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1 [The R.M.C. 803 session was called to order at 0903,
2 08 September 2025.]

3 MJ [Lt Col BRAUN]: This hearing is called to order. The
4 accused is present.

5 Trial Counsel, please identify who is here on behalf of the
6 United States.

7 TC [Lt Col GOEWERT]: Good morning, Your Honor. On behalf of
8 the United States, we have Lieutenant Colonel Christopher Goewert,
9 myself, United States Air Force; Lieutenant Colonel Matthew Miller,
10 United States Army; and Major Kristy Milton, United States Marine
11 Corps. No member of the prosecution is currently in the RHR.

12 All trial counsel present today have been detailed to this
13 commission by the chief prosecutor in accordance with Rule for
14 Military Commission 503. All members of the government are qualified
15 under Rule for Military Commissions 502(d). All attorneys have been
16 previously sworn in accordance for Rule for Military Commissions 807.

17 No member of the government has acted in any manner which
18 might tend to disqualify us in this proceeding. The detailing
19 document has been marked as Appellate Exhibit 003.012 (Gov).

20 The proceedings are being transmitted stateside via
21 closed-circuit television transmission to remote viewing sites at
22 Fort Meade, Maryland. The Pentagon is currently down, but I
23 understand people are working on it to restore its service per the

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1 commission's order AE 007.006 (TJ).

2 Moreover, the government will be utilizing in this courtroom
3 for this week's hearing the means authorized in Appellate
4 Exhibit 0012.023 (TJ).

5 MJ [Lt Col BRAUN]: Thank you, Trial Counsel. If you could
6 please provide updates with regard to the remote viewing site at the
7 Pentagon as you become aware of them, that would be appreciated.

8 TC [Lt Col GOEWERT]: We will, Your Honor.

9 MJ [Lt Col BRAUN]: Thank you.

10 Additionally, I note that at our last proceeding on the
11 record the government was also represented by Major Christopher
12 Pirog. I did note that in AE 00033.014, he was removed from that
13 list of counsel representing the United States in this proceeding.
14 What is Major Pirog's status at this time.

15 TC [Lt Col GOEWERT]: Your Honor, Major Pirog has PCS'd to a
16 new duty assignment and is no longer part of the prosecution team.

17 MJ [Lt Col BRAUN]: Okay. Very well. The commission will
18 note that he has been permanently excused as detailed trial counsel
19 consistent with Rule for Military Commissions 505.

20 Mr. Nurjaman, good morning. I know that in the past we've
21 discussed your rights to counsel. However, I'm going to go over them
22 with you again today to ensure that you understand your rights to
23 counsel before we begin this week's docketed hearing.

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1 Pursuant to Manual for Military Commissions, you have the
2 right to be represented by detailed military defense counsel free of
3 charge.

4 Do you understand this?

5 ACC [MR. NURJAMAN]: Yes, I understand.

6 MJ [Lt Col BRAUN]: You also have the right to be represented
7 by a military counsel of your own selection provided that the counsel
8 you request is reasonably available. If you were represented by
9 military counsel of your own selection, then your detailed defense
10 counsel would normally be excused. However, you could request that
11 your detailed counsel continue to represent you, but your request
12 would not have to be granted.

13 Do you understand that?

14 ACC [MR. NURJAMAN]: Yes.

15 MJ [Lt Col BRAUN]: In addition to detailed military defense
16 counsel, you may be represented by qualified civilian lawyers. A
17 civilian lawyer would represent you at no expense to the government.
18 To be qualified, he or she must be a United States citizen admitted
19 to the practice of law in a state, district, territory, or possession
20 of the United States or a federal court, may not have been a subject
21 of a disqualifying action by a bar or other competent authority, be
22 eligible for a Secret clearance or higher as required, and agree in
23 writing to comply with the orders, rules, and regulations of these

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1 military commissions.

2 Do you understand this?

3 ACC [MR. NURJAMAN]: Yes, I understand.

4 MJ [Lt Col BRAUN]: If a civilian lawyer represents you, your
5 detailed military defense counsel will continue to represent you as
6 well unless you specifically waive the right to be represented by
7 detailed military defense counsel.

8 Mr. Nurjaman, do you understand what I've just explained to
9 you?

10 ACC [MR. NURJAMAN]: Yes, I understand.

11 MJ [Lt Col BRAUN]: Finally, the Regulation for Trial by
12 Military Commission authorizes the chief defense counsel to detail
13 DoD civilian attorneys performing duties with the Military Commission
14 Defense Organization to represent you before a military commission.
15 This is in addition to any military defense counsel detailed to
16 represent you.

17 Mr. Nurjaman, do you understand what I've just explained?

18 ACC [MR. NURJAMAN]: Yes.

19 MJ [Lt Col BRAUN]: Very well. Do you have any questions
20 about what I've just explained?

21 ACC [MR. NURJAMAN]: None.

22 MJ [Lt Col BRAUN]: Thank you.

23 Mr. Fanniff, please indicate for the record who is here on

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1 behalf of Mr. Nurjaman. Please also indicate if any attorney is
2 making their first appearance before this commission.

3 LDC [MR. FANNIFF]: Yes, Your Honor. So representing
4 Mr. Nurjaman is myself, Mr. Todd Fanniff. With me is Lieutenant
5 Colonel Brent Stricker and Captain Reid Hopkins, United States Marine
6 Corps; and Captain Tara Trull, United States Air Force, here in
7 Guantanamo Bay.

8 In the Remote Hearing Room we have Lieutenant Desiree
9 Fernandez, United States Navy.

10 All members of the defense team are qualified under Rules
11 for Military Commission 502(d) and have been previously sworn under
12 the Rules of Military Commission 807. No member of the defense has
13 acted in any manner which might tend to disqualify us in these
14 proceedings.

15 In addition, not appearing but also representing
16 Mr. Nurjaman are Mr. James Hodes and Major Lindsey Parsons, United
17 States Air Force, and they have been excused from acting as detailed
18 counsel in this hearing.

19 MJ [Lt Col BRAUN]: Thank you, Defense Counsel. Defense
20 Counsel, will Lieutenant Fernandez appear remotely from the RHR for
21 all sessions this week?

22 LDC [MR. FANNIFF]: Yes, she will, Your Honor.

23 MJ [Lt Col BRAUN]: I just remind counsel that the RHR is an

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1 extension of the well of the courtroom by order of the commission.
2 As such, should counsel decide to depart the RHR, that needs to be
3 noted on the record. So counsel's assistance in the -- to the
4 commission in ensuring that that is accomplished is appreciated.

5 Additionally, Defense Counsel, do you have a means of
6 confidential communication with Lieutenant Fernandez should you need
7 to communicate with her during these proceedings?

8 LDC [MR. FANNIFF]: We do, Your Honor.

9 MJ [Lt Col BRAUN]: Mr. Nurjaman, do you consent to proceed
10 today with Lieutenant Fernandez appearing remotely from the RHR, or
11 the Remote Hearing Room?

12 ACC [MR. NURJAMAN]: I agree.

13 MJ [Lt Col BRAUN]: Have you had an opportunity to discuss her
14 remote appearance with your defense counsel?

15 ACC [MR. NURJAMAN]: Yes.

16 MJ [Lt Col BRAUN]: Did they answer all of your questions with
17 regard to her appearing remotely from the RHR for this week's
18 proceedings?

19 ACC [MR. NURJAMAN]: Yes.

20 MJ [Lt Col BRAUN]: And just to be certain, was the decision
21 to allow her to appear remotely from the RHR your decision and your
22 decision alone?

23 ACC [MR. NURJAMAN]: Yes.

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1 MJ [Lt Col BRAUN]: Now, Mr. Nurjaman, defense counsel has
2 made me aware that some members of your defense team are not present
3 for today's session. I'm going to discuss the absence of those
4 counsel with you.

5 Under Rule for Military Commissions 805, ordinarily no
6 member -- no military commission proceeding should take place if any
7 defense or assistant defense counsel is absent without your consent
8 to the absence.

9 On 22 August 2025, your defense team filed a motion
10 requesting the commission authorize the absence of Mr. James Hodes
11 and Major Lindsey Parsons for the purpose of the hearings we will
12 conduct this week. I note that that filing has been marked as
13 Appellate Exhibit 0111.006. In those motions the defense team -- in
14 that motion the defense team represented you consented to the absence
15 of Mr. Hodes and Major Parsons for this week's hearings.

16 Understanding that, having the benefit of having you in
17 front of me right now, I want to ask you directly, do you agree to
18 the absence of Mr. Hodes and Major Parsons from this week's hearings?

19 **[Counsel conferred.]**

20 ACC [MR. NURJAMAN]: Yes, only for this time.

21 MJ [Lt Col BRAUN]: So only for the hearings that we have this
22 week, Mr. Nurjaman?

23 ACC [MR. NURJAMAN]: Yes.

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1 MJ [Lt Col BRAUN]: Very well. Mr. Nurjaman, did you have an
2 opportunity to discuss this matter fully with your defense team?

3 ACC [MR. NURJAMAN]: Yes.

4 MJ [Lt Col BRAUN]: And do you have any questions about your
5 right to have counsel present for this proceeding?

6 ACC [MR. NURJAMAN]: No.

7 MJ [Lt Col BRAUN]: Mr. Nurjaman, did anyone make any promises
8 or threats to get you to agree to proceed this week without the
9 presence of Mr. Hodes?

10 I think your microphone was muted, Mr. Nurjaman.

11 ACC [MR. NURJAMAN]: There's been no threats.

12 MJ [Lt Col BRAUN]: And I'm going to ask you the same question
13 with regard to Major Parsons. Mr. Nurjaman, did anyone make any
14 promises or threats to get you to agree to proceed this week without
15 the presence of Major Parsons?

