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1 [The R.M.C. 803 session was called to order at 0915,
2 3 December 2019.]

3 MJ [COL ACOSTA]: This commission is called to order. I'm
4 Colonel Lanny Acosta, United States Army. I have been
5 detailed to this commission to replace Colonel Shelly Schools,
6 United States Air Force, who was detailed for a brief time but
7 issued no rulings and did not appear on the record. She was
8 detailed to replace Colonel Vance Spath, also United States
9 Air Force. I will announce my detail and qualifications in
10 greater detail in a moment, after we identify counsel and take
11 care of a few other preliminary matters.

12 Trial Counsel, good morning. Please identify who is
13 here on behalf of the United States. If any counsel are
14 making their first appearance, please indicate such so that we
15 can get their detailing information, qualifications, status as
16 to oath, and whether they have acted in any disqualifying
17 manner in this case on the record.

18 TC [MR. MILLER]: Good morning, Your Honor. First, as a
19 housekeeping matter, these proceedings are being transmitted
20 by CCTV to the locations in the United States pursuant to the
21 commission's order AE 028M dated 22 November 2019.

22 Present this morning for the United States,
23 Your Honor, as identified in AE 338I, the detailing memorandum

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1 dated 26 April 2019, are Brigadier General Mark Martins;
2 myself, Mark Miller; Colonel John Wells; a new counsel,
3 Lieutenant Colonel Patricia Gruen; and Lieutenant Commander
4 Cherie Jolly.

5 Also present in the courtroom for the prosecution,
6 sir, are Master Sergeant Lisa Grant, Mr. Forrest Parker Smith,
7 Ms. Joleen Sanders. And present in the back of the courtroom
8 are Special Agent Sean McCarthy, the Federal Bureau of
9 Investigation; and Ms. Kimberleigh Albites, and Ms. Jane
10 Solis, both staff operations specialists of the Federal Bureau
11 of Investigation.

12 And with your permission, Your Honor, I would ask that
13 Lieutenant Colonel Gruen announce her qualifications and
14 certifications to appear before the commission.

15 MJ [COL ACOSTA]: Lieutenant Colonel Gruen.

16 ATC [Lt Col GRUEN]: Thank you. I'm Lieutenant Colonel
17 Patricia A. Gruen. I have been detailed to this military
18 commission by the Chief Prosecutor for military commissions,
19 Brigadier General Mark Martins. I have been detailed and
20 qualified under Rules for Military Commission 502 and 503. I
21 have been sworn under Rule for Military Commission 807, and I
22 have not acted in any manner which might tend to disqualify me
23 from these proceedings.

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1 MJ [COL ACOSTA]: Thank you. Have you been previously
2 sworn?

3 ATC [Lt Col GRUEN]: I have been previously sworn.

4 MJ [COL ACOSTA]: Thank you. All right.

5 Mr. Natale.

6 LDC [MR. NATALE]: Good morning, Your Honor.

7 MJ [COL ACOSTA]: Good morning. Welcome. Please indicate
8 by whom you were detailed and your qualifications.

9 LDC [MR. NATALE]: Again, good morning, Your Honor. My
10 name is Anthony John Natale. I have been detailed to the
11 military commission by the Chief Defense Counsel of the
12 Military Commissions Defense Organization. I am a civilian
13 attorney. I am qualified under Rule for Military Commission
14 502(d). I am a member in good standing of both the District
15 of Columbia and Florida bars. I have not been previously
16 sworn pursuant to Rule 807, and I have not acted in any way
17 that that would tend to disqualify me from these proceedings.

18 I also have with me, and I would like each one of
19 them, if I could, to have them introduce themselves to the
20 court, as well as the new people.

21 DDC [CDR MIZER]: Good morning, Your Honor. Captain Brian
22 Mizer.

23 DDC [LT PIETTE]: Morning, Your Honor. Lieutenant Alaric

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1 Piette.

2 DDC [MS. MORGAN]: Good morning, Your Honor. Ms. Annie
3 Morgan, previously sworn and qualified and certified under
4 R.M.C. 502 and 807.

5 MJ [COL ACOSTA]: Thank you.

6 DDC [Maj ROBINSON]: Good morning, Your Honor. My name is
7 Major Brett Robinson, United States Air Force. I have been
8 detailed to the military commissions by the Chief Defense
9 Counsel of the Military Commissions Defense Organization. I
10 am qualified under Rule for Military Commissions 502(d). I
11 have been previously sworn pursuant to Rule 807, and I have
12 not acted in any manner which may tend to disqualify me from
13 these proceedings.

14 MJ [COL ACOSTA]: Thank you.

15 LDC [MR. NATALE]: Your Honor, the other people are
16 paralegals, investigators, security, and other staff members.
17 And I would also like to recognize that Brigadier General
18 Baker is present in the courtroom.

19 MJ [COL ACOSTA]: All right. Thank you, Mr. Natale.

20 I am going to swear you in just a minute. First, I am
21 going to go over counsel rights with your client.

22 LDC [MR. NATALE]: Very well.

23 MJ [COL ACOSTA]: Mr. Nashiri, you may remain seated while

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1 I am talking to you, because if you keep standing when I am
2 talking to you, you are going to be standing all day, okay?
3 So go ahead and have a seat.

4 I want to go over your counsel rights with you at this
5 time. Pursuant to the Manual for Military Commissions, you
6 are represented by Captain Mizer, Major Robinson, Lieutenant
7 Piette, and Ms. Morgan, your detailed defense counsel.

8 Do you understand this?

9 ACC [MR. AL NASHIRI]: [Microphone button not pushed; no
10 audio.]

11 MJ [COL ACOSTA]: Detailed counsel are provided --
12 detailed counsel are provided to you free of charge. Do you
13 understand this?

14 ACC [MR. AL NASHIRI]: [Speaking in English] Yes.

15 MJ [COL ACOSTA]: Now, in addition to detailed defense
16 counsel, you are also entitled to be represented free of
17 charge by at least one additional counsel who is learned in
18 the applicable law relating to capital cases, pursuant to Rule
19 for Military Commissions Rule 506(b). I understand that
20 previously that was Mr. Rick Kammen, but he has been replaced
21 by Mr. Anthony Natale. Is that also your understanding?

22 ACC [MR. AL NASHIRI]: Yes. I understand that Mr. Rick
23 was present and I hoped that he could stay with us, but right

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1 now Mr. Tony is here.

2 MJ [COL ACOSTA]: Okay. I'm going to talk to you about
3 the status of Mr. Kammen in just a moment, okay? I am aware
4 of their -- the composition, the members of your defense team,
5 has changed significantly since the commission was last in
6 session, and I want to talk to you briefly about that.

7 Mr. Kammen, Ms. Eliades, and Ms. Spears were all
8 previously excused by the Chief Defense Counsel. I have also
9 been informed that Mr. Kammen intends to retire entirely from
10 the practice of law. Based on that, I found that he had
11 effectively withdrawn from your case.

12 In the meantime, Mr. Natale, Captain Mizer, Major
13 Robinson, Major McCormick, and Ms. Morgan have been detailed
14 to represent you. However, I understand that Major McCormick
15 has since decided to leave the military. Based upon that, I
16 granted his request to withdraw from your case in Appellate
17 Exhibit 339P.

18 Do you understand all of that?

19 ACC [MR. AL NASHIRI]: [Speaking in English] Yes. Yes, I
20 understand.

21 MJ [COL ACOSTA]: Have you spoken with your current
22 defense counsel about everything I have told you?

23 ACC [MR. AL NASHIRI]: Yes. Yes, we talked about it.

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1 MJ [COL ACOSTA]: Okay. As to Mr. Kammen, do you consent
2 to his withdrawal from your case?

3 ACC [MR. AL NASHIRI]: As a matter of fact, I wish that he
4 could be with us here.

5 MJ [COL ACOSTA]: So you would request that he continue to
6 represent you; is that correct?

7 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes.

8 MJ [COL ACOSTA]: Even though you do not consent to
9 Mr. Kammen's withdrawal, do you understand that I have
10 determined that, because of his retirement from the practice
11 of law entirely, that he has effectively withdrawn from the
12 case?

13 ACC [MR. AL NASHIRI]: If Mr. Kammen cannot come back,
14 then I will be forced to approve Mr. Tony.

15 MJ [COL ACOSTA]: As I mentioned before, Mr. Kammen was
16 known as your learned counsel because of his experience in
17 cases involving the death penalty. Mr. Natale has been hired
18 to replace Mr. Kammen based upon his experience in death
19 penalty cases. Understanding that Mr. Kammen is no longer
20 available to represent you, do you wish to be represented by
21 Mr. Natale as your learned counsel?

22 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes, of
23 course.

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1 MJ [COL ACOSTA]: Next, as to Ms. Eliades and Ms. Spears,
2 do you consent to their withdrawal from your case?

3 ACC [MR. AL NASHIRI]: The same thing. I would have loved
4 to have all those attorneys that withdraw with me here.
5 However, if that is not possible, then I agree to everybody
6 who is here.

7 MJ [COL ACOSTA]: Defense, what is your position as to
8 Ms. Spears' and Ms. Eliades' status?

9 LDC [MR. NATALE]: Your Honor, I believe that the actions
10 that they took were that they were withdrawn from the case
11 and, although one of them may still be doing some work for the
12 commission and the other may actually be in the process of
13 being hired by another team, they are -- one of them for sure
14 is unavailable to work on the case.

15 MJ [COL ACOSTA]: Now, I believe you stated that they
16 withdrew. Is it not true that they withdrew because of a
17 perceived conflict; is that correct?

18 LDC [MR. NATALE]: That is correct, Your Honor, same as
19 with Mr. Kammen.

20 MJ [COL ACOSTA]: Well, Mr. Kammen had withdrawn, but now
21 he has retired.

22 LDC [MR. NATALE]: That's correct, but originally ----

23 MJ [COL ACOSTA]: Well, what I am trying to get at is his

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1 status is different, in that he has retired. Has the
2 perceived conflict that precipitated the withdrawal of
3 Ms. Eliades and Ms. Spears been remedied? Has it not been
4 remedied?

5 LDC [MR. NATALE]: I don't think that it has been remedied
6 because we haven't yet had all of the discovery that we
7 requested, so we don't know the extent and depth of that
8 matter.

9 I think to the degree from -- since I began my
10 representation, I can say that I am comfortable that the
11 present meeting facilities are such that we can have
12 meaningful attorney-client confidence and conversations which
13 will not be in any way monitored.

14 MJ [COL ACOSTA]: Right. I'm talking about -- I'm not
15 talking about the details of their reasoning. What I'm
16 talking about is the fact that they had withdrawn, based upon
17 that basis; and that now that that is resolved, are they not
18 still employed by the Military Commissions Defense
19 Organization?

20 LDC [MR. NATALE]: I believe that one is; however, one is
21 not presently employed as counsel on this team.

22 MJ [COL ACOSTA]: All right. Is it your understanding
23 that they will no longer be detailed to this case by the Chief

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1 Defense Counsels -- by the Chief Defense Counsel?

2 LDC [MR. NATALE]: Your Honor, it is my understanding that
3 what we -- what their situation is that one has continued to
4 be an aide on our team. The other has not been on our team,
5 and there is no indication that that person will be joining
6 our team.

7 MJ [COL ACOSTA]: All right. As to Ms. Eliades and
8 Ms. Spears, I find that their withdrawal, whether supported by
9 good cause or not at the time, was in accordance with the
10 Rules for Military Commissions then in effect. I further find
11 that their -- that repeated attempts by the prior military
12 judge to require their participation proved fruitless.

13 To the extent that they have not effectively withdrawn
14 from representation of the accused, they have effectively
15 abandoned the representation. I therefore find the
16 termination of their representation to be supported by good
17 cause, and that the accused is still adequately represented by
18 his remaining and newly appointed defense counsel.

19 As to Major McCormick -- Mr. Nashiri, as to Major
20 McCormick, your defense counsel submitted a document
21 indicating that you consented to his withdrawal from your
22 case; did you, in fact, sign such a document?

23 ACC [MR. AL NASHIRI]: [Speaking in English] Yes. Yes.

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1 MJ [COL ACOSTA]: And do you, in fact, consent to his
2 withdrawal from your case?

3 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes.

4 MJ [COL ACOSTA]: Do you also wish to be represented by
5 Captain Mizer, Major Robinson, Lieutenant Piette, and
6 Ms. Morgan?

7 ACC [MR. AL NASHIRI]: **[Speaking in English]** Yes. Yes,
8 of course.

9 MJ [COL ACOSTA]: All right. All right. Any defense
10 counsel who has not been previously sworn, at this time please
11 stand and raise your right hand.

12 **[Mr. Anthony Natale was sworn.]**

13 MJ [COL ACOSTA]: Thank you.

14 On 17 May 2019, I conducted a telephonic conference
15 with trial and defense counsel in accordance with Rule for
16 Military Commission 802. The accused was absent.

17 At this conference, we discussed the following:
18 Counsel all introduced themselves. Mr. Natale was not yet on
19 the case at that time. We briefly discussed the status of the
20 case at that time in light of the fact that the District of
21 Columbia Circuit had not formally dissolved the stay of
22 proceedings. That stay was subsequently dissolved.

23 Counsel stated their opinions as to the status of

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1 various defense counsel, including Mr. Kammen, Ms. Eliades,
2 and Ms. Spears. It was noted that, at the time, there was not
3 an appointed convening authority. No one had any information
4 on when a new convening authority might be appointed.

5 The parties agreed that the D.C. Circuit's ruling had
6 the following impacts: The admission of any prosecution
7 exhibits was nullified. A substantial number of motions
8 required relitigation. The government indicated they would be
9 seeking to have their various ex parte requests under
10 M.C.R.E. 505 reconsidered as they stood.

11 The defense, on the other hand, requested to be heard
12 on the adequacy of the summary and substitution process.

13 We discussed scheduling, depending on the resolution
14 of the defense's then-pending request for the appointment of
15 learned counsel.

16 At a subsequent R.C.M. -- R.M.C., pardon me, 802
17 session was held on 1 November 2019 with the parties present
18 and Mr. Nashiri absent. Appellate Exhibit AE 403C is my
19 summary of that conference. The defense submitted a
20 clarification in AE 403D and the prosecution submitted a
21 further clarification in AE 403E, which the commission accepts
22 as accurate.

23 Finally, an R.M.C. 802 session was held yesterday

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1 evening. The following was discussed: I covered the items I
2 believed needed to be handled during this hearing. Defense
3 counsel indicated they had been able to meet with their client
4 and that they are currently satisfied with the meeting
5 location being provided them.

6 I specifically inquired whether the issues raised in
7 AE 398 relating to the defense's meeting location with the
8 accused had therefore been resolved. The defense indicated
9 they are satisfied with the current accommodations, but they
10 are concerned that the solution will not be permanent.
11 Neither party believed it was necessary to take up AE 398 on
12 the record during this session.

13 I asked defense counsel what they anticipated -- what
14 they anticipated Mr. Nashiri's preferences would be regarding
15 the various departures and additions to his defense team. The
16 defense provided their best forecast, which proved to be
17 accurate today.

18 As I indicated, I also indicated that I would cover
19 the accused's right -- right to be present at the proceedings,
20 which I will cover in just a moment. And I also indicated
21 that the following AEs had already been resolved, and those
22 are AE 397, AE 399, AE 401, and 404.

23 I asked the parties how long they anticipated voir

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1 dire of the military judge would last. The prosecution stated
2 they anticipated approximately 15 minutes, and the defense
3 anticipated 45 to 50 minutes.

4 I indicated to the parties that I intended to get the
5 parties a copy of my military biography, which I understand --
6 which I know I provided and has been marked as AE 302C.

7 I also indicated that I would take up AE 402 after
8 voir dire, whenever voir dire is complete. The parties
9 confirmed that neither party intends to present any classified
10 evidence or argument regarding AE 402. The prosecution
11 provided an unclassified slide deck of approximately 50-plus
12 pages that they would like to use during their argument on the
13 motion. That visual aid has since been marked as 402E, which
14 the prosecution may refer to during their argument.

15 I also indicated that I would take up AE 311B. I
16 reiterated again that we will not be covering AE 398, and in
17 fact I intend to resolve that issue with a written ruling
18 before we leave this session this week.

19 When asked if there were any other issues, the defense
20 mentioned they had received notice from the prosecution that
21 they had -- that the prosecution had inadvertently received a
22 transcript of a defense ex parte presentation to the
23 commission from October of 2014; that the prosecution had

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1 indicated that they identified that it was ex parte prior to
2 reviewing it, and that they immediately took action to ensure
3 that it was not reviewed by anybody on the prosecution team
4 and that it was immediately destroyed. The prosecution
5 provided further elaboration to that effect.

6 The defense indicated that they may wish to seek some
7 further information and/or relief on the issue and I
8 encouraged the parties to share information openly regarding
9 this issue, which they seemed at the time prepared to do, and
10 encouraged the defense to file a motion if they felt they
11 weren't able to adequately address their concerns working
12 directly with the prosecution.

13 We briefly identified the status of the defense
14 request for continuance. While the defense filed a motion
15 about a month ago during the 1 November -- approximately the
16 exact same time as the R.C.M. 802 conference, it has
17 apparently been undergoing security review since that time.
18 The defense indicated that their inquiries as to the status of
19 the security review did not provide any clarity as to its
20 status.

21 The defense also indicated that they typically would
22 like to have an hour before and after court to meet with their
23 client at the Expeditionary Legal Complex, but that they

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1 required an order from me to assure that that occurred. I'm
2 not sure why such a reasonable and normal accommodation for
3 any trial proceeding or court proceeding would be necessary;
4 however, I did indicate that I did so order that.

5 Finally, Captain Mizer indicated that his active duty
6 orders will expire in approximately 90 days. He has requested
7 that the Navy extend him, but that request has gone unanswered
8 or unacted upon as of today. I am hopeful that the Navy will
9 act timely and responsibly on that request. I indicated that
10 should that not happen, the defense is free to file a motion
11 to address that issue, which will be a priority item at our
12 scheduled January session.

13 Do counsel for either side have any additions or
14 corrections to my summary of our 802 sessions?

15 Government?

16 TC [MR. MILLER]: None by the government. Thank you,
17 Your Honor.

18 MJ [COL ACOSTA]: Defense?

19 LDC [MR. NATALE]: None from the defense, Your Honor.
20 Thank you.

21 MJ [COL ACOSTA]: All right. Mr. Nashiri, I will now
22 advise you of your rights to be present and to waive said
23 presence. You have the right to be present during all

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1 sessions of the commission. If you request to absent yourself
2 from any session, such absence must be voluntary and of your
3 own free will.

4 Your voluntary absence from any session of the
5 commission is an unequivocal waiver of the right to be present
6 during that session. Your absence from any session may
7 negatively affect the presentation of the defense in your
8 case. Your failure to meet with and to cooperate with your
9 defense counsel may also negatively affect the presentation of
10 your case. Under certain circumstances, your attendance at a
11 session can be compelled regardless of your personal desire
12 not to be present.

13 Regardless of your voluntary waiver to attend a
14 particular session of the commission, you have the right at
15 any time to decide to attend any subsequent session. If you
16 decide not to attend the morning session but wish to attend
17 the afternoon session, you must notify the guard force of your
18 desires. Assuming there is enough time to arrange
19 transportation, you will then be allowed to attend the
20 afternoon session.

21 You will be informed of the time and date of each
22 commission session prior to the session to afford you the
23 opportunity to decide whether you wish to attend that session.

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1 Do you understand what I just explained to you?

2 ACC [MR. AL NASHIRI]: [Speaking in English] Yes. Yes,
3 everything.

4 MJ [COL ACOSTA]: Okay. I have been detailed to this
5 commission by the chief judge of the military commissions
6 trial judiciary pursuant to Rule for Military Commissions 503.
7 I am certified and qualified in accordance with Article 26 of
8 the Uniform Code of Military Justice, as well as Rules for
9 Military Commission 502 and 503. And I have been previously
10 sworn under Article 42(a) of the Uniform Code of Military
11 Justice and Rule for Military Commission 807.

12 I am not aware of any grounds for challenge against
13 me. I do not expect to be called as a witness in the case.

14 Does either side desire to question or challenge me at
15 this time?

16 Government?

17 TC [MR. MILLER]: No, Your Honor. We do, however, have
18 voir dire questions.

19 MJ [COL ACOSTA]: Now is the time.

20 **INDIVIDUAL VOIR DIRE OF THE MILITARY JUDGE**

21 **Questions by the Trial Counsel [MR. MILLER]:**

22 Q. Thank you, Your Honor. I appreciate the opportunity.

23 The prosecution team in this matter includes an Army

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1 officer, Colonel Wells; an Air Force officer, Lieutenant
2 Colonel Gruen, who was also a judge previously and is actually
3 the judge during the time you've been sitting on the bench;
4 and a naval officer, Lieutenant Commander Jolly. Do you know
5 any of these individuals?

6 Or let me ask it a different way: Have you met any of
7 these individuals prior to your involvement in this case?

8 A. I -- yes. The answer is yes. I have met --
9 Lieutenant Colonel Gruen and I, I believe, attended the same
10 Military Judges Course in 2015 in Charlottesville. And I am
11 sure it is going to come up with Captain Mizer as well; he
12 also attended that course with me at the same time. Other
13 than brief interactions during that course and at subsequent
14 military judge -- joint military judge training events, I have
15 had no interaction. And at those events, our interactions
16 were brief, fleeting, and only social to the extent of saying
17 hello, recognizing each other from those events.

18 Colonel Wells served at Army Litigation Division. I
19 believe he was in Environmental Litigation Division. I'm not
20 sure, I can't remember which portion of Litigation Division he
21 was at. I was in general litigation for one year prior to an
22 assignment as -- outside of the Litigation Division to the
23 Civil Division of the U.S. Attorney's Office in D.C. So we

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1 interacted in the extent that we were all members of the
2 United States Army's Legal Services Agency, which is a large
3 body within the United States Army JAG Corps.

4 I don't know Commander Jolly to any -- that I can
5 recall in any way.

6 Q. So there is nothing about the nature of your contacts
7 or your relationships, previous relationships, with them, that
8 would in any way affect your ability to sit in this particular
9 case?

10 A. No, there is not.

11 Q. I have been assigned as Trial Counsel in this matter.
12 I am detailed here to the commissions from the United States
13 Attorney's Office in the Eastern District of Louisiana.
14 That's New Orleans. Have we ever met before?

15 A. We have not.

16 Q. And do you know anybody in the United States
17 Attorney's Office for the Eastern District of Louisiana?

18 A. I don't believe that I do.

19 Q. You are a member of the Mississippi bar. I am a
20 member of the Mississippi bar. Have we ever met at any sort
21 of function, bar function? Have we ever served on any
22 committees? Have we ever met in that sort of a forum?

23 A. No, we have not.

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1 I believe I failed to put this on there. I'm also
2 admitted before the Fifth Circuit, which happened on the day
3 that I was sworn into the bar. Like many things, you pay your
4 fee, you raise your hand, and you get sworn into each of the
5 jurisdictions that you do. And that was, I can tell you, on
6 around the 29th of September, 1998. I have never appeared
7 before the Fifth Circuit Court of Appeals, nor the Southern or
8 Northern District courts in Mississippi, nor in any court of
9 jurisdiction in the state of Mississippi. I was sworn into
10 the Army JAG Corps on 1 October 2000 -- pardon me,
11 1 October 1998, and have never practiced in Mississippi or
12 Louisiana.

