique or that CIPA also contemplates that?

DC [MR. PERRY]: No, no, absolutely CIPA contemplates that. But as Mr. Sowards talked about at length, in Section 6, that would be in trial. There could be an issue that arises because a particular witness is about to elicit classified information that perhaps the defense has never been made privy to or been aware of.

The government raises that concern, and then there's an in camera proceeding to the exclusion of the public to determine, all right, what do we do with that. And there could be a discussion at that point about whether there's a way we can substitute around it to avoid the disclosure of that classified information.

But again, the ex parte basis of it would -- is more along the lines of discovery, right, in Section 4, which is preferably months, if not years, before the trial so that the defense is given an adequate opportunity to assess what discovery they are provided and ultimately see what can be done about that.

One of the questions you had for General Martins yesterday was, well, what do I do with -- if at some point I determine that the substitutions are not adequate, how do I remedy that? And I think General Martins said, well, Your Honor can just always reconsider things.

We actually have an expressed order in this case that allows motions to compel discovery even though there's been an approved substitution. That's AE 164C, I believe.

And so if at the end of the day through the course of this pretrial litigation it comes to our attention that the approved summaries are not adequate because of change in circumstances, change in facts -- and I think Your Honor said several times facts matter -- then motions to compel that additional discovery can be filed and considered.

MJ [Col COHEN]: Okay.

DC [MR. PERRY]: So I appreciate your question because it reminded me of something that happened yesterday.

MJ [Col COHEN]: All right, thank you. I appreciate it. Thank you for your thoughts.

DC [MR. PERRY]: All right. Thank you.

MJ [Col COHEN]: Mr. Harrington, does your team wish to individually address this?

LDC [MR. HARRINGTON]: We do, Judge, but could we have a

brief recess before we do that?

MJ [Col COHEN]: Most definitely. We'll take 15 minutes in comfort.

[The R.M.C. 803 session recessed at 1011, 12 September 2019.]

[The R.M.C. 803 session was called to order at 1038, 12 September 2019.]

MJ [Col COHEN]: The commission is called to order. All parties present when the commission recessed are again present.

I'll note for the record, just a reminder to the parties, if there are any special accommodations, I'm more than happy to allow for those.

In addition, just to clarify what the question that was asked on Monday, that if counsel -- if anyone other than the learned counsel needs to get up and leave, that will be fine. I can -- if I feel the need to specifically put that on the record, I'll just do so at a later time. But, yeah, if learned counsel leaves, it's a little more difficult for me to proceed, but as long as learned counsel is here we're good to go. All right.

Mr. Harrington, your team may present your argument, if you wish to do so.

Good morning, Major Bare.

DC [Maj BARE]: Good afternoon, Your Honor. Oh, it's morning still. Oh, my goodness. This day is flying.

MJ [Col COHEN]: That's all right. It's day four. I understand.

DC [Maj BARE]: Well, with that great start, Your Honor, the question here is about statutory authority. So in addition to the arguments in the pleadings, I want to address two issues in the statute, the record and the right of reconsideration, because the mechanics of these hearings are relevant to interpreting how the hearings should be conducted.

You see, the hearings under Section 4 and under Section 6 don't just use the words "ex parte" and "in camera" hearings differently, but they function differently as well. Section 4 hearings are the ones about discovery. In a Section 4 hearing on substitutions or other relief, they can be conducted ex parte. But if the judge grants relief, there are very clear requirements for the transcripts.

In general, commissions transcripts are verbatim anyways, but 949p-4(b)(2) is very clear that the record is going to be verbatim with no wiggle room. Everything presented will be verbatim, including any part of an oral conference or hearing. Then the accused has no right to reconsideration. That's 949p-4(c).

Taken together, this makes sense. The defense can't participate, so they don't have a basis for asking for reconsideration. They can't ask the judge to change his mind because they weren't there. And every word said to the judge needs to be recorded so the appellate courts can exercise what in the words of the court in Libby is careful scrutiny, and this makes sense.

Now at Section p-6 governs the way evidence for a pretrial or trial proceeding is introduced. And this is where substituted evidentiary foundations are addressed. P-6 only discusses in camera hearings. And thus, the plain language of the statute is why the defense believes we can be included and we must be included and can't be excluded.

But the mechanics of the hearing are different as well. P-6(e) discusses both the record and reconsideration as it applies to these hearings, and the decisions that come out of them. At the end of these in camera hearings, the record is sealed, and the language is different as to the verbatim requirements. It's just not there. And the accused can move for reconsideration. That's in p-6(e).

Read together, this makes sense. Defense is present in these hearings. They can ask for reconsideration because they know what happened. They were there. And while it will

still be verbatim, these careful details about the need for a verbatim record aren't included because there isn't that same concern about the additional appellate scrutiny.

Now, when you get to protective orders under p-3, there is no discussion of the record or reconsideration. It presumes that the information is held by both parties. In sum, there's no statutory authority for an ex parte protective order. And in the case of Section 6 hearings, the defense has a right to be present.

And, Your Honor, that's all I have to add orally.

MJ [Col COHEN]: No, that's very helpful. I -- let me make sure. Can you walk me through again what the statute -- you're the first one that's addressed it from that perspective, and so I -- you've scratched my curiosity here.

So let's talk a little bit about this idea of the distinction between -- okay, so we go back to p-4?

DC [Maj BARE]: Yes.

MJ [Col COHEN]: All right. That's where you're talking about then in 949p-4(b)(2), where we're talking about ex parte presentations, and then it says, "including the text of any written submission, verbatim transcript of the ex parte oral conference or hearing, and any exhibits received by the court as part of the ex parte presentation." That's what you're

saying, that's where -- because we're talking about, it's verbatim, and then obviously the language in here is that you can't reconsider -- you can't have a motion for reconsideration.