16 ACC [MR. NURJAMAN]: None.

17 MJ [Lt Col BRAUN]: And was it your decision and your decision
18 alone to agree to proceed this week -- with this week's hearings
19 knowing that Major -- Mr. Hodes, excuse me, and Major Parsons will
20 not be present?

21 ACC [MR. NURJAMAN]: Yes, after I spoke to my defense team.

22 MJ [Lt Col BRAUN]: Very well. Thank you, Mr. Nurjaman.

23 I find that you have voluntarily and intelligently waived

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1 the presence of Mr. Hodes and Major Parsons. I further find that you
2 are represented by five detailed defense counsel previously
3 identified on the record who are present with you either physically
4 in the courtroom this morning or from the RHR and will be present
5 throughout the hearings this week.

6 I also find that at least one of those defense counsel is
7 qualified in accordance with Rule for Military Commissions 502(d).
8 As such, I find that this commission can proceed this week in
9 accordance with Rule for Military Commissions 805(c), given your
10 waiver of the presence of Mr. Hodes and Major Parsons.

11 In AE 0111.011, I note the commission approved the absence
12 of Major Parsons from all of this week's hearings. In that same
13 ruling, the commission approved the absence of Mr. Hodes from this
14 week's hearing with the exception of requiring his presence from the
15 Remote Hearing Room for the limited purpose of conducting an inquiry
16 into his continued representation in this case. I anticipate that
17 inquiry will occur tomorrow.

18 Yesterday I held an R.M.C. 802 conference. Present were
19 members of the prosecution and the defense, with the exception of
20 Mr. Hodes, Major Parsons, and Lieutenant Fernandez. The accused, Mr.
21 Nurjaman, was also absent from that conference.

22 The commission discussed the scheduled prayer times for the
23 week and how that would impact the timing of this week's hearing.

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1 Then the commission broadly discussed the matters that were docketed
2 for discussion for this week's hearings and the way ahead for those
3 hearings to occur this week.

4 The commission also inquired into anticipated evidence and
5 witnesses that the parties expected based upon the matters that the
6 commission was going to discuss this week. During that R.M.C. 802
7 conference, no evidence was received, argument entertained, nor
8 ruling provided.

9 Does either side wish to object to or supplement my summary
10 of our latest R.M.C. 802 conference?

11 Trial Counsel?

12 TC [Lt Col GOEWERT]: No, Your Honor.

13 MJ [Lt Col BRAUN]: Defense Counsel?

14 LDC [MR. FANNIFF]: No, Your Honor.

15 MJ [Lt Col BRAUN]: Very well.

16 It's my understanding that two of the daily prayer times are
17 scheduled during our normal court hours, one taking place a little
18 before 1300 each day and then the other will take place shortly after
19 1620 each day. I note that there is a later prayer time at about
20 1900 each day.

21 It's further my understanding that the dining facility will
22 be open from 1100 to 1330 for lunch and from 1700 to 1900 for an
23 evening meal.

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1 To accommodate those matters and meal times, I intend to
2 take a lunch recess from 1200 to 1330. We'll take an afternoon break
3 from 1615 to 1645. The parties can anticipate that that will flex a
4 little bit as it has in the past as I try to find natural breaking
5 points to not artificially interrupt the presentations of counsel as
6 much as I can do so.

7 We will reconvene after the afternoon recess, but I would
8 expect that we will likely recess for the day before that 1700 -- I'm
9 sorry, before that 1900 prayer time.

10 I would like each party to confirm whether that tentative
11 schedule and those breaks will work to include -- Defense Counsel,
12 please ensure you, if you haven't, confer with Mr. Nurjaman before
13 answering me.

14 Trial Counsel, does that way ahead work?

15 TC [Lt Col GOEWERT]: Works for us, Your Honor.

16 MJ [Lt Col BRAUN]: Defense Counsel?

17 LDC [MR. FANNIFF]: That is acceptable, Your Honor, and I have
18 previously discussed that with my client.

19 MJ [Lt Col BRAUN]: Thank you.

20 So the commission directed oral argument on AE 0010.001.
21 That's a defense motion for appropriate relief to provide Mr.
22 Nurjaman access to all evidentiary summaries produced pursuant to
23 Military Commission Rule of Evidence 505(f)(2)(a)ii.

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1 In AE 0010.001, the defense has requested that this
2 commission order the government to allow the accused to have access
3 to all evidentiary summaries produced pursuant to Military Commission
4 Rule of Evidence 505.

5 Defense, in your filing, you bear -- you indicate that you
6 bear burden as movant and that the applicable burden is a
7 preponderance of the evidence.

8 Is that indeed the case?

9 DDC [Capt HOPKINS]: Yes, Your Honor.

10 MJ [Lt Col BRAUN]: Trial Counsel, would you concur with that
11 statement?

12 TC [Lt Col GOEWERT]: We do.

13 MJ [Lt Col BRAUN]: As neither party has filed notice pursuant
14 to Military Commission Rule of Evidence 505(g), I will assume neither
15 party will seek to disclose classified information in their argument
16 or presentation on that matter.

17 Is that assumption correct, Defense Counsel?

18 DDC [Capt HOPKINS]: Yes, Your Honor. We discussed with
19 the CISO following the 802 yesterday, there will be discussion of the
20 general nature of some of the summaries like the categories that some
21 of them fall into that were reflected in some of the government's
22 unclassified filings on their discovery updates. That's really the
23 extent, the closest it would possibly come. So there's been no

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1 notice because it's our understanding that those matters are
2 unclassified.

3 MJ [Lt Col BRAUN]: Okay. Thank you, Defense Counsel.
4 Trial Counsel?

5 TC [Lt Col GOEWERT]: Your Honor, we do not intend to get into
6 any classified matters for this motion.

7 MJ [Lt Col BRAUN]: Defense, any evidence or witnesses?

8 DDC [Capt HOPKINS]: Your Honor, we of course request that the
9 commission consider the attachments to the filings. Also, in
10 discussing the general nature of some of those summaries, as those
11 are reflected elsewhere in the record of trial, I'm not offering
12 additional evidence, but I do ask that the commission take note, you
13 know, that those are the general nature of some of these summaries
14 that we're discussing.

15 MJ [Lt Col BRAUN]: Trial Counsel, any objection to the
16 commission considering those matters?

17 TC [Lt Col GOEWERT]: No objection, Your Honor.

18 MJ [Lt Col BRAUN]: Given the defense has no additional
19 evidence or witnesses they desire to present, does trial counsel have
20 any evidence or witnesses they desire to present on this matter?

21 TC [Lt Col GOEWERT]: Only what was attached to our motion,
22 Your Honor.

23 MJ [Lt Col BRAUN]: Defense Counsel, any objection to the

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1 commission considering what's attached to the government's filing?

2 DDC [Capt HOPKINS]: No, Your Honor.

3 MJ [Lt Col BRAUN]: Very well.

4 The commission will consider the attachments to both
5 parties' filings, as well as any references the parties may make in
6 argument to potentially other filed matters for the general substance
7 as defense counsel indicated. Should that change for some reason,
8 the commission will note that fact in its ruling and, of course, will
9 give those matters the weight the commission deems appropriate for
10 the material as it pertains to the ruling on this matter.

11 With that, then, Defense Counsel, are you ready to proceed
12 with argument?

13 DDC [Capt HOPKINS]: Yes, Your Honor.

14 MJ [Lt Col BRAUN]: Okay. Please.

15 DDC [Capt HOPKINS]: Good morning, Your Honor.

16 The question before the commission is one of statutory
17 interpretation. The problem, practically speaking, is that the
18 government has provided us, by which I mean Mr. Nurjaman's defense
19 counsel, but not Mr. Nurjaman himself, with thousands of pages of
20 summaries that they have drafted for purposes of this litigation, and
21 they've provided all of those summaries in lieu of the default
22 discovery practice of providing us with actual source documents.

23 These summaries describe prior statements of potential

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1 witnesses in this case, statements of government personnel about Mr.
2 Nurjaman's treatment in CIA custody, as well as Mr. Nurjaman's own
3 prior statements to the government. The government has provided ----

4 MJ [Lt Col BRAUN]: Defense Counsel, if you could slow down,
5 please.

6 DDC [Capt HOPKINS]: Yes, Your Honor. My apologies.

7 The government has provided all of these documents in a form
8 that does not permit Mr. Nurjaman to access them, and they have done
9 this despite the fact that the only law that authorizes the
10 government to draft and use these types of substitutions rather than
11 turn over the actual underlying discovery documents to the defense
12 requires the government to make those substitutions available to
13 Mr. Nurjaman. So I'll talk a little bit about that law.

14 The title of the defense motion refers to M.C.R.E.
15 505(f)(2), which is the relevant rule in the Manual for Military
16 Commissions. But that rule is copied directly from Section 949p-4 of
17 the Military Commissions Act of 2009. So we're really talking about
18 a law passed by Congress, not just a rule promulgated by the
19 Secretary of Defense.

20 The title of Section 949p-4 is discovery of and access to
21 classified information by the accused. And the part that we're most
22 concerned with here, Section 949p-4(b), provides that, quote: The
23 military judge in assessing the accused's discovery of or access to

1 classified information under this section may authorize the United
2 States to delete or withhold specified items of classified
3 information to substitute a summary for classified information or to
4 substitute a statement admitting relevant facts that the classified
5 information or material would tend to prove.

6 What's important for the commission to note, as a matter of
7 interpreting that piece of statutory text, is that the whole process
8 laid out in that section is subject to a conditional authorization.
9 The law says that the military judge, in assessing the accused's
10 discovery of or access to classified information, may take certain
11 actions.

12 So we can contemplate other hypothetical laws that might
13 have a similar structure to help, you know, do some textual analysis
14 on what that means. If we imagine a statute providing that, quote,
15 an environmental regulator in assessing a private company's
16 eligibility for certain federal grants may require the company to
17 submit to an inspection of its facilities, that would not be a
18 freestanding authorization for a regulator to go conducting
19 inspections for any purpose.