13 Q. The Chief Prosecutor in this case is a brigadier
14 general. Is his rank -- or will his rank in any way affect
15 any decisions that you might make?

16 A. No, it will not.

17 Q. The previous judge in this case was Colonel Vance
18 Spath. He was also the chief judge of the Air Force. Had you
19 had any prior dealings with Judge Spath, either personal or
20 professional?

21 A. I did. Judge Spath was the chief judge -- chief trial
22 judge of the Air Force -- I don't know if they refer to it as
23 the chief trial judge or not -- but he was the chief trial

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1 judge of the Air Force in 2015 when I attended the Military
2 Judges Course. I met him there. He interacted with our chief
3 judge at the time. I believe I had a social interaction the
4 night before graduation with him, just as everyone went out --
5 did not go out to dinner with him; the group that I was with
6 met -- ran into his group at some restaurant in
7 Charlottesville, Virginia, and that was our interaction there.

8 And I know that I said hello to him on at least
9 probably two other occasions during the joint military judges
10 annual training that was either in Alabama at the Air Force
11 JAG school or at Tampa at MacDill Air Force Base; but there
12 was no -- nothing other than saying hello. I have had no
13 working relationship with him. We never worked on anything
14 officially. And I have not spoken to him in probably two
15 years or so.

16 When he left active duty -- it was probably well
17 before he left active duty my last time that I saw him at one
18 of those occasions either in Montgomery or in Tampa.

19 Q. So there is nothing -- it would be a fair statement
20 that he's more the acquaintance, then, and you would not
21 consider him a friend?

22 A. Absolutely.

23 Q. So there's nothing about that relationship that would

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1 make you unable to sit in this particular case?

2 A. No, there is not.

3 Q. Now, a significant number of his rulings have been
4 vacated, as the court is aware, and it is also certain that
5 you're going to know what the nature of his rulings were.

6 As a trial judge, will it be difficult for you to
7 reach a different conclusion than the prior trial judge?

8 A. No, it will not be.

9 Q. You were -- I think you have already mentioned you
10 were a SAUSA, a Special Assistant United States Attorney, for
11 the U.S. Attorney's Office in the District of Columbia; is
12 that correct?

13 A. Yes, in the Civil Division for one year beginning --
14 or approximately one year beginning in May of 2008 to end of
15 May or June 2009.

16 Q. Was that a full-time position?

17 A. It was. The Army puts one judge advocate in that
18 position to assist in the civil defense of the United States
19 Army in civil cases there.

20 Q. Did you ever have occasion to handle any criminal
21 matters?

22 A. None. My only interaction with criminal cases was
23 when a civil case was stayed for -- because of an adjacent or

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1 a related criminal -- my only conversations with the criminal
2 division were to call and to get the status and to effectively
3 be told you can keep waiting until we resolve the criminal
4 case before you can do anything in your civil case.

5 Q. What sort of cases did you handle, Your Honor?

6 A. There was a significant amount of Freedom of
7 Information Act cases, Privacy Act cases, and torts.

8 Q. Did any of your duties or responsibilities at the U.S.
9 Attorney's Office involve terrorism matters?

10 A. They did not.

11 Q. Anything -- then I guess, more specifically, anything
12 about the USS COLE that ever crossed your desk?

13 A. No. The only military-related case that ever came was
14 related to a request for information about -- well, there was
15 for body armor type issues, and that was -- the main justice
16 relieved us of that case at the U.S. Attorney's Office in D.C.

17 Q. Did you ever apply for a position with the United
18 States Attorney's Office?

19 A. I did not.

20 Q. Is there anything about your experience there at the
21 U.S. Attorney's Office that would make you unable to sit in
22 this particular matter?

23 A. There is not.

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1 Q. Sir, this case has also received a significant amount
2 of media attention. Have you had occasion to hear or see any
3 media coverage of this matter?

4 A. Very minimally. I have made -- I don't go looking for
5 any of it. I have been made aware that there was a story
6 after a ruling that I made a few weeks ago, and that's the
7 extent of what I know. I don't know what the -- I purposely
8 avoid getting involved. I don't -- I know that there is
9 coverage and that people like to talk about these cases and
10 these issues, and I purposely do not delve into that.

11 Q. You haven't formed any opinions about the case
12 generally, or Mr. Nashiri in particular, as a result of what
13 you may have heard in the media?

14 A. No.

15 Q. The question I have to ask: Have you applied for any
16 positions outside the Army, specifically in anticipation of
17 any future retirement?

18 A. I have applied for -- in my entire career, I have
19 applied for -- very early on in my career, when I was Captain
20 Acosta in probably 2000, I applied for some jobs back in my
21 home state. I did not take those, obviously.

22 And then I did apply -- I submitted an application to
23 an organization at Mississippi State University, which is my

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1 undergraduate alma mater, for which I was thanked for sending
2 my application and that was it.

3 Those are the only two times I have submitted -- and
4 that was about two years, maybe a year ago, and that was just
5 because it was back in Starkville, Mississippi, and I was
6 declined.

7 Q. It would be fair to say you have also not applied for
8 any positions as an immigration judge?

9 A. No. I have applied -- just to be clear, I have
10 applied for no job with the United States Attorney's Office in
11 any capacity or the Department of Justice in any capacity.

12 My only experience working with the Department of
13 Justice relates to that one year -- well, the one year where I
14 was a SAUSA and the year that I was agency counsel at
15 Litigation Division, where I essentially was assisting them in
16 their litigation efforts, but that is my entire -- and that
17 was entirely in the civil field, and that's it.

18 Q. Do you have any ongoing personal relationship with any
19 member of what I would call a high-level Department of
20 Justice -- that holds a high-level Department of Justice
21 position?

22 A. No. I am -- I have remained friends with the
23 individuals that I worked with at the U.S. Attorney's Office,

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1 the Civil Division of the U.S. Attorney's Office. I've
2 greatly curtailed -- I haven't gone -- in any opportunity that
3 I have had to go back into -- to come to D.C., I may have
4 tried to meet up with somebody just to say hello, but I have
5 not had -- that didn't occur. And I have greatly curtailed
6 any efforts to do that just because I know that -- my
7 responsibilities within this case and to prevent any
8 appearance of an overly familiar relationship with somebody in
9 the Department of Justice.

10 Q. Have you or any family member or any personal friend
11 ever been the victim of a terrorist act or similar to an
12 offense that has been charged in this particular case?

13 A. No.

14 Q. Do you know of anything of either a personal or
15 professional nature that would cause you to be unable to give
16 your full and impartial attention to this matter?

17 A. No.

18 Q. Is there anything else in your personal or
19 professional life that you think would make you unable to sit
20 fairly and impartially in this case?

21 A. There is not.

22 Q. Is there anything about the nature of the offense
23 itself -- that is, that it's an alleged act of terrorism --

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1 that gives you pause about sitting as a judge in this matter?

2 A. There is not.

3 Q. Likewise, you are a military member?

4 A. Yes.

5 Q. The victims in this case are military members. Will
6 this fact influence you in any way?

7 A. No.

8 Q. Lastly, sir, this is a death penalty case. Do you
9 hold any views, whether political, religious, philosophical,
10 or moral, that would make it difficult for you to sit as a
11 judge in this case?

12 A. I do not.

13 Q. Will your views on the death penalty influence you
14 either way, either for the prosecution or for the defense? Do
15 you think that your views will in any way affect your ability
16 to reach a fair and neutral decision?

17 A. No.

18 TC [MR. MILLER]: Nothing further. Thank you, sir.

19 MJ [COL ACOSTA]: Thank you.

20 LDC [MR. NATALE]: Your Honor, may I inquire?

21 MJ [COL ACOSTA]: You may.

22

23

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1 Questions by the Learned Defense Counsel [MR. NATALE]:

2 Q. Again, good morning.

3 A. Good morning.

4 Q. Mr. Nashiri has expressed many concerns to me, and I
5 think they are understandable in light of the totality of the
6 circumstances that have happened since 2002 to the present.
7 The following questions are questions which are issues which
8 he would like me to ask, and obviously some of these are
9 questions that I was able to think of on my own.

10 A. Okay.

11 Q. Some of them you've sort of already answered. But
12 have you ever handled a death penalty case as a prosecutor, as
13 a defense lawyer, or as a judge?

14 A. I was a supervising prosecuting attorney at Joint Base
15 Lewis-McChord over two cases that were capital. Neither of
16 them -- they were both referred capital.

17 Q. Yes, sir.

18 A. They both resulted in offers to plead that removed the
19 death penalty from the case.

20 Q. When you say you were involved in supervising, were
21 you the actual trial counsel or were you ----

22 A. I was the chief of justice, so I was not in the
23 courtroom; I was just largely serving as the logistics and

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1 supervising the two attorneys. There was another -- I was a
2 lieutenant colonel at the time. There's a lieutenant colonel
3 that was the lead of both of those trial teams and I generally
4 represented them to the staff judge advocate in their views on
5 the case and helped them with anything logistically to get
6 that done, supervised some of their filings cases. I attended
7 the trials, one of which was essentially a mixed plea and the
8 other was a full guilty plea with sentencing, but with the
9 death penalty removed from the table, so to speak, prior to
10 those proceedings.

11 Q. And did you have any participation in the
12 decision-making process that led to the death penalty being
13 removed in those particular cases?

14 A. As the chief of justice, yes, I know that I was
15 involved in discussions that occurred.

16 Q. And what particular role would you have had in that
17 decision?

18 A. In discussing the offers received from counsel,
19 whether or not they were favorable or not, speaking to the SJA
20 about what his recommendation would be to the convening
21 authority, and then acting upon the decision by the convening
22 authority. As you know, it goes to the convening authority
23 and that's his decision to make.

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1 Q. Very well. Have you -- have you taken any courses,
2 either as a prosecutor, a defenses attorney or judge,
3 regarding the death penalty, either at the judge's course, at
4 the Army JAG school, or anywhere?

5 A. I attended the National Judicial College Capital
6 Litigation Course in May of 2019.

7 Q. And was that before or after you were appointed to
8 this case, or detailed to this case?

9 A. It was, I believe, immediately after or -- when I say
10 immediately, in the course of this case it seems immediate.
11 It was a couple of months after I was detailed to this case.

12 Q. Prior to that, have you had any experience in dealing
13 with death penalty cases, the law of death penalty cases?

14 A. Other than as that time ----

15 Q. Yes.

16 A. ---- as a pros- -- as the chief of justice, no. Those
17 are my -- those are my experience with it is the supervising
18 attorney for those two cases; and then when, I was detailed to
19 this case, to go to that course.

20 Q. Other than that course, have you, on your own, taken
21 any independent study and research into the law surrounding
22 the death penalty and the due process rights that really are,
23 in effect, the heightened necessary reliability of information

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1 as it relates to the death penalty?

2 A. Other than what was required -- than the reading that
3 was sparked by those -- by that training and by those cases
4 that I was involved in, I have not gone to seek out any
5 independent research or scholarly work on the death penalty --
6 on death penalty cases.

7 Q. Could you give us the name of the two cases that you
8 referenced?

9 A. They were United States v. Russell and United
10 States v. Bales. I don't think you are going to have any
11 problem finding records -- or issues regarding those cases.

12 Q. Would you be able to explain to Mr. Nashiri how you
13 came to be selected as the judge in this case?

14 A. Yes. I will say in the fall of 2018, my circuit
15 judge, my chief circuit judge asked if anyone in the
16 circuit -- he asked me specifically if I was interested in
17 serving on the commissions in general as a judge. I told him
18 that I was interested, that I would do it. He told me that he
19 was going to nominate me to the chief trial judge of the Army
20 at the time.

21 I later learned that I was selected to be a judge on
22 the commission by the chief judge who is -- the chief judge of
23 the commissions is also my circuit chief right now, as I am

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1 stationed at Fort Hood, Texas. The chief judge of the
2 commission is my boss there as well as here. He selected me
3 for this.

4 And then I learned in -- I want to say in February, at
5 the joint military judges annual training in Tampa, I believe
6 that's when I was informed -- that's where I was sworn, and
7 that's where I was also, I believe, told that I was detailed
8 to this case.

9 I was not told when I was selected or nominated to the
10 commissions that I would be taking any case in particular or
11 this case. I had no knowledge -- I had no knowledge of what
12 case, if any. As you know, there are multiple judges that
13 serve on the commissions, but there are not -- there are fewer
14 cases. I don't know what their reason for my detailing was
15 other than it was the chief judge's decision.

16 Q. Could -- would you share with me the name of the
17 person who nominated you? Because I'm not familiar with a lot
18 of -- being a civilian, I'm not familiar with who are in those
19 positions.

20 A. He is now the chief trial judge of the Army; he was
21 then the circuit chief for the Fourth Judicial Circuit in the
22 Army, and that's Colonel Tim Hayes.

23 Q. Thank you, sir. Have you written any articles, given

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1 any interviews, or made any speeches at any time in your life
2 regarding the death penalty?

3 A. No.

4 Q. What about on the issue of terrorism?

5 A. I know that I -- I spoke at the University of
6 Washington School of Law one time with an individual that
7 represented somebody in the previous commissions; I can't
8 remember who he represented. There was a discussion. I
9 briefly talked about the Uniform Code of Military Justice and
10 how we dealt with it. I had no knowledge. I've never worked
11 on the commissions in any way at that time and had not, before
12 or since until I was detailed to this court, worked on the
13 commissions on anything like that.

14 So I had no -- I was unable to address the issues of
15 the commissions and I gave them only the -- I could only
16 discuss the Uniform Code of Military Justice. I essentially
17 listened to the presentation of the individual that
18 represented a detainee. I can't tell -- I honestly cannot
19 remember who he was or who he represented.

20 Q. I guess my question, I should have been clearer, is:
21 In addition to things that would have been done in your sort
22 of official capacity as a judge or a lawyer, have you ever
23 participated in any lectures or interviews or things, you

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1 know, regarding either the death penalty ----

2 A. No.

3 Q. ---- or the handling of terrorism cases?

4 A. No, none at all.

5 Q. If I understand it correctly, the chief judge is your
6 boss in this case?

7 A. The chief trial judge -- the chief judge of the
8 commissions, yes, is.

9 Q. And what, if any, issues -- and again, forgive me,
10 because I'm not as familiar with the hierarchy.

11 What, if any, issues would be confronted with the fact
12 that he is and remains your boss?

13 A. When I say he's my boss, the way the trial judiciary
14 works is he details me to cases and then they are my case.
15 That's it. He just -- he's my detailing -- well, he assigns
16 cases to me; I detail myself, generally, to cases. But as
17 we're docketing cases within the Third Judicial Circuit, he
18 controls the docket as to which judge. There are three of us
19 at our location. He spreads the cases out equitably. And
20 once we are assigned the case, he eliminates himself from
21 any -- because he has his own, he wants nothing to do with any
22 of them. So that's ours, obviously, so ----

23 Q. Is there any concern with you that, by issuing

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1 opinions that he or some superior might disagree with -- one,
2 I guess, have you done that before; and two, is that a
3 concern?

4 Because it's -- I will be quite frank. It's clear to
5 me that you have, you know, chosen to take an honorable path
6 of dedicating yourself to the military and especially to the
7 JAG Corps. And so I'm -- I'm wondering how you, when you're
8 sitting at home and you're thinking, how do you process that?

9 A. I have no concern about making a decision that another
10 judge may disagree with, other than our -- as all judges, I
11 try to remain within the limits of our appellate courts and
12 what they -- and apply the law as they have interpreted it,
13 and -- but I am not concerned about another trial judge's
14 opinion about any other issue except for that has any
15 precedential effect over what I'm doing. It's just not a --
16 it's not a concern at all.

17 It is very well established within, I know, the Army
18 trial judiciary -- and I'm sure it is this way in the other
19 services' trial judiciary -- the independence of the judiciary
20 is emphasized, repeatedly, from any influence or impact from
21 anybody else. We are given that it is a great freedom to make
22 the decision that we believe is correct under the law, and
23 that's what I seek to do with every decision. I strive to do

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1 that with every decision. I will continue to do that without
2 regard for any impact it may have of anybody's opinion of me
3 one way or the other.

4 Q. Did you volunteer to work on the military commissions,
5 or how does that work? Do you volunteer? And, if so, what
6 was the motivation to volunteer?

7 A. When I was asked if I would be willing to do it, I saw
8 it as an opportunity to work on challenging cases with
9 excellent attorneys in a -- in hopefully what is an
10 environment of ----

11 Q. Patience and respect?

12 A. Absolutely, but certainly an environment of high
13 practice. This is, I believe, one of the highest levels of
14 practice within -- that a military judge can serve at. I
15 don't -- potentially other than our appellate courts, which
16 I'm not -- but I believe at the trial level is -- it's so
17 distinct from the appellate courts, it's an entirely different
18 practice, as you know.

19 So it's -- I find this to be the highest level of
20 practice for a military judge and for attorneys, and the
21 opportunity to do that and the fact that someone thought
22 enough -- that Colonel Hayes thought that I might be capable
23 or appropriate to do it, it would be challenging and rewarding

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1 professionally, and that's why I said yes.

2 Q. Thank you, sir. Have you had any communications with
3 either Judge Pohl or Judge Spath returning this -- regarding
4 this case?

5 A. Not about this case at all. I had some discussion --
6 I never spoke to -- I haven't spoken to Judge Spath, like I
7 said, in multiple years ----

8 Q. Right.

9 A. ---- I don't think I've spoken to him.

10 Judge Pohl, since he was an Army judge, he used to
11 frequently attend our -- some of our annual training. He just
12 retired. I think I communicated with him briefly when I was
13 first coming down here, maybe in May, and it was more social
14 of, hey, I'm coming down. I've known him since I -- slightly
15 before on the bench, I'd observed him on the bench. I never
16 practiced in front of him as an attorney, but I'd observed my
17 counsel at another job practice in front of him.

18 His reputation is sterling, and I did seek his counsel
19 on -- as a judge on non-commission-related issues previously,
20 but I've not had any communications with him about this case
21 in any way.

22 Q. There is going to probably be, obviously, some very
23 novel issues and some very difficult issues in this case, and

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1 will -- do you intend to consult or would you consult with
2 other judges or other individuals, other than the parties, in
3 making those sorts of difficult decisions?

4 A. Any consultation that a judge makes is -- with another
5 judge is privileged. I would not get into -- I would never
6 substitute -- regardless of any conversation I would ever have
7 or have ever had with another military judge regarding a case,
8 I never substitute anybody's judgment for my own.

9 All decisions that will be made in this case will be
10 my own based upon the law and the facts in front of me.

11 Q. Have you had any contact with prior convening --
12 individuals who were a prior convening authority regarding
13 this case or with any other death penalty cases?

14 A. No.

15 Q. How would you explain to a nonlawyer what -- why
16 witnesses take the oath to tell the truth, the whole truth,
17 and nothing but the truth? Why -- how would you explain that
18 to the nonlawyers who may be curious as to why do we say the
19 truth, the whole truth, and nothing but the truth? How would
20 you explain that to them?

21 A. The oath is to ensure that they understand that what
22 they are saying holds with it a burden, that they have an
23 obligation to the court and to the parties and to the law to

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1 tell the truth, and that this is not the time for enhancement
2 of anything other than the facts as they exist and that these
3 are truth-finding mechanisms.

4 The court is to only decide things based upon what
5 truly occurred and not upon anything that did not.

6 Q. I guess what I'm more concerned about, like where the
7 truth obviously is something that people perceive at the time
8 to believe true, the whole truth, I think, doesn't that get to
9 whether we're giving complete information? Would you agree
10 with that?

11 A. I would.

12 Q. To the degree that I am not prying, has anyone given
13 you any sort of advice about taking this position?

14 A. No. No. I think other judges might have commented
15 that they would not take the position, that they would not
16 volunteer or accept the position if nominated. I understand
17 that everybody makes personal decisions. I have been -- there
18 are times where people are offered jobs or think about taking
19 jobs that they don't think it's a good idea to take a job, and
20 maybe that's why they thought that. I don't know.

21 But no one has told me I think this is a good idea for
22 you, I think this is a terrible idea for you, or I wouldn't do
23 that, no.

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1 Q. Would you be willing to explain to Mr. Nashiri the
2 oath that you took in order to become a judge in this case,
3 explain to him what that oath was and why a judge is required
4 to take that oath?

5 I know these things, Your Honor, but, you know,
6 Mr. Nashiri clearly comes from a situation where there -- it
7 is not as clear to him culturally as to that.

8 A. I would state that my job is to be an impartial
9 arbiter of the law in this case, to ensure that the accused in
10 any case receives a fair trial, that the trial is done in
11 accordance with the law as it is and that the result can be
12 trusted from any trial, and that I have no personal stake in
13 any result. I have no personal stake in any side other than
14 ensuring that this is a fair, orderly, and just trial.

15 Q. I think you may have answered this, but I want to ask
16 it specifically. This case, there's been books written about
17 it, there's been articles; there may have even been movies or
18 TV shows regarding it.

19 Have -- I see from your expression, I think your
20 answer is you've had no ----

21 A. No.

22 Q. ---- contact with any of those.

23 A. Whatever -- as soon as I've -- I have not

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1 independently gone seeking information about the commissions,
2 prior. I was fully employed up until the point when I became
3 a military judge; as a military judge, I have been fully
4 employed with cases. It did not leave a lot of free time to
5 go looking for information about the commissions at that time,
6 and I wasn't -- I have not been seeking to be involved in the
7 commissions and wanting to know more and more information
8 about the details of everything that has gone on.

9 I have been doing my job wherever I was at that time
10 to the best of my ability, and since I was nominated for the
11 commissions and then detailed to this case, I purposely have
12 avoided any books or accounts or movies or television shows.
13 I know that they exist that could potentially touch upon this
14 and I have avoided all of those, whether they be about this
15 case directly or tangentially related to this case in any way.

16 I have avoided that on purpose because I don't want
17 anything to -- to impact me, even though judges, as we
18 always -- you know, we are able to compartmentalize and to
19 separate those things, there is no need -- I felt that was in
20 my -- in the best interest of all parties that I avoid
21 anything that could -- that could influence that.

22 Q. It makes perfect sense. Other than when you are here
23 and in D.C., do you have access ----

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1 A. To be clear, yeah, I don't -- I'm not stationed in
2 D.C. I don't know if that's the point.

3 Q. No, I know that.

4 A. Okay.

5 Q. I know you are stationed not in D.C., just like
6 myself; we are in warmer climates.

7 But when you are in the non-D.C. and non-Guantanamo
8 area, do you have access to all of the classified information
9 that may be part of pleadings that the sides would be filing?

10 A. No, I don't, and that's part of the logistical
11 challenge for me. But in addition to my time that I spend
12 here, I am attempting -- or not attempting. I am blocking off
13 significant parts of my docket for time to spend with -- in
14 the Office of the Military Commissions trial judiciary in the
15 D.C. area so that I can have access to that material and spend
16 a long time with that, with those classified filings, so that
17 I fully understand where everybody is.

18 Q. Have you thought about -- I am assuming; my guess is
19 you probably have -- in your mind what do you see is the
20 historical significance of the military commissions, this
21 case, as it will impact, you know, international law, the law
22 of military justice, the law of conflict? How do you see this
23 as fitting into that historical development?

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1 A. I did not consider or have not reflected upon what I
2 think your broader question is about, what the legacy of this
3 will be. I'm not concerned about the legacy of some -- I'm
4 not concerned about that. I'm concerned about doing -- making
5 sure that this is a just and fair trial for this accused in
6 this case.