DC [Maj BARE]: Yes.

MJ [Col COHEN]: All right. Then you took me to 949p-6.

DC [Maj BARE]: P begins ----

MJ [Col COHEN]: And then (e), right? Is that what -- or did I miss -- I just wanted to make sure I -- I definitely caught your argument on (e), and I caught it, but I just wanted to make sure I had the citation right. Did you cite me something before the (e)?

DC [Maj BARE]: It's (c), (d), and (e).

MJ [Col COHEN]: Okay, (c), (d), and (e) together?

DC [Maj BARE]: (e) is the only section that talks about the sealed record and the reconsideration.

MJ [Col COHEN]: Okay.

DC [Maj BARE]: Substituted evidentiary foundations appear in (c) and are subject to the procedure in (d).

MJ [Col COHEN]: That's right. So (d)(3) we talk about the hearing, and then (e) would be sealing of records of an in camera hearing. And then, you're right, I mean, it does say, "The accused may seek reconsideration of the military judge's

determination prior to or during trial." Okay.

I see your citations, and I understand your argument. Thank you very much.

DC [Maj BARE]: Thank you, Your Honor.

Mr. Ali -- or Mr. Connell, but representing Mr. Ali.

LDC [MR. CONNELL]: Sir, I liked your description the other day of spending some time with the statute, because that's where we're going. So I'd just like to ask you what questions do you have? What's on your mind?

MJ [Col COHEN]: Hopefully the parties have realized that -- you know, I started off yesterday telling you how important this is to me to get this right and the -- and the significant weight that any judge feels, but I don't mind mentioning that, yeah, I feel a weight to get this right, because the United States of America has an interest, the trial counsel individually has an interest, the defense counsel have an interest, your clients have an interest, the gallery has an interest. And, you know, although it doesn't have any bearing on me, I'm not -- I'm a human being and realize the significance of yesterday in the history of the United States and of the world.

And also I haven't forgot the things that I learned as a prosecution and defense counsel. And essentially what

the government argued to a large extent is I take on the role of that defense counsel and try not to forget those things. So I certified this issue for the very reason of saying, I want to make sure that I -- that I'm doing this the right way. Because I do understand the consequences of a substituted evidentiary foundation and the role that I might have in doing that ex parte of trying to figure out what five different teams may want to challenge on potentially any piece of evidence that are out there.

So I didn't want to do that -- I could -- if -- if the statute says that I have to do this ex parte -- which that's why I certified it; it's an "if" -- how do I do that the best way possible to ensure a fair trial for both sides? If I -- and then if I do do it ex parte -- like I said, you know, the other part of that that I still think I would like you to specifically address, if you're willing to, is this idea of -- of the latter half of 949p-6(c)(2), where it specifically says, "The evidence is otherwise admissible; and the military judge finds that the evidence is reliable."

And although I have a general idea, I mean, I think we could all probably come to some general agreement even on Supreme Court precedence on what "reliable" might mean. But it's that second prong, too -- and it's a conjunctive, not a

disjunctive -- which is, the redaction is consistent with affording the accused a fair trial.

And the government may have its theory on what that is. This is kind of my opportunity to find out from the defense as: What's the defense theory on, in this particular case, a fair trial? And so if you'd like to address that -- especially that particular prong, I'd -- I would enjoy hearing it.

LDC [MR. CONNELL]: Yes, sir. So I'll start with your first question, which is one that you asked other counsel, too, which is like, how does all of this work? Like if we're going to make this process work, how does that happen?

So if you wouldn't mind -- since we are spending some time with the statute, if you wouldn't mind flipping to 949p-1, I just want to walk through how I think this works.

MJ [Col COHEN]: All right.

LDC [MR. CONNELL]: All right. CIPA has the same structure, as the government pointed out, but that structure is built along an idealized view or a sort of pro forma view of the way a criminal defense case works. And it explains that -- the fact that it is progressive, in the sense that it progresses throughout the case, explains the why there is only in camera protections for classified information later in the

case than there is earlier. So let me just walk you through that for a second.

So p-1, of course, is sort of the introductory section, sort of sets the stage. But -- and one would expect, okay, we have a case, it has classified information involved in it. And so what's the first thing that a judge would ordinarily do? A p-2, a conference, all right?

So somebody tells the judge, hey -- government says, hey, listen, we have some classified information, or maybe it's an insider case and the defense already has the classified information, or maybe the government doesn't intend to use any classified in its case in chief, but it has some Brady, you know, that is classified and it wants to turn over. And so somebody brings that to the court's attention, says, hey, and that judge has the conference under p-2.

And then we come to p-3 where the judge says, okay, I understand that there's going to be some classified in the case, how are we going to handle that? Let's have a protective order. And generally that's what happens in p-3, is because there's an overarching protective order, just like what happened in this case. It might be negotiated by the parties in a conference, it might be litigated among the parties.

The judge here said, listen, I want to put a mark on the wall and get Protective Order #1 out there, and then you can make your amendments, Defense. And that's the way that it worked. And it was a stronger protective order, a more viable and workable protective order as a result.

So once a protective order is placed, and this is again exactly what has happened in this case, for a long time the government would not turn over discovery to -- classified discovery to four of the teams because they had chosen not to sign the memorandum of agreement until some changes were made into it that they felt were appropriate. And it took a long time because -- mostly because of the investigation of Mr. Harrington to get to that issue.