20 An inspection conducted under that law would need to be in
21 furtherance of and related to the conditions stated in the law.

22 Or imagine a law that providing that, quote, a police
23 officer, in assessing whether it is necessary to contact child

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1 protective services in response to a domestic disturbance may
2 temporarily detain and question minors about their living conditions
3 without providing a rights warning. That permission that comes after
4 the word "may" would also be directly conditioned upon the
5 authorization being used in furtherance of the specific scenario
6 described in the law following the words "in assessing."

7 So what does that mean here? It means that when the
8 government drafts substitutions and summaries in lieu of providing
9 actual source documents to the defense, the military judge can
10 approve those summaries on the condition that the purpose of this
11 whole exercise is to provide discovery materials that Mr. Nurjaman
12 can access.

13 This is not only true as a textual matter. It is supported
14 by the structure and context in which this provision appears in the
15 MCA. For one, there's clear evidence that the drafters of the MCA
16 were capable of distinguishing between the accused on one hand and
17 his defense counsel on the other.

18 The section of the MCA that comes immediately before the
19 classified information procedures sections, Section 949o,
20 specifically subsection (c), provides that the proceedings -- or,
21 excuse me, Your Honor -- provides that after the proceedings are
22 over, the accused shall be given ----

23 MJ [Lt Col BRAUN]: Counsel.

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1 DDC [Capt HOPKINS]: Yes, Your Honor.

2 MJ [Lt Col BRAUN]: Slow down, please.

3 DDC [Capt HOPKINS]: Sorry about that.

4 Provides -- that Section 949o, Subsection (c), provides that
5 following the proceedings the accused shall be given a redacted copy
6 of the record of trial that omits any classified information, and
7 then says, quote, defense counsel shall have access to the unredacted
8 record.

9 So this is a distinction that the MCA is perfectly familiar
10 with. And when they say the accused, it means the accused.

11 This also emphasizes another key point, which is that the
12 MCA was drafted against a backdrop understanding that defense counsel
13 would be cleared to receive and view classified information, whereas
14 the accused likely would not be. That's quite obviously the
15 assumption undergirding Section 949o, which I just read, and the same
16 assumption clearly undergirds Section 949p-4.

17 Congress clearly did not anticipate the government's desire
18 to withhold huge numbers of relevant documents from fully cleared
19 defense counsel as well as the accused. They, therefore, did not
20 provide a mechanism for the government to easily accomplish that, you
21 know, frankly, quite odd objective.

22 As we said in our motion, Your Honor, Section 949p-4 also
23 must be read within the context of the other rights provided to Mr.

1 Nurjaman by the MCA, including the right to self-representation.

2 We pointed out in our motion that if Mr. Nurjaman were to
3 exercise his right to fire all of us as his defense counsel and
4 represent himself, he would unquestionably need to be given access to
5 these summaries in order to conduct his own defense.

6 One of those rights does not depend upon the other. In
7 other words, Mr. Nurjaman has not forfeited his rights under Section
8 949p-4 by accepting the assistance of defense counsel.

9 Even with that assistance, he retains the right to fully
10 participate in his own defense and have access to the discovery
11 materials that the MCA says he must have in order to understand the
12 evidence in the case and thereby make decisions about how to plead,
13 whether to testify, and how to advise us on how to better do our jobs
14 on his behalf.

15 It is noteworthy that the government response does not
16 engage whatsoever with the statutory text of Section 949p-4 or the
17 question of whether the government would provide Mr. Nurjaman access
18 to these summaries if he exercised his right to self-representation.
19 If, in that scenario, the government would ask the commission to
20 approve different summaries than the ones they have approved to date,
21 then that is what the government needs to do now.

22 If the government would simply mark most or all of the
23 summaries that have been approved to date as releasable to

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1 Mr. Nurjaman in that scenario, then that is what the government
2 should do now.

3 Turning now to the arguments the government does make in
4 their response. For one, the government argues that this motion asks
5 for relief that this commission is not authorized to grant, either by
6 ordering the government to disclose classified information to
7 Mr. Nurjaman or by asking for reconsideration of previously approved
8 summaries. Neither of those accusations are true.

9 We're not seeking an order ----

10 MJ [Lt Col BRAUN]: Counsel, I'm actually going to ask you to
11 elaborate on that. How is this not a motion to reconsider?

12 DDC [Capt HOPKINS]: Yes, Your Honor. So -- well, I was first
13 speaking about the order to provide classified information, Your
14 Honor, and then separately from that would be a motion to reconsider.

15 So the commission has reviewed underlying classified
16 documents and then has approved a summary. We are not asking the
17 commission to change its order approving any of those summaries,
18 because the commission is not authorized, even in approving that
19 summary, to write "releasable to ISN 10019," which is the only step
20 that needs to be taken to make that summary available to
21 Mr. Nurjaman.

22 You couldn't put that in your order if you wanted to, Your
23 Honor. Only the government can do that. So you have approved the

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1 summary, given it back to the government, said this is good to go,
2 and then if they are going to comply with the condition upon which
3 that approval was granted, all they have to do is write "releasable
4 to ISN 10019" on it. You couldn't do that in your order, you know,
5 under any scenario.

6 So it's not a reconsideration. Now, they don't have to
7 write "releasable" on that document. They could come back to you
8 with a different summary, and you could say whether that was
9 sufficient. But that would be their decision, not yours.

10 MJ [Lt Col BRAUN]: Isn't that, though, in essence, creating a
11 motion to reconsider?

12 DDC [Capt HOPKINS]: No, Your Honor. I don't think that we
13 can construe that that broadly. I think there is a practice when it
14 comes to a lot of classified information procedures in this
15 commission to give, frankly, more than the benefit of the doubt to
16 the government on the -- on how to construe some of these procedures,
17 and strict construction of criminal statutes is very important.

18 So I am not -- and we have not been privy to any of the
19 hearings where the commission has explained why it's removing, what
20 it's removing, why it believes, you know, what's in those summaries
21 is sufficient. So we have not had the opportunity, you know, to
22 participate in that process. We see what comes out and then we read
23 the statute. And what the statute says is that the purpose of this

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1 whole process is to provide information to Mr. Nurjaman.

2 It's also very clear that the commission, again, could not,
3 if it wanted to, order the government to write "releasable" on these
4 documents.

5 So all the commission can do is say, yes, this gives the
6 defense substantially the same ability to make its defense as this
7 other document that I'm looking at. And so you are authorized to
8 disclose it. And, Your Honor, in your rulings in the 17 series, your
9 rulings have routinely said that this gives the accused substantially
10 the same ability to make his defense as would access to the
11 underlying documents because the accused is the word that appears in
12 the statute.

13 So the final step is for the government, who's the only
14 party who can mark these discovery documents as releasable to my
15 client, to make that marking.

16 As well, Your Honor, we're not asking for an order to
17 disclose classified information to Mr. Nurjaman because, again, if
18 the government does not want to provide a particular summary to
19 Mr. Nurjaman, they could give, as we discuss in our motion, the
20 underlying documents to cleared defense counsel and then we could, if
21 we believe there's something in there that needs to be discussed with
22 Mr. Nurjaman, request that the government and yourself go through the
23 949p-4 process and produce an accurate substitute stipulation, et

1 cetera, that allows us to do our jobs.

2 But when we can't participate in the initial process and all
3 we get is something that we can't show to Mr. Nurjaman, and then
4 we're told we will never be able to show anything in there to
5 Mr. Nurjaman as a, you know, baseline assumption, that is not
6 complying with the statute.

7 So the discovery process, as a whole, is not being completed
8 lawfully when that's how it's being carried out.

9 So to clarify, the relief we are seeking is simply a ruling
10 forbidding the government from claiming that it has lawfully
11 completed discovery until all its discovery obligations have in fact
12 been completed through lawful means that comport with the relevant
13 statutes.

14 As I just referred to Your Honor, our motion does not
15 challenge the practice of providing original classified source
16 documents to cleared defense counsel only. The government cites a
17 lot of precedent approving that practice in civilian courts. And for
18 the reasons I just explained, we believe that that makes sense in the
19 context of the MCA as well because 949p-4 allows us when -- when
20 Mr. Nurjaman does accept the assistance of counsel to review before
21 reviewing underlying classified source material which, again, we have
22 clearances to view, to then request that that process be exercised.

23 If Mr. Nurjaman were to exercise his right to

1 self-representation, then, again, that process would be more
2 complicated because he wouldn't have the assistance of counsel. And
3 then it may be appropriate for the government and the commission to
4 have to be the ones to work out what he needs to see. But in that
5 case, again, Your Honor, he would obviously then see the resulting
6 document because he would be exercising his right to
7 self-representation.

8 The workaround that's been created that both extracts a lot
9 of information and then says only the defense counsel get to see that
10 and not Mr. Nurjaman is not derived from the statute. It's derived
11 from the desires of the government for how to conduct litigation in
12 this case, but it's not authorized by Section 949p-4.

13 So the only argument that the government is left with is
14 that a half dozen or so district courts that had approved
15 substitutions under Section 4 of CIPA have specifically said that
16 those substitutions can be withheld from the defendant.

17 Section 4 of CIPA uses different language than Section
18 949p-4 but we acknowledge, as we did in our initial motion, that it's
19 extremely similar language in terms of its apparent legal effect.
20 What I will note here is that it is both important and telling that
21 this practice appears to have never been approved by any appellant
22 court.

23 If the DoJ were doing this often, then it would have been

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1 challenged often enough that one of those challenges would have
2 percolated up and produced some law on appeal, but that seems not to
3 have happened. That is likely because the DoJ almost always produces
4 unclassified summaries when they use the permission provided under
5 Section 4 of CIPA, and that's because their own criminal
6 resources -- excuse me, Criminal Resource Manual says that that is
7 what they are supposed to do.