7 Q. Wouldn't that be an excellent legacy, though, to have
8 a just and fair case?

9 A. I'm focused on having a just and fair case.

10 Q. Have you written, read, or expressed any opinions on
11 the use of torture?

12 A. I have not.

13 Q. When you first learned that torture had been employed
14 by certain governmental agencies, what was your reaction?

15 A. I believe that the report of activities by -- related
16 to these cases, while I have not looked for any particular
17 information, I believe that it is a known fact that certain
18 activities were done and that they have been classified, as
19 you have stated. It was just understood. My only thought was
20 I will deal with those challenges as they arise in front of
21 me, in front of the case.

22 Q. Have you had a chance to read the Senate Intelligence
23 Committee report regarding the torture of the CIA?

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1 A. I don't believe I read that report.

2 Q. Or the CIA Inspector General report regarding the
3 detention and interrogation activities from September 2001 to
4 October 2003?

5 A. I don't believe I read those -- those reports. I have
6 read what is in the -- I have read portions, large portions of
7 what is in the filings in this case, but I have not -- I don't
8 know if those are all attached or not. There is a significant
9 amount of reading that I'm still doing, as I know you are as
10 well.

11 Q. Yes. What was your assignment when the -- and what
12 was your impression and reaction when you first heard of the
13 COLE bombing?

14 A. At that time, I was, I believe, a trial counsel at
15 Fort Huachuca, Arizona. I don't recall any reaction to it. I
16 don't recall -- it was many years ago. I don't recall. But I
17 know where I -- I know, based upon the calendar, where I was,
18 but I don't recall.

19 Q. I think you have answered this, but I want to make
20 sure: Have you ever appeared as counsel in any Article III
21 court?

22 A. Yes.

23 Q. In what type of matters?

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1 A. Civil matters.

2 Q. Were they actually hearings with evidentiary ----

3 A. Yes, I had a hearing; there was a trial I've appeared.
4 Multiple motions hearings, one trial, and then I argued in
5 front of the Court of Appeals for D.C. three times.

6 Q. And were those all in your capacity as an Assistant
7 United States Attorney in the civil division?

8 A. All of those were as civil -- in the civil division of
9 the U.S. Attorney's Office as a Special Assistant U.S.
10 Attorney.

11 Q. Would you be willing to provide us with the citations
12 to those cases?

13 A. Yes. I can find the -- I believe -- I believe I can
14 find them.

15 Q. If you can find them ----

16 A. You can jump onto PACER and punch in my name and I'm
17 sure I'll pop up.

18 Q. Have you spent any time in the Middle East?

19 A. Yes.

20 Q. And I believe that's when you were assigned in
21 Baghdad; is that correct?

22 A. Yeah. There were two -- two times. From 2000 --
23 January 2005 to January 2006, I was a brigade judge advocate,

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1 2nd Brigade, 3rd Infantry Division, regular brigade judge
2 advocate time. And then for the second time, I was the senior
3 legal advisor to the Office of Security Cooperation-Iraq from
4 2014 to 2015.

5 Q. I'm going to ask sort of more questions about that in
6 particular. Do you have any particular knowledge or opinion
7 about the Islamic religion?

8 A. No, none other than what is traditionally and normally
9 given to officers and members of the military before they
10 deploy into an area. I received the culture training that we
11 all receive, and some of that includes some training about
12 Islam.

13 Q. If you could, on a scale of 1 to 10 -- 10 being
14 extremely important, 1 being not so much -- how important do
15 you think the right of confrontation is for an accused to have
16 in getting a fair trial?

17 A. I'd say it is very important that the -- that an
18 accused have the ability to confront an accuser.

19 Q. The same question regarding the right to present
20 evidence and witnesses on their own behalf.

21 A. It is important that a defendant -- it is important.
22 I am not giving it a number. I am not going to give you a
23 number. It is important that those rights be observed and be

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1 afforded any accused in accordance with the law.

2 Q. As you sit here today, can you think of any reasons
3 that would change the significance of those rights?

4 A. I am not going to give you any opinion as to what
5 that -- what anything could -- that could cause a deviation
6 from or an adjustment to those rights.

7 Q. Have you been made aware of Mr. al Nashiri's mental
8 and physical health problems?

9 A. I'm generally aware of them from the pleadings as I
10 have been able to read to this point.

11 Q. The -- one of the concerns that Mr. Nashiri has
12 expressed and -- has been that, as a member of the military,
13 there is the Commander-in-Chief and that there is a concern
14 that pronouncements from the Commander-in-Chief, be they in
15 any form -- interviews, tweeting, or whatever form -- here is
16 a concern as to whether or not that would be interpreted as an
17 implicit or explicit order to you.

18 And, you know, we talked about that. And I think
19 particularly in light of some of the recent things that
20 occurred when we spoke about it, it's a concern that he had
21 that some pronouncement made by the Commander-in-Chief would
22 be construed explicitly or implicitly as an order which must
23 be followed.

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1 A. Only a superior court with competent jurisdiction can
2 order this court -- this commission to do anything. The
3 convening authority may do certain things with this case as he
4 or she may wish to do. My decisions are subject to review by
5 our superior courts, and I will follow their guidance.

6 Q. Very well. Have you ever been in a situation where --
7 as a judicial officer where you were ever approached in what
8 you felt would create the appearances of improper command
9 influence in any way whatsoever? And if so, how would you
10 deal with that?

11 A. No. I -- there was one time where a -- the convening
12 authority made a statement to me about a case. I was about to
13 walk out onto the bench to start hearing a guilty plea, and I
14 immediately put it on the record and told the accused -- gave
15 the parties an opportunity to question me about it. They
16 questioned me about it, I asked them if they wanted to
17 challenge me; they did not.

18 I went through the voir dire process, as I am required
19 to do. It is a continuing obligation at any time that
20 somebody says or does anything that I think could create an
21 appearance; I will raise it, as you are expected to raise
22 anything that could become a conflict for you. I have the
23 same obligations upon me, and I will -- if anything in my

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1 status changes, I know that I have the obligation and the duty
2 to raise that to the parties' attention and give you the
3 opportunity to question me.

4 Q. I think that's comforting for Mr. Nashiri to hear.

5 Have you ever been involved in a case where there was
6 the intentional or negligent destruction of evidence?

7 A. I believe -- I'm trying to remember if it actually
8 occurred in my case or if I am thinking of the cases that I
9 did research on to be able to talk to the counsel about, but
10 I'm familiar with the case law regarding the negligent and --
11 negligent destruction of particular items in some cases, so --
12 no, but none that leap to mind.

13 Q. There may be witnesses in this case at some point from
14 different agencies of the United States government. Would
15 you -- do you think that they would come to you with a
16 presumption of reliability because -- simply because of their
17 position?

18 A. This is the same instruction that we give to all of
19 our panel members when we instruct, and I -- as a trial judge,
20 I generally try to remind myself of the instructions that I
21 give my panel members for myself to consider as well, and that
22 is to not give anybody more or less credibility based solely
23 upon that person's position or status in life.

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1 Q. I think in this case you are going to learn that
2 Mr. Nashiri was subjected to torture, and I also believe that
3 at some point you will be providing instruction to the members
4 regarding mitigating factors. Do you feel or think that the
5 torture which he endured would be a mitigating factor in the
6 determination of the penalty in this case?

7 A. I'm not going to give you any advisory ruling at this
8 time about what would be -- what I am going to instruct on
9 mitigating factors at this time. When the appropriate time
10 will come up, I will ask the parties to tell me what the
11 mitigating factors will be and I will consider them in
12 determining what they would be.

13 I do anticipate that instructions regarding such
14 things will likely be given, but I don't -- I don't know what
15 I'm going to do at the time. I'm not going to give you an
16 advisory opinion about that in any way.

17 Q. I didn't mean to ask it that way. Maybe I should
18 rephrase it.

19 Have you done anything to see or to research what type
20 of instructions -- mitigating instructions or aggravating
21 instructions have been given previously?

22 A. Not yet.

23 Q. Have you ever received any special training in the

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1 Laws of Armed Conflict?

2 A. Other than what is received by other judge advocates
3 of my rank and position as I have gone through training at
4 various levels of the Judge Advocate General's Legal Center
5 and School, no.

6 Q. What about professional military education?

7 A. I've attended -- other than the ones that I indicated?

8 Q. Other than the ones you mentioned.

9 A. That's it.

10 Q. Any particular training that involved the Geneva
11 Conventions or prisoner of war handling procedures, any of
12 those?

13 A. All of the ones that we typically receive ----

14 Q. Yes.

15 A. ---- prior to that, those are the ones. I've received
16 every one, the training that we receive at the JAG school, the
17 Army JAG school; pre-deployment training as we go through
18 those things about the rules of engagement and the law of war
19 and then -- as well.

20 Q. And since then, any additional training, any
21 additional guidance, any ----

22 A. No. Just that that we do on a daily basis to ----

23 Q. Okay. Have you ever served as a staff judge advocate

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1 for a combatant command?

2 A. No.

3 Q. Have you ever served as a staff judge advocate office
4 for a deployment?

5 A. I was -- when I was a brigade judge advocate for
6 Second Brigade, Third ID, I was the brigade judge advocate, I
7 was essentially the legal advisor for that brigade, yes.

8 Q. And what would your -- in summary, what would your
9 duties relate?

10 A. My duties related to preparing, participating in staff
11 planning for all of the operations that went forward for that,
12 including the military decision-making process for all of our
13 operations. I did conduct law of war training, essentially
14 rules of engagement training for myself and there were two
15 captains that served as trial counsels.

16 The positions, there were two attorney positions at
17 each brigade. One was the brigade judge advocate position,
18 one was the trial counsel position at that time.

19 We both conducted rules of engagement training for all
20 of the soldiers, as we were required to do, on a rotating
21 basis. We did it prior to deployment; we did it during the
22 deployment as well.

23 Q. Now, did you ever provide such command or operational

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1 law advice to a commander?

2 A. Yes.

3 Q. And have you ever advised the commander on the subject
4 of the laws of war ----

5 A. Yes.

6 Q. ---- of armed conflict?

7 A. Yes.

8 Q. And when would that have been?

9 A. In 2005 and 2006, and also in 2000 -- more adjacently
10 in 2014 and '15 as the -- when I was the senior legal advisor
11 for Office of Security Cooperation-Iraq, there was a period of
12 time where things became a little busier. That was around
13 the -- what is the ISIS surge in Iraq at that time; Mosul had
14 fallen. We had been -- some of us were evacuated, even, from
15 the embassy at that time and then brought back later as --
16 waiting for things to stabilize.

17 And I was essentially a liaison between -- now,
18 granted, we were not a combatant -- it was the Office of
19 Security Cooperation. The director of that office was a
20 lieutenant general who worked directly with the CENTCOM
21 commander and with the folks that do security cooperation
22 assistance. I talked on a regular basis to the CENTCOM legal
23 office, Central Command legal office, at MacDill. But I was

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1 not providing any advice to anybody; we were just about the
2 law of war because we weren't involved in those operations.

3 Q. That wasn't ----

4 A. Before coming in and doing that around us, but there
5 was always concerns and we talked about those issues of --
6 that could come up.

7 Q. Did you ever provide legal counsel or advice regarding
8 the handling of prisoners or legal guidance regarding the
9 interrogation of individuals?

10 A. Not regarding the interrogation, but regarding
11 detainee operations, yes. During 2005 and 2006, the brigade
12 had what was called a brigade internment facility that was
13 only for -- I believe the rules were very strict at that time.
14 I believe it was like a three-days' time period where a
15 prisoner would either be released or sent up to some other
16 higher detainment facility.

17 Q. So you would provide written direction and
18 instructions on that or legal opinions?

19 A. It was a process -- it was a very rapid process of
20 reviewing detainee -- of detainees, about being held and about
21 letting the individuals who were making intelligence, perhaps,
22 recommendations, I believe, about whether or not a detainee
23 had particular value or not; making sure that they were

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1 following their procedures and passing those up to higher and
2 that the detainee was either released or forwarded up.

3 Q. Your Honor, other than yourself, do you know of anyone
4 or any other agency that would make the determinations as to
5 the admissibility of evidence in this case?

6 A. As far as admissibility, no.

7 Q. Your Honor, one moment.

8 Have you received any training on the Law of Naval
9 Warfare?

10 A. Other than, I believe, a particular block of
11 instruction during the -- my -- my lack of knowledge on it
12 tells you that I potentially did not achieve full -- shouldn't
13 have achieved full marks for the law of the sea that I
14 received during my year during the grad course in 2006 to
15 2007. I'm not -- I don't recall. I know that it was given.
16 My retention of it is probably less than what the JAG school
17 would hope for.

18 Q. I guess that's part of our job, to refresh the
19 recollection.

20 Your Honor, may I have a moment?

21 A. You may.

22 [Pause.]

23 Q. The detention facilities that you talked about, were

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1 you aware of any other agencies that may have been using those
2 same detention facilities that you mentioned?

3 A. No. The one, it was run by our brigade, by our
4 military police contingent that we had that operated that, and
5 I'm not aware of any other agency that had anything to do with
6 it. It was -- I know that it was fully inspected on a regular
7 basis by the Red Cross, and our division would come in and
8 walk through on a regular basis; and there were never any
9 issues, to my knowledge, that ever occurred involving any
10 other agency at that facility.

11 Q. Your Honor, thank you. I have been told that I have
12 asked sufficient questions.

13 A. Okay.

14 Q. Thank you.

15 A. Thank you.

16 TC [MR. MILLER]: Your Honor, may the government have just
17 a short amount of follow-up?

18 MJ [COL ACOSTA]: You may.

19 Questions by the Trial Counsel [MR. MILLER]:

20 Q. I appreciate the opportunity. Thank you, Your Honor.

21 I think this sort of goes in line with much of what
22 Mr. Natale was talking about. All the government can expect
23 and all the defense can expect is a fair shake from the court,

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1 that you listen to both sides and make a decision accordingly.
2 But his questioning did suggest a couple of things, and I
3 would like to clarify.

4 First off, as to Colonel Watkins and Colonel Hayes,
5 have they in any way indicated to you how you are to rule or a
6 type of analysis you are to use?

7 A. None at all.

8 Q. Did they indicate to you in any way what result you
9 should reach in this case?

10 A. No.

11 Q. Did they indicate to you in any way that the failure
12 to reach a certain decision or to act in a certain way will
13 affect your career or career path?

14 A. No.

15 Q. You indicated also that there will be some logistical
16 challenges in this case. You are in Fort Hood; the facilities
17 you need to use are in Washington, D.C. Are you confident
18 that you will be able to make sufficient time to review the
19 materials in this case, which are quite, in many ways,
20 voluminous?

21 A. Yes. Because Colonel Watkins is my -- is both the
22 chief judge of the commissions and my chief circuit judge, he
23 understands more than anyone else what the requirements are of

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1 the position and has made sure and has pressed me to make sure
2 that I have been telling him when I need time to do this job.

3 I don't consider this to be my other job. I consider
4 this to be my job as a -- is the commission, and I -- it is
5 first on the docket.

6 Q. Mr. Natale also brought up the issue of torture,
7 allegations of torture, of what might have occurred. Do you
8 have any preconceived notions of what did occur in this
9 particular case?

10 A. I don't. I don't. I have read some of the pleadings
11 that have -- and some of the filings, but that's why I know
12 about the -- anything that I know about this case is from
13 reading filings in this case.

14 Q. So it would be a fair statement that you have an open
15 mind and will make a decision based upon the pleadings and
16 whatever evidence may be presented?

17 A. Yes.

18 Q. You also brought up the issue of hearsay and, I guess,
19 confrontation rights. Are you confident you will be able to
20 follow the applicable statutes, applicable precedent, in
21 making any decisions about the admission of hearsay in this
22 case?

23 A. Yes, as we always do.

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1 Q. And lastly, he asked you about your experiences in
2 Iraq. Is there anything about those experiences that would
3 affect your ability to sit fairly and impartially in this
4 particular matter?

5 A. No, there is not.

6 Q. Thank you for the opportunity, sir.

7 A. All right.

8 MJ [COL ACOSTA]: Mr. Natale, anything based upon that?

9 LDC [MR. NATALE]: Nothing further. Thank you for the
10 asking.

11 MJ [COL ACOSTA]: All right. Does either side desire to
12 challenge me?

13 TC [MR. MILLER]: The government does not, Your Honor.

14 LDC [MR. NATALE]: The defense does not, sir.

15 MJ [COL ACOSTA]: Okay. Before we get into the
16 substantive portion of the hearing today, what I am going to
17 do is recess for -- to allow -- before we -- I don't want to
18 get started with argument, which I anticipate to be extended,
19 especially based upon the ample slide deck provided by the
20 government, so I'm not going to get that started and then have
21 to break in the middle for lunch. So we're going to break for
22 an early meal now, to the best of our ability.

23 We will come back -- we'll come back at -- it's

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1 quarter until 11:00, by my watch. We'll come back at noon and
2 start after that and go through until we are finished with
3 402.

4 Does any party have any opposition to that way forward
5 that I need to know about for any logistical reason?

6 TC [MR. MILLER]: No, Your Honor. Thank you.

7 LDC [MR. NATALE]: No, Your Honor.

8 MJ [COL ACOSTA]: All right. Commission is in recess.

9 [The R.M.C. 803 session recessed at 1047, 3 December 2019.]

10 [The R.M.C. 803 session was called to order at 1230,
11 3 December 2019.]

12 MJ [COL ACOSTA]: The commission is called to order.

13 We will now take up AE 402. Defense.

14 LDC [MR. NATALE]: Your Honor, if I may, just as an alert
15 to the court as far as scheduling, Mr. Nashiri never has taken
16 and does not take prayer breaks. So in the event -- I
17 appreciate the sensitivity of everyone to that; however, from
18 now on, for scheduling purposes, it's important for everyone
19 to know that he has never, and he has no intention to, so we
20 can go on a schedule that doesn't require that.

21 MJ [COL ACOSTA]: Understood. Part of the reason for my
22 expansion in time was that, logistically, it takes a little
23 bit longer for most folks to take care of getting in and out

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1 of the facility. So I gave more time for that as well.

2 LDC [MR. NATALE]: I just wanted to let the court know.

3 MJ [COL ACOSTA]: But I appreciate it. Thank you for
4 reminding me of that.

5 All parties present when the commission last recessed
6 are again present.

7 Sir.

8 TC [MR. MILLER]: Just for housekeeping, there is an
9 additional individual in the courtroom. Patrick O'Malley, the
10 FBI, is seated in the back; I wanted to alert the court. He
11 has also been present in other sessions.

12 MJ [COL ACOSTA]: Okay. Thank you.

13 TC [MR. MILLER]: Thank you, Your Honor.

14 MJ [COL ACOSTA]: All right. Defense, we are going to
15 take up AE 402 ----

16 LDC [MR. NATALE]: Thank you, Your Honor.

17 MJ [COL ACOSTA]: ---- which is your motion.

18 LDC [MR. NATALE]: That's correct, Your Honor. It is our
19 opinion that, based on the court's ruling in 400N, that the
20 motion that we filed is really, more than anything else, an
21 attempt to present the court with a procedure which will
22 expedite the production of discovery.

23 Obviously, we're not talking about admissibility at

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1 this point; we're talking about the production of discovery.
2 And we believe that the statutes, the applicable statutes, all
3 say that, even though the government has a right to have
4 ex parte presentations, it's to the degree to protect
5 classified information. So we're proposing the following,
6 Judge ----

7 MJ [COL ACOSTA]: Okay.

8 LDC [MR. NATALE]: ---- that the government give us the
9 original document and their suggested summary. We then write
10 back to them saying we agree, we disagree; we try to work
11 something out. If we can work it out, you don't have to see
12 it, you don't have to rule on it.

13 On the other hand, if we do all of that work first, I
14 think there will be fewer matters which will have to come
15 before you in order to go through each of these documents.
16 And I just think it's a way of really getting this matter on
17 track. And I think that the prior procedure clearly wasn't
18 effective and didn't work, and I think this would be the
19 shortest and simplest way that we could get the discovery
20 moving in this case. Because without that ----

21 MJ [COL ACOSTA]: Let me stop you before we get any
22 farther. I have a particular way that I like to do motions,
23 and one of them is ask: What's the -- you bear the burden for

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1 this motion, correct?

2 LDC [MR. NATALE]: Yes.

3 MJ [COL ACOSTA]: And what's the standard for granting the
4 relief that you request? What do I have to find?

5 LDC [MR. NATALE]: I think that you have to find -- I
6 would say that you have to find that the interest of justice
7 and his due-process rights are outweighed by any concern from
8 the government and that any concern from the government can be
9 mitigated by proper procedures.

10 MJ [COL ACOSTA]: Are there any factual -- contested
11 factual issues I need to decide on this case? For this
12 motion, pardon me.

13 LDC [MR. NATALE]: I don't think there really is any
14 factual issues to decide because we are talking, from my -- we
15 are talking about what do we do in the future. Quite
16 possibly, it may have a spillover effect into what we do
17 regarding the 100N prior summaries.

18 But no, I don't think -- I think the facts are clear.
19 Everyone's ----

20 MJ [COL ACOSTA]: Okay. That's my question.

21 LDC [MR. NATALE]: Okay. It's clear, yes.

22 MJ [COL ACOSTA]: This is a motion, right?

23 LDC [MR. NATALE]: Yes.

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1 MJ [COL ACOSTA]: So I have to have facts upon which to
2 decide it. Are there any contested facts between your motion
3 and their response that I need to resolve?

4 LDC [MR. NATALE]: I mean, I guess, Your Honor, just by
5 the preponderance of the evidence would be the standard that I
6 think that we are bound by. But I don't think that there is
7 any factual dispute other than we are not a danger to national
8 security. We have all been vetted, gone through all the
9 processes, have all the necessary clearances; and there is no
10 reason to think that anyone on the defense team would put in
11 jeopardy any of this classified information that we've already
12 been allowed to see and to participate. So I just don't see
13 that there's any facts in dispute.

14 MJ [COL ACOSTA]: Okay. Now you can continue with your --
15 you can go back to your argument as to why I should grant the
16 relief, which is for you to participate. Your motion was for
17 you to be able to participate in ex parte presentations to the
18 commission, not for this what seems to be a different relief
19 that you are asking me for now. Is that true? Am I accurate?

20 LDC [MR. NATALE]: That is correct. In fact, let me
21 explain that.

22 MJ [COL ACOSTA]: Just to be clear, your motion requested
23 that you be able to participate in what would no longer be an

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1 ex parte presentation, but to a -- of a presentation of
2 classified information to the commission and to resolve the
3 commission's potential concerns with those submissions; and
4 now you are asking for there to be an out-of-court process
5 between you and the government where the defense and the
6 government -- where the defense receives the original
7 documents in the summary ahead -- or the defense attorneys, at
8 least, receive the procedures -- that's not in your motion,
9 though, correct?

10 LDC [MR. NATALE]: That's correct, Your Honor, and let me
11 explain why. I don't want to keep repeating it. I'm new to
12 the case, and I am not abandoning anything that was said
13 before or any requests that were made previously. However, I
14 have been spending a lot of time reading the record and
15 everything I can on the case, and I have litigated CIPA cases
16 before.

17 And when all is said and done, I actually think that
18 the procedure which I am now recommending is consistent. Not
19 only is it justified, not only is it okay and approved, it's
20 the wise one to do when we have such a large number of
21 documents. This is a death penalty case, and we have a
22 demonstrated inability for the process of providing summaries
23 to be complete and accurate.