But -- so once that's done, okay, protective order is in place. Government starts to do its classified discovery. And so at the -- at this point, there's no reason why -- Congress expected the defense didn't know what its defense was by this point, right? Because we're still early in the case. They don't know what the evidence is, they don't know what their options are. Even if they think they know, they're not in a good position to say, oh, my goodness, the government has -- is going to foreclose that completely or, hey, there's this opportunity for a defense that I never realized.

And so the government, appropriately so, starts producing discovery. And it does that -- as you know, our position is that it should -- in the D.C. Circuit, it should do that under the Ellsberg v. Mitchell framework, which is that it should ask permission, articulate the general topic area, and -- and then -- and then the military judge grants permission, and they file ex parte. I've briefed that many, many a time, and no -- none of our judges have ever bought into it, so I'm not saying -- I'm not rearguing it, I'm just saying that's the way that I see that it should work.

In this military commission it has always worked that the government gets to make its ex parte submissions without leave of court, and so that's what it does. It makes submissions with leave of court -- without leave of court and the judge considers those, sometimes sends them back for more. They file an amended or a supplement, and then eventually, the military commission authorizes the substitution, and then it comes over to us.

Now, this is a place where CIPA and the Military Commissions Act part company because the -- CIPA does not have any bar on reconsideration. And there are, in fact, quite a few cases which in their facts -- I don't think it's ever gone on this issue to appellate court, but in their facts talk

about the government produces a substitution, the defense doesn't think that it's adequate, and they have a hearing about it.

The Rosen case, for example, talks about having three days of Section 4 hearings, and -- and Section 4 is the equivalent of 949p-4, of course. And what I understand those hearings to have been would be they've produced substitutions and now we're arguing about the adequacy of the substitutions. As one of my colleagues pointed out, the whole question in Moussaoui on appeal from the second Fourth Circuit appeal -- on remand from the second Fourth Circuit appeal was the adequacy of the substitutions.

So normally, there's an adversarial process that happens there around -- this -- I -- the defense doesn't know what's under the substitution, although -- except on an insider case. But in an outsider case, it doesn't know what's under the substitutions but it still argues with, look, I think there's more. Maybe the government is describing by category. Maybe the government is saying -- is arguing that I'm going to give you this one document because these other three are cumulative to it. And so even without access to the underlying classified information, a dialog is able to happen among the parties.

But that's not what happens here. What happens in the military commission, because of the bar on reconsideration -- and we've challenged its constitutionality; we've lost that with a construction, that's the 164C, that the military commission has given 949p-4(c) a construction that saves it from unconstitutionality, which is that either sua sponte or at the suggestion of a party the military commission may reconsider a substitution made under 949p-4.

The -- which is a lot like when you ask for en banc review. You know, you're never allowed to move for en banc review. You can only suggest it to the court that it might wish on its own initiative to have en banc review.

So -- but that makes sense, right, because we're still at the front end of the funnel. We don't even know -- the government doesn't even know at this point how important any of this is to the defense, right? Is that their defense or are they running some other defense, right?

And that's when under 949p-5, the government -- the defense gives notice, well, okay, here's what I want to use. So there's a universe of classified information out there, some of which the defense has access to it, and then a smaller subset of that is here's what I intend to use.

In this case -- and it's very interesting that

there's discussion of this in the early congressional treatments of CIPA, of we don't know how the CIPA process is going to work when there's a massive amount of classified, but in general it has worked, and -- and the defense gives notice, this is what I want to use, and then we have a hearing about it.

And we have done that dozens of times in this case without access to the underlying classified information. We did it on Tuesday, right? What we did on Tuesday was a 949p-6(a) hearing, where it's the same as 505(h)(1)(A) which we talk about quite a lot.

The -- and so we have that hearing, and no classified information is disclosed as a result unless the government chooses to disclose it. We debate the -- we debate the question. Can it be used? Is it admissible? Yes/no.

A defense request to use classified information automatically triggers an admissibility inquiry because that's what we're doing at a 505(h) hearing, use, relevance and admissibility, as we say, is this admissible? Because if it's not, problem solved. We don't have to worry about what we're going to do about this anymore because it's not relevant. We don't have to mess around with classified information privilege, or anything else, 401 relevance out, goodbye.

A government intent to use classified information does not automatically trigger an admissibility inquiry because we're in a closed session. The government can use classified information, and -- but sometimes it wants an admissibility inquiry.

An example of that is when we're coming to this substituted evidentiary foundation because the government wants to know, is my copy of Mr. al Baluchi's résumé, which was seized in a raid, is that going to be admissible or not, right? It's a form of like motion in limine. If it -- CIPA in many ways is a mandatory motion in limine.

And that's what the whole graymail thing was about. The graymail is not about relieving the government of the burden to make difficult choices between revealing classified information and a fair -- and prosecuting a case. It's about moving -- it's about increasing transparency and moving that forward. And if your -- if that's the topic that interests you, let me commend the Collins case to you, cited by both parties, cited by the Secretary of Defense in the rules.

And Collins explains that the graymail problem was not that the defense -- the government sometimes has to make hard choices. That comes with the territory. The graymail problem was the government could not accurately assess the, in

its words, the price in classified information that it would have to pay in order -- for its prosecution until it got to trial, and then it was too late. Because there was no way, in Congress' view, to force the defense to articulate in advance here's the classified information that I want to use.

And the reason why it is graymail is that it was a fog that the government didn't know. Now, maybe that could have been handled through motions in limine. I know that if I was a prosecutor working in that situation, that's what I would have done, but there's no accounting for individual judges, and Congress wanted to make sure that it would work that way.

So a 949p-6(b)(1) notice to accused serves two functions. One of those is sometimes we know a category of classified information, but we don't know what actually of that is classified. That's very similar to the process that you went through recently with the government, saying please give us some fidelity on what falls on what side of this line.