8 So while our initial filing in this series may have
9 overestimated the level of absolute uniformity among the federal
10 courts when it comes to the practice of producing unclassified
11 summaries under Section 4 of CIPA, the lack of appellant activity on
12 this issue suggests that the practice that the government is using in
13 this commission is very rare in the civilian courts.

14 As we cited in a quote to the recent opinion from the
15 Supreme Court in Trump v. CASA, "Individual district court rulings do
16 not create binding precedent even for other judges in the same
17 judicial district." So to the extent that a handful of district
18 court rulings show inconsistent federal practice on this point, that
19 at best means that there is no binding precedent ----

20 MJ [Lt Col BRAUN]: Counsel, please slow down.

21 DDC [Capt HOPKINS]: Sorry, Your Honor. That at best means
22 that there is no binding precedent for this commission to rely upon.
23 This commission, therefore, has its own obligation to interpret and

1 enforce the text of the statute in the first instance.

2 MJ [Lt Col BRAUN]: Not binding but we can agree that the
3 commission can rely upon other district court findings as helpful in
4 crafting its own resolution in this particular case, correct?

5 DDC [Capt HOPKINS]: Your Honor, I would never tell the
6 commission that it cannot look to the rulings of adjacent judicial
7 officers who are -- who have their own obligation to interpret the
8 law.

9 I will note that there has been greater insistence, now more
10 than ever, among the appellate courts and the Supreme Court in this
11 country on adhering to the plain text of a statute.

12 So as a practitioner of military justice, when I look back
13 in cases from even ten years ago, 20 years ago, I frequently see
14 courts like the Court of Appeals for the Armed Forces in the past
15 approving divergent practices on the theory that it's close enough to
16 what the statute says and appears to be convenient and in the
17 interest of justice as the court sees it. And then I see rulings
18 from more recent times than the last ten years insisting upon
19 no -- when the statute says something that clearly, you know, does
20 not contemplate the specific course of action approved here, then
21 that's not authorized.

22 So I think the trend in the law is that the statute means
23 what it says. And that to the extent what the government is asking

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1 the commission to do is interpret the accused to mean not the
2 accused, that that should not -- that should not be a step that the
3 commission should take lightly, particularly when there's not binding
4 precedent ordering it to do so.

5 So the last point I'll make, Your Honor, is that this relief
6 that we're seeking is, in fact, quite meaningful. The only other
7 arguments the government makes in its response are in essence that
8 this isn't that big of a deal because we have access to our client
9 and because we can ask the government to make some of these documents
10 available to him on a case-by-case basis. But this suggestion
11 imposes a large and improper burden that cuts at the core of
12 Mr. Nurjaman's right to assist in his own defense and is likely to
13 create substantial prejudice in this case.

14 Mr. Nurjaman is the expert on his own experiences in CIA
15 custody, and he should be able, like us as his counsel, to review the
16 whole record of his treatment there and to identify gaps in that
17 record that we as his counsel are not able to identify because we
18 don't know what should be in there.

19 He should even be able to tell us, for example, who he
20 believes, among the government personnel whose statements are
21 contained in these documents, might be willing to talk to us based on
22 his experiences 20 years ago. The government probably doesn't want
23 him doing that.

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1 MJ [Lt Col BRAUN]: How -- Counsel, how does the government's
2 proposed approach that you go to them, ask for them to make something
3 releasable or displayable to Mr. Nurjaman, how does that prevent him
4 from telling you who you may want to go interview or talk with about
5 various matters in this case? I'm not seeing one impact the other
6 directly.

7 DDC [Capt HOPKINS]: So I'll start, Your Honor, that -- by
8 saying, at the point at which we're discussing, you know, what are
9 the harms? The question we're really talking about is, you know, is
10 the -- is the -- we're not talking about what the statute means.
11 We're now talking about what the prejudice is associated with
12 interpreting the statute in a way that we believe is clearly wrong.
13 So I just want to make -- make clear that the commission could
14 believe that the harm is negligible and should still rule for us on
15 statutory interpretation grounds.

16 MJ [Lt Col BRAUN]: And I appreciate -- I appreciate the
17 argument.

18 DDC [Capt HOPKINS]: Yes. But I also believe it's important
19 to explain why this is, in fact, harmful. Because these documents
20 taken individually, we might look at one document and say this isn't
21 particularly important. We were not there. We might look at 20
22 documents that describe a time period and say this appears to not be
23 particularly relevant. And what Mr. Nurjaman might know, or might

1 have his memory jogged, you know, when he -- when he reviews 20
2 documents from a single month, could very easily -- what is jogged in
3 his memory could very easily be there's something that's not there
4 that should be there from that month. And these are the types of
5 connections that can only be made whenever you view the entire
6 structure created by these documents. Each document is an individual
7 brick, Your Honor, that, viewed in isolation, may be useful, may not
8 be.

9 I will also note, though this is not the subject of this
10 motion, that this is one of the inherent difficulties invited by this
11 procedure. This notion that the government can, four years ago, with
12 a different military judge, say we believe that these documents turn
13 into this document, and that's an adequate substitute for the
14 defense. We have no way of knowing how much has been stripped out of
15 that, and we know that it's a bit of a legal fiction to say that a
16 military judge four years ago who hasn't reviewed everything you've
17 reviewed since then, could somehow know that everything has
18 accurately been put in, even on the front end, to these materials.
19 And then that effect becomes multiplicative because then we get a
20 whole bunch of materials that we have to sift through.

21 I don't think I'm the only defense counsel in a situation
22 like this that does not trust the government when they get to draft
23 these documents to make them particularly helpful, to make them paint

1 a clear picture. And, obviously, Your Honor plays a role, and we
2 believe from what we can see in the record that Your Honor has taken
3 that rule seriously, and we appreciate that.

4 But however seriously Your Honor takes it, however hard Your
5 Honor tries to make those documents appear to be as effective as the
6 original documents, when stretched across a four- or five-year
7 process in producing an entire mass of information that we're
8 expected to understand, it makes a very difficult task. And in some
9 ways, that task is easier for Mr. Nurjaman because he has a baseline
10 of knowledge that we don't have. And we can communicate with him,
11 and we do, of course, do our work on that. But, of course, Your
12 Honor, we're representing a client who has 20 years separating him
13 from many of these events or -- we're representing a client who does
14 not speak English as a -- as his first language or even his second
15 language, for that matter.

16 And so he, in reviewing the collective output of the
17 material that's supposed to be given to him, is extraordinarily
18 likely to make connections and also see gaps that we simply cannot
19 see and that will be unlikely to be revealed by us showing him one
20 document on the basis of we can tell the government that this one
21 specific document is important to the case because we know what it
22 says.

23 So that will produce some helpful information, but it does

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1 not -- that is not what "meaningfully participating in one's own
2 defense" means. And we believe that the MCA was drafted with one of
3 its explicit purposes being to allow Mr. Nurjaman to meaningfully
4 participate in his own defense. Enforcing the plain text of this
5 statute will do that in many meaningful ways.

6 So with that, Your Honor, Section 949p-4 of the MCA gives
7 Mr. Nurjaman the right to view these summaries, and the commission
8 must enforce that right. We respectfully submit that the specific
9 relief requested in our motion is necessary to achieve that end.

10 Pending any other questions, that's all I have for my
11 initial argument, Your Honor.

12 MJ [Lt Col BRAUN]: I do -- I do have some additional
13 questions.

14 So the defense counsel, as I understand it and as ordered by
15 the commission previously, has access to a Defense Information
16 Security Officer, correct?

17 DDC [Capt HOPKINS]: Yes, Your Honor.

18 MJ [Lt Col BRAUN]: And that person can help defense with
19 questions as to whether something may or may not be classified. I
20 think, actually, we talked about that earlier on the record. Defense
21 counsel had indicated that -- or you had indicated that you didn't
22 anticipate going into classified matters based upon discussions with
23 that -- that individual, correct?

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1 DDC [Capt HOPKINS]: Yes, Your Honor. And I also earlier
2 mentioned specifically the Court Information Security Officer. But,
3 yes, we have access to a Defense Information Security Officer, and we
4 have those types of conversations with her on a daily basis.

5 MJ [Lt Col BRAUN]: And she could provide you a walled-off
6 approach to try and determine what may or may not be classified?

7 DDC [Capt HOPKINS]: Well, Your Honor -- so in response to
8 this question, you know, I'm now referring to things that are not in
9 the record, and I recognize that. And to the extent the commission
10 needs evidence supporting this, it's not a matter that I personally
11 handled. But, for example, I do believe that we submitted, through
12 the walled-off process, some number of months ago. I don't want to
13 estimate. I will say minimum three months ago -- my best-faith
14 recollection is closer to five or six months ago -- a couple of 505
15 summaries through that walled-off review process, and just asked for
16 portion markings or guidance on specifically what was classified in
17 those summaries through that process. And we have not gotten an
18 answer back to that yet. We were initially told to ask the
19 prosecution.

20 And then we, you know -- that's part of the process that,
21 looking through all of this, we quickly realized that the law that's
22 supposed to govern all this, 949p-4, doesn't actually contemplate any
23 of this, that it -- that what it contemplates is this process being

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1 done as an initial matter in a way where he gets to see the output.

2 So that's a long answer to a short question. I want to make
3 sure I did answer Your Honor's question, but our Defense Information
4 Security Officer is also acting without classification guidance on
5 much of -- many of the documents that we have. So her answer when we
6 say we have a document marked SECRET/NOFORN, and based on the
7 classified -- classification guidance that we have received, it
8 actually appears to us that nothing in this should be classified.

9 And this is now getting into my colleague Captain Trull's
10 argument on the next motion series, but I can tell Your Honor that
11 the attachments, the classified attachments to our reply in that
12 filing when we reviewed them in light of the classification guidance
13 we have, and when our Defense Information Security Officer does the
14 same, from what we can tell nothing in that document has been
15 identified in any classification guidance that we've received as
16 that's a classified statement, that's classified information. But
17 because the marking is SECRET/NOFORN, the only advice she can give us
18 is you have to assume it's all classified. You can't take that
19 document outside, you know, of the SCIF, of course. You cannot copy
20 portions of that document and carry that into a meeting with
21 Mr. Nurjaman.