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1 So rather than sort of to go over that, that's the law
2 of the case, as far as I'm concerned; the ruling in 400N is
3 the rule of the case. There has been no request for
4 rehearing, no appeal. That I am interpreting to be the rule,
5 the law of the case.

6 So now I'm suggesting a procedure which -- not that we
7 don't want you to be involved, Judge, because you obviously
8 will. But what I think and what I'm suggesting now would
9 allow the lawyers to do all of the heavy lifting prior to you
10 having to make any decisions.

11 We are not abandoning in any way the fact that we
12 believe we should participate. We believe we should be able
13 to participate, and we think that there is no reason for us
14 not to. And we think this is the most efficient way if we are
15 going to be able to do as what everyone wants, is to get this
16 case on track and to have some predictability to discovery and
17 then what, if any, motions will flow from those; rather than
18 on every issue we are going to have to try to relitigate
19 which -- what was done on the 400 series.

20 MJ [COL ACOSTA]: Okay.

21 LDC [MR. NATALE]: That's it. Do you have any questions,
22 sir?

23 MJ [COL ACOSTA]: I do. I do.

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1 LDC [MR. NATALE]: Okay.

2 MJ [COL ACOSTA]: What for this procedure -- first, you
3 said you have handled it in procedures -- not that this would
4 be -- has this proposed procedure that you have now that's not
5 in your motion, has it been done in those cases that you've
6 practiced before, where the government provided you the
7 classified information for you to review before they made
8 their summary?

9 LDC [MR. NATALE]: Yes. In fact, in United States v.
10 Padilla, there was an instance where we were -- all had the
11 proper clearance, and there was a request that we made; it was
12 an ex parte presentation to the court. We told the court why,
13 ex parte, why we felt that it was important that we have this
14 information.

15 The parties then -- the court basically said can you
16 come up with a summary or a stipulation. Of course, that was
17 for admissibility; it wasn't for discovery. So, I mean, I'm
18 going to separate that. We got it in discovery. We got
19 everything in discovery.

20 MJ [COL ACOSTA]: So you had already received the
21 classified information in discovery?

22 LDC [MR. NATALE]: That's correct. We had already
23 received it. This was only when we are talking about

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1 admissibility. There was a compromise worked out and a
2 stipulation worked out for the government for admissibility;
3 however, we received the discovery, and we were able to then
4 say here is why we think it's relevant.

5 The court said that it is relevant and material. And
6 then the government had the opportunity to either dismiss the
7 case, which they declined to do, or to come up with something
8 that would satisfy us and the court, and that's what we --
9 ended up happening.

10 All I'm saying is we are at the discovery stage. If
11 we don't do it now, Judge, at trial, when we talk about
12 evidentiary issues, we are going to have -- we are going to
13 have a real mess at that point, because things that could have
14 been dealt with by us and by the court in the discovery
15 process will now have to be taken up in the midst of
16 admissibility decisions, which, as you know, are best made
17 during the trial because you will then have a better
18 understanding as to what is the evidence.

19 MJ [COL ACOSTA]: What's the -- can you cite to me a rule
20 or a case that supports your proposed course of action?

21 LDC [MR. NATALE]: I don't have a case directly that says
22 that the way I have suggested it is the way to do it; however,
23 I think in our pleadings we have set forth the reason why our

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1 participation is needed and can be in this case. And I think
2 that actually, since what was drafted reflected us physically
3 being present all at the same time, I think was certainly more
4 time-consuming to the court and more inclusive of everyone.

5 And if that's something that the court thinks is
6 better than what I suggest, fine. But I'm trying to come up
7 with a way of getting our discovery so that it can be
8 received, analyzed, and processed.

9 MJ [COL ACOSTA]: Aren't you saying essentially your
10 argument is that you should see all of the classified
11 discovery to determine what classified discovery you should
12 see?

13 LDC [MR. NATALE]: No.

14 MJ [COL ACOSTA]: Okay.

15 LDC [MR. NATALE]: What I'm saying is that we should be
16 provided all of the classified discovery. If they want to
17 make ex parte presentations, they can certainly make ex parte
18 presentations, but the -- it actually states, in both CIPA and
19 in 505, the ex parte presentations to the extent necessary to
20 protect classified information. So we have to read in its
21 entirety. So what it says is to allow the prosecution to make
22 ex parte presentations to the extent necessary to protect
23 classified information.

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1 So the question comes down to what is needed to
2 protect the classified information, which is why I spent a
3 couple of minutes saying, you know, we've got all the
4 clearances. We've got everything that everyone said we needed
5 to have, and what is it that additionally needs to be done to
6 deprive the defense of knowing the discovery in the first
7 instance and knowing that it's going to be something that is
8 relevant, and also for the court to be able to make
9 intelligent decisions knowing what our legitimate legal basis
10 is for its inclusion as well as -- discovery, certainly, but
11 hopefully even for inclusion.

12 MJ [COL ACOSTA]: Isn't that part of what the ex parte
13 presentation of the defense case allows in the current
14 process, under the current procedures?

15 LDC [MR. NATALE]: Well, it does, but it does it on sort
16 of a global basis. And, in fact, that backs us into the
17 problem that was raised last night regarding that in-depth
18 presentation. What I'm suggesting, if we think about it, is
19 we have the document. They say, here's what we think the
20 summary should be. We say, we think -- we think it's okay, we
21 think it should include this, we think -- I mean, that doesn't
22 in any way jeopardize the classified information.

23 MJ [COL ACOSTA]: Does your -- how does your procedure not

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1 defeat the purpose of the ex parte presentation? I know that
2 this is a large part of the government's argument, and I would
3 like you to address that, is the ex parte procedures exist for
4 a reason.

5 LDC [MR. NATALE]: And the reason is to protect classified
6 information. That's what it says. It doesn't say anything
7 else, and I don't see where it says the judge has the
8 discretion to allow. And if it's -- it's an ex parte
9 presentation in the sense that they get to send it out, we
10 then get to look at it, and then we make our ex parte
11 presentation regarding it. They're not being deprived of
12 making an ex parte presentation because they can say, here is
13 why we think the defense suggested summary is wrong, and we
14 can make an ex parte summary as to say here is why we think it
15 should be there.

16 And I think that it would be done more efficiently
17 because we would be on a document-by-document basis rather
18 than for us to keep requesting to have ex parte hearings with
19 the judge in order to say, Judge, let us tell you the latest
20 thing that we have discovered, let us tell you the latest
21 thing that we have, here is what we are working on, here is
22 what we have, and that's why we think this is going to be
23 important that we need it.

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1 Now, there is -- the procedure that the government is
2 asking for I think is, one, unnecessary, and two, it puts the
3 court in a position to determine what the court thinks could
4 or should be done by the defense. And obviously that's not
5 your role; we all know that. And I think your role would be
6 to say let's -- you tell me what the issues are and I resolve
7 them.

8 MJ [COL ACOSTA]: Doesn't Asgari, though, state
9 essentially that that's the role of the judge in a case like
10 this?

11 LDC [MR. NATALE]: Well, it can be the role of the judge.
12 It's discretionary. Moussaoui allowed the defense to be
13 present. In Moussaoui, they actually were present during the
14 ex parte presentations. And that was a death penalty case,
15 albeit an Article III court, but yet the issues were a death
16 penalty case, substantially the same issues, and, you know,
17 the defense was allowed to be present in that case.

18 This is not -- I'm not asking you to go out on a plank
19 or to go out on a limb. I think this is -- I hate to say
20 it -- I think it's very logical and I think that it makes
21 perfect sense, that this is a way to proceed in this case.
22 Because the way it's been going clearly hasn't allowed for the
23 proper discovery to be presented.

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1 MJ [COL ACOSTA]: Let me ask you which way you're saying
2 is the logical way, the way in your motion ----

3 LDC [MR. NATALE]: My way.

4 MJ [COL ACOSTA]: I know you're saying your way. You have
5 two ways now: You have the way in your motion, and you have
6 the way that you've presented orally here today in argument.
7 Which way?

8 LDC [MR. NATALE]: I think that the way I presented orally
9 is the best way. And then as a secondary, we're not
10 abandoning, we would say the way that was set forth in our
11 motion.

12 MJ [COL ACOSTA]: So your primary argument is for what you
13 presented in oral argument today?

14 LDC [MR. NATALE]: That is correct. And in the ----

15 MJ [COL ACOSTA]: In the alternative, what you
16 presented ----

17 LDC [MR. NATALE]: ---- would be what we asked for in our
18 pleadings. As I said, I've been thinking long and hard about
19 what is the best way for us to handle this. And we're at the
20 discovery stage. Discovery forms the basis of the facts upon
21 which we can raise proper legal issues.

22 MJ [COL ACOSTA]: Would you agree that the defense has a
23 choice as to whether or not to make their theory of the case

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1 to the commission ex parte? It's a decision, correct?

2 LDC [MR. NATALE]: Oh, absolutely. And we would certainly
3 want to if the court is going to not allow us to have what I
4 am suggesting is influence or ----

5 MJ [COL ACOSTA]: You don't have to make it ex parte. You
6 could make it to the government as well, what your theory of
7 the case is.

8 LDC [MR. NATALE]: Yeah. Well, see, traditionally, theory
9 of the case includes work product, attorney-client product,
10 and that is something which traditionally the defense has not
11 been required and is never required to present to the
12 government; just like the government is not required to
13 present to us or to give us necessarily their theory of
14 prosecution or arguments that they're going to make.

15 MJ [COL ACOSTA]: Well, there are times that the defense
16 needs to put its theory of the case forward for a judge to be
17 able to determine whether or not particular evidence is
18 relevant, though, correct?

19 LDC [MR. NATALE]: That's correct.

20 MJ [COL ACOSTA]: And that's not done ex parte all the
21 time; that is typically not done ex parte. It's, Your Honor,
22 we need this evidence. Here is why we need this evidence:
23 Our theory of the case is X, Y, and Z; and when our theory of

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1 the case is X, Y, and Z, we get A, B, and C over here from the
2 government. And then the government goes, well, if that's
3 their theory of the case, this may be relevant and we will
4 give you the material. Right?

5 LDC [MR. NATALE]: Actually, I've seen that happen. But
6 I've also seen what I am suggesting happen, where you go
7 ex parte to the court, particularly in CIPA litigation;
8 because if we don't know what it is, we may not know whether
9 it's going to be relevant.

10 So, for example, if I say I want an exhaustive list,
11 and I give an exhaustive list of everything I want regarding
12 the torture that was engaged, right? Well, that's obviously
13 classified information. And we can go to the court ex parte
14 and say all of that; but, as we all know, that that's not
15 something I can even do in open court.

16 And I'm not trying to take away from you, Your Honor,
17 any of -- you know, work or any decisions to make, because you
18 will have decisions to make in the event that we don't come to
19 an agreement. I mean, I -- for the life of me, I can't figure
20 out what is the downside.

21 Now, if there is an unusual situation, Judge, where
22 the government comes and says ----

23 MJ [COL ACOSTA]: You are anticipating my next question.

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1 What's the middle ground?

2 Is there anything short of the government -- in your
3 remedy, is there anything short of them just giving you all of
4 the classified information -- which of course the government
5 could decide to do; the government could decide we are going
6 to give you everything. Is there anything -- and we're going
7 to go through this process that you want ----

8 LDC [MR. NATALE]: Right.

9 MJ [COL ACOSTA]: ---- is there anything short of them
10 giving you all of the classified information ----

11 LDC [MR. NATALE]: Yes.

12 MJ [COL ACOSTA]: ---- is there anything short of that?

13 LDC [MR. NATALE]: They could say, judge, this particular
14 classified information for these good reasons, and I think you
15 could determine whether there is good cause.

16 So they would still reserve, I would say, the right to
17 say, judge, on this particular information, we think that we
18 should deprive the government -- I mean, the defense of
19 knowing what it is and just go with the summary that we give.

20 Now, then you could make a decision as to whether it
21 is that most extreme situation which, in order to protect
22 classified information, would require a deviation from the
23 normal procedure. So they still have that.

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1 MJ [COL ACOSTA]: Isn't what you just stated the actual
2 normal procedure of how it goes under 505? That they say here
3 is the document, here is the summary, we can't give all of
4 this over; you make the decision based upon what you know,
5 Your Honor, as to whether or not this is sufficient or not.
6 It keeps the defense in the same place as they would be as if
7 they had the entire document? Isn't that exactly what you
8 just described?

9 LDC [MR. NATALE]: No, Your Honor, and here is why.

10 MJ [COL ACOSTA]: Okay.

11 LDC [MR. NATALE]: As we put in our prior pleadings, there
12 are law students at George Washington Law School who have
13 access to the actual documents. When you compare those actual
14 documents to the summary, they were at best incomplete,
15 misleading, and certainly didn't convey the essence or the
16 significance of information which we think would be relevant
17 to the defense.

18 I think that if there wasn't a proven track record of
19 the government's inability to make those decisions, it would
20 be different. But what's changed is the ruling of the D.C.
21 Court of Appeals; your ruling in 400N, which, as I said, I
22 believe is the law of the case; and that what I am proposing
23 will make us be much more efficient. And we wouldn't have to

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1 figure out, well, there is a summary; we get the summary. The
2 summary says sometime on some date somewhere something
3 happened, and it's like a paragraph long. How do we know
4 whether or not there is something that is in there that is
5 important for the defense to know, and how can we properly
6 advise the court that it is important for us to know when
7 there is no compelling need?

8 And as I keep repeating, this whole -- you know, the
9 whole CIPA litigation came out of the cases involving
10 graymail, and it's to preclude and protect classified
11 information from being improperly disseminated.

12 MJ [COL ACOSTA]: Well, how do you address those
13 government cases -- the cases the government cites
14 particularly about that it's not really about the clearance
15 level of the defense team? They spent ----

16 LDC [MR. NATALE]: I think that -- I think that the
17 cases -- I don't think they're citing anything that would be
18 binding authority on this case. And I also think that -- I
19 think it's illogical to think that -- normally you can have
20 clearances, but there's also the need to know.

21 When we have a person's life, when we have a
22 Constitution that remains intact, that guarantees certain due
23 process rights and they want to put someone to death -- as you

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1 know, the main statement is death is different and that there
2 is a heightened sense needed of reliability, a heightened
3 sense of reliability.

4 We know that the summaries that have been previously
5 provided weren't even close. And if there is going to be
6 30,000 pages or 30,000 documents, then if it weren't for -- if
7 it weren't for the fact that under the Freedom of Information
8 Act, George Washington Law School was able to get those actual
9 cables, we would have no way to tell you, Judge, they are
10 incomplete. How can we say, Judge, something is incomplete
11 when we don't even know what they are summarizing?

12 I mean, if this is going to be a solemn and sacred
13 search for the truth, it has to start with us getting
14 discovery. Down the road we can argue about admissibility,
15 all of that other stuff. There is no doubt, I think, in
16 anyone's mind here that there is information which is relevant
17 to our defense which the government has clearly demonstrated
18 in prior filings of summaries they chose not to include. They
19 chose to use different language which doesn't convey the
20 intent.

21 So if the court is inclined not to do what we suggest
22 in our pleadings, or what I'm suggesting to you -- if you are
23 inclined to do that, then you will need to have all of these

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1 ex parte hearings, right? You will have to have them in the
2 District of Columbia or here, because, as you mentioned, you
3 wouldn't have access to that information, and then I am
4 assuming that we would be provided a summary in advance of
5 trial. I'm assuming that would happen.

6 Then we would look at those summaries and then, based
7 on what we know from prior actions, we would then submit to
8 the court a whole host of questions as to whether or not
9 things were included or not included in the original document
10 and did the court consider all of these in making its
11 determination.

12 So now you would get another pleading and then you
13 would probably have to go back and again look at the
14 classified document and say, well, maybe this one yes, maybe
15 that one no.

16 So the procedure, that's what's going to happen. If
17 we get a summary that says -- the ones that we have seen,
18 there is no reason for anyone to believe that those are
19 accurate summaries of what happened, when it happened, and why
20 it happened. We know that, you know that, and they know that,
21 that the summaries have been inadequate, to say the least.

22 All I'm saying, Judge, is going through more steps is
23 going to require a substantial more amount of time, because we

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1 are going to have to contest every summary because we have no
2 reason to believe that these summaries are in fact accurate.

3 MJ [COL ACOSTA]: On that issue, on -- as far as the
4 summaries that you have received that you pointed out in your
5 filing don't seem to match up with what you have been able to
6 learn from, as you refer to them, the law students and their
7 FOIA filing, have you made any requests for discovery based
8 upon -- or additional discovery based upon those
9 discrepancies?

10 LDC [MR. NATALE]: We have ----

11 MJ [COL ACOSTA]: Have you gone back and said, Government,
12 there is -- look what we have here that we got from the public
13 record, and look at the summary that we have. Will you give
14 us the -- will you give us more about this or some other area?

15 Have you gone back and asked for any of that?

16 LDC [MR. NATALE]: Not yet, Your Honor, because we are
17 waiting -- actually, I was waiting to see what we were going
18 to do with 402. Because I don't know how long it's been since
19 your ruling on 400N, but we -- and in light of your ruling,
20 which was not appealed and not asked for rehearing, the
21 government has not sought to even tell us why they think that
22 it is relevant.

23 The person presenting the summary should bear the

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1 burden of saying that the summary is accurate and complete.
2 Your job would be to say it is or it isn't, and you can only
3 do that -- only do that, I think, effectively, knowing what
4 information would be relevant to that decision.

5 For example, if there's private investigation that we
6 have done which we think is significant to an incident that's
7 covered by a summary, if we only -- if we don't get the date,
8 the time -- now, I know they gave us a list recently of dates
9 and times -- but if we don't have the actual information, we
10 won't even know who, if anyone, we can call as a witness in
11 rebuttal or impeachment, and that's part of the discovery
12 process.

13 There is no reason to think that the procedures that
14 we asked for in the pleading or that I am asking for now in
15 any way puts the security of the United States in jeopardy.
16 There is nothing to say that this is going to be a breach of
17 our national security; and in the event there's that one
18 rare -- if there's a rare situation, then they can say, Judge,
19 we don't want this summary to go under this procedure.

20 MJ [COL ACOSTA]: What's the case law say about whose
21 authority it is to determine whether or not it's a risk to
22 national security? Is it the court's -- the commission's in
23 this case?

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1 LDC [MR. NATALE]: Well, I think it would be yours. I
2 think it would be yours in the sense that -- because what you
3 have to balance is whether or not -- the due process rights of
4 the defendant. In order -- in regular CIPA litigation, if the
5 government says, under no circumstances are we going to
6 declassify, and we're not going to agree to any summaries or
7 stipulations regarding this, in an Article III court, if the
8 judge finds that that information is crucial to a fair trial,
9 the judge can dismiss the case.

10 MJ [COL ACOSTA]: Right. But that's not the question that
11 I asked, and I'm just focusing you in on what I asked. The
12 determination of whether or not something is a risk to
13 national security, it's not the court's, right? Those courts
14 aren't deciding that that information isn't to be protected,
15 they are saying that that information is required by the
16 defense ----

17 LDC [MR. NATALE]: That's correct.

18 MJ [COL ACOSTA]: ---- right? They're not making a
19 declassification, the courts are never, and I think the case
20 law I want to say is pretty clear ----

21 LDC [MR. NATALE]: You're right.

22 MJ [COL ACOSTA]: ---- about who the classification
23 authority is and that the courts don't get into that

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1 decision-making process.

2 LDC [MR. NATALE]: Precisely. So we are not asking you to
3 declassify anything. But what else could the language mean
4 when it says that the court has the discretion when it is to
5 protect classified information? I mean, it clearly provides
6 the court the discretion not to change the classification. No
7 one is saying that.

8 It is clear -- let's make things -- people who have
9 the authority to make the classification make it. Period, end
10 of story. We may not know what their criteria is, they may
11 not have to tell us what their criteria is; but in this
12 context, classified information, we all have the same
13 clearance. There is nothing articulated to say that we are
14 going to be a danger.

15 This information, if we take the interpretation that
16 the government wants, then whatever -- if they -- they could
17 tell us that there is no document, they can tell us that there
18 is no summary, or they could just give summaries, you know,
19 which they have given us, and how could we -- how can we rebut
20 or defend that? I mean, I can't think of a more fundamental
21 impediment to due process than to know what you are charged
22 with, what's the evidence against you? That's all it is.

23 And I also think logistically it makes sense. But if

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1 not and we have to then file objections to every summary, we
2 will. And we will file extensive requests and ask for,
3 regarding each summary, the ability to present to the court an
4 ex parte presentation why these questions and this information
5 is needed for a complete and fair determination of the
6 summary.

7 We get to the same place with less time, more
8 efficiency, but we'll still be at the same place.

9 MJ [COL ACOSTA]: I think that's all my questions.

10 LDC [MR. NATALE]: Thank you.

11 MJ [COL ACOSTA]: All right. Thank you, Mr. Natale.

12 I'm going to let you come back, and the way I normally
13 do this, the way I am going to do it here is you've got the
14 burden, so you're going to go first. The government's going
15 to get its one shot to convince me on their side, and then
16 I'll let you come back with some rebuttal. Okay?

17 LDC [MR. NATALE]: Thank you.

18 MJ [COL ACOSTA]: Government.

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

20 MJ [COL ACOSTA]: Good afternoon.

21 CP [BG MARTINS]: Mindful of the commission's guidance to
22 counsel on how best to assist you ----

23 MJ [COL ACOSTA]: Right. I believe -- and let me just

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1 clarify. You weren't at the 802 where I stated this, and I
2 took this from wise counsel who was training me to go before
3 appellate courts and cautioned me at the time by saying the
4 words, the court does not want your brief with hand gestures;
5 they want something that's addition to, that supplements.

6 So that's all I said. Is, you know, if you have
7 something that's valuable to supplement the motion, the
8 responses, we've gone -- there are several different replies
9 and responses on this motion as well, and I think they're
10 pretty extensive as they are. But I certainly want to hear
11 the government's argument on this as well. I am not meaning
12 to dissuade anybody from that, I'm meaning to encourage
13 refinement.

14 CP [BG MARTINS]: Thank you, Your Honor. Those were
15 focusing comments, and I regret perhaps reinforcing a
16 stereotype on military officers and their use of PowerPoint.
17 But sometimes in discovery-related matters, a picture can be
18 more economical than words. We think this is one of those
19 occasions.

20 At the outset, I must reject the notion -- and this is
21 in the briefs; Mr. Natale used different language here -- but
22 the notion that the prior military judges and the prosecution
23 abused the authorized ex parte process or the notion that the

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1 prosecution is failing to live up to its solemn obligation
2 under the law to provide discovery. I am proud of the work
3 the prosecution has done and I'm proud of the trial that good
4 and hardworking government personnel have made possible. If
5 allowed to happen, such a trial will be in the interests of
6 justice, and it will also not compromise our national
7 security. I want to thank all the folks who helped get this
8 marked and ready to be put up on the screen.

9 Your Honor, at this time I request permission to
10 publish the slides to the -- both in the courtroom and to the
11 gallery.

12 MJ [COL ACOSTA]: You may publish.

13 CP [BG MARTINS]: While it's coming up, Your Honor, we do
14 agree the burden is with the defense. I don't believe they
15 have met their burden and believe that there are factual
16 matters in dispute. And I will go through those and ask that
17 you consider things that are in your record. But we agree
18 they have the burden; we don't believe they have met it.

19 Slide, please.

20 MJ [COL ACOSTA]: Without throwing you off, Government, is
21 there a way to summarize the factual issues in dispute, at
22 least give me some categories that I am going to be looking
23 for in your presentation here?