But there's the second and main function of 505(h)(2)(A) or 949p-6(b)(1) notice is for the government to seek an admissibility determination, and which is no place more important than the substituted evidentiary foundation, because the government might go back, let's say you deny --

you say, I've looked at the substituted evidentiary foundation, I don't feel it meets the standard. Well, the government could go back, add a little bit more, come back to you and say, well, is this good enough, like they do on an ex parte basis with the military commission. So it's a mechanism for the military -- for the government to bring to you the question of: Is this good enough?

And so the -- that brings us, and so we're coming through -- but we're now at the point where the government knows what its case is; the defense has some ideas, some pretty strong ideas probably about what its defense is; and the case has matured, right? The focus is sharper.

And that's why in both -- in CIPA Section 6 and 949p-6, Congress has provided for an adversarial hearing because the -- we're at a place where people can speak intelligently to the question.

Now, does that mean that the underlying classified information gets revealed, disclosed? No, certainly not. The -- there are plenty of mechanisms to deal with that. One of them is, as my colleague pointed out, in 949p-6(b)(1), the third sentence allows generic categories.

And, in fact, in 658, on some circumstances, that's what the government did. There are references in 658 to

evidence that I did not know existed. And they have done it by generic category. This level of -- this amount of information we're invoking national security privilege over, and you're just never going to find out the details of that information. That's example of generic category.

I will tell you, this afternoon we're going to have an argument just like this in exactly this mode without revealing the underlying classification. In 9 -- excuse me, in 523N, one of the categories of witness which is at issue are the so-called XYM witnesses, and I've never had access to the underlying classified information. But this afternoon, I'm going to make my argument to you as to why the government should have to reveal the identities of those witnesses who are not covered by Protective Order #4 because of what I think an interview would reveal.

Now, maybe I'm wrong. And if the government chooses to reveal enough classified information to prove me wrong, that's their strategic choice to make; otherwise, we're going to argue by generic category, here's what I think it is.

In fact, Your Honor, to be completely clear, that's what we did in the argument over 574G. We've never had access to the underlying information in 57 -- in the 574 protective order, Protective Order #3. And when -- because that whole

process was done ex parte. It should not have been done ex parte. I argued that it should not have been done ex parte, but I lost.

So instead I brought a motion to the military commission under 949p-6(e) which allows reconsideration, saying you should reconsider this in part because you didn't know what our interest in this was, but in part because of the substance. Look, look at these questions that I would want to ask the foundational witnesses for these telephone calls. And the military commission ruled against me. I understand it. But it's an example of how we argued by category.

That was mostly in an open session, right, because there were UNCLASSIFIED//FOUO paragraphs in the military commission's ruling, and so I argued from those FOUO paragraphs as to why I thought that the substituted evidentiary foundation or proposed substituted evidentiary foundation at issue in the 574 series would not give us substantially the same ability to present a defense. Because we have a defense related to the capabilities of however -- the source and methods of how these telephone calls were gathered that we cannot make, it's an argument that is foreclosed to us if we can't -- aren't allowed to ask any questions about it.

So the idea that the phrase "while protecting from disclosure information identifying those sources, methods, or activities" becomes a sort of tail that wags the dog of the rest of the statute. That idea is put to rest by the fact that there are many mechanisms available to the military commission and to the parties to argue about the viability of a substituted evidentiary foundation, specifically with respect to the information we're talking about.

And I'll give you a further example. We already did it with 574. But in 586 and 641 -- I'm not asking you to confirm anything -- but it's abundantly clear to me that -- that 586 is about the raid evidence and that 641 is about the XYM evidence, and I am prepared to argue as to what we need out of the -- out of those two bodies of information.

The government has turned over a lot of information out of those two generic categories. I can see what we have, and I can see -- with, you know, humility and skepticism, I can see, you know, some gaps of what we don't have. That's ordinary discovery practice, right? You look at what you have, and you say, you know, there should be something there, and you look for whatever is there.

I am prepared to do that argument without access to the underlying classified information. So if you were to just

say today, all right, this closed hearing that we're having this afternoon, we're also taking up the Ali's team challenge to 641 and 586, there would be no additional classification -- classified information which was revealed. The -- you would be, in the language of the statute, protecting from disclosure information identifying those sources, methods, or activities.

So as a practical matter, this structure makes sense. As a functional matter it makes sense, because it's not that hard to do.

There's one more structural observation that I think answers your question of how does this work, and that is one point that no one has made is what is the fundamental difference between the 949p series and CIPA. And that is that the 949p series combines the approach in M.C.R.E. 505(a) with CIPA. And there have been a couple of references to CIPA plus.

And the government did a spectacular job of legislative history in its brief. There was lots of stuff that I didn't know, I didn't find in my research. I only found Vice Admiral MacDonald's testimony about CIPA plus. And what he described it as is we should take what he called the good parts of M.C.R.E. -- excuse me, of M.R.E. 505(a), which is an absolute prohibition on disclosing classified, and

combine it with CIPA.

Now, why is that different? Two reasons:

The first is that CIPA does not authorize -- you talked about uniqueness in the Military Commissions Act versus CIPA. CIPA doesn't authorize the closing of hearings. And I point the military commission to the Rosen case that we cite in the briefs.

And the Rosen case -- out of the Eastern District of Virginia, the venerable T.S. Ellis, III -- who has struck fear into my heart many a time -- held in that case that a government scheme to have a key card, which is exactly the same scheme they propose here for Dr. Mitchell and Dr. Jessen, was not allowed under CIPA because CIPA did not authorize the closure of hearings, and you couldn't have information which was available to the witness and not available to the jury and to the public.