22 So she has to help us navigate these procedures, but she
23 also has to help us keep our clearances. And sometimes those things

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1 are intentioned because we want to represent Mr. Nurjaman effectively
2 with the information that we have. But then the advice we receive is
3 the document that you've gotten from the government does not allow
4 you to, absent further guidance, pull any information out of it and
5 walk out of this room with it into a client meeting. Did
6 that -- does that help?

7 MJ [Lt Col BRAUN]: That does. Can you -- I appreciate it's a
8 proffer, but I would be curious to know how many documents have you
9 tried to submit through this process that have -- have been pending
10 for, best guess -- and I appreciate you qualified it as best guess
11 six months, five, six months.

12 DDC [Capt HOPKINS]: I believe it was three, Your Honor, and
13 this was really a trial run. It was just can this work? And so far
14 it hasn't.

15 MJ [Lt Col BRAUN]: Was that -- I'm assuming, based upon the
16 timing, that would have happened -- that would have occurred prior to
17 an update in AE 0107 was provided.

18 DDC [Capt HOPKINS]: Yes ----

19 MJ [Lt Col BRAUN]: Okay.

20 DDC [Capt HOPKINS]: ----- Your Honor, that we initially
21 submitted those prior to receiving that classification guidance. And
22 I do want to point out, Your Honor, you know, with regard to that
23 specific category of statements that the government has described as

1 non-HVD statements, you know, from the government's perspective,
2 they're operating with just so much more information than the defense
3 is that things that seem obvious to them, right, that they put in an
4 item of classification guidance are not obvious to the defense and
5 are not obvious to our Defense Information Security Officer because
6 it hasn't been provided in formal guidance that we can rely upon.

7 So with regard to that category of statements, I will be the
8 first to say, you know, what the government has said, not just in
9 that initial classification guidance in 107.001 but in their filings,
10 right, elaborating upon what they understand that to mean have, in
11 fact, been helpful for that category of statements. There are other
12 categories of statements that were not anywhere close to that level
13 of understanding.

14 And again, Your Honor, all of this goes to the prejudice,
15 you know, associated with denying this motion, not the legal basis
16 for the motion. I just want to be clear about that.

17 MJ [Lt Col BRAUN]: And I -- again, I appreciate the defense's
18 argument. It helps the commission holistically understand the facts
19 on the ground from your perspective, though, and I think
20 that's -- that's helpful and appropriate based upon the request.

21 The other question I had for you, Counsel: You had stated
22 during arguments that the relief you were requesting was direction
23 from the commission that the government cannot certify it has

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1 completed discovery. That is different than the relief you're asking
2 for in the motion.

3 So I need you to clarify what you are asking for.

4 DDC [Capt HOPKINS]: I don't believe it is particularly
5 different, Your Honor. You know, this is an example maybe where ----

6 MJ [Lt Col BRAUN]: Those are different -- those are different
7 orders, though.

8 DDC [Capt HOPKINS]: Well, they are different orders, I will
9 acknowledge that. And I will say I think what has happened here is
10 that when we make a title of a motion, we want that title to be
11 concise and, you know, convey the prejudice associated with denying
12 the motion. And then we, in the relief sought section of the motion,
13 will put, you know, the specific -- something approximating the
14 specific order that we are requesting from the commission to
15 effectuate that goal.

16 So initially, Your Honor, the relief that we requested in
17 paragraph 2(b) was to grant this relief in full, the commission
18 should rule discovery of any evidentiary summary approved under
19 M.C.R.E. 505(f)(2)(A)(2) will not be complete until the summary is
20 produced to Mr. Nurjaman in unclassified form. And then in
21 subparagraph (c) we say also any other relief that the commission,
22 you know, believes is appropriate in light of these facts and
23 circumstances.

1 Now, I will acknowledge, and then we did acknowledge in the
2 relief, the corresponding section of our reply, that the government
3 by offering some of these examples from U.S. district courts made
4 what I will acknowledge is a strong argument that there's not clear
5 practice among the federal district courts that support the specific
6 section of our motion saying that basically by interpreting federal
7 district court practice the commission should be required to make
8 these summaries unclassified or should require the government to
9 certify that these are unclassified in order to complete its
10 discovery obligations, but that argument does not extend to overcome,
11 for all of the reasons I discussed, you know, in my discussion of the
12 text of the law and the effect of district court rulings, that does
13 not overcome the plain text of the law which is that Mr. Nurjaman
14 must have access.

15 So we discussed in the relief discussed -- or excuse me, the
16 relief sought section of our reply just clarifying that the same
17 relief requested in 2(b), paragraph 2(b) of our initial motion, would
18 be substantially granted by an order interpreting the text of the
19 statute saying that discovery will not be lawfully completed until
20 they're provided in a form that Mr. Nurjaman can access them.

21 Now, I still believe that the structure of all of this, as
22 laid out in the MCA and as described again in the Department of
23 Justice's Criminal Resource Manual, creates a strong presumption that

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1 the purpose of these summaries is to remove the classified
2 information and make an unclassified document. But if that's
3 something that the government declines to do, it can still say this
4 document is classified but releasable to Mr. Nurjaman. And that is
5 certainly the core of what the plain text of this statutory section
6 requires.

7 MJ [Lt Col BRAUN]: Thank you, Counsel.

8 DDC [Capt HOPKINS]: Thank you, Your Honor.

9 MJ [Lt Col BRAUN]: Trial Counsel, are you ready to present
10 argument?

11 TC [Lt Col GOEWERT]: We are, Your Honor.

12 MJ [Lt Col BRAUN]: Please proceed.

13 TC [Lt Col GOEWERT]: Good morning, Your Honor. Good morning,
14 Commission. I will try to speak as slowly as I possibly can and I
15 apologize in advance if I go -- if I go quickly.

16 So what the defense motion is trying to do, it is -- it is
17 trying to obstruct the 505 process. It's trying to eviscerate it and
18 it's trying to render null and void everything that the commission
19 and the prosecution has done so far to provide them with an enormous
20 volume of very sensitive information.

21 The prosecution has been working in good faith with its
22 partners to provide the defense with information so that they can use
23 it in aid of their client, in aid of discovery.

1 What the defense has done is made an incredibly overbroad
2 and categorical assertion to this commission. They've not given you
3 any particularized showing, Your Honor, of how their client has
4 suffered prejudice or how they cannot work with him or what -- what
5 has actually occurred that's limited their ability to defend him.
6 They've given no facts that have done that. They've simply said
7 broadly and categorically because we cannot show him a document, we
8 cannot defend him or there's something wrong with this process. But
9 the truth is absolutely opposite that.

10 The defense has misunderstood what's happened in 505, and
11 that's understandable because they're not part of it, to a large
12 degree. They see an end product. What they don't realize is how
13 hard the commission and Your Honor and the prosecution have been
14 working to provide them the materials in these documents.

15 The commission has fastidiously required the prosecution to
16 add materials back in. And I don't want to get too much into the
17 process, but just so everyone who's watching this understands that
18 the effort in part of 505 is not to remove information that is
19 helpful to defense or to keep them -- to limit their ability to
20 defend their client but to provide as much information as possible.
21 The commission has often held us to that task.

22 What the 505 process has been doing in this case is removing
23 only incredibly sensitive equities that defense counsel has no need

1 to access, and then providing them with as much of the other material
2 as possible. And that material comes out, in general in this case,
3 been coming out at SECRET/NOFORN for very good reasons but while
4 protecting intelligence equities in this case, the defense does not
5 need to know about.

6 It's this misunderstanding of the process, I think in part,
7 that's driven this motion, and we understand that they have some
8 frustration. But let's talk about -- a little bit about their
9 argument that the plain text of this rule should govern the case.

10 The defense stated that Mr. Nurjaman must have this
11 information because that's what 505 says. Well, it's very
12 interesting because when Your Honor looks at the -- I'm sorry -- 505
13 in context, the commission will see that essentially 505 talks about
14 the accused as a defense team, as a corporate consolidated group. It
15 is the accused and counsel together. And if -- they're asking the
16 commission to read logical absurdity into the interpretation of this
17 text.

18 And why do I say that? It's because they cite one specific
19 provision of 505, 505(2) -- (a)(2) and say that, well, because it
20 references the accused, it must be him personally. And we know it
21 must be him personally because he can defend himself personally in
22 this case and therefore must have access to the information
23 personally. He must see everything that we see or at least some

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1 version of it, I suppose, but, generally, he must have access to
2 everything you approve through the 505 process.

3 That's both absurd and ultimately illogical. It's absurd
4 because this commission would never allow him to go without counsel.
5 This commission would never allow him to operate pro se because the
6 commission is required under Rule -- R.M.C. 506(d)(2), the commission
7 shall appoint standby counsel for the accused. So even if he fired
8 everyone here today, even if he said "I'm not interested in them, I
9 don't like what they're doing for me, I want them all fired," you
10 would still be obligated by the rules to provide him a standby
11 counsel. And it's for this very reason. It's a very good reason.
12 It's because there's so much classified information in this case, he
13 cannot, will not, and should not have access to that. You would give
14 him someone who could look at that, talk to him about that
15 information, and advise him about that. And that's baked into the
16 rules.

17 MJ [Lt Col BRAUN]: Well, how does that standby counsel talk
18 with him about that if it's all been marked as something he can't
19 have access to, see, or otherwise have knowledge of?

20 TC [Lt Col GOEWERT]: Certainly, Your Honor. They can talk to
21 him in many ways. They could say, "What do you know about this? Who
22 do you -- tell me about this person. Tell me everything that you
23 know about this."