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1 CP [BG MARTINS]: Your Honor, counsel on oral argument
2 stated that all they are getting is things that say sometime,
3 some day, somewhere something happened. We believe you
4 need -- this is not something you can answer in the abstract;
5 you've got to look at what we provided.

6 MJ [COL ACOSTA]: To summarize what you just said,
7 adequacy of the summaries?

8 CP [BG MARTINS]: Adequacy of the summaries ----

9 MJ [COL ACOSTA]: Okay.

10 CP [BG MARTINS]: ---- is in -- we believe are in dispute,
11 although we do grant that there are matters, based upon their
12 description of where they want to go, that we would -- if we
13 were looking at this now, we would have offered to Judge Pohl
14 that that phrase be in there. But I'm going to explain the
15 process by which we did our duty, having gone through all of
16 the 18 matters.

17 So yeah, adequacy of the summaries is in dispute. We
18 believe the reading of AE 400N, which came up as in dispute,
19 we read it certainly differently, and we believe the -- you
20 asked for factual matters. There are issues of standards that
21 are different as well, but the -- several of the specific
22 cables they gave and their comparison resulted them in
23 alleging we altered language. We believe in the most

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1 important examples they gave, they were using the wrong cable
2 that we gave them.

3 So, I mean, there are factual issues here that are in
4 detail that I pledge to go through.

5 MJ [COL ACOSTA]: All right.

6 CP [BG MARTINS]: Your Honor, the bottom-line position of
7 the United States up front is that a military judge who
8 declines to use his clear authority to consider trial
9 counsel's substitution requests ex parte is both less able as
10 the presiding officer to protect the highly sensitive
11 classified information in this case from improper disclosure
12 and also more likely to err by promoting graymail.

13 Counsel's pledge that he would challenge every summary
14 sounded to me like a version of a graymail threat. He did it
15 gently and so forth, but that's graymail. Let's use this
16 process to grind it to a halt if we don't get our way on the
17 motion.

18 The result of the judge failing to use this authority
19 would be to frustrate Congress' intent that judges
20 resourcefully seek a solution that neither disadvantages the
21 accused nor penalizes the government and the public for
22 protecting classified information vital to national security.

23 Slide, please.

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1 Your Honor, we believe the proper framework for
2 interpreting this or any other provision of law is the -- is
3 laid out in Musacchio -- this is a unanimous Supreme Court
4 decision on interpretation that has been adopted by the
5 D.C. Circuit several times since it came out on this specific
6 issue of interpretation, and that means we must look first to
7 the text, then to the other provisions that can help you
8 understand the words of the provision itself, context, and
9 then examine relevant historical materials and, in this case
10 legislative history and federal case law. We are directed to
11 do that by statute.

12 Slide, please.

13 So looking to that provision of the Military
14 Commission Rule of Evidence 505 that the defense cites, I'll
15 note what the commission may have already observed, and that
16 is M.C.R.E. 505(f) is one of those portions of M.C.R.E. 505
17 that is word-for-word identical to the statute. The only
18 differences between p-4, Section 949p-4, and M.C.R.E. 505(f)
19 is an internal cross-references just to make sure that the
20 references are the same. Every other word is identical. So I
21 intend to rely upon the statute here, because all of this is
22 statutory authorizations.

23 Congress, by the way, purposefully gave 949p-4 that

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1 designation so it would align with Section 4 of CIPA and allow
2 us to more easily assimilate the case law.

3 As the commission has also observed in its AE 400N
4 ruling of 7 November, M.C.R.E. 505(f)(2), and thus 959p-4(b),
5 expressly states that the military judge shall permit trial
6 counsel to make a request for an authorization ex parte to the
7 extent necessary to protect classified information; and yet
8 while the mandatory language is used, the commission in 400N
9 and defense counsel too placed stress on the phrase "to the
10 extent necessary" in order to posit that this language should
11 preclude some or all ex parte presentations in the case.

12 The military judge also reads in AE 400N the
13 permissive language of "may" in subsection (b)(1) as vesting
14 the commission with discretion in deciding whether or not, and
15 on what scale, to allow the government to employ the summary
16 and substitution process.

17 The government believes the commission is being
18 attentive to the language and agrees with much of the
19 commission's analysis of the statute, but we respectfully
20 disagree on some of that analysis. And I would like to use
21 this Musacchio framework to highlight authorities that the
22 government respectfully believes the commission decision in
23 400N fails to fully adhere to.

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1 And then following that, I would like to take up the
2 examples -- some of the examples to explain why my own study
3 of every one of these 18 gotchas that we've got that was
4 preceded by no request to the government of any kind, of the
5 kind we get in plenty of CIPA cases, why those are not abuses
6 but rather the prosecution's requested declassifications
7 working over time to get the defense what it needs. And then
8 I'll also speak to where we could go and have a more
9 adversarial process as we get toward trial. I believe we have
10 some important middle ground that we could explore.

11 Slide.

12 So we've done the first part. We actually looked at
13 the text and scrutinized it. Looking now to context,
14 subsection 949p-4(b) includes a term, namely, "classified
15 information," delineated elsewhere in the CIPA provisions of
16 the MCA, so we have to go there and look at it. In that
17 definition, Congress makes clear that what requires protection
18 against unauthorized disclosure such that it is classified is
19 exclusively an Executive Branch determination.

20 Slide, please.

21 Meanwhile, another piece of context is the executive
22 order that's incorporated by reference in the statutory
23 definition. In the executive order it's clear that disclosure

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1 does not mean merely disclosure to the general public; rather,
2 it means communication to any unauthorized recipient. There
3 is no authority which suggests some kind of defense counsel
4 exception. I would add there is also no authority for a trial
5 counsel exception or trial judge exception. I mean, there are
6 good reasons for us to continue to be walled off from lots of
7 different kinds of classified information. We don't traffic,
8 for instance, in certain kinds of highly sensitive information
9 because the need-to-know aspect applies to us as well. But
10 there are reasons why defense counsel can and should be among
11 those at times who shouldn't be given disclosure, and I'll
12 suggest those in a moment.

13 Slide, please.

14 It's sometimes suggested by defense counsel that
15 because they've been granted security clearances, that there
16 can be no unauthorized disclosure to them for which the
17 military judge should protect classified information. And
18 such suggestions, with respect, discount that a favorable
19 determination of eligibility for access through a background
20 check, that is, a security clearance, an adjudication process,
21 is not the only restriction that the government may and need
22 to apply on access. Only persons having a need to know, as
23 was discussed in defense counsel's oral argument, have a --

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1 can be granted access to specific information.

2 Slide, please.

3 And then the need to know is recognized both in the
4 executive order and, I would also point, out in the
5 commission's Protective Order #1, as an exclusively Executive
6 Branch determination. Lawyers denied access because they lack
7 a need to know, Your Honor, sometimes claim that denying them
8 access on that basis must mean that someone is concluding they
9 are not fulfilling an authorized function and they clue in on
10 the last portion of that definition.

11 No one is saying that defending a client in the
12 military commissions process is not a lawful and authorized
13 function. And the definition does not impugn defense counsel,
14 trial counsel, military judge. There are lots of types of
15 information, as I said, on which we need to be walled off from
16 specific information.

17 It's a truth, though one perhaps not often enough
18 reflected upon, that those who have to safeguard the secrets
19 are demanded to be guarded about everybody else who gets
20 access.

21 Slide, please.

22 And this is recognized in our reviewing court. This
23 is probably the most famous statement of this principle, that

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1 those who make these determinations have to be technically
2 qualified. They've got to be looking at that and thinking
3 about that all the time. And we are not doing that. And
4 wise -- wise people kind of recognize that. This is an area
5 outside of our expertise, what al Qaeda may be putting
6 together. It doesn't mean there isn't a very important role
7 for what's relevant to this commission, and there is a process
8 for that.

9 Slide, please.

10 As the Sixth Circuit recently said in the Asgari case
11 that the commission, I noticed, has read, a principled reason
12 for excluding even a defense counsel with a security clearance
13 from being given access to certain classified information is
14 that defense counsel have a professional and ethical
15 obligation to represent an accused ardently. That is clearly
16 being recognized in this Asgari case just this year in 2019 in
17 the Sixth Circuit. And I'll give you the cite, Your Honor.
18 The point cite is 940 F.3d 188, and then it's 191 to -2 is the
19 point cite, Sixth Circuit, October 4, 2019.

20 And in that case, you had a lieutenant colonel,
21 retired, Marine Corps, who had full clearances, and yet the
22 court found that, because of this obligation that was
23 professional in nature, he could exclude the individual on

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1 that basis, not on the basis of the 13 adjudicative guidelines
2 that are depicted on the slide. That's one way in which a
3 government can protect its legitimate secrets, to look to the
4 individual's own background when we're required to do that,
5 but there is also an ability of a classification authority to
6 consider categories of individuals, and not to be put -- not
7 to have the burden put on them to justify every type of
8 exclusion of people from information.

9 And again, there is a process by which relevant,
10 material information gets into the commission. But
11 requiring -- excluding a whole way in which OCAs do their job
12 is not contemplated even in the "to the extent necessary"
13 language that the commission has seized upon.

14 And so we respectfully disagree on this fine point
15 that we think the commission has said, you've got the "may" in
16 (b)(1), and then you've got the "to the extent necessary" in
17 (b)(2) vests the commission with discretion. We respectfully
18 see it a bit differently. Commission has very important
19 duties in regulating time, place, and manner of discovery,
20 concur completely; but the Executive Branch can't be displaced
21 from that "to the extent necessary" language. There's a
22 process by which both sides are going to get their inputs to
23 that. We don't believe that the commission's discretion is

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1 exclusive, and I think that's one way we thought 400N could
2 reasonably be read.

3 MJ [COL ACOSTA]: Doesn't that -- when you talk about the
4 "may," and you have repeatedly stated that the commission has
5 seized upon language and is focusing on language. I'm looking
6 at all of the language of all of this, all of the rule, and
7 I'm asking questions and pointing out things that are the
8 questions that I have about it.

9 So does not the term -- the Military Commissions Act
10 is to be read in those rules about 505, aren't they supposed
11 to be interpreted in accordance with CIPA practice, correct?
12 That's what it says? Does not the commission then have the
13 discretion under "may," like other federal courts do, to say,
14 let me look at this filing and say I don't accept this ----

15 CP [BG MARTINS]: Absolutely.

16 MJ [COL ACOSTA]: ---- I sent it back.

17 I mean, I know that you've referred to 400N, the
18 defense has referred to 400N, and that's the commission
19 saying, I'm looking at this, I'm not taking it right -- I'm
20 not taking it as it is now, right? So are you saying that --
21 what's the government's position on whether or not the
22 commission has the authority to say, I accept that summary or
23 not?

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1 CP [BG MARTINS]: First of all, Your Honor, we think this
2 is very healthy. We appreciate a careful reading of the
3 statute and the things -- the commission's analysis is very
4 helpful, we believe, in pointing up nuances of this. And this
5 can be nuanced in this amount of material. So that's just an
6 opening comment.

7 We believe that that "may" in (b)(1) that you are
8 pointing to, that allows you to decide, am I going to allow
9 this substitution to take place. That's not a "shall." And
10 even the "shall" that has to do with our ability to present
11 the damage to national security that could occur and why we
12 need a substitution ex parte thus is not really a "shall."
13 Agree. We agree with that. But we do wish to say there's a
14 "may not" in (a)(2), as the commission also points out. And
15 that "may not" -- the commission sort of moves through it
16 rather quickly because I would agree these are not the normal
17 circumstances where you're considering a number of vacated
18 orders.

19 So on one level we agree with that. And yet AE 120AA
20 is an extant ruling, still-in-force ruling of the commission,
21 that sets up ten categories by which we have spent the last,
22 you know, five years trying to comply with. That was the
23 initial authorizing "may" or -- that you may have access to in

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1 discovery of information ----

2 MJ [COL ACOSTA]: Right. That was the categories that the
3 commission at the time said -- the defense at that time said,
4 here is the things that we'd like. The commission ruled, hey,
5 here's these ten categories; Government, give us what you have
6 on that, make your substitutions.

7 CP [BG MARTINS]: Right. And yet those substitutions, it
8 states in (a)(2), I mean, all of that -- or when you add those
9 three provisions that the AE 400N focuses on, the "may not
10 authorize access to or discovery of information" in
11 949p-4(a)(2), the commission may authorize counsel to seek
12 substitutions, statements of relevant facts, and then the
13 "shall permit trial counsel to do ex parte," all of that
14 contemplates there is a process in 949(b) that must be
15 followed for the authorization for access to and classified
16 information to be proper.

17 And that -- you know, what is the status of 120AA
18 going forward with all of the materials that we would submit
19 remain before Your Honor? Because you asked us to go back
20 and -- among things, and if we want to, we've got to present
21 you with a declaration. We intend to do so; we filed a notice
22 to that effect.

23 So it's a process-driven approach here. And that is

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1 why we believe that the approach at this point needs to be,
2 continue to allow ex parte presentations based on a
3 declaration that you are going to get, and that there be a
4 focused evaluation of the risk and whether that risk is harmed
5 by a substitution.

6 Your Honor, I can -- you've asked a couple of
7 questions that have accelerated things. If I can move forward
8 to slide 18, because a number of the slides merely show that
9 the case law is very clear, that you have the authority. It's
10 really about are you going to exercise it and what happens if
11 you don't.

12 So our view is that the Collins case, which is an
13 important part of the CIPA canon, defined graymail as a threat
14 the nation's security might be damaged by a prosecution and
15 that it's practiced upon the government to extract some kind
16 of concession that's not consistent with justice as Congress
17 saw it.

18 That word "unevaluated" is very important, because our
19 position is that the court, with respect, has to evaluate
20 these summaries in detail. And we have a program for going
21 forward on how that could occur, but it can't be a process
22 that's done in the abstract. It really -- that's what
23 Congress is asking for, and they are asking for the judge to

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1 step into a somewhat unfamiliar role. The slides that we have
2 skipped over refer to that role as kind of a standby counsel.
3 There are some things that federal judges have long said, boy,
4 this is not normal. This is not what we have traditionally
5 done.

6 MJ [COL ACOSTA]: That's where the court says you are
7 asking the court to determine what's relevant and necessary to
8 the defense.

9 CP [BG MARTINS]: Right, exactly what Mr. Natale said you
10 shouldn't be doing. Maybe pre-1980 that was the law. In the
11 Sedaghaty case that we cite, and that is a major cite in the
12 Hayat case that's in our response, that is a battle already
13 lost in the federal courts. Judges have to do this. Congress
14 is saying you have to evaluate in detail. There is really no
15 other way.

16 If the military judge doesn't allow ex parte
17 proceedings, three different things we believe can happen.
18 First of all, it could result in depriving the defense of
19 truly noncumulative, relevant, and helpful information. I
20 mean, this is part of the process of standing in the defense's
21 shoes. Again, not comfortable for judges, but CIPA says must
22 happen.

23 But two ----

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1 MJ [COL ACOSTA]: Are you saying that -- are you
2 suggesting that it deprives the defense because the government
3 would no longer produce it to the commission?

4 CP [BG MARTINS]: Well ----

5 MJ [COL ACOSTA]: How would -- how does that work?

6 CP [BG MARTINS]: Well, the government errs, and we would
7 ask you to look -- the next thing we would ask you to look at
8 is AE 406, the request for substitutions relating to a whole
9 body of information that we haven't been able to get to a
10 commission because we haven't had a commission since early
11 2018, and we would submit a lot of the things that are in
12 those cables -- and I'll get to those FOIA disclosures in a
13 minute. I think they are being misconstrued as well.

14 But if you go and you look at those, we have erred on
15 the side of inclusion. The state of the practice is that we
16 should err on the side of inclusion even if we don't really
17 think it's material in the sense of the quote -- the court
18 cited Lloyd at the D.C. Circuit. There has to be some
19 indication that the disputed information would significantly
20 alter the quantum of proof in the defendant's favor.

21 You know, we don't want to make the close calls on
22 that, so it's -- you know, what we are saying is the posture
23 of a trial judge is to stand in the shoes. You know more

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1 about their case than we do. You will have had -- under p-2,
2 you will have had pretrial conferences with them to get
3 things. So that's only the sense -- not that we would
4 intentionally withhold things, we are actually trying to put
5 forth more, but it's just not the way that the process is
6 supposed to work.

7 The process is supposed to be iterative and
8 interactive. I use -- the two cases are the Rosen case for
9 the word "iterative" and the word "interactive" is used in
10 Moussaoui, which the commission cites in 400N. And that
11 process enables us to get to what the defense needs. It's not
12 maybe as efficient as some ideas of doing it, but it complies
13 with the law and it gets us to where we need to go.

14 So yes, so it could involve depriving the defense of
15 information as you have conferred with them. It will result
16 in a -- it will result in perhaps a sanction that fails to
17 fully consider the damage inflicted, because the damage
18 inflicted has to be done looking at the substitute.

19 And third, it will -- it could result in a failure to
20 evaluate that substitute to determine if it puts the defense
21 in substantially the same position, drawing on different parts
22 of the statute to state those three harms.

23 Slide 19, please.

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1 So I have offered the government's position on the
2 statute. We don't think it's even close in terms of whether
3 you have the authority. Again, the defense 400-plus-page
4 brief and enclosures is attempting to meet a burden of whether
5 it was to the extent necessary to protect national security,
6 and I'd like to go through some of these illustrations of why
7 that's ignoring important circumstances. So ----

8 MJ [COL ACOSTA]: Can you address that first before you
9 get into the examples?

10 CP [BG MARTINS]: Sure.

11 MJ [COL ACOSTA]: What I am looking for is, can you
12 address how that is -- how that language operates within the
13 statute ----

14 CP [BG MARTINS]: And which specific language?

15 MJ [COL ACOSTA]: "To the extent necessary," does that not
16 modify the language before it in some way or does it not?

17 CP [BG MARTINS]: It does. It does. And using that
18 framework of Musacchio, text, context, legislative history,
19 it -- it is following a section where you have a "may provide
20 us the opportunity to give substitutions and summaries." The
21 "to the extent necessary," though, still has a component that
22 can't be displaced from the Executive Branch.

23 MJ [COL ACOSTA]: Right. And that's the part where it

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1 says -- the Executive Branch says this is required ----

2 CP [BG MARTINS]: Yes.

3 MJ [COL ACOSTA]: ---- protect it, right?

4 CP [BG MARTINS]: Yes. Now, they have to give you a
5 declaration, and we have a slight difference with the
6 commission on whether the exact -- the declarations that you
7 received were current. Declarations like the actions of a
8 convening authority or a judge come out of an office and they
9 don't expire when the person leaves the office, which seems to
10 be an implication of the commission's ruling.

11 So we believe they were still current, and we had an
12 obligation of candor to the tribunal, if something changed, to
13 give you something new. But we are going back -- we see value
14 in the commission's request, because there have been
15 declassifications. We are going back and we are going to
16 provide a new omnibus declaration. That's happening. But I
17 did want to point out we reject -- we oppose this idea that
18 those were not operative declarations. They did not persuade
19 you at some level, that's important, and your understanding of
20 national security concerns is something that could cause us to
21 articulate that in a fuller way, and we are doing that. So
22 that's happening.

23 But the "to the extent necessary" must build upon the

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1 other parts of the statute. And you can't make that in the
2 abstract, with respect, Your Honor, you've got to look at that
3 declaration. And as the Rosen case, this Fourth Circuit case,
4 Rosen, that can and should be iterative at times. Otherwise
5 we are penalizing the people from getting a fair trial of
6 somebody whose defense may involve very sensitive sources and
7 methods.

8 Your Honor, so the first specific illustration I would
9 like to point to is that the claimed basis really for throwing
10 out the whole process, the whole process that we have that's
11 an unauthorized process, is that the request -- the
12 substitutions were not necessary to protect national security,
13 the ones that Judge Pohl approved.

14 Slide 19 depicts the most generalized of the defense
15 allegations. And the allegation here was that, in referring
16 to custodial interviews, a term that didn't appear in some
17 cables that the defense got from a FOIA release, which I will
18 get to, that in referring to that, the government was
19 disingenuous and it was peddling in euphemisms, that it was
20 intentionally depriving the defense of evidence of torture.

21 Slide, please.

22 This allegation, and I am going to go through this one
23 more fully than the others, but a lot of these types of

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1 considerations apply to the other misfires I would say the
2 defense had in their gotcha motion.

3 This allegation ignores six important determinations
4 or circumstances. First, it's disingenuous for the defense,
5 we submit, to suggest that it could have been confused; that
6 the information being summarized dealt with traditional law
7 enforcement. The President himself had announced on national
8 television that Mr. Nashiri had been in the custody of the
9 CIA.

10 Slide, please.

11 We believe that the defense knew this, as indicated in
12 the record of this case. They filed a motion in 2013 where
13 they quoted the very same passage of the President's speech.
14 So the custodial interview aspect couldn't have been
15 interpreted as a traditional law enforcement meaning, which
16 they stated was misleading.

17 Slide, please.

18 The second circumstance that we believe is being
19 ignored in this kind of allegation is that a summary for
20 classified information, the statutory language, does not
21 purport to be and cannot reasonably be misunderstood as a
22 word-for-word transmission. A summary is a summary. It's an
23 account of the main points of something. Whether a summary is

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1 helpful to a legitimate defense preparation or not can be
2 debated, and we believe there are forums in which we can do
3 that and litigate it, including in camera forums that are not
4 ex parte; but it is not a coherent or fair criticism of a
5 summary that it does not include the exact verbiage of the
6 original. Summarizers do seek to use the language from the
7 original, and I'll point to a place where they thought we were
8 changing language arbitrarily.

9 Slide, please.

10 The third circumstance is that section p-4 recognizes,
11 at the -- even at the discovery phase, that issues can be
12 taken off the table in a way that's both beneficial to the
13 defense and protective of what is mostly irrelevant classified
14 information through eventual stipulation to a fact. And in
15 part, the word "custodial" was connoting that Nashiri was not
16 free to leave and that this raised the admissibility of any
17 statements he made as being inadmissible unless we were to
18 prove voluntariness. We have long said we're not going to
19 introduce any statements taken while he's being questioned by
20 the CIA, and this is in part -- the word "custodial" is in
21 part coming out of that as an introduction to the summaries.

22 Let's set it straight. This is a custodial interview.
23 It's not some thing where the question of his freedom to

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1 depart is even at issue.

2 Next slide.

3 The fourth circumstance that we believe, respectfully,
4 the defense allegation ignores is that the terms "custodial
5 interview" and "interviewers" vice "interrogation" and
6 "interrogator" more accurately conveyed that Nashiri's
7 questioners during his time in CIA custody were not merely
8 interrogators who had been trained and certified to administer
9 so-called enhanced interrogation techniques. And this
10 technical definition the defense did receive in July of 2014.
11 This is a page from a special review of the CIA Inspector
12 General that included information about Mr. Nashiri, but it
13 also showed that "interrogator" was this technical term.
14 "Custodial interviewer" is a way to use a generic term without
15 raising a -- a misunderstanding about who was questioning him.
16 Other people besides interrogators questioned him. We needed
17 a generic term, and this was a generic alternative.

18 Slide, please.

19 Judge Pohl saw a similar problem when he was trying to
20 determine how to write 120AA, Your Honor. He refers to people
21 who had direct and substantial contact in the same way. He
22 doesn't want to get tied up in technical definitions of
23 interrogator, because that's a very technical CIA term; he

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1 wants us to know direct and substantial, who are they. And so
2 that's a similar spirit in which "custodial interviewer" was
3 being used.