The -- there might be a different answer under M.C.R.E. 505. Because M.C.R.E. 505, like M.R.E. 505, requires that you do not have authority to authorize the disclosure of classified information; whereas, that's not true in federal court. In a federal court, the assumption is that you're going to have a public -- a fully public trial, and what you're doing in this CIPA process is trying to get to evidence

that you can present in a public trial.

And at some point, the government has to make a choice of am I going to drop -- or more realistically settle -- but am I going to stop prosecuting this case or am I going to allow that information to be presented to the public? That's called the disclose-or-dismiss dilemma.

That doesn't exist here. There is no disclose-or-dismiss dilemma because you, sir, under 806 and 949d have the authority to close and, arguably, the responsibility to close the -- this hearing if classified information is going to be presented.

Now, just as a footnote there, that brings us to the terrible problem that this military commission has had, is that this military commission on -- time and time again has exceeded its authority under 949d for closure, because 949d does not allow the defendants to be excluded from the presentation -- from 806s at which classified information is presented.

Judge Pohl always dealt with that question by saying, "I think there will be a different analysis when we get to trial. You know, talk to me again when we get to trial." I think that was wrong, but it's an issue that we're going to have to deal with here.

But the -- it explains why the stakes are not as high here for a military commission as they are for a federal court. Because a federal trial is going to be open, except in very, very limited circumstances; whereas, we're having almost as much -- many closed days, you know, I expect this -- over this three weeks, we'll have as many closed days as we have open or something very close.

Now, the second point that I want to make about that is why M.R.E. 505 works that way, and that's because in a sense every court-martial is an insider case, right? Every Soldier, Sailor, Airman or Marine, Coast Guardsman holds a Secret at least when these matters come up in courts-martial. They're usually not terrorism, although that can occur. It has occurred, unfortunately, but they are normally the sort of -- the normal case for M.R.E. 505 is a soldier who mishandles classified information in some way, or a servicemember who wants to present classified information on their own behalf such as their -- as in mitigation or their service record.

And so, you know, it makes sense that all of that's happening in camera because everybody is **[sic]** there has some kind of -- some kind of -- the default is that everyone has had access to the information because they're almost all

insider cases. All right.

So that's how I think it works. And I hope that I've answered the question of how it works, because how it works is not very different than what we do routinely, and have done routinely.

So when I hear the government propose, you know, a complicated sort of back-end structure where there can be a sua sponte reconsideration after an ex parte presentation or, to be honest, when I hear the military commission propose a kind of alternating ex parte hearings, none of that is necessary. The -- the statute is fully robust enough to handle and has handled this situation time and time again.

Now, the subsidiary question to that is the one that you asked my colleague for Mr. Bin'Attash, which is: Are substituted evidentiary foundations unique to the Military Commissions Act? And certainly, the language is, right? We know that there's no -- CIPA Section 6 has no equivalent to a substituted evidentiary foundation. When you type "substituted evidentiary foundation" into LEXIS, you get zero hits. I'm sure you had the same experience that I did on that.

But the idea of substituted evidentiary foundations is not unique at all. I mean, a business record certificate

is a substituted evidentiary foundation, right? A lab sheet is a substituted evidentiary foundation because you don't have to call all the witnesses that went through, you know, that kept the records. There are lots of substituted evidentiary foundations in the law.

Now, there are limits on their use, and that's what we learned from Crawford and its progeny, is that that lab sheet might not always be admissible, right? There are limits on that. But that doesn't mean that the idea of a substituted evidentiary foundation is unusual or unique because there are lots of times that the government or the defense skips over the evidentiary foundation for something as a matter of judicial economy, as a matter of agreement between the parties in a stipulation, or as a matter of simple application of the Military Rules of Evidence.

The -- so what are those limits, right? And that was the second -- your second question to me, sir, which was, right, so we have these limits in 949p-6(c)(2) ----

[Alarm in courtroom went off.]

MJ [Col COHEN]: I know we just checked. Just reminding everyone. If anyone has come in with either a cell phone or a Fitbit -- if not, then we'll proceed. Go ahead.

LDC [MR. CONNELL]: Thank you, sir.

So I was just turning to your second major question, which is what does -- you know, what are those limits? How do you know what it means, what are those limits?

So taking them in order out of 949p-6(2) **[sic]**, the first limit is -- found in (a), is the evidence is otherwise admissible. And, you know, military commission rules being what they are, I find myself agreeing with the government that, you know, otherwise admissible may not be the bar that it is in some jurisdictions, but it is still a bar.

And objections to admissibility may sound in a number of places, they might sound in the Military Commission Rules of Evidence. They might sound in Crawford. You know, once we decide what elements of the Constitution apply, there are sometimes constitutional limits.

There are even in death penalty cases, sometimes, First Amendment limits, like association, sort of trying to find someone guilty by association with a white nationalist gang or al Qaeda or some -- you know, there are in an ordinary or -- I won't say ordinary, I'll say in a federal or state death penalty case, there are some constitutional limits because under the Federal Death Penalty Act, and the military commission may know or not, but under the Federal Death Penalty Act, there are no evidentiary rules by statute in the

sentencing.

It's a little bit like a court-martial after the defendant has relaxed the rules, it's, you know, open season then for both sides and there are some cases holding that, well, yes, that's true, there are no rules by statute, but there are still constitutional limits that can be placed.

So the importance of all of that is the significance of the defense in the participation of whether evidence is otherwise admissible, right? We have a range of options available to us, from stipulating to its otherwise admissibility, perhaps because we don't want that witness to come here. That happens to the defense sometimes because they have other things. Or we horse trade it with the -- with the government. I'll stipulate to the admissibility of your thing if you stipulate to the admissibility of my thing, right? There are plenty of ways that that happens. And plenty of good, judicially economic reasons for the defense to be involved, to help those things happen.