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1 What's important is Mr. Nurjaman, with the information
2 that's in his memory and in his own mind about something, you can
3 talk to someone about people, places, facts, events by asking him,
4 "What do you know about this? Tell me everything that you know about
5 this. Hypothetically, if this were to happen, what would you think
6 about this?" You can talk in broad-brush strokes without getting
7 into individualized documents.

8 There are many ways to go about talking to someone about it.
9 There are many ways to advise someone about this. I think we
10 shouldn't take this course because I have access to information which
11 he may not have access to. So this is a bad decision for us
12 tactically. Right?

13 So if we talk about the strategic -- first of all, we need
14 to rewind a little bit. We are talking about two different pieces of
15 information, right? One is discovery that is informational and
16 discovery that is affirmative use, right? The United States must
17 provide him with anything we intend to use affirmatively in this
18 case, right? That is a given. He will see anything that is actually
19 presented in court that's actually used against him.

20 The rest is background information, right? A lot of it's
21 very general. And to provide the defense with information about the
22 people, the players, the places, that things happened, that things
23 occurred, many of which he's not actually privy to because he

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1 wasn't -- he wasn't there and may not know anything about, some of
2 which he might know about.

3 So the defense is in a better informational position with
4 him overall. But that is the structure of this -- right? -- because
5 the structure of it is -- there's a small body -- right? -- there's a
6 small portion of a very large body of discovery that you don't have
7 access to for very good reason, but I can do my best to talk to you
8 about it and try to figure it out. But the defense
9 ultimately -- counsel is -- have -- has obligations to make lots of
10 decisions in the case that the accused does not have
11 obligations -- is not required to make.

12 Counsel makes many, many tactical decisions that the accused
13 does not -- does not get to make. And counsel is privy to
14 information that allows them to do that. So there is a team defense
15 element that's at play here. And, certainly, I don't want to get
16 into how they might speak to their client about it, but there are
17 many ways that they can speak to it. For instance, the
18 classification guidance, right?

19 If we have a body of information related to deponents or
20 witnesses, et cetera, that the counsel can talk to them now at length
21 about that because they know and understand that those statements
22 they've made are not, in fact, classified.

23 If there are other matters in there, they can certainly talk

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1 around them, and they can provide them information that they think
2 might be important in various and other ways and provide them their
3 advice about courses of action to take.

4 MJ [Lt Col BRAUN]: It -- I want to stop you there, Counsel.
5 You allude to defense counsel talking around issues. I mean,
6 it -- isn't that a dangerous proposition to ask counsel, who are
7 holders of clearances, and that gives them access to this information
8 to effect a defense on behalf of their client, isn't that a dangerous
9 position to have to put them in to try and talk around issues with
10 somebody who is not cleared to have access to information.

11 TC [Lt Col GOEWERT]: Well, Your Honor, there's always
12 dangerous -- there's always a danger in classified information no
13 matter who has it, no matter who holds it, and no matter who's
14 talking about it. I face -- we all face some degree of jeopardy
15 whenever we're around it, and it's very sensitive. You know, there
16 is a radiation-type element to it. But they -- it just requires them
17 to be more deliberative and more careful in how they do it and how
18 they approach it.

19 They also exist under the benefit of an attorney-client
20 relationship and an attorney-client privilege. We will never know
21 what they say to him or how they say things to him. So to the degree
22 that there may be any error in that ----

23 MJ [Lt Col BRAUN]: Counsel, but let's not go down the line of

1 because there's attorney-client relationship, defense counsel can, in
2 essence, violate federal law. I mean, that's a little absurd. So...

3 TC [Lt Col GOEWERT]: Your Honor, I don't take it that far.
4 What I'm saying is you're -- you're proposing to us that -- that they
5 must be able to talk to him about every single thing in here. But we
6 know that that's not true because the body of case law provides
7 defense counsel classified information and specifically says -- In
8 Re: Tariffs Holdings is a good example. You don't get that -- like,
9 other courts resolve this issue. You just don't get access to that.
10 And I don't know how you square defense having access to it and their
11 client not, In Re: Tariffs Holdings or any of these other cases
12 because we have this systematic problem in all classified cases. It
13 is the fundamental nature of it that counsel must carefully decide
14 how they intend to speak to their client about things and must
15 carefully decide how they explain their tactical and strategic
16 decisions that is inherent in every case involving classified
17 information because cleared counsel is privy to it, defense -- sorry,
18 client is not. So this is not unique to this commission. It is the
19 fundamental structure of all of these kinds of cases.

20 And -- other than reminding the commission that this happens
21 routinely in all cases, and other courts have decided that this is
22 not an issue worth undermining or overturning the whole process is
23 worth noting.

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1 Your Honor, back to the defense's structural argument. What
2 defense said is that because 505(f)(2) mentions the material must go
3 to the -- goes to the accused. Well, if their reading is accurate,
4 then none of the rest of 505 makes sense -- right? -- because this
5 commission can then look at 505(g), which requires notice by the
6 accused of some intention to disclose classified information.

7 Presumably, if the defense's reading were true, then only
8 the accused himself would provide notice, right? Defense counsel
9 would be -- would not be required to put any notice of any intent to
10 disclose classified information because they would not be subject to
11 this provision. (g)(1) would not apply to them, it only applies to
12 the accused.

13 But, clearly, the rule is talking about a team defense,
14 right? The defense -- the accused is both the accused and his
15 counsel in this regard. Just as in (2)(a)(1) -- sorry, in (2)(a),
16 the accused means individual and counsel. Otherwise, we get the
17 absurd result that the defense would not have to provide notice
18 because only the accused must provide notice.

19 Similarly, (g)(1)(B), it limits disclosure by the accused.
20 No accused shall disclose or cause the disclosure of information
21 known or believed to be classified. Well, if their reading is
22 correct, then this rule does not apply, right? Because it's
23 only -- it's only specific to him. He -- it's not -- they are not

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1 limited in disclosing information. They don't have to provide notice
2 to the government or the commission because this rule would only
3 apply to him.

4 Similarly, a failure to comply, (g)(2), it says: "If the
5 accused fails to comply with the requirements of 505(g), the military
6 judge will preclude it or may prohibit the examination by the accused
7 of any witness.

8 So I don't say this in a -- I say this very, very -- not
9 mockingly or condescendingly, but the accused is not going to
10 cross-examine anyone. The accused is not going to provide motions or
11 provide notice because he does it through counsel because this is
12 a -- a team defense. It is speaking of defense as a group, accused
13 and counsel. If it -- this were not so, then you would not prohibit
14 them from providing information if they failed to provide notice
15 because only their client would have to provide notice. Only he
16 himself would have to provide notice.

17 The rule is unitary, and it's logical and not absurd.

18 The rule works together because we don't provide classified
19 information to someone who is not a holder of a security clearance.
20 Similarly, we don't receive notice from Mr. Nurjaman, we receive it
21 from his counsel. He provides notice of his intent to disclose
22 information. The commission doesn't penalize Mr. Nurjaman, it
23 penalizes his defense as a whole.

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1 This is because in every sense in 505(g) and 505(f), the
2 accused is used in a unitary fashion, meaning the defense team.
3 There's a distinct difference here when trying to understand 505 as a
4 process and how it's written.

5 When you look at 505(d)(4), which is pretrial conferences,
6 whenever the rule seeks to delineate between counsel and the accused,
7 what it does is it gives -- it does so only when they're acting as
8 independent entities when they have different -- different things
9 that each must do separately as a person or as an actor versus a
10 team. And when you are talking about the pretrial
11 conferences -- right? -- the rule says no admission made by the
12 accused or by counsel of the accused at a pretrial conference may be
13 used against the accused until the admission is in writing and is
14 signed by the accused and the counsel for the accused. It makes this
15 distinction because they are now -- they are now severable entities,
16 they're not acting as a team, not being addressed as a team. They're
17 both required to do something different.

18 In this case, when it's referring to the word "accused" in
19 505(f)(2), it only makes sense to read them as a team and not as an
20 individualized right. Otherwise, this entire system, this entire
21 process, entire statute is -- I'm sorry, the entire rule is -- it's
22 just absurd and illogical.

23 This would also create the logical contradiction -- I think

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1 we spoke about this a little bit -- between the 505 process and the
2 505 end products and the remainder of classified discovery. So the
3 prosecution has provided to the defense a large body of classified
4 information in direct production. The defense has not yet taken
5 issue with the provision of that to them because, as is very clear in
6 the commission's protective order and in the case law, we are allowed
7 to provide them classified information for the review of counsel,
8 right? So they can make -- they can advise their client, they can
9 make the best decisions possible in the case. And while there may be
10 some limitation on what they discuss with their client about it and
11 there may be some -- some, as we spoke about, some danger in the way
12 they address him and talk to him about it, they're still ultimately
13 responsible and they have the information.

14 If it were true that the 505(f) process can only result in
15 an unclassified version, or at least a version that is releasable to
16 the accused, then it would be entirely contradictory with the wide
17 body of case law that was cited in here but have said it's just fine
18 to give defense counsel classified information. That's why we have
19 them. That's why we have cleared counsel, and that's why the rule is
20 created. There would be an inherent contradiction because that would
21 mean that the only way to provide and protect classified information
22 is not the 505 process, the only way to provide it and protect it is
23 to provide it directly to them. That's an absurd result because the

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1 505 process doesn't dictate a classification.

2 It's interesting, the defense has said that we have been
3 trying to provide them information that is simply SECRET/NOFORN, and
4 we haven't attempted at all to declassify it in any way, shape, or
5 form. And that's really not correct. They don't see the original
6 products but, as this commission is aware, the United States has
7 moved many of those items from a higher level of classification and
8 categorization down to a lower level to make it more accessible, more
9 usable, and better ultimately for the commission.

