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1 **[The R.M.C. 803 session was called to order at 0900, 23 June 2025.]**

2 MJ [Lt Col BRAUN]: This hearing is called to order.

3 The accused is present.

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

6 TC [Lt Col GOEWERT]: Good morning, Your Honor.

7 Representing the government today are myself, Lieutenant
8 Colonel Christopher Goewert, United States Air Force; Major Kristy
9 Milton, United States Marine Corps. And we are present in the
10 courtroom here at Courtroom 2.

11 Present in the RHR are Major Christopher Pirog, United
12 States Air Force; Lieutenant Colonel Matthew Miller, United States
13 Army.

14 All trial counsel today have been detailed to this military
15 commission by the chief prosecutor in accordance with Rule for
16 Military Commission 503. All members of the government are qualified
17 under Rule for Military Commissions 502(d). All attorneys have been
18 previously sworn in accordance with Rule for Military Commission 807.
19 No member of the government has acted in any way which might tend to
20 disqualify us in this proceeding.

21 The most recent detailing document has been previously
22 marked and submitted to the commission as Appellate Exhibit 0003.011
23 (Gov).

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1 Major James Jordan is no longer detailed to this commission
2 as he PCS'd to Musawa, and accordingly we would request permanent
3 excusal from this commission.

4 MJ [Lt Col BRAUN]: Very well, Counsel. That excusal, that
5 permanent excusal is granted.

6 TC [Lt Col GOEWERT]: And, Your Honor, I would like to note
7 that these proceedings are being transmitted stateside by a closed
8 circuit television transmission to remote viewing sites at Fort
9 Meade, Maryland, and the Pentagon, pursuant to commission's order AE
10 007.006 **[sic]** (TJ).

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

12 Is the teletype capability the commission authorized in
13 AE 0012.020 being utilized today?

14 TC [Lt Col GOEWERT]: It is not, sir.

15 MJ [Lt Col BRAUN]: Mr. Nurjaman, good morning.

16 In the past I've discussed your rights to counsel with you.
17 I'm going to, however, as there's been a significant break since
18 we've last been on the record, discuss those rights with you again.

19 Pursuant to the Manual for Military Commissions, you have
20 the right to be represented by detailed military defense counsel free
21 of charge.

22 Do you understand this?

23 ACC [MR. NURJAMAN]: Yes, Your Honor.

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1 MJ [Lt Col BRAUN]: You also have the right to be represented
2 by a military counsel of your own selection, provided that the
3 counsel you request is reasonably available. If you are represented
4 by military counsel of your own selection, then your detailed defense
5 counsel would normally be excused.

6 However, you could request that your detailed counsel
7 continue to represent you, but your request would not have to be
8 granted.

9 Do you understand that?

10 ACC [MR. NURJAMAN]: Yes, Your Honor.

11 MJ [Lt Col BRAUN]: In addition to detailed military defense
12 counsel, you may be represented by qualified civilian lawyers. A
13 civilian lawyer would represent you at no expense to the government.

14 To be qualified, he or she must be a U.S. citizen, admitted
15 to the practice of law in a state, district, territory, or possession
16 of the United States or a federal court, may not have been subject of
17 disqualifying action by a bar or other competent authority, be
18 eligible for a Secret clearance or higher as required, and agree in
19 writing to comply with the orders, rules, and regulations of these
20 military commissions.

21 Do you understand this?

22 ACC [MR. NURJAMAN]: Yes.

23 MJ [Lt Col BRAUN]: If a civilian lawyer represents you, your

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1 detailed military defense counsel will continue to represent you as
2 well unless you specifically waive the right to be represented by
3 detailed military defense counsel.

4 Mr. Nurjaman, do you understand what I have just explained
5 to you?

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

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

13 Do you understand that?

14 ACC [MR. NURJAMAN]: Yes.

15 MJ [Lt Col BRAUN]: Thank you, Mr. Nurjaman.

16 Mr. Fanniff, if you could please indicate for the record who
17 is here on behalf of Mr. Nurjaman, and if you could also indicate if
18 any attorney is making their initial appearance before this
19 commission.

20 LDC [MR. FANNIFF]: Yes, Your Honor.

21 So Mr. Nurjaman is represented by myself, Mr. Todd Fanniff.
22 Also with me is Lieutenant Colonel Brent Stricker, U.S. Marine Corps;
23 Captain Reid Hopkins, U.S. Marine Corps; Captain Tara Trull, United

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1 States Air Force; and Lieutenant Desiree Fernandez, United States
2 Navy.

3 Lieutenant Fernandez is in the Remote Hearing Room. The
4 rest are here in Guantanamo Bay in this courtroom.

5 We all -- no one is newly detailed. Everyone has been
6 qualified, is certified, and has been previously sworn. And no
7 member of the defense has acted in any manner which would tend to
8 disqualify us from participation in this commission.

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

10 Will you, Lieutenant Colonel Stricker, Captain Hopkins, and
11 Captain Trull, be present physically in the courtroom with
12 Mr. Nurjaman during all sessions this week?