The -- but if there's a defense objection, the government -- I mean, the military commission needs to know what it is, right, so that you can adjudicate whether it's otherwise admissible or not, because otherwise you're acting in a complete vacuum. And not even like the vacuum that

you're acting in at the beginning of the case when you are dealing with discovery, you're acting in a complete vacuum about what is going to be admissible at trial to those members, right?

A much higher value is at stake at that point because we are deciding what the men and women of the panel are going to be hearing and assessing both guilt and innocence, and the death penalty based upon, right? Important stuff.

So then we come to (b), which has two standards, and I find these standards quite understandable and in many ways familiar. Reliability is a standard that for many years was assessed in hearsay inquiries by ordinary courts, and is still to this day assessed in Federal Rule of Evidence 807 and Military Rule of Evidence 807, the residual hearsay exception. One of the elements is: Does the evidence possess the particularized guarantees of trustworthiness that would give the finder of fact reason to accept it as accurate?

And so what I think -- I think that's what's happening here is that Congress knew that the government might have trouble satisfying the modern Crawford v. Washington standard, and so I think that Congress was here trying to legislatively overrule Crawford for military commissions in this context, and place reliability -- the sort of old

Ohio v. Roberts reliability, 807 reliability, as the standard. Now, whether they're allowed to do that or not of course depends on the application of the Constitution and some other factors.

But at the same time the Congress was trying to reform the Military Commissions Act of 2006, and, you know, its much more loosey-goosey predecessor, Military Order #1, in which in Military Order #1 there was no standard other than probativeness to a reasonable person.

And so I think that Congress in their mind -- and I believe this is unconstitutional, I don't want to be unclear about that, but I think that what they were trying to do was to strike a balance between the confrontation clause protections which the defendants would receive in a federal court, and the sort of utter lack of protection that they received under Military Order #1. So I think that's what they were doing.

So I think that -- without reciting a wide variety of factors here, I think that the factors which appear in Ohio v. Roberts and its progeny in the well -- well established in the military case law under Military Rule of Evidence 807 are what inform its reliability analysis.

Now, what about consistent with affording the accused

a fair trial? The question there is, is there -- in my mind, statutorily, is there any light between consistent with affording the accused a fair trial and allowing -- providing substantially the same ability for a defendant to make a defense?

Because when you look at the cases on this, those are -- very much arise in the fair trial cases, you know, the cases about the rules that prohibit the defendant from testifying or the rules that require that the defendant testify first instead of other areas, or the rules which prevent the defense from calling for evidence in some way that have an interplay with the confrontation clause.

I think what Congress was doing here was invoking that jurisprudence from the Supreme Court, the -- the right to present a defense line of cases. And I think that they chose to use different language than allow the defendant substantially the same ability to make a defense to underscore the importance of that in this particular area, because Congress understood the risk of substituted evidentiary foundations.

We know that there are foreign partner actors in the chains of custody of this evidence, many of these evidence -- some of this evidence. And, you know, that presents, as one

of my colleague said, special concerns. We know that there are witnesses in these chains of custody who the government either has or might invoke classified information privilege over in the sense of taking it out of the judicial process.

And so I think that Congress anticipated that and realized -- and thought it was especially important that the evidence be, not -- not just procedurally tested by adversarial proceedings but also substantively sufficient to support the idea of a fair trial. So I think it's substantially the same ability to make a defense plus. I think that's what they meant here.

And so as far as factors go, I think the factors that are the factors -- the same factors that arise under the fair trial cases. And that does not necessarily mean that the defendant gets to do whatever they want at all times, but neither does it mean that the government can foreclose areas of defense. It can -- the military commission can place restrictions, in my view, on how a defense gets presented in the same way that you can place restrictions on how a witness gets cross-examined; but that's a different issue than taking entire areas of defense and placing them off limits.

And so I think we really need a specific factual context to talk about exactly what that will mean in this

case, but I think that this sort of hearing is what gives us that specific factual context in which we can have that discussion.

MJ [Col COHEN]: All right. Thank you, sir. That was very helpful.

LDC [MR. CONNELL]: Thank you. Is there anything else?

MJ [Col COHEN]: No, sir.

LDC [MR. CONNELL]: Thank you.

MJ [Col COHEN]: Good morning, sir. How are you doing?

DC [MR. GLEASON]: Good morning, sir. How are you?

MJ [Col COHEN]: Doing well, thank you.

DC [MR. GLEASON]: Your Honor, I will focus primarily on the Constitution because I don't believe that was touched on very heavily.

MJ [Col COHEN]: Okay.

DC [MR. GLEASON]: And I agree with Mr. Sowards that I felt that the commission asked a very simple question in 650: Does the MCA allow the prosecution to conduct an ex parte evidentiary foundation hearing?

And the way I view that is, does the Constitution allow the commission to conduct a one-sided hearing in a death penalty case where evidence of guilt is presented and the defense is prohibited from attending the hearing or learning

about what was presented.

Framed as a constitutional question, Your Honor, the obvious answer is absolutely not. The Constitution would never tolerate evidence of guilt to be presented in a criminal case, let alone a death penalty case, and then prohibit the defense from attending that hearing. That would clearly violate the Fifth, Sixth, and Eighth Amendment of the Constitution.

And when you have read the -- the prosecution had a very lengthy brief, 33 pages, and then another 50 pages of their PowerPoint presentation where they tried to argue that Congress somehow forgot to include this ex parte language in the statute, that somehow Congress made a mistake and they managed to leave this language out. The magic words is what they referred to them as.