10 Your Honor, you asked the defense about their request for
11 reconsideration and certainly this is a mega request for
12 reconsideration. It is absolutely a request for reconsideration of
13 all your rulings. And the defense in their argument said this -- and
14 made this perhaps Freudian slip, but made it very clear. They said,
15 let's look back, Your Honor, let's look back to the decisions made by
16 prior judges in this case because you, Your Honor, now have more
17 information and are better situated to reevaluate the rulings of
18 those prior judges.

19 This is absolutely what they're doing. They're asking you
20 to -- first of all, they're setting up the possibility that you
21 should reconsider all your 505 rulings or those of the prior judge,
22 or should another judge come after you if this case continues for
23 that amount of time, perhaps that judge should reconsider your

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1 rulings because he or she has more information. That's what
2 they -- that's what they telegraphed to you, that they can and they
3 do reserve that right.

4 The problem with the entire motion is that it is tantamount
5 to a request for reconsideration. Because at the end of every ruling
6 that every judge has made in this case, the judge has found that the
7 substitution provides the defense with substantially the same ability
8 to make a defense as it had from the original. And that's because
9 the document is very close to the original with just some minor
10 alterations.

11 But what the defense is asking the commission to do is to
12 wholesale decide that those approved summaries do not provide the
13 defense with the same ability to make a defense as would discovery or
14 access to the specific information.

15 What they're saying is, no, Judge, you really do need to
16 reconsider every single one and they're only okay if they're
17 releasable to my client. The problem with that is it's going to put
18 the commission into a sort of infinite delay loop, right? Because
19 they're going to say, all right, Your Honor, you need to order that
20 all of these summaries become -- become -- come to a level that my
21 client can see. What they know is, or they should know is that he's
22 not going to see everything in there, right? And even if we were to
23 reduce these in some way, shape, or form to a level that he could see

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1 through some declassification process, there would be redactions to
2 some of these things. Some of them would be greater, some of them
3 would be lesser. That is for the OCA, not for the prosecution, to
4 decide that. Right?

5 But what's going to happen is and they're fundamentally
6 going to get those back were you to grant this, and they're going to
7 say, well, Your Honor, we still can't provide him information that
8 was previously approved because it's redacted, right? And they're
9 going to go back to you and say we need you to compel them to provide
10 this information. We need you to revise the summaries and redo
11 everything because we are dissatisfied, fundamentally dissatisfied.

12 It is a recipe for an endless cycle of litigation, and that
13 was what 505 was designed to protect against. That's why the 505 has
14 the no reconsideration provision because otherwise we are literally
15 litigating this for years and years and years because the purpose of
16 it is met.

17 The purpose is defense counsel has the information, defense
18 counsel has the ability to use it to defend their client, especially
19 when we're -- it was talking about discovery materials who is
20 materiality to the case, has not even been placed before the
21 commission, right? We're talking about a lot of vague and
22 speculative assertions by the defense, right? We could be harmed
23 because I can't really talk completely to my client about this. Or

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1 he might find some brick that is helpful to him in terms of analyzing
2 this case, but that's entirely speculative.

3 That's why their request is incredibly overbroad, because it
4 doesn't tell you, all right, we actually have this really legitimate
5 problem with this one piece of information and you can, as a
6 discovery matter, help us resolve this.

7 They're saying broad brush, this whole process is just
8 wrong, it's just messed up and I can't do anything. We're absolutely
9 paralyzed because he might find something, he might say something.
10 Well, that's the definition of speculative. Might happen, could
11 happen, maybe it will happen. It isn't actual evidence before you of
12 a real problem. It's a fake problem. It is a proposed possible
13 problem. It is a dummy problem, right? It isn't an actual pointing
14 to a very specific piece of conflict that requires an assertion, I
15 have this one particular fact and I really need to know about it and
16 the United States government won't let me tell my client about this.
17 That's not what's going on.

18 MJ [Lt Col BRAUN]: Counsel, I read the government's response,
19 in a footnote you allude to that very situation and it's AE 0110.002,
20 page 6, footnote 4. In that footnote, the government seems to
21 indicate that it is willing to -- should a situation arise where the
22 defense feels that it requires the ability to release or display
23 certain classified information to their accused where that would

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1 otherwise be prohibited based upon the, I'm assuming, document
2 markings, that the government would work with the OCA or whoever is
3 responsible for the classification of that particular document to see
4 if there is a way to make that possible for the defense in
5 those -- those specific situations.

6 I note there is discussion about whether or not that's
7 required but the government at least has indicated at least as the
8 commission reads its response, has committed to trying to assist with
9 that to the greatest extent practicable. Is the commission
10 understanding that footnote correctly?

11 TC [Lt Col GOEWERT]: Yes, Your Honor, and that's exactly what
12 we -- we will do. We say that because the defense has -- just saying
13 that we will look at reclassifying something or working to get
14 something at a level that Mr. Nurjaman can see himself. The defense
15 could theoretically shove everything back in and say we need it all
16 declassified, which is what they've done to you in this motion,
17 right? And we think that would be just totally illegitimate because
18 they have not demonstrated any real materiality to the preparation of
19 their defense -- right? -- which is what the 505(g) process is for.

20 So if there is a document or some number of documents that
21 they can look at and say -- explain why this is really important to
22 them ----

23 MJ [Lt Col BRAUN]: Well, I think -- sorry. I'm going to stop

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1 you there.

2 You referenced 505(g). I think 505(g) is slightly different
3 than what we're talking about, right? 505(g) is talking about the
4 disclosure in a -- in a more specific sense than perhaps discovery
5 purposes and case development purposes for the defense to have those
6 attorney-client conversations with Mr. Nurjaman. I don't think
7 they're necessarily -- I don't think 505(g) -- yeah, I think there's
8 a difference there.

9 TC [Lt Col GOEWERT]: Well, there's certainly a difference.
10 And I don't mean it as a replacement, as a one for one. What I mean
11 is that we're in a long-term process, right? We're in a long-running
12 case that is very complicated and is complicated by, in one sense,
13 the degree of classified information involved, right?

14 So when we were talking about the entire journey that we've
15 all been on together here, it is in part because the body of
16 information involved is very sensitive and very -- very broad.

17 So when the defense comes forward, as you said, and asks us
18 for a particular piece of information, we will work to get it
19 declassified. But what I mean by 505(g) is that that process itself
20 will also help to sort this out. Because, as they provide 505(g)
21 notice for various events in the case, that's going to allow us to
22 try to produce or get -- perhaps get to declassification of certain
23 information -- right? -- which will also help solve their problem.

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1 So we have multiple ways to work on this problem without
2 throwing it before the commission and demanding the result the
3 defense is demanding. One is, of course, that they can talk to their
4 client about it in many ways. Two is the 505(g) because, as we go
5 through the process, and as they make 505(g) notices, we're going to
6 ultimately try to get to a usable product there within the bounds of
7 reason and the rules.

8 Three is class guidance, right? So the defense proposes
9 a -- problems it's having in terms of understanding what information
10 can be given to them, their client, or use in the commission, and we
11 can take that back to the OCA and say that the defense has proposed
12 this problem. And we saw this in relationship to non-HVD statements,
13 right? That's a body of information contained in the discovery that
14 we would like to use or discuss with our client. Well, we know that
15 that body is general -- of information is generally in and of itself
16 unclassified. So that should help you.

17 So the degree that he can come back to us with -- with
18 problems and issues, we can work to get class guidance to resolve
19 some of this. And the class guidance is not Lieutenant Colonel
20 Goewert's class guidance. You know, I signed it, I don't make it up.
21 I would go back to the OCA and say, what do you think? And I would
22 just put it in -- my name on the document. And, of course, we also,
23 in consultation with our partners and looking at other cases, that we

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1 will provide them with releasable versions of the RDI statements and
2 some of the RDI materials as well. I think that's been done in other
3 commission cases, so we can work to provide them those at a degree,
4 at a level that is displayable or releasable to the accused. And so
5 we will do that. And that should remove a significant portion of
6 information from this.

7 MJ [Lt Col BRAUN]: Trial Counsel, has -- we've talked a
8 little bit around the "release to," "display to" caveats that could
9 be applied, it appears, to classified information to allow defense
10 counsel an ability to discuss or show their client certain things.

11 Has anything been provided to the defense that contain that
12 caveat?

13 TC [Lt Col GOEWERT]: No, we have not been providing materials
14 to them because the OCA has been making those decisions, right? And
15 so the commission -- the problem is this, right? The defense can
16 say, well, there's a document here that looks on its face to be
17 unclassified, but they don't -- they don't take into account mosaic
18 effects. They don't know all the participants or all of the reasons
19 why something might be SECRET/NOFORN, even if some portion of it was
20 clearly not, right? So that is -- there's clearly an OCA duty and
21 not something the defense can cavalierly say that shouldn't be
22 classified.

23 So what we can do is, of course, work on the RDI documents

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1 to get this down, but the rest of it, I think, will have to be on a
2 case-by-case basis.

3 MJ [Lt Col BRAUN]: And -- okay. I can appreciate that
4 response, understanding the commission's role in the 505 process.
5 However, it is a little concerning to hear that when defense is
6 trying to utilize the process to get clarification on what may or may
7 not be classified based upon perhaps information from a
8 classification guidance and then banner markings on a document that
9 may seem to conflict with that, defense counsel, in doing their
10 diligence to protect classified information is seeking clarification,
11 but then not getting a response for five, six months. And, again,
12 that was caveated with -- it's, to best recollection, five, six
13 months to get those documents, some kind of decision, some kind of
14 guidance back, I mean, that seems to be problematic.

15 TC [Lt Col GOEWERT]: Well, I wouldn't -- they said they used
16 a walled-off review. I shouldn't know about that. I wouldn't know
17 about that, and I wouldn't speak to -- speak to that because it's
18 presumably between them and the OCA -- I don't know what happened.
19 And if defense wants to give us permission to inquire into it, we can
20 do that. But otherwise, we'll treat it as a walled-off process and
21 say that if you had come to us with it, we would have forwarded it
22 and asked for it as well.

23 MJ [Lt Col BRAUN]: And that's the footnote for all of

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1 the ----

2 TC [Lt Col GOEWERT]: Yes, Your Honor. Exactly. Exactly. So
3 just barring this commission's questions, we're looking at the big
4 picture of what's happened here, right? The defense has been
5 provided with an incredible volume of information and then turned
6 around and said, well, you know what, because you've given us so much
7 information and because of its classification, even though it's
8 only -- a lot of information in and of itself, it's -- but relative
9 to the entire case, it's only a portion of the information they've
10 received. I think that bears noting that they have hundreds of
11 thousands -- a hundred thousand plus other pages of nonclassified
12 discovery that they can certainly share with their client and think
13 about. But yet, it is a large volume of sensitive and classified
14 information provided to them as information in
15 discovery -- right? -- in discovery phase not -- not for use at
16 trial, not evidence in trial but just -- just -- let's -- counsel,
17 let's help you figure out your case. Let's figure out what you can
18 do and how you should advise your client. That's the big picture.

19 They've taken all those efforts by the prosecution, the
20 commission, and then said, you know what, let's figure out how we can
21 pedantically obstruct what has happened here by filing a motion that
22 doesn't advance anything. We have been moving along together as a
23 commission. The defense has received a huge volume of discovery, but

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1 they intend to rewind everything by four years to come back to the
2 commission and demanding what is ultimately an unrealistic and
3 illogical reading of 505, which is entirely taken out of context of
4 the whole statute. And we ask this commission to deny their motion.

5 MJ [Lt Col BRAUN]: Thank you, Trial Counsel.

6 Defense Counsel?

7 DDC [Capt HOPKINS]: First, Your Honor, I will say I don't
8 think it's pedantic or obstructionist to read the enabling statute
9 that brings us all here and simply make the observation that a
10 process laid out there has been reimagined by the government and then
11 conducted in a way that doesn't comport with the authorization
12 provided in the statute. To the -- to the extent that that's some
13 sort of, you know, ad hominem argument on the defense, I'd ask
14 the -- the commission to disregard that.

15 There's a lot else to say about the prosecution's response
16 argument, but the most important, as a matter of statutory
17 interpretation, is to note that the government repeatedly said that
18 when you read the MCA in context, it is clear that the accused means
19 accused and counsel.

20 And that is exactly our point. What the government wants is
21 to be able to pick and choose when the accused means accused and
22 counsel and when it means just counsel. But as the prosecution said
23 repeatedly, the context of the statute makes clear that when the

1 accused is used as a standalone statement in the MCA, it refers to
2 accused and counsel. That is directly comporting with Mr. Nurjaman's
3 right to self-representation, and it is important, as a principled
4 matter, to further the essential principle that someone must be able
5 to participate meaningfully in their own defense.

6 The prosecution says that other provisions of the statute
7 would not make sense if the accused meant Mr. Nurjaman and referred
8 to the provisions requiring notice by the accused and then says: The
9 accused is not going to be providing notice, counsel are going to be
10 providing notice. The accused is not going to be conducting
11 cross-examinations, counsel will do cross-examinations.

12 But again, Your Honor, when a right to self-representation
13 is embedded in a statute, he could do those things. And then in an
14 effort to downplay the prejudice associated with this, the government
15 said, well, you would have an obligation to appoint standby counsel.
16 And then in explaining why standby counsel would alleviate this
17 problem, the government then went on a long explanation of all the
18 things that standby counsel would do that, in fact, standby counsel
19 would not do.

20 Standby counsel would not have to participate for months or
21 years in the preparation of a defense strategy. Standby counsel
22 would ensure that Mr. Nurjaman comports with the rules of court
23 during court. Standby counsel may be able to advise Mr. Nurjaman on

1 certain tactical things but Mr. Nurjaman would be the one making the
2 tactical decisions, conducting cross-examination, providing notice.
3 And if he didn't provide notice, the commission would supply the
4 remedies that would arise in that situation.

5 So at a statutory -- as a matter of statutory
6 interpretation, as a matter of interpreting the text and structure of
7 the MCA, the prosecution is exactly right when they say that in the
8 context of this provision, when the word "accused" is used by itself,
9 it means accused and counsel and accused and counsel means accused
10 and counsel, not just counsel.

11 That's really the extent of the government's argument that
12 any of this process as they envision it complies with the statute.
13 So I will leave that there and then talk about the prejudice that the
14 government discusses. The government provides a lot of proffers,
15 made a commitment during response argument to provide, it sounds
16 like, better classification guidance on Mr. Nurjaman's own statements
17 that we have in these categories of discovery. The first time we've
18 gotten, you know, that -- that commitment.

19 So, sure, that may be helpful. It does not solve the
20 fundamental problem of interpreting the statute that's present here.
21 But, yes, you know, that -- I will not deny that that will be helpful
22 when they follow through on that commitment. That would also go to,
23 of course, the next motion that the commission is going to hear.

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1 However, I will note that it is deeply ironic and telling
2 that the government cites the mosaic effect as a reason why he can't
3 have it and then says there's no prejudice associated with not giving
4 him the full effect. In other words, the reason they're not going to
5 give him most of these documents that, again, as we say, we look at
6 many of the documents and go based on the guidance we have, none of
7 this should be classified. And their reason why he can't have it is
8 the mosaic effect. It's important enough to them, to their equities
9 that he not figure out the whole picture but then they absolutely
10 denigrate the idea that he might figure out something that would be
11 helpful to his defense by looking at the mosaic of the documents.
12 They describe that as obstructionist and absurd and, you know,
13 essentially call us bad-faith actors for filing this motion.
14 Meanwhile, the people who are deciding what he gets to see are
15 extremely concerned with the mosaic effect.

16 That is, in fact, how you build a defense. You look at the
17 collective body of information. You make inferences. You find gaps.
18 And he doesn't have to rely on us to just do that ourselves. He has
19 a right in the MCA to do it with us, to meaningfully participate in
20 his own defense.

21 So I would ask the commission to completely disregard any
22 suggestion that looking at the documents collectively is somehow not
23 prejudicial -- or that denying him the ability to look at the

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1 documents collectively is somehow not prejudicial, because the
2 government acknowledges that looking at documents collectively is
3 important, that that aids understanding. That's exactly what they're
4 concerned with, is aiding his understanding of the things that they
5 don't want him to know.

6 All of that, again, Your Honor, comes back to the prejudice
7 associated with denying the defense's motion. I think it's clear
8 that the government would be very happy with an outcome where they
9 win this motion at trial, it goes up on appeal and it is determined
10 that although the process laid out in the MCA was not followed, an
11 accused -- and facts means accused and defense counsel -- the error
12 was harmless. I think that's what they're going for here.

13 The amount of time spent in the government's argument
14 talking about the overall effect of this clearly suggests that
15 they're trying to get information in the record to suggest that not
16 interpreting the statute on its face, that not giving effect to the
17 text of the statute doesn't actually hurt us. Of course it does.

18 And those harms are both practical for the reasons I've
19 discussed and also simply principled.

20 If you're going to give someone the right to participate in
21 their own defense, you have to do that. There are a lot of motions
22 that have been filed before this commission, that are pending before
23 this commission, that discuss differences between commissions

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1 practice and court-martial practice. And we've put forth many times
2 that the standard laid out in Hamdan is that any such difference must
3 be justified by some sort of practical need. So what the government
4 has essentially identified is that they believe as prosecutors that
5 there is a practical need essentially not to give Mr. Nurjaman a full
6 right to participate in his own defense. They may say there's a
7 practical need based on how they describe the role of standby counsel
8 to, in effect, not allow him to represent himself.

9 The problem is that's not in the law. If Congress had
10 identified that practical need, they could have put it in there.
11 There's many differences that they put in without clearly identifying
12 any practical need at all. But so if giving the accused access to
13 the discovery in his case at least through this
14 process -- right? -- was going to be some sort of issue, then
15 Congress had an obligation to identify that as something requiring a
16 practical need to essentially not give him the right to participate
17 in his defense meaningfully or at least as meaningfully as a
18 servicemember or not give him the right to self-representation. But
19 they didn't do that. That's a principled decision about a right to
20 give the accused. And when you give people rights, that has effects.
21 In fact, it usually has effects that the government doesn't like,
22 that cause government actors to come up to podiums like this and
23 accuse defense counsel who are simply reading the text of the statute

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1 and saying something has gone awry here, to say that we're
2 obstructionists, to say that we're bad-faith actors, et cetera.
3 That's what it means to enforce a right, is for the judiciary to read
4 what's on the paper and say to give effect to what's on the paper
5 requires you as the government to do something that you don't want to
6 do.

7 So we would ask the commission to do that in this case.

8 Thank you.

9 MJ [Lt Col BRAUN]: Thank you, Defense Counsel.

10 **[Pause.]**

11 **[Counsel conferred with courtroom personnel.]**

12 MJ [Lt Col BRAUN]: Counsel, based upon the way ahead I
13 provided the parties yesterday, the next matter we're going to take
14 up will require a closed session. There's some logistics that the
15 commission has to think through to convert us to that session.

16 Based upon that and the lunch recess we discussed earlier,
17 I'm inclined to recess the commission now and then reconvene at 1330
18 where we can move into that closed session to take up those matters.
19 I assume that will be agreeable to the parties.

20 Trial Counsel?

21 TC [Lt Col GOEWERT]: That's fine, Your Honor.

22 MJ [Lt Col BRAUN]: Okay.

23 LDC [MR. FANNIFF]: No issues, Your Honor.

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1 MJ [Lt Col BRAUN]: Okay. Very well then. This commission
2 stands in recess until 1330.
3 [The R.M.C. 803 session recessed at 1041, 08 September 2025.]
4 [END OF PAGE]