4 Slide, please.

5 The fifth circumstance that we believe is being
6 ignored in the allegation about custodial interviewer is that
7 there just was no design to withhold helpful information for
8 defending Nashiri. What you had were cables that have nested
9 in every paragraph, intertwined almost, you've got identifying
10 information of CIA officers, you've got very sensitive
11 information, and, you know, along with things that we believe
12 the defense should have. And this is an example of one of the
13 summaries that the defense put in tab 2 or -- yeah, put in tab
14 2 of Attachment D to AE 402.

15 I would point out, by the way, "strapped to a litter,"
16 "clothes ripped off of him," "Nashiri was shaved, moaning and
17 wailing," I mean, those are language that I would submit is
18 not just sometime, someplace, something happened, we're trying
19 to get across the main points, but this is nested in and along
20 things that are sensitive sources and methods.

21 The commission can't determine that unless you look at
22 the original, Your Honor. With respect, you can't just
23 compare it to a heavily redacted tab that they've got. But

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1 what we had were paralegals, analysts under an attorney's
2 supervision trying to get to them in a form they could use
3 with Mr. Nashiri the circumstances of his detention.

4 MJ [COL ACOSTA]: You mentioned paralegals and analysts.
5 How many paralegals and analysts have a need to know all of
6 this information, too?

7 CP [BG MARTINS]: Your Honor, we saw that comment in the
8 Appellate Exhibit 400N, so I went back and checked. It's a
9 sizable number. We know every one of them, where they are.
10 We also -- they had very specific duties that did not include
11 going out and investigating. They didn't have duties to a
12 client, representational duties that might put them in a bind
13 over their own conflicts if they unintentionally released
14 something. They were specifically producing summaries.

15 So, understand the spirit of that question ----

16 MJ [COL ACOSTA]: Right. It's the first part of something
17 that's coming.

18 CP [BG MARTINS]: Every one of them had to be very
19 carefully cleared into doing this process and they were -- it
20 is a pretty sizable number that I'm not going to give you in
21 this forum, if you will, but we believe ----

22 MJ [COL ACOSTA]: You can't even tell me the number in
23 this forum, you don't think?

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1 CP [BG MARTINS]: I can't tell you the number in this
2 forum.

3 MJ [COL ACOSTA]: All right. And it talks about these
4 rules of thumb that they are implementing. What are these
5 rules of thumb?

6 CP [BG MARTINS]: Your Honor, those are -- and I -- can I
7 build on it with this next slide? I will show you an
8 illustration.

9 MJ [COL ACOSTA]: You may. Absolutely.

10 CP [BG MARTINS]: Slide, please.

11 So this was one rule of thumb. And again, it was
12 having to go through hundreds and hundreds of cables where you
13 had very sensitive information in the same paragraphs as
14 others. And this rule of thumb, because at this time -- we'll
15 get to the declassifications that have occurred -- at the time
16 when we were doing this, and even in 2015, the
17 declassification of techniques as they were applied to Nashiri
18 and so-called conditions of detention were still classified.
19 We're trying to put together an unclassified summary or some
20 kind of summary Nashiri can use, and that resulted in a rule
21 of thumb for the analysts, paralegals, and attorneys going
22 through this, as I reviewed it, of absent something that made
23 the information otherwise discoverable.

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1 And in this case, there was a rescue scenario that was
2 a prominent part of his detention. And it was something that
3 he was likely to have remembered and that we want them to be
4 able to review with him. That was otherwise discoverable.
5 But absent some factor that made it discoverable,
6 characterizations and other matters that Nashiri himself did
7 not experience would not be included in the summary, and we
8 would have it all go through the judge.

9 We were also trying -- a lot of good people across
10 government were trying to get this stuff declassified as we
11 were doing it and we were trying to get them discovery,
12 thinking they will also be coming back, hey, we talked to our
13 client. How long was he in that position? How long was he
14 put in the box? We didn't get anything like that back from
15 them, by the way. So that's the way in which good public
16 servants were going through a lot of material.

17 And, Your Honor, there are things in there, the
18 adjective "cat-like," the tissue paper that he was on, that
19 did not get in. And I went back and looked at that, and it
20 wasn't somebody -- part of some concerted design to deny them
21 something. And as I'll show you, the fact that they've got
22 those details is a result, you know, I would submit, our
23 efforts of trying to get the stuff declassified, and I'll talk

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1 about that here.

2 I mean, the whole declassification of conditions of
3 detention and techniques as applied is happening because of
4 this commission, this process, and our obligation to seek
5 declassification. So I would like to build on that.

6 This is one of the examples that defense cites, and
7 I'd like to go through this a little bit. This is an early
8 part in the pretrial proceedings. We are trying to comply
9 with our R.M.C. 701 discovery obligations. Defense theories
10 and approaches might be shifting. Presumably they are talking
11 to the judge about those.

12 We are trying to get unclassified or
13 lowest-classified-possible summaries to the defense. And in
14 the summary depicted on this slide, which is one of the 18 the
15 defense calls out, on the left is this FOIA version that came
16 out. The summarizer included what I presume the defense --
17 I'm sorry, this is -- I'm back on slide 26. And this
18 introduces the point about the rules of thumb. The stuff
19 included here are things that Nashiri could have experienced.

20 Next slide.

21 And then further elaborating the rule of thumb, that
22 material that you see -- I'm sorry, I keep hitting the screen
23 and making some marks on it -- that paragraph 26 are aspects

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1 of the rescue scenario that were not known to Nashiri and were
2 classified, and they caused omission from one summary of
3 related field reports about this rescue scenario.

4 So there were more than one report that came back
5 about the rescue scenario. And if you look at that Bates
6 number, Your Honor, at the bottom of page -- of slide 27, the
7 defense got another version. They didn't put this in their
8 brief. But if they look at that four-page summary, they'll
9 see that has a lot of the same language that's in the version
10 of the cable that the GW National Security Archive received.
11 So they're using -- they're doing an apples-and-oranges
12 comparison.

13 You have the ability to look at the one on the right
14 and to see that it is using the same language that was in a
15 field cable. And again, I'm not saying they are going to look
16 at the summary, that four-page summary at that Bates number
17 and like every bit of it and not want to have more. I am
18 saying it's wrong to say somebody was doctoring the language
19 and you have the ability to make that determination as well.

20 The words "howling," "the crash," "pounded on the wall
21 with their fists," and other details, are all in that summary
22 that we gave them that they didn't include.

23 Slide, please.

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1 And the sixth circumstance, largely ignored by the
2 defense allegations, Your Honor, has to do with the
3 significant declassification that has occurred, and I'm using
4 here the commissions's Protective Order #1 as amended in early
5 2015. This is still in force. And the commission itself put
6 that underlining. That's not emphasis that I put in this
7 language. That's how the protective order now reads.

8 The intent was to allow the defense to be able to
9 discuss aspects of his treatment. That's why we were seeking
10 this under our duty to get declassification consistent with
11 national security, and that happened.

12 Slide, please.

13 This is from AE 013S, the second amended protective
14 order. Details of capture, locations of detention, and
15 identities and dates of those involved with al Nashiri's years
16 in CIA custody remained and remain classified.

17 Slide, please.

18 But this is the commission recognizing it by crossing
19 it out. Interrogation techniques as applied to Nashiri and
20 the conditions in which he was confined were declassified in
21 early 2015, and we have been seeking to have that percolate
22 through all of the summaries that were provided prior to that.
23 That is AE 406.

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1 Slide, please.

2 And taking a step back, you know, this -- there is
3 nothing counterintuitive or nefarious about a government
4 wanting to try an alleged enemy war criminal, alleged, for
5 very serious crimes from receiving classified national
6 security information. There's sometimes a suggestion, and
7 there has been in this case, that that's underlining the
8 presumption of innocence or something. No. He has got the
9 presumption of innocence. There is a -- part of the
10 protection that he gets under the statute is that he may
11 challenge the jurisdiction of the commission on the basis that
12 he's not an alien unprivileged belligerent, and yet he has not
13 done so, and this is where in this case that's documented. He
14 has not done so yet. That has not changed since October 2014.

15 So there is a way for the accused to say, hey, I'm not
16 an alien unprivileged enemy belligerent and possibly changes
17 posture with regard to some of this information. In the
18 meantime, with respect, we believe we are able to rely upon
19 that in the preparation of materials.

20 Your Honor, I'm going to move to slide 33, because
21 again, the commission has asked some questions that have
22 helped clarify some things.

23 Something I found in going through the 18 and looking

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1 at the source material is that attempts to portray
2 classification decisions is just -- this is just inconsistent.
3 This is absurd. At the base of it a lot of times is this
4 important principle of compilation. Group discovery efforts
5 that do rely on rules of thumb that are specific to the kinds
6 of information are having to respect this compilation
7 principle where a critic maybe doesn't have the responsibility
8 to do it, and that is, you can put a couple of pieces together
9 and very quickly undermine a source or method.

10 And this is recognized in the executive order, which
11 is incorporated by reference in the statute. So this
12 compilation principle is strewn throughout these cables, and
13 the OCA has to be pragmatic and has to think about what
14 happens if that detail gets out there. I'm not saying
15 "cat-like" is something that could be compiled easily, but I
16 am saying that that was not done intentionally to deprive
17 anything. But that approach to highly classified information
18 in an attempt to provide summaries to the defense they can use
19 with their client is what's behind a lot of these things that
20 we think are being alleged to be an abusive process.

21 MJ [COL ACOSTA]: Let me ask you this, and this is just
22 kind of a counterargument and maybe it will short a question
23 that I am going to get from -- an argument from the defense is

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1 can the same argument be made in reverse; that first, while
2 some of the substitutions may not have been an intentional
3 redaction of something that could be important, it could still
4 nonetheless be important and it cannot -- all these small,
5 little changes that may not seem important to the
6 government -- and again, they've got 18, and I believe it's
7 just because that's the number they have of these things that
8 they could compare it to. If they'd had 118, you would
9 probably have 118 examples I would probably argue. So they've
10 got 18, you know, that's where they are. So could not all of
11 those small mosaic-type things that they are talking about --
12 that you are talking about as far as the, you know,
13 compilation type things, could not the -- that also work in
14 reverse, that these little things -- like you said, I'm not up
15 here questioning the intent of somebody that's on your staff
16 and whether or not they are -- I have no reason to question
17 somebody's intent on taking something out, and I'm not saying
18 that they are not fine people that are working. I'm sure they
19 are.

20 But cannot their changes, these small changes, can
21 they not add up to a large gap in perhaps the defense
22 knowledge and affect their ability to be in the same position
23 otherwise?

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1 CP [BG MARTINS]: I think there's -- Your Honor, I think
2 there are similarities between the compilation that can make
3 something that is by itself unclassified classified. There
4 are similarities between that and what the commission I
5 believe eloquently talks about in citing Old Chief on how, if
6 you drain the facts out of something and just bring it down to
7 kind of a bare statement, you're not going to achieve the
8 purposes of a trial.

9 I mean, we're aware of that, and there are
10 similarities between. I don't think they're the same, because
11 what's being protected with the national security privilege is
12 a whole framework for collecting intelligence, protect our
13 country. It's not really comparable to -- the defense is
14 doing other important things, but it's just -- that makes it
15 sort of not quite comparable. I don't deny the force of the
16 argument that they have to ultimately be able to cross-examine
17 witnesses ----

18 MJ [COL ACOSTA]: I was using it by analogy, okay?

19 CP [BG MARTINS]: Sure. No, I understand. I understand.
20 But it does help me bring up that point that we believe this
21 process will very much allow them to cross-examine witnesses,
22 to corroborate, to authenticate. It may not be able to be
23 done in the first instance, because we would submit the

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1 original documents, we just aren't going to have authority to
2 let them see all of them. And I'll talk about that some more
3 because I know that's one of the questions you asked the
4 defense and may ask me.

5 Slide, please.

6 So that was like one allegation, the allegation that
7 we were -- the language of "custodial interviews" was
8 disingenuous or misleading.

9 Another thing they have said is that the lack of
10 specificity on the dates is a problem. And there were six
11 dates that were put in more detail in the defense -- in the
12 cables that were received by the National Security Archive at
13 GW. Those dates, by the way, are also in the dates project
14 that we've long been working for and trying to integrate into
15 this process.

16 So we recognize the legitimacy of this and haven't
17 denied that knowing about the sequencing and the timing, that
18 those things are relevant to such -- for instance, such things
19 as the litigation over voluntariness of subsequent statements
20 they may have given to the FBI and other things. And so --

21 Slide, please.

22 And yet I do want to point out that certain
23 information about dates remains sensitive. I said six of the

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1 cables that they provided, it's actually nine. So there are
2 18 cables, nine of them from the GW archive have more specific
3 date information than "late 2002" or "mid-2003." So -- but I
4 am pointing out with this slide, one of the cables that did
5 not have specific information, its date information can remain
6 very sensitive. And we have a declaration to that effect and
7 we are updating it for you per the commission's guidance.

8 Slide, please.

9 In order to live up to a commitment that we've long
10 had of giving them in -- the chronological order of everything
11 we've given them -- again, this goes back to when we were
12 litigating 120AA, the judge noted that in his ruling.

13 Slide, please.

14 The multiyear project that we've done has resulted in
15 a 34-page spreadsheet that they can use with Mr. al Nashiri
16 that sequentially lists the reports and gives the most
17 specific date information that we can give, recognizing that
18 there are reasons why some date information remains very
19 sensitive.

20 Slide, please.

21 So taking up a few of the other defense allegations,
22 there was a claim that we, you know -- that Judge Pohl and we
23 improperly deprived the defense of a reference to Nashiri

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1 having been described as medically stable and another -- that
2 Nashiri had spoken about Khalid Shaikh Mohammad or had been
3 questioned about Khalid Shaikh Mohammad, and this is just
4 incorrect. While one summary did omit that specific
5 information, another at the Bates number there ending in
6 76655, that contains both items. And we would just refer them
7 to them. There are some examples of this where they've
8 just -- they've just not got, you know, through all the
9 discovery that we've provided them.

10 Your Honor, I want to use this slide to highlight ----

11 MJ [COL ACOSTA]: What's the inconsistency, though? Why
12 is there inconsistency?

13 CP [BG MARTINS]: Well, Your Honor, we pick up something
14 that we find in the files and we consider the relevance of it.
15 We do think about the judge's ultimate noncumulateness,
16 relevance, helpfulness standard, because this is helpfully
17 classified original documents, lots of very sensitive things
18 in it, and we summarize it.

19 And there are different -- we're also providing now --
20 we've been trying to give a version, if it's classified,
21 that -- an unclassified version for Mr. Nashiri and maybe a
22 classified version for the defense. We are using that model
23 that the commission points to in 400N. There are many things

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1 we give the defense because they have clearances that we don't
2 give Mr. Nashiri.

3 So the examples I have given you are, there is
4 different field reporting that overlaps, and this -- the
5 version -- if they go to that version of the same cable, the
6 one that was produced in FOIA, they will see "medically
7 stable" and the questioning about KSM are in there.

8 Slide, please.

9 I'm sorry, let me -- stay on slide 38, please.

10 Your Honor, I would like to use this to point out that there
11 is a Bates number in slide 38 and then there is a blank space.
12 There are eight occasions in this slide deck where we want to
13 be able to tell you where you can find that, and I am asking
14 the commission to consider it. And yet those are in an
15 ex parte, under seal record. So I've got a version of that
16 slide and the seven others where that appears that I would
17 like to submit to the commission under a separate
18 Appellate Exhibit AE 400G number -- or 402G number and ask you
19 to consider it. Because it gives you the places, specific
20 places within the appellate record where you can refer to what
21 I'm talking about. You just had a question about
22 inconsistencies. You'd be able to look at it, and I'm
23 pinpointing you to it. The Bates number doesn't help you

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1 because that's what we've given to the defense. So my request
2 is that the places on this and the seven other slides where
3 there is data missing, that we be able to submit those eight
4 slides to the commission ex parte. The defense is having
5 notice that we are doing this, but we believe it's important
6 for you to be able ----

7 MJ [COL ACOSTA]: When are they having notice? Right now
8 or that you told them previously?

9 CP [BG MARTINS]: I have those. I could give them to the
10 commission. I can't give a copy to the defense.

11 MJ [COL ACOSTA]: No, no. I understand. But you said
12 they have notice. Do they have notice because you just said
13 it?

14 CP [BG MARTINS]: Yeah, because I am saying it.

15 MJ [COL ACOSTA]: Okay.

16 CP [BG MARTINS]: We think that before you decide 402,
17 Your Honor, you should look at the versions that we provided,
18 and this gives you the place where you can actually find them.
19 You can't find them in the Bates-numbered versions.

20 MJ [COL ACOSTA]: Well, if you are going to file it, it's
21 going to be 400F, not G.

22 CP [BG MARTINS]: 400F, thank you. Thank you, Your Honor.
23 We will file it.

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1 MJ [COL ACOSTA]: Pardon me, 402F, not 400F.

2 CP [BG MARTINS]: 402F, I understand. It's eight pages
3 and it's the slides that you have here beginning with
4 slide 24. There are eight slides that have this blank in them
5 near a Bates number.

6 MJ [COL ACOSTA]: Now, you just stated there's times where
7 you're giving classified information to the defense ----

8 CP [BG MARTINS]: Yes.

9 MJ [COL ACOSTA]: ---- that doesn't go to the accused.
10 Isn't that exactly what Mr. Natale stood where you were about
11 an hour ago and said he wants?

12 CP [BG MARTINS]: Your Honor, we've used that model and
13 the commission has encouraged it in the past extensively. But
14 what does not follow from that, that there isn't still
15 information for which we need the ex parte process.

16 MJ [COL ACOSTA]: You're saying that it's a case-by-case
17 basis for each document?

18 CP [BG MARTINS]: I think it's based on the declaration,
19 Your Honor, that you're getting under 949p-4(a). There is
20 still information for which that process we've discussed,
21 which again, an Executive Branch determination looking at what
22 adversaries want to get and at the category of person in this
23 case who's getting it ----

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1 MJ [COL ACOSTA]: So who's making the decision on which
2 document you can give them and not to the accused and which
3 document you can't give them at all?

4 CP [BG MARTINS]: Ultimately we believe the commission
5 is ----

6 MJ [COL ACOSTA]: No, no. Who's making the decision --
7 you're making a decision at some point without involving the
8 commission that you are giving them some classified
9 information that they're not giving a classified version of
10 to -- and you're giving -- you just said, there are some
11 times ----

12 CP [BG MARTINS]: The law -- the law is ----

13 MJ [COL ACOSTA]: Hold on. Hold on.

14 CP [BG MARTINS]: Go ahead.

15 MJ [COL ACOSTA]: You said, and I don't mean to cut you
16 off, but I'm just trying ----

17 CP [BG MARTINS]: Sure, go ahead.

18 MJ [COL ACOSTA]: ---- I just want to clarify from what
19 you said and what we're also talking about that there are
20 times where you have a classified document and that you create
21 an unclassified version and you give both to the defense
22 attorneys: One version, the classified version that they can
23 look at; and the unclassified version that they can share with

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1 their client. And that sometimes does it not occur without
2 the involvement of the commission, yes or no?

3 CP [BG MARTINS]: Yes.

4 MJ [COL ACOSTA]: Okay. So now ----

5 CP [BG MARTINS]: Emphatically yes.

6 MJ [COL ACOSTA]: ---- now this ex parte process where you
7 say, commission, we need -- here's the -- we want to do this
8 ex parte. Here is the classified version, here is the
9 summary; we want you to bless off on us giving this summary to
10 the accused. Who is making the determination of when to use
11 the first process I described, which sounds similar to what
12 Mr. Natale asked for, which is they get both versions and the
13 second version where you use the -- where you use the 505
14 procedures?

15 CP [BG MARTINS]: Well, you say who is making the
16 determination. We are making an initial prosecutorial look,
17 which is our job.

18 MJ [COL ACOSTA]: Right. I'm saying, is it you or is it
19 the OCA?

20 CP [BG MARTINS]: Well, we are informed, as the commission
21 is at a later point in the process, by an assessment of what
22 could cause risk to national security. We are often looking
23 at the same declarations we filed with you to help us read the

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1 lines. And then we are looking at 949p-4(a) in determining
2 whether it would cause damage in the view of a technocrat,
3 practical, not immersed in our day-to-day lawyer world but
4 have to listen to us about things, they determine that would
5 be damaging to national security. If they don't and it's
6 discoverable, we give it to the defense.

7 MJ [COL ACOSTA]: So it's you -- and when I say you, I
8 mean the government team, the prosecution team -- in
9 consultation with the stakeholder, correct?

10 CP [BG MARTINS]: In consultation with the original
11 classification authority.

12 MJ [COL ACOSTA]: Yes, the OCA, the stakeholder ----

13 CP [BG MARTINS]: Yes, sir. Yes, Your Honor.

14 MJ [COL ACOSTA]: ---- the agency or whoever controlled --
15 was the classification authority for that particular document,
16 right?

17 CP [BG MARTINS]: Yes. And we also are thinking about the
18 commission's rulings, right? Because we are often looking at
19 it through the lens of Appellate Exhibit 120AA, four theories
20 of relevance, ten categories of RDI information.

21 MJ [COL ACOSTA]: Right.

22 CP [BG MARTINS]: And we're saying, hmm, you know, maybe
23 if we didn't have the 120 process, maybe that's not something

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1 we'd have normally be gravitated to, but we are trying to
2 implement the judge's rulings. So at all stages of this, we
3 are trying to follow our obligations under the law, which
4 requires us to consult the OCAs. That's not a discretionary
5 thing; we have to.

6 MJ [COL ACOSTA]: Right. I was just trying to determine
7 where that -- where that came in.

8 CP [BG MARTINS]: No, absolutely. I think that's a useful
9 back and forth because we are -- we are going out there doing
10 our normal prosecutorial job, but we are also then having to
11 look at it, hey, this original that we are looking at, that we
12 see some relevant information locked up in it, how do we get
13 that out? I mean, that's our -- that's our way of approaching
14 it, and we have to do that in consultation with OCAs and
15 sometimes we have to bring it to the judge.

16 MJ [COL ACOSTA]: And are the OCAs -- are the OCAs saying
17 this piece of classified information you can trust the defense
18 counsel to have, but this piece of classified information you
19 can't trust the defense counsel to have?

20 CP [BG MARTINS]: We would ask you to read the declaration
21 that we provide. I would put it the way I put it at the
22 outset at an earlier slide: The United States is not
23 required, when trying to protect treasures -- treasured

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1 national secrets, to only follow the 13 adjudicative
2 guidelines as to an individual's eligibility.

3 MJ [COL ACOSTA]: No, I know. But at some point, you are
4 saying they are allowed to see some classified information,
5 they are, or the OCA is. And that's who ----

6 CP [BG MARTINS]: OCA in consult- -- you know, we are
7 making this determination of relevance and discoverability, as
8 prosecutors do; and if it's classified, we are consulting the
9 OCAs, we are reading the declarations, and some of them are
10 not hard. We are giving them lots of -- we're giving them
11 thousands of pages of discovery.

12 MJ [COL ACOSTA]: I am not disputing that. I am trying to
13 get into the kind of more of the process here of how it's
14 going, because their motion is about they don't like the
15 process of how it's going and I am talking about the process.

16 CP [BG MARTINS]: I understand.

17 MJ [COL ACOSTA]: And the process for determining which
18 time you can give the defense attorneys the classified
19 information and which time you can't give them the classified
20 information, is what I was interested in.