I don't believe that Congress made a mistake. I think it was intentional that Congress did not put in the statute that this hearing could be ex parte for the very reason that it would violate the Constitution.

One thing Congress cannot do is pass a law that violates the Constitution. It would be found unconstitutional. And if they would have said that the prosecution can conduct an ex parte evidentiary hearing in any

criminal case, let alone a death penalty case, that would be clearly unconstitutional, sir.

One of the arguments the prosecution makes is, well, this evidentiary -- this evidentiary hearing is not going to be a big deal because it's only foundational. And they argue that this evidence is highly classified so there needs to be an exception. But, sir, based on the case law, there is no exceptions. A criminal defendant has a right to be present during all presentations of evidence, even if it's just foundational. And a criminal defendant has a right to know all the evidence presented against him, even if that evidence is classified.

Now, the prosecution's argument and the dilemma that they presented you with is a first impression or first issue for this commission, but this is an argument that the government has raised throughout the history of our country. And we briefed some of the case law, and I'd like to briefly go over a couple of the key cases.

MJ [Col COHEN]: You may, sir.

DC [MR. GLEASON]: So the argument of state secrecy trumping a criminal defendant's right to know the evidence is an argument that has been made and rejected throughout the history of our country. The first such case we cite goes back

to 1807. It's the case of United States v. Aaron Burr. Aaron Burr was the former vice president of the United States. And in 1807 he was charged with treason and the government sought the death penalty.

Now, the trial judge in this case was actually the Chief Justice of the Supreme Court, John Marshall, one of the great jurists in our country's history. He detailed himself to that case. And when the government wanted to withhold evidence because of state secrets privilege, John Marshall thought that was absurd. He put in his opinion that it ought not be believed that the department which superintends prosecutions in a criminal case would be so inclined to withhold such evidence from the defense.

Fast-forward to 1944, another similar issue came up in the case of United States v. Andolschek, a Second Circuit case. The judge that wrote the opinion in this case is Judge Learned Hand, another great jurist in our country's history. And in Andolschek, the prosecution again wanted to withhold evidence from the defense. In that case, they had a statute that said -- that prohibited them from providing it to the defense.

What Judge Learned Hand said in his opinion is that statute has to give way to the Constitution. He said, While

we must accept it as lawful for the government to suppress documents, we cannot agree that this should include the suppression in a criminal prosecution. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess. And the government must choose: Either they leave the transaction of the documents in obscurity or they expose them fully. It's the government's choice.

A well -- better known example of this same issue coming up is the 1957 Supreme Court case of Jencks v. United States. In that case, the government wanted to have witnesses testify, but they wanted to withhold the witnesses' prior statements to the FBI, and the government cited national security reasons for withholding that information.

Again, the Supreme Court rejected that argument, and they put in their opinion, "... the production -- the protection of vital national security interests may mitigate **[sic]** against public disclosure of documents in the Government's possession," but they concluded in a criminal case that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free."

They said since the Government which prosecutes an accused also has the duty to see that justice is done, it would be unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything that might be material to his defense. Exactly the situation that is raised in this case.

And then the question comes up of, well, does the Constitution apply because this is a military commission? And the answer to that question is addressed in the case of United -- of Hamdan v. Rumsfeld, 548 U.S. 557, Supreme Court case from 2006.

And in that case -- I'm sure you've read that opinion, sir; it's very lengthy -- the Supreme Court justices disagreed on a lot of different areas. But one thing that they agreed on, with the exception of Justice Thomas, I believe, is that accused, in order to have a fair trial, has to be present during the trial and hear all of the evidence presented.

One of the issues that came up with the Military Commission Order #1 was that some of the evidence was classified, and the defense would be excluded from the courtroom when that was presented.

The Supreme Court found that to be offensive, and

they stated that "An accused must, absent disruptive conduct or consent, be present for his trial and must be privy to all the evidence against him."

And they cite at footnote 67 to support that, that "Depriving a criminal defendant of access to evidence would deprive him of a fair trial." And they discuss that "There are no circumstances in which it would be fair to convict an accused based on evidence that he is not allowed to see or hear."

Which brings me to the second question that the commission asked: If you were to conduct this one-sided evidentiary hearing when the defense is not there, how would it be fair? And I believe that is answered by the Supreme Court in Hamdan, that it wouldn't be. In order to be fair, the defense has to be present, they have to hear the evidence, and they have to the opportunity to confront that evidence. That's what is the concept of fair in our system of justice.

And, Judge, I just briefly want to discuss a few of the questions that you've raised. One of the questions you asked Mr. Sowards was how can I hold this hearing if the government's classified the evidence and they said that defense can't attend, because that would mean if I allowed them to hear the evidence, then that would be disclosing

classified information. I don't know if I paraphrased that correctly or not.

MJ [Col COHEN]: I don't remember exactly how I said it, but either way, I'll let you go with your -- with your hypothetical to the extent that -- you know, go ahead. This may be beneficial anyway.

DC [MR. GLEASON]: I think the question is if the government's classified the information, you have no authority to say the defense can attend the hearing because they've classified it. The person ----

MJ [Col COHEN]: Yeah, it would be more the limitation on what I could actually discuss, right? So if -- yeah, I think what I was doing it in the context of -- I'm going to be honest with you, I'm having difficulty myself going back to the hypothetical that I posed, but ----

DC [MR. GLEASON]: But the one thing I picked up, sir, is that it seems like -- that you feel that you're carrying a heavy burden.