13 LDC [MR. FANNIFF]: Yes, Your Honor.

14 MJ [Lt Col BRAUN]: Likewise, do you expect Lieutenant
15 Fernandez will appear remotely from the RHR for all sessions this
16 week?

17 LDC [MR. FANNIFF]: Yes, Your Honor.

18 MJ [Lt Col BRAUN]: Thank you. I'd just ask, should that
19 change, that you notify the commission immediately.

20 LDC [MR. FANNIFF]: I will, Your Honor.

21 MJ [Lt Col BRAUN]: And, Defense Counsel, do you have a means
22 of confidential communication with Lieutenant Fernandez should you
23 need to communicate during these proceedings?

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1 LDC [MR. FANNIFF]: Yes.

2 MJ [Lt Col BRAUN]: Mr. Nurjaman, your defense counsel just
3 indicated that one of your detailed defense counsel, Lieutenant
4 Fernandez, is appearing remotely via the Remote Hearing Room in
5 the -- in the National Capital Region. Is that also your
6 understanding?

7 ACC [MR. NURJAMAN]: Yes.

8 MJ [Lt Col BRAUN]: And do you consent to that remote
9 appearance for this week's proceedings?

10 ACC [MR. NURJAMAN]: Yes.

11 MJ [Lt Col BRAUN]: Did anyone make any threats or promises to
12 get you to agree to the remote presence of Lieutenant Fernandez?

13 ACC [MR. NURJAMAN]: No.

14 MJ [Lt Col BRAUN]: Okay. And is that decision your decision
15 and your decision alone?

16 ACC [MR. NURJAMAN]: Correct.

17 MJ [Lt Col BRAUN]: Now, Mr. Nurjaman, I'm aware that some
18 members of your defense team are not present for today's session,
19 either here in the courtroom or remotely from the Remote Hearing
20 Room. I'm going to discuss the absence of those counsel with you.

21 Under Rule for Military Commission 805, ordinarily no
22 military commission proceeding should take place if any defense or
23 assistant defense counsel is absent without your consent to that

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1 absence.

2 On 4 June 2025, Lieutenant Ryan Hirschler filed a motion
3 requesting the commission authorize his absence for the hearings we
4 will conduct this week. Subsequently, on 16 June 2025, your defense
5 team filed a motion requesting the commission authorize the absence
6 of Mr. James Hodes and Major Lindsey Parsons for the hearings we will
7 conduct this week.

8 In these motions, your defense team represented you consent
9 to the absence of these counsel for just this week's hearings.

10 So I want to ask you directly: Do you agree to the absence
11 of Mr. Hodes, Major Parsons, and Lieutenant Hirschler from this
12 week's proceedings?

13 ACC [MR. NURJAMAN]: Yes.

14 MJ [Lt Col BRAUN]: Mr. Nurjaman, did you discuss this matter
15 fully with your defense counsel?

16 ACC [MR. NURJAMAN]: I have.

17 MJ [Lt Col BRAUN]: Do you have any questions about
18 your -- about your right to have counsel present for this week's
19 proceedings?

20 ACC [MR. NURJAMAN]: None.

21 MJ [Lt Col BRAUN]: Mr. Nurjaman, did anyone make any promises
22 or threats to get you to agree to proceed this week without the
23 presence of Mr. Hodes, Major Parsons, or Lieutenant Hirschler?

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1 ACC [MR. NURJAMAN]: None.

2 MJ [Lt Col BRAUN]: And was it your decision and your decision
3 alone to agree to proceed with this week's hearings knowing that
4 Mr. Hodes, Major Parsons, and Lieutenant Hirschler would not be
5 present?

6 ACC [MR. NURJAMAN]: Yes. After I have discussed that with
7 the team defense.

8 MJ [Lt Col BRAUN]: Thank you, Mr. Nurjaman.

9 I find that you have voluntarily and intelligently waived
10 the presence of Mr. Hodes, Major Parsons, and Lieutenant Hirschler
11 for this week's proceedings.

12 I further find that you are represented by the four military
13 counsel -- the five military counsel detailed to your case that were
14 previously identified in the record, to include those who are
15 physically present in the courtroom this morning and your one counsel
16 that is remotely present in the RHR, and that those counsel will be
17 present throughout this week's hearings.

18 I also find that at least one of those defense counsel is
19 qualified in accordance with R.M.C. 502(d). As such, I find this
20 commission can proceed this week in accordance with R.M.C. 805(c),
21 given your waiver of the presence of Mr. Hodes, Major Parsons, and
22 Lieutenant Hirschler.

23 I further note that in AE 0104.012, the commission approved

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1 the absence of Major Parsons from all of this week's hearings. In
2 that same ruling, the commission approved the absence of Mr. Hodes
3 from this week's hearings except for those portions which would
4 require his presence from the RHR for the limited purpose of
5 conducting an inquiry into his continued representation in this case.

6 Further, in AE 0104.007, the commission approved the absence
7 of Lieutenant Hirschler from