21 CP [BG MARTINS]: I understand. It's a good question and
22 it's driven by the law and by the responsibility of an
23 original classification authority who is trained, as the Yunis

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1 case would say, on the things an adversary would love to get
2 even if it's an innocent interview with somebody and you
3 happen to talk to them about something that you got in
4 discovery. They have to consider all of that.

5 The commission still has to look at it and say, is
6 this necessary for a fair trial, and there is a process by
7 which that gets evaluated.

8 MJ [COL ACOSTA]: And the commission under 120 had said
9 here are the things that are relevant and necessary for the
10 defense, and you are going back and looking at it. You are
11 not trying to -- I'm sure that you are not going through and
12 going, well, this stuff is not relevant ----

13 CP [BG MARTINS]: We are not.

14 MJ [COL ACOSTA]: ---- let's go through, let's go into the
15 505 process with this nonrelevant material. We are only
16 getting there with relevant material as is defined by 120,
17 correct?

18 CP [BG MARTINS]: Correct. Although 120 was very much
19 about that whole reconsideration that we did in the spring of
20 2014, was very much about what the commission left out its
21 first try in the order, because it said turn over the
22 identities of everybody who had direct and substantial
23 contact, turn over their training records, their commendatory

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1 and disciplinary data, turn over all of the times when the
2 accused talked about anything, and so there was -- and they
3 didn't make any reference to our ability to seek
4 substitutions. So they weren't -- we would submit, weren't
5 following the process by which that information gets produced,
6 and we weren't complying, for instance, with the Intelligence
7 Identities Protection Act, even.

8 And the commission corrected and put out a version
9 that specifically said the government should come through the
10 505 process, and that's what we've done.

11 With respect, Your Honor, another thing in 400N where
12 it kind of looks like all the choice in this is sort of being
13 pushed to the government, we are -- we have the burden of
14 determining whether a piece of classified information should
15 be produced. We agree on that. That should never get
16 displaced from us.

17 But there is also a requirement for an engagement of a
18 process that's going to evaluate the risks and then look at
19 that summary and say you're still not giving them what they
20 need and again, at times having that to be iterative, as it's
21 been many times in this case.

22 MJ [COL ACOSTA]: Everybody wants to keep talking about
23 400N and we are not talking about it yet, and I'll talk to you

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1 about that when it's time ----

2 CP [BG MARTINS]: I understand.

3 MJ [COL ACOSTA]: ---- about the adequacy as I addressed
4 it then, okay? We'll talk about that ----

5 CP [BG MARTINS]: I understand.

6 MJ [COL ACOSTA]: ---- about what the expectation will be
7 then, okay?

8 CP [BG MARTINS]: I understand. Your Honor, so -- slide,
9 please.

10 Another example was that they were deprived of
11 information, that an objective of the RDI program was learned
12 helplessness. And I would submit again, this is not one the
13 commission can review in the abstract. So defense is alleging
14 that that was left out of a cable intentionally to deprive
15 them of the idea that that's what the RDI program was about.

16 Slide, please.

17 This is something they got in discovery. It's a CIA
18 document that defines and describes learned helplessness.
19 That's the Bates number.

20 Slide, please.

21 MJ [COL ACOSTA]: I think this goes back to more of my
22 question of, why is there an inconsistency? If it's okay that
23 you gave it to them here, why is it not over here ----

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1 CP [BG MARTINS]: This is ----

2 MJ [COL ACOSTA]: ---- and -- and the follow-up question,
3 the logical question that I think the defense is following is,
4 is there something else that I am missing? Is there something
5 else that isn't being consistently applied? Because these
6 rules of thumb, whatever they may be -- and I'm still not 100
7 percent satisfied on how you have defined what these rules of
8 thumb that you are using to make these substitutions are, and
9 that again might be back to 400N.

10 CP [BG MARTINS]: Right.

11 MJ [COL ACOSTA]: I am likely violating my own previous
12 statement about I don't want to get into 400N today, but that
13 gets into that, how these are done. So that -- do you see my
14 question there?

15 CP [BG MARTINS]: Your Honor, so this document goes to
16 them. It's not nestled within a lot of other classified
17 information. I reviewed that cable. Cable 15 is in their
18 Appendix C, and it was the learned helplessness mentioned in
19 there was nestled among things that were of that category of
20 the rule of thumb that Nashiri would not have experienced it.
21 It was about planning, methodology; again, we are trying to
22 get a version to them they can use with him. Not entirely
23 satisfactory because ultimately we were trying to get more of

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1 that information out, and it comes out in 2018.

2 So this is just a different document. It's actually
3 produced unclassified. It doesn't have nestled within it very
4 sensitive sources and methods of intelligence gathering,
5 and -- slide, please.

6 MJ [COL ACOSTA]: He was able to know it from this other
7 filing?

8 CP [BG MARTINS]: And not only this, Your Honor -- I am
9 about to get there. They have got lots of examples where
10 we're -- there is no question the CIA was seeking to induce,
11 in these documents, a state of learned helplessness. This
12 is -- again, this is that same document. This is the next
13 page of it, and again, this is one of those slides that I'm
14 going to be submitting to you as 402F that gives you where you
15 can find it.

16 Slide, please.

17 And again, they got this. This is just -- I am just
18 pointing out that if there is a Bates number it means, you
19 know, there is a record that they received it in a certificate
20 of service.

21 Slide, please.

22 And these are other learned helplessness references
23 that they have got Bates numbers for. Again, because "in the

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1 record at" column is in the sealed appellate ex parte record,
2 I'll be submitting slide 43 ----

3 MJ [COL ACOSTA]: Thank you.

4 CP [BG MARTINS]: ---- among the AE 402F.

5 Slide, please.

6 Your Honor, the previous slide indicated among the
7 things that they've got that talk learned helplessness were
8 the Senate Select Committee on Intelligence Report. After all
9 the Bates numbers, I also listed the Senate Select Committee
10 on Intelligence Executive Summary. I also listed the cables.
11 And you could kind of say, wait a minute, on a slide that
12 talks about "made available through government efforts," how
13 are you giving yourself credit for that? And I just want to
14 point out two letters that we did include in our references to
15 in our motion -- in our response.

16 These two letters show that that process in 2011, '12,
17 '13, '14, of seeking to get declassification was part
18 considering this commission's work.

19 Slide, please.

20 The first letter from Counsel to the President that we
21 cited to is depicted here. She is specifically stating that
22 they're intending to support the military commission
23 proceedings, including through declassification. And that

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1 ultimately feeds through to the commission's ruling in early
2 2015 to declass- -- to say that techniques as applied and
3 conditions of detention are no longer classified.

4 Slide, please.

5 The other letter from Counsel to the President that's
6 depicted on slide 46, you know, indicates that throughout
7 there is an interest in ensuring we don't compromise national
8 security in the process. So it was methodical, and it took a
9 long time to consider the different considerations.

10 Slide, please.

11 And this is our duty that we were following throughout
12 all of that. And again, I'm pretty proud of this work. So
13 we're being kind of hammered a little bit for getting the
14 stuff declassified and folks are going back and grabbing up
15 the stuff prior to that date. So -- but this is a solemn
16 obligation of ours.

17 Slide, please.

18 So then what happens? So that -- the 500-page
19 Executive Summary is declassified. The declassifications that
20 run through that are generally of the kind, techniques as
21 applied and conditions of detention. It leads to these two
22 footnotes on page 67 and there they are. You know, it's
23 talking about al Nashiri's time at DETENTION SITE GREEN.

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1 Slide, please.

2 I am applauding the initiative of the students. And
3 I'm not making any comments about the defense not having come
4 back to us and asked us questions of this kind like we get in
5 cases. But they're asking for the stuff in those footnotes,
6 which again is coming about as a result of the Executive
7 Branch trying to facilitate this trial. We think that's an
8 important piece of context, Your Honor. The stuff they got in
9 2018 -- again, it's very similar to the project we had in 406
10 that you now have, we have a commission to give it to -- is
11 the result of a declassification process.

12 Slide, please.

13 And the Senate study has a lot of graphic treatment.
14 Again, the stuff that's now available to them to use in public
15 is hardly a desiccated statement of fact, and they've got
16 lots -- the idea that the students have more than they do is
17 nonsense. Nonsense. They have hundreds and hundreds of
18 highly detailed OIG interviews, other testimony that
19 corroborates with this, and we are -- we have stated for long,
20 we're prepared to stipulate to this. Again, we're not -- no
21 one is required to stipulate, but we can stipulate to things.
22 They can use anything we can verify with -- by looking at the
23 original cables.

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1 Slide, please.

2 And this is one of our statements where we're prepared
3 to stipulate that the Executive Summary recitations are
4 verifiable, did occur. So they can use that. And it's
5 understandable how skilled defense counsel can use that to
6 help their client.

7 Slide, please.

8 I just want to end by giving you some examples of
9 that, Your Honor, because you have asked where we should go
10 from here. Before you rule on this motion, Your Honor, we
11 respectfully request that you take a look at some of the types
12 of discovery that have been provided. These examples that are
13 listed on slide 52, we would submit, have rich and vivid
14 details. They were provided to the defense at the Bates
15 numbers on the left. You can find them in the version of
16 slide 52 that will be submitted today in Appellate Exhibit
17 402F. And, you know, this is helpful to the defense, we would
18 submit. It puts in a different light some notion that we're
19 holding back intentionally.

20 Slide, please.

21 These are some photographs. Again, you don't have
22 them because we did provide them directly to the defense on
23 that approach that we talked about before.

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1 And, Your Honor, that idea of what we can give to the
2 defense, why not everything, the -- I'm not going back to
3 400N, but I think 400N is a careful, thoughtful thing, so I
4 want to highlight an aspect of it. There was a notation to
5 Moussaoui, El-Mezain, and In Re Terrorist Bombings as examples
6 of where the trial judge struck the balance by letting the
7 defense get it but not the accused, and we respectfully would
8 look at that a bit different. It struck a balance in a
9 certain category of information that way; and again, we're
10 doing it. With some of the same kind of information that's in
11 El-Mezain and some of the same kind of information in
12 Moussaoui, we are striking the balance the same way those
13 federal courts did. They're not dealing with the information
14 we're dealing with. Nor did they exclude -- nor did the
15 government let the defense see everything in those cases.

16 Moussaoui is a case where the defense never had access
17 to the deponents that they were seeking. They never had
18 access to the deponents at all. There was a process of
19 summarizing and substitution that grew out of questions,
20 interrogatories that were given to those individuals in a
21 black site.

22 So we agree, there has to be use of that model. That
23 is a way to strike a balance, appropriate balance in a lot of

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1 places but not in every place. And we believe the categories
2 where it has not been struck that way here are well justified.

3 So these are photographs. Again, I'd ask that you
4 review those before there is some thought that we're holding
5 back. And all of them are displayable to Nashiri at this
6 point for preparation.

7 Slide, please.

8 And then the last table, Your Honor, this is
9 information from the categories in the Appellate Exhibit
10 120AA, ten categories of RDI information. The defense has
11 them at the Bates number. You will have them in the version
12 of 54 that will be in Appellate Exhibit 120 -- or I'm sorry,
13 402F. And again, please read those before you think we're
14 holding back.

15 Slide, please.

16 And then, you know, really ultimately, witnesses that
17 are relevant and necessary under the commission in this
18 process, how it determines it, will be produced. Compulsory
19 process of the state, to assist the defense. There is a
20 process to get there dealing with classified information and
21 sensitive sources and methods. But in this very commission,
22 had we not been stayed or abated in February of 2018, this was
23 on the docket, to bring in individuals who would have provided

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1 testimony relating to the alleged -- to the AE 354.

2 Slide, please.

3 So, Your Honor, that's our bottom line up front.

4 Again, we think you have the authority. There are
5 discretionary aspects in that authority, certainly. But if a
6 military judge declines to use the clear authority when OCAs
7 are providing appropriate declarations, we are seeking it.
8 You've spoken to the defense counsel about their theories that
9 there is much more likelihood of failing to protect the
10 information and promoting a type of frustration of forward
11 movement that Congress is specifically trying to deal with in
12 the statute.

13 On the way forward, we believe in-camera proceedings,
14 as we are moving out of the 949p-4 world of discovery to a
15 world where testimony is coming in and we are having hearings
16 and introduction of exhibits, there is a lot of room for
17 in-camera proceedings, both hearings where we are discussing
18 use, relevance, admissibility and how things will be used
19 under M.C.R.E. 505(h) -- those are hearings, not sessions,
20 where we are taking evidence, but those help us figure out
21 what they need to use. We are using this extensively in the
22 9/11 case in laying out very sensitive areas and how one can
23 navigate through those and dealing with them in 505(h)

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1 hearings, and then in sessions as well.

2 There are going to be times when the defense is going
3 to have a motion to compel and it's not going to be able to
4 make all of its points or show the inadequacy of something
5 with a witness on the stand where they go hand them a summary
6 and they are not able to cross-examine him effectively on the
7 summary, that can lead to a compulsion of something that's
8 better or we are finally put on the horns of the sanction as
9 Congress envisions it, which is ----

10 MJ [COL ACOSTA]: What's that sanction?

11 CP [BG MARTINS]: Well, I mean, it depends on the nature
12 of the -- the circumstances. So if the witness receives a
13 summary, can't be cross-examined, you've got the -- you will
14 have had the original. You will be able to make a
15 determination in detail of whether the substitute is depriving
16 them of something that is helpful in the Yunis sense. And
17 there we finally have a factual dilemma that is what Congress
18 intended. We have evaluated the risk; the judge is not making
19 the decision in the abstract that this is inadequate or it's
20 desiccated. You have got a witness on the stand. The
21 consequences both to national security and to the trial can be
22 evaluated, U.S. v. Collins, and then you say, government,
23 produce this information -- or what they need or the original

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1 e-mail or whatever -- or I'm going to have to dismiss the case
2 or I'm going to exclude certain evidence, et cetera.

3 MJ [COL ACOSTA]: Right. Okay. So I think that's what --
4 not the sanction portion, but the process that you just
5 described of going through all of this is what -- part of what
6 the defense argument is is what they say that they want to
7 seek to avoid, of having to have all of those -- to have the
8 505 process go through, and then we have the hearing about
9 whether or not those witnesses can be effectively
10 cross-examined.

11 When they challenge that, we say okay, we are going to
12 cross-examine this witness and we bring them in, find out they
13 can't, and then I tell you back -- then I tell you, yes, oh,
14 no, this was good, or the defense learns, okay, this is enough
15 to cross-examine this witness or enough to question the
16 admissibility of Exhibit, you know, 25, or, you know, the
17 defense's alternative is you give them -- you know, you choose
18 to use the process that you described that you do sometimes,
19 which is you give them a classified version that they can see
20 and you can determine whether or not you need it. And I'm not
21 saying that it has to be on every -- I mean, you stated that
22 you do it at times.

23 CP [BG MARTINS]: If they want to avoid it, one approach

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1 could be to say we need more information about this, a
2 follow-up discovery request. We have seen none of those, by
3 the way. I went back through all of our discovery requests.
4 I saw -- we've got a generic discovery request for 85
5 categories of RDI information that led to the 120 litigation.
6 They have not come back and said we are getting summary at
7 Bates number blank, summary at Bates number blank, both
8 talking about Nashiri in the box; how long did he spend in the
9 box? Who was with him among those individuals who were
10 identified by pseudonym, a three-digit designator? We are not
11 getting any of that.

12 That's one, I would submit, approach to this before we
13 reject an entire process that has absolute authority behind
14 it.

15 MJ [COL ACOSTA]: Have they even appealed the 505
16 summaries? I don't think they can appeal that, can they?

17 CP [BG MARTINS]: It's not subject to reconsideration ----

18 MJ [COL ACOSTA]: Right.

19 CP [BG MARTINS]: ---- under the statute.

20 MJ [COL ACOSTA]: That's almost what you just described,
21 though, isn't it? They said we got this summary ----

22 CP [BG MARTINS]: They are asking us. That's not an
23 appeal.

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1 MJ [COL ACOSTA]: Okay.

2 CP [BG MARTINS]: They are saying, can we get follow-up
3 information on a specific Bates number, got zero.

4 MJ [COL ACOSTA]: Okay, not a reconsideration to the
5 commission ----

6 CP [BG MARTINS]: Zilch of ----

7 MJ [COL ACOSTA]: ---- but go to you and they say we have
8 this and it leads us to the following follow-up questions.

9 CP [BG MARTINS]: Correct. I would submit it shouldn't be
10 like as Mr. Natale said, which is we are going to bombard you
11 with a bunch of stuff. But if they have a theory that they
12 believe is not -- you know, needs to be explained to you, they
13 can go to you under p-2 and provide that to you.

14 And then if the commission looks at the material, it's
15 in the appellate record, we may be producing related material
16 due to our continuing discovery request and you ask the
17 government about it, the commission can reconsider things. I
18 don't believe that's a way around the statute. It's a way
19 that respects process. And the process is not that every time
20 they don't like something or they, you know, they think there
21 is bad faith, they are going to move for reconsideration.

22 We absolutely want to get this case to trial. That's
23 what we are about. We are producing discovery and trying to

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1 give them what they need. They ask us how long was a
2 particular technique applied, ask us about inconsistencies
3 they are seeing. Instead of assembling 18 cables that are the
4 result of, I would submit, the hard work of the folks on the
5 staff I've got in part, and a lot of other government
6 personnel did a lot of great work in that, and say gotcha to
7 stuff that is in a filing that we haven't been able to give
8 you because we haven't had a commission because defense
9 counsel departed in late 2017 I would submit is a bit unfair.

10 MJ [COL ACOSTA]: All right. We are getting awful close
11 to some finger-pointing as far as where we are and stuff. I
12 talked about this extensively with both sides. We are moving
13 forward, not backwards.

14 My question -- a couple of questions I have for you is
15 you talk -- 701 states that I can -- you know, that the
16 commission can allow summaries and substitutions to the extent
17 practicable, correct?

18 CP [BG MARTINS]: The commission ----

19 MJ [COL ACOSTA]: 701F.

20 CP [BG MARTINS]: 701F, yes. 701F is a restatement of
21 essentially 505.

22 MJ [COL ACOSTA]: Right. It says to the extent
23 practicable. Is there a limit to the extent practicable?

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1 CP [BG MARTINS]: I think "the extent practicable" is the
2 same language as "may" in 949p-4(b)(1), and I will tell
3 Your Honor our intent is to keep this civil and appropriate
4 and to deal with requests the defense gives us. I just want
5 you to know I am taking onboard your caution.

6 MJ [COL ACOSTA]: Right. I am talking about to the extent
7 practicable. I am talking about how does this apply to our
8 process with that amount of material, because I think a
9 fair -- I think a fair interpretation of the defense in
10 Mr. Natale's argument was gee, Judge, there sure is a lot of
11 this stuff. Let's -- you know, let's deal with it in a more
12 efficient process, and that the process that the government
13 and that is laid out in 505 may not be as practicable. How do
14 you address that?

15 CP [BG MARTINS]: Your Honor, I don't think that 701F
16 surmounts the federal court interpretation of 949p-4(a), (b),
17 and (c). That's the process; that's what we've been
18 following. I don't believe that gives the commission any
19 further discretion to determine that we've got to use the
20 let-the-defense-have-it model. I believe it all still has to
21 come through the process in 949p-4.

22 So I don't believe that language -- I don't believe
23 the language, although it gives the commission important

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1 authority, that your authority to regulate the time, place,
2 and manner of discovery in the Rules for Military Commission
3 and the Rules for Court-Martial give you authority to
4 countermand, if you will, or pull in a different direction
5 from 949p-4. That's how we deal with very sensitive sources.
6 I don't believe that 701(f) is intended to be different from
7 949p-4, those parts of (f) that deal with discovery, which
8 is -- because it's under 701, it does.

9 MJ [COL ACOSTA]: Where do you believe the need-to-know,
10 can you expand upon that, the need-to-know issue fits into the
11 process as you would like -- as has been going on under 505?
12 Need-to-know for the defense.

13 I mean, I know that you said that it's just, that
14 it's -- that there is that separate -- I know I come back to
15 it, or I've asked you about this; however, can you explain to
16 me how, again, their need-to-know or their ability to know
17 some of the material that you get -- it gets to the question
18 of when they get -- when they get certain classified material
19 that apparently you think is okay for them and they need to
20 know, and then some of -- but unclassified goes to their
21 client and then some of it they don't have a need-to-know and
22 they only get the summary for, how does that mesh in the
23 process?

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1 CP [BG MARTINS]: Your Honor, it is -- I think the only
2 way to reconcile the term "need," because that can be read by
3 a judge to say, hey, wait a minute, you know, I'm determining
4 whether this is material to the case. The way to reconcile it
5 is that there is a process by which the commission is able to
6 ensure everything that's noncumulative, relevant, and helpful
7 to a legally cognizable defense, rebuttal of the prosecution's
8 case, or to sentencing. There is a way for it to do that, and
9 that's a process.

10 But the practical people who know our adversaries and
11 who know our vulnerabilities and where the information is are
12 the ones who have to decide, is that a person, 13 adjudicative
13 guidelines, you know, background, foreign contacts, all of
14 that, but also categories of persons, whether they should be
15 given access to this.

16 The commission can say, well, that is not going to
17 allow us to have a fair trial, because I've looked at your
18 explanation, I've looked at the information, and I know the
19 issues in the case, and I'm telling you -- then we've now got
20 in detail a proper burden on the government.

21 MJ [COL ACOSTA]: Right.

22 CP [BG MARTINS]: What CIPA seems to rule out is not that
23 important tug of war. CIPA has been described as an

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1 invitation to struggle, that important tug of war. What it
2 rules out is that that tug of war be uninformed and failure to
3 evaluate in detail what might happen to national security and
4 what might happen to the accused's case.

5 And with respect, Your Honor, we submit that's -- the
6 judge has to use all of the authorities that he can get his
7 hand on. He has got to resourcefully find a way to get a
8 trial everywhere we can and to get security all the time.

9 MJ [COL ACOSTA]: The MCA adds the phrase "to the extent
10 necessary to protect classified information," correct?

11 CP [BG MARTINS]: Correct. Yes, Your Honor.

12 MJ [COL ACOSTA]: That's the difference, right?

13 Does that mean that Congress intended or saw a
14 circumstance where it could be that ex parte is not necessary
15 to protect the classified information?

16 CP [BG MARTINS]: All those occasions when we have
17 produced things directly to the defense fall into that
18 category. So yeah, you can give meaning to the statute by
19 having that determination "to the extent necessary" in
20 p-4(b)(2) being one where the Executive Branch still does its
21 part and the judge still does his part under the process. So
22 we believe our reading of that phrase is one that gives
23 meaning to all of the different parts of the statute and the

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1 different roles.

2 MJ [COL ACOSTA]: And the authority to state that an
3 ex parte presentation is necessary, whose authority is that?

4 CP [BG MARTINS]: An ex parte presentation?

5 MJ [COL ACOSTA]: Yes.

6 CP [BG MARTINS]: Your Honor, if the qualifying
7 declaration has been filed, if the judge has authorized access
8 to the classified information -- which we believe has happened
9 in all of the post AE 120AA -- and the process was followed,
10 the 949p-4 process, which is what's required under 949p-4, is
11 that we have to follow that process; if there is going to be
12 an authorization of their access, if that happens, the judge
13 may authorize a substitution. He may at that point, if he's
14 got a crystallized understanding enough in detail of the cost
15 to national security of providing a specific piece of
16 information and the cost to the accused's case, seek to impose
17 a sanction ----

18 MJ [COL ACOSTA]: I'm talking about to conduct the
19 ex parte.

20 CP [BG MARTINS]: That's a "shall." That's a "shall."

21 MJ [COL ACOSTA]: Yeah.

22 CP [BG MARTINS]: If you've authorized -- and again, we
23 believe 120AA is important law of the case in context. Judge

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1 Pohl invited us, he said come back to me with the stuff that
2 implicates the sensitive sources and methods. So here we are,
3 now we are giving you summaries. If a specific one isn't
4 satisfactory because you think it's leaving something out --
5 that has happened a number of times in this case -- we look at
6 it, but now we look at it aware of the different consequences
7 that could happen. And we often come back with a revised
8 version. And that's how it's intended to work iteratively
9 there.