MJ [Col COHEN]: Right. I mean, what they're proposing is -- I mean, because one of the languages they cited there was this idea that judges citing, like, essentially you're taking on the role of the defense counsel in analyzing this information, and the reality is that if that is the reality --

I realize that's a big "if" at this point, that's why we're discussing this issue -- how I do -- you know, how do I truly understand what the defense needs?

Yeah, I have made reference -- it's not that I have never done the job, but I have never seen all of the evidence that you all have, or sat down with you all and gone into probably excruciating detail as to what your individual theories of the case are and how you're going to defend these and all of these kinds of things.

So I -- those will be my concerns, is that if this process works the way the government says is I -- having been a defense counsel, I understand the burden that you all are under as well, and so this is -- that would not be typical of a judge to ever do.

And as I've indicated earlier, it's -- the judge never knows what all the evidence that was provided in discovery is. I only know what's admitted, either by virtue of motion or what's presented in the trial. That's just -- because there's just things that the parties may decide, yeah, it was discoverable but it's not relevant to what we're trying to do. And that's the reality of litigation.

So knowing all of that, trying to figure out how this would possibly work in the construct that the government is

asking while me still meeting my obligations to a fair trial really goes to the core of what I'm trying to get at here.

DC [MR. GLEASON]: The answer -- the simple answer to that question, sir, is it won't work. It will violate the Constitution.

As you point out, you only know a small part of the case as opposed to we've got five different defense teams represented by five different -- or five different accused represented by five different defense teams full of attorneys, some of whom have been working on this case for over a decade. Their knowledge of the facts and the evidence in this case is, with all due respect to the court, going to far exceed what you possess.

MJ [Col COHEN]: As I would expect. Like I said, I expect that the prosecutors know more about their evidence than I do.

DC [MR. GLEASON]: And one -- on that point, sir, I'd like to point out the opinion in Moussaoui's case. I know the prosecution brought it up yesterday. It's 382 F.3d 453, and I'll point you to 474-475.

And in that case, they point out that this burden about whether to make a decision to disclose classified evidence or not is not on the judge, it's a burden that's placed squarely on the government. And they emphasize that

this burden is not to be shifted to the trial judge to decide whether the public prejudice of allowing the crime to go unpunished is greater than that upon the disclosure of the state secrets. Ultimately, they say the cases make clear the appropriate procedure for the judge is to order the production of the evidence or witnesses and leave it to the government to make that choice.

And that is especially so in this case where the government is offering evidence of guilt in a death penalty case. They are making that choice to offer that evidence. They should not then be allowed to erect their state secret privilege to prevent the defense from learning that evidence. And that is what over close to 250 years of legal precedent in this country has established, that a criminal defendant, especially in a death penalty case, has a right to be present for all the evidence, and has a right to know and hear and challenge all the evidence that goes to his guilt, even if that evidence is classified, and even if that evidence is just foundational.

And that's all I have. Thank you, sir.

MJ [Col COHEN]: No, I appreciate your comments.

DC [MR. GLEASON]: Okay. Have a good day, sir.

MJ [Col COHEN]: Thank you. You, too.

Mr. Trivett.

MTC [MR. TRIVETT]: Sir, just a matter of housekeeping, as this may be the last open session we have prior to witness testimony on Monday.

MJ [Col COHEN]: Sure.

MTC [MR. TRIVETT]: The government's witness, Special Agent Fitzgerald, on Monday will be identifying Mr. Ali in court, so we would ask that he be required to come into court and not be permitted to waive his appearance on Monday.

MJ [Col COHEN]: Okay.

MTC [MR. TRIVETT]: Thanks.

LDC [MR. CONNELL]: Your Honor, he's planning to come to court anyway. It's not going to be an issue.

MJ [Col COHEN]: Okay. Excellent. Makes that one easy, right? Thank you.

If that changes, Counsel, please let me know. All right. Thank you. All right. We are -- thank you. If I have any additional questions, I will submit them to the parties in the same way that I did the 650.

I mean this with all sincerity. You guys were well prepared. You well briefed this. It has been very helpful to me as the new judge. You know, I read the CIPA cases. They're great. I've never read a CIPA case that dealt with

the vast breadth of classified information that I have already encountered in three months here.

When I set the trial date, I thought of the idea of pushing a little bit further to the right because I didn't know how long the admissibility hearings in and of themselves were going to take. Ultimately, that is something that could potentially impact the trial date. But if that's at the point that we are that it's impacting the trial date, then we have moved this case significantly forward.

But at the same time, to even get to that point, there's things that -- significant steps that have to happen before we can even get to this idea as to what is the evidence that's going to be admitted in trial by both sides and having those types of admissibility hearings. Because at a minimum, even if -- whether I take the government's position or not, I mean, the defense has the right to say this is additional classified information that we want to present into court and we need an admissibility hearing on it. That is clearly stated in the statute as well. All right.

So I will take this matter under advisement. I will try to get a -- you will get a ruling as soon as I -- as soon as I can put together these thoughts. And what I will not be doing is I will not be moving forward on anything that could

potentially impact this issue until I can give you what the ground rules are going to be for this issue. That does not impact anything that might happen under a CIPA Section 4 process or 949p-4.

All right. That's all I have. We'll reconvene at 1300 hours today in a closed -- Major Dykstra.

ATC [Maj DYKSTRA]: Sir, it may be unclear in my mind, but was it your intention to take up 523 during the classified session today, or was that for -- you said at some point in time you were going to look at the pleadings and determine whether or not additional oral argument was necessary.

MJ [Col COHEN]: I put it under the umbrella order. Let's -- let's briefly discuss that during the -- during the 806 and see how much argument we're ready to have on that, okay?

All right. We'll be in recess until 1300.

[The R.M.C. 803 session recessed at 1145, 12 September 2019.]