10 But if the summary is authorized -- the ability of our
11 side to seek it ex parte is not in -- is not in doubt. That
12 is a "shall," because our ability to articulate why a summary
13 may be needed is intertwined. As the KSM commission actually
14 just ruled, the considerations in the declaration about what
15 might damage national security, if we are going to explain why
16 a substitution is needed, we have to refer and return to ----

17 MJ [COL ACOSTA]: Right. And this circles back to my
18 question and your point about my stating "to the extent
19 necessary." Because that's one of the distinctions, right?
20 That's a distinction between CIPA and the MCA that's
21 different. "To the extent necessary" isn't in CIPA, it's in
22 the MCA. And you are saying, well, why are you -- and you've
23 asked the commission ----

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1 CP [BG MARTINS]: Well, Section 4 of CIPA ----

2 MJ [COL ACOSTA]: Hold on. And you've asked the question,
3 why are you looking at that? Well, that's a part that's
4 different.

5 CP [BG MARTINS]: I understand. Well, let me just --
6 Your Honor, there's -- actually one of the ones we skipped
7 over, I think I need to go back to. Go to, please, to
8 slide 14.

9 Your Honor, Section 4 of CIPA looks significantly
10 different from Section p-4. And we believe it would turn p-4
11 on its head to conclude that it did not contemplate all of
12 what's in the case law from 1980 forward on Section 4.

13 This reflects -- this is the Amawi case out of the
14 Sixth Circuit. It is cited prominently in the Asgari case,
15 which is also Sixth Circuit. And it is saying here that
16 Section 4 actually didn't even speak of ex parte hearings. It
17 doesn't have the word "ex parte" in it. If you go look at
18 Section 4 of CIPA itself, it doesn't even have the word
19 "ex parte" in it; and yet the courts said for us to give this
20 effect we have to give it.

21 So Amawi illustrates that we have codified a practice,
22 a federal practice.

23 MJ [COL ACOSTA]: And that's that expansion, presenting

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1 it -- that CIPA says it's in writing, the MCA says ex parte
2 presentation.

3 CP [BG MARTINS]: I totally understand the focus on that
4 phrase. We don't believe that is giving the commission
5 discretion. I kind of said this at the outset, but it's
6 enabling me to say it in a more pointed way, is that is not
7 about the commission now has the authority to say it's not
8 necessary for us to rule out this category of people, OCA.
9 The tools that are available, the avenues available for the
10 commission under the process, Your Honor, would be to rule
11 that a summary does not put the defense in substantially the
12 same position. And then to say I -- therefore, unless you
13 find a way to get them this information, Government, I am
14 going to dismiss or I am going to, you know, exclude a certain
15 piece of evidence ----

16 MJ [COL ACOSTA]: Or there is going to be some other
17 remedy, correct?

18 CP [BG MARTINS]: Some other remedy. And certain of those
19 remedies that you might call upon from your kit there, we have
20 the ability to appeal, so we have a right as well. So that's
21 how the process is intended to work.

22 [The military judge conferred with courtroom personnel.]

23 MJ [COL ACOSTA]: I asked some of the questions I have

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1 written here. I am just trying to make sure that I have hit
2 everything I want to hit with you.

3 CP [BG MARTINS]: Certainly, Your Honor.

4 Your Honor, while you are doing that, if I may speak
5 to my co-counsel.

6 MJ [COL ACOSTA]: You may.

7 CP [BG MARTINS]: Thank you, Your Honor.

8 MJ [COL ACOSTA]: I think I have hit everything I wanted
9 to hit. Unless you have anything else?

10 CP [BG MARTINS]: Your Honor, thank you for giving me the
11 opportunity. Counsel has reminded me that the context of "to
12 the extent practicable," I think you were drawing that from
13 701(f)(3).

14 MJ [COL ACOSTA]: Right. To the extent, right. Let me
15 check my cite. Go ahead.

16 CP [BG MARTINS]: Yeah. I mean, that is one way of
17 speaking of our 949p-4(b)(1) request for substitutions and I
18 think it embraces it, but it is really talking about an
19 unclassified summary, purely, you know, the unclassified part,
20 whereas the ones that we are -- some of the summaries we are
21 providing are classified ones. I just wanted to point out
22 that distinction from the statute.

23 The p-4(b)(1) discussion of summary substitution,

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1 statement of relevant facts ----

2 MJ [COL ACOSTA]: Are classified.

3 CP [BG MARTINS]: ---- is broader. Some of those things
4 we are providing through that process are unclassified, some
5 of the summaries; but some of the summaries we are doing are
6 classified ones, and so it's -- we would submit it's another
7 indicator that p-4(b)(1) is broader than this and is different
8 and we believe controls what we are doing in this process
9 here.

10 MJ [COL ACOSTA]: Right. What I was mainly trying to get
11 at, and I think is clear and that you agree with -- and let me
12 just make sure you agree with it to crystallize where we went.
13 We have gone around the world a couple of times on this.

14 CP [BG MARTINS]: Yes.

15 MJ [COL ACOSTA]: But it is the government's authority to
16 say we need to have this ex parte proceeding, but that doesn't
17 withdraw from the court its -- the commission, pardon me; I
18 know that they are counting how many times I misstate "court"
19 for "commission" -- where the commission has the authority to
20 state this is inadequate based upon what I know from the
21 defense, which you state is the process and the
22 uncomfortable -- as you stated, the uncomfortable position
23 that federal courts tend to find themselves in of having to do

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1 that, and in this case involving a massive amount of material,
2 right?

3 CP [BG MARTINS]: Yes, sir.

4 MJ [COL ACOSTA]: More of the material falls within this
5 almost than -- that I can see, most of the material is falling
6 within this process. So we have got -- the court has the
7 authority to go back to the government and say this is
8 inadequate, fix it. You have the option then to either fix it
9 or say sorry, we can't, or we choose not to, we can't for
10 whatever reason, because the OCA won't allow us to change, to
11 modify, to fix it. And then if there is no change that
12 satisfies the court that the defense is in the same --
13 substantially the same position they would be, then there is a
14 remedy of either potentially excluding some evidence, or --
15 and you keep going then to dismiss the case.

16 We all know that that is the extreme remedy and
17 sanction, right? I'm not going -- courts are always hesitant
18 to start to say, oh, and then we can dismiss the case. That's
19 not what we are talking about. There is other remedies short
20 of that that we are always instructed to look at.

21 So do you agree with that, that that's the process?

22 CP [BG MARTINS]: Your Honor, that's a fair -- that's a
23 fair recapitulation of the process.

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1 MJ [COL ACOSTA]: And that is your position, okay, of how
2 the process is to go. I think I've got it.

3 CP [BG MARTINS]: And counsel did also remind me that
4 AE 406, if in terms of dealing with the mountain of
5 information that remains before the commission, if you deal
6 with those examples that are here in addressing the motion of
7 402 and then take up 406, because in that one we have gone
8 back and reconsidered all of the early material ----

9 MJ [COL ACOSTA]: Right, and that was because based upon
10 the court's -- the commission's reading of what was provided
11 and said, hey, let's take -- tell me why I should re-look all
12 of this now without ----

13 CP [BG MARTINS]: Our recommendation ----

14 MJ [COL ACOSTA]: ---- without you looking at it first,
15 without you re-looking at it first.

16 CP [BG MARTINS]: Or providing you a declaration that we
17 believe deals with it. But I think, yes, Your Honor, I would
18 also explain 406 as integrating carefully the declassification
19 guidance that has happened over this period that resulted in
20 similar types of releases, including to FOIA requesters and
21 that kind of stuff.

22 MJ [COL ACOSTA]: Understood.

23 CP [BG MARTINS]: Thank you, Your Honor.

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1 MJ [COL ACOSTA]: All right. Again, we will address that.
2 We will address the mountain, as you put it, at the
3 appropriate time. Thank you.

4 CP [BG MARTINS]: Thank you, Your Honor.

5 MJ [COL ACOSTA]: All right.

6 LDC [MR. NATALE]: Your Honor, can we have a comfort
7 break?

8 MJ [COL ACOSTA]: I'm way ahead of you. Let's take 30
9 minutes.

10 The commission is in recess.

11 [The R.M.C. 803 session recessed at 1502, 3 December 2019.]

12 [The R.M.C. 803 session was called to order at 1533,
13 3 December 2019.]

14 MJ [COL ACOSTA]: The commission is called to order. All
15 parties present when the commission last recessed are again
16 present. Is that correct, Government?

17 TC [MR. MILLER]: It is, Your Honor.

18 LDC [MR. NATALE]: Yes, Your Honor.

19 MJ [COL ACOSTA]: All right. Mr. Natale, rebuttal
20 argument.

21 LDC [MR. NATALE]: Without getting into all of the factual
22 stuff, my understanding, we were talking about the process and
23 the procedure. Moussaoui, a first degree murder case, CIPA

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1 documents, death penalty, in 2003, a time when things were all
2 too fresh in people's memory, a short time after the attack of
3 9/11, and in that case the defense participated in the
4 communications, the ex parte communications. They were in
5 camera as it related to the RID [sic], and what happened on
6 appeal we all know.

7 The Fourth Circuit said it was absolutely appropriate,
8 and if I can quote, the circumstances of this case, talking
9 about Moussaoui, most notably the fact that the substitutions
10 may very well support Moussaoui's defense, dictate that the
11 compiling of substitutions be an interactive process among the
12 parties and the district court.

13 That is the case which is consistent with and upon
14 which all of our arguments rest, and that is the reason why
15 originally the specific request to be actively sitting all
16 together was made. The legal precedence is made. The
17 government hasn't entered here anything different.

18 The difference in this case, we have more documents.
19 The difference in this case is that 17 -- almost 17 years have
20 transpired. And at a time when it was fresh, the court ruled,
21 the appellate court sustained, that it was not a risk to
22 national security to allow the defense team to participate in
23 these ex parte in-camera proceedings, and it was endorsed.

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1 MJ [COL ACOSTA]: You are referring to Moussaoui there?

2 LDC [MR. NATALE]: Moussaoui. I think we have a case
3 which is if not just as justified, it's more so, Judge.

4 The -- I think when we talked about the need-to-know,
5 it's been clear that we have the need-to-know as early as
6 AE 120 and all of the As and alphabets that follow after that.
7 That was a discovery request. It's continuing and ongoing.
8 Yet we haven't received a summary, a new summary, since
9 November of 2017.

10 It has been acknowledged in practice that there is a
11 way of restricting certain information from Mr. Nashiri and
12 letting the counsel have it. It's been done all the time.
13 Even the government pointed out the dilemma of the system
14 because in the 9/11 cases where witnesses, when attempted to
15 be refreshed or impeached, say don't know what you're talking
16 about, never saw that document before -- those are things that
17 we can avoid. Those are things that we can avoid the delay of
18 having to go through all of this at the time.

19 We heard talk about the good people, and I don't doubt
20 them, that they're good human beings; but yet it appears to me
21 that the people who are using the rule of thumb are the very
22 people who tortured my client and are the very people who have
23 every reason for the truth, the whole truth, and nothing but

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1 the whole truth to come out.

2 Now, they may be doing what the government says is a
3 good job, but yet we don't know who they are, where they are.
4 We don't know what the rule of thumb is. And yet the
5 government wants to say their declaration is the be-all,
6 end-all.

7 You know, two individuals, Mitchell and Jensen, are
8 scheduled to testify in the 9/11 case next month. These are
9 the people who designed, and we believe maybe even
10 participated in, the type of interrogation and what we believe
11 to be the torture that occurred. Yet these are the same
12 sort -- they are going to be testifying in that case, and yet
13 we are being told that, well, the manner and the procedures
14 that were done is something that can't be revealed for either
15 the mosaic or the compilation. And I think, as Your Honor
16 pointed out, that's a two-way street and that goes to our
17 need-to-know.

18 The devil is in the details; we all know that. We
19 know that. That -- I believe it was in slide 19 where the
20 government substitutes words and acts as if that that is not
21 significant. It is significant, and the reason why it's
22 significant is they want to substitute legal terms for the
23 intel terms and thereby create an impression, inaccurate, that

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1 this was some type of a different type of proceedings. And
2 they then tell us, well, if you look hard enough at what we
3 gave you, you can figure out that these two documents relate
4 to the same thing. We can't. The only people who know that
5 are them, Judge.

6 We get the documents. We don't know for sure which
7 one really relates to one another, and it's only recently that
8 we were provided the dates.

9 They will tell us, for example, that on a page of a
10 document it will say that this is day X of the interrogation,
11 but yet on all the other pages that's blocked out. So if it
12 was date X, one would assume that all the numbers that precede
13 that would -- we would also have something relating to that.
14 It's only common sense.

15 But yet for us to infer that doesn't make any sense,
16 and for us to at every little thing say, we want this, we want
17 this, we want this, that was done in the very beginning.
18 That's been ruled on, what they should give us. And when they
19 say that we should be getting more, and we -- you know, but,
20 you know, we gave them enough already and we're working hard,
21 I can appreciate them saying that, but that isn't -- working
22 hard doesn't necessarily mean that we're getting the job done
23 that this commission is supposed to do.

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1 And I understand and I appreciate, as does everyone on
2 my team, many of them who have served bravely in our services,
3 we appreciate that. And one of the things that I am
4 constantly reminded by them is that they took an oath to
5 protect the Constitution of the United States. They take it
6 seriously. I have taken that oath, and we take it with pride.
7 There should be no inference that our concern for due process
8 or the validity of our Constitution, that we -- that it should
9 be subordinated to a concern to prevent embarrassment,
10 particularly when things have already been disclosed in a
11 variety of forums.

12 The Sixth Circuit case which they referred to wasn't a
13 death penalty case; there was very, very few documents in that
14 case. I believe in the Yunis case, there maybe was only one
15 document or conversation that they cite to. And it's
16 interesting so much as to what an advocate says as what they
17 don't say. With all of the slides in the presentation, there
18 wasn't one that showed you or told you that the ruling in
19 Moussaoui was legally wrong, was a violation of the law, and
20 that the Fourth Circuit got it all wrong.

21 Certainly the Supreme Court didn't weigh in and say
22 that. And if my understanding of the law is somewhat correct,
23 it's good law unless the Supreme Court says something else,

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1 and that it directly relates to this issue, but yet that was
2 something that remained silent.

3 We have had so much discussion about substantive
4 things, did this mean this, did this mean that. Judge, that
5 to me was prelude to what the government is suggesting that we
6 continue. I mean, it's like they're waist deep in the Big
7 Muddy, and instead of saying we can think of a better way
8 which is consistent with Moussaoui, which is consistent with
9 the law, which is consistent with every notion of due process
10 in our Constitution, they say no.

11 There are things which we get which are redacted and
12 then other things which aren't redacted. The prosecution went
13 on and on about things that they did and how we could figure
14 things out and indicated that they are well aware of their
15 obligations. However, the actual cables that we have been
16 talking about were not a consequence of the government
17 providing them to us; they were not a consequence of the
18 prosecution saying, hey, there's something that we now have
19 discovered. They were a consequence of the hearings of the
20 CIA Director Haspel.

21 They seem to think that we've been sitting on our
22 hands, not requesting things. We have requested the entire
23 Senate report. We have been denied, even though we know that

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1 there are specific references in detail to what occurred to
2 Mr. Nashiri.

3 We have done and will continue to do everything to get
4 at the truth. And that is a legitimate concern or should be a
5 legitimate concern, as the Supreme Court in Berger said, of
6 all those who practice in our jurisprudence.

7 We are talking about fundamental rights. We are
8 talking about how we are going to be looked at as a society.
9 We have the opportunity to show a just and fair system and we
10 run no risk to our national security. Our country is far
11 stronger than they seem to want us to believe. The principles
12 of our country are far stronger than they seem to want to
13 believe. And I think it was Benjamin Franklin who says, if
14 you give up liberty and freedom for security, you get neither.

15 This is a time for us all to start fresh on this case.
16 Let's not just continue to push on in the same way that we
17 have, which we know has not given us the results or put us
18 where we would like to be.

19 I could go on in detail about the section that says
20 "where practical" and all of the discretionary aspects of it.
21 I don't have to repeat myself. You know. You know what they
22 say. You know how it -- you're going to make the decision of
23 it being interpreted. But by no means, by no means of what I

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1 am requesting on behalf of a person is farfetched, unlawful;
2 and again, it's totally consistent with what the court did and
3 was approved in Moussaoui.

4 I've said it all, because I don't think to keep going
5 over and repeating something is needed. But I do ask not only
6 for Mr. Nashiri, but for everyone, that if there are questions
7 that we can clarify, I will do my best, sir, to clarify our
8 position and the reasons for it.

9 MJ [COL ACOSTA]: I don't have any questions at this time.

10 LDC [MR. NATALE]: You don't have any questions, Your
11 Honor?

12 MJ [COL ACOSTA]: Not right now. I reserve the right to
13 ask for additional briefing as I always -- as I have if I need
14 it, as we go through this.

15 LDC [MR. NATALE]: We will be here all week.

16 MJ [COL ACOSTA]: Yes. Me too.

17 All right. I believe the commission is going to
18 recess until tomorrow morning at -- was 09 an acceptable time
19 to start? Or was it -- was everybody able to make it here on
20 time and begin at 09, or is 0930 a better time?

21 LDC [MR. NATALE]: 09 worked for us, Your Honor.

22 MJ [COL ACOSTA]: Government?

23 TC [MR. MILLER]: 09 works for us, Your Honor.

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1 MJ [COL ACOSTA]: We will start again at 09 tomorrow. We
2 will talk about 311B and we will hear that starting tomorrow
3 at 09. And we will finish that up tomorrow.

4 If there is anything else that we're going to hear, I
5 will address the parties about that at the conclusion of
6 tomorrow's hearing.

7 Yes.

8 LDC [MR. NATALE]: Your Honor, at the conclusion of that,
9 would you entertain the possibility of us, in an 802, giving
10 you some updates?

11 MJ [COL ACOSTA]: Tomorrow or today?

12 LDC [MR. NATALE]: Tomorrow.

13 MJ [COL ACOSTA]: Government?

14 I don't know what you're referring to specifically.
15 Has there been some information that you need to talk -- that
16 you have already talked to the government about?

17 LDC [MR. NATALE]: It's information regarding to the issue
18 that we raised of the inadvertent disclosure of the ex parte
19 presentation.

20 MJ [COL ACOSTA]: Okay. Is there something -- do you want
21 to talk about it now? We can just put it on the record
22 instead of talking about it in an 802 and having to summarize
23 it later.

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1 LDC [MR. NATALE]: Judge, we made our requests for the
2 actual transcript. As of this moment, I have been told ----

3 MJ [COL ACOSTA]: The transcript of what?

4 LDC [MR. NATALE]: The transcript of the document which
5 was the -- what was disclosed.

6 MJ [COL ACOSTA]: Okay.

7 LDC [MR. NATALE]: It was a -- I think it was either two,
8 maybe longer, hour presentation made by the defense ex parte
9 and under seal in great detail, and we hadn't received it. I
10 now know that we just have received the disc.

11 MJ [COL ACOSTA]: Okay.

12 LDC [MR. NATALE]: But in addition to that, Judge, we have
13 made a substantial discovery request of the government because
14 the importance of that transcript and the circumstances
15 surrounding it are so crucial and vital to the defense in this
16 case that it raises some very real concerns that we are going
17 to have to address I think in more detail, which is why we
18 followed up with the discovery requests that we made to them.

19 MJ [COL ACOSTA]: You have already filed that request with
20 the government?

21 LDC [MR. NATALE]: That is correct.

22 MJ [COL ACOSTA]: Government, you have -- are you in
23 receipt of that?

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1 TC [MR. MILLER]: We have, Your Honor.

2 MJ [COL ACOSTA]: Okay. All right.

3 LDC [MR. NATALE]: So -- I thought I saw the sign that
4 said "push to talk" but it was talking to him. That's all I
5 have to report, Your Honor.

6 MJ [COL ACOSTA]: Okay. Government?

7 TC [MR. MILLER]: Your Honor, I can acknowledge we had a
8 four- or five-page discovery request. I don't know. You
9 talked about collegiality. Where I come from, when a general
10 officer or an officer of the court said I didn't look at
11 something, that usually ends the issue; but apparently they
12 want to push it a little further. So that's kind of where we
13 are on that.

14 Other than tomorrow, I think the General has one
15 housekeeping matter to address with the court. Do we
16 anticipate that 311B will be the single matter that we address
17 tomorrow?

18 MJ [COL ACOSTA]: I believe that's the last remaining
19 issue that we had on the docket, because the other issue was
20 essentially made moot by agreement of the parties that it was
21 essentially done. And as I stated, I will address that before
22 we leave in writing just because I prefer to have that in
23 writing for the record, for posterity, as opposed to having

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1 somebody have to comb through the record and look for did
2 Judge Acosta say this on this day. I'm going to -- we'll put
3 it out in writing so that there is a ruling on it.

4 TC [MR. MILLER]: Other than ----

5 MJ [COL ACOSTA]: I don't know of anything else other than
6 311 that I am going to address.

7 TC [MR. MILLER]: I believe the General would like to
8 address the court just briefly.

9 MJ [COL ACOSTA]: Yes.

10 CP [BG MARTINS]: Thank you, Your Honor. Co-counsel
11 reminded me to ask for a housekeeping item. AE 402F is this
12 filing that is the eight slides with the information filled
13 in. Slides 43, 52, 53, and 54 include a series of 8 to 12 in
14 each of them. In order to have that in one place in the
15 appellate record -- and in order, frankly, to assist your
16 clerks in not having to go dig it all up -- we've found all of
17 those. I request from the bench a leave to supplement
18 with ----

19 MJ [COL ACOSTA]: The actual documents themselves?

20 CP [BG MARTINS]: ---- with the actual documents so you
21 have them so you are not going to have to go chase for them.

22 MJ [COL ACOSTA]: That is much appreciated. You may do
23 so.

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1 CP [BG MARTINS]: And, Your Honor, and the clerks have
2 said those would be Appellate Exhibit 402G for slide 43 and
3 the documents associated with that, 402H for the documents in
4 slide 52, 402I for the ones in 53, and 402J for the ones in
5 54.

6 MJ [COL ACOSTA]: Yes, that makes more sense and it will
7 make it a little easier for me go back as opposed to digging
8 through the record.

9 CP [BG MARTINS]: Thank you, Your Honor.

10 MJ [COL ACOSTA]: All right. Is there anything else that
11 we need to take up before I recess the commission for today?
12 Government?

13 TC [MR. MILLER]: Nothing further from the government.
14 Thank you, Your Honor.

15 MJ [COL ACOSTA]: Defense?

16 LDC [MR. NATALE]: Nothing further from the defense.

17 MJ [COL ACOSTA]: The commission is in recess until 09.
18 [The R.M.C. 803 session recessed at 1559, 3 December 2019.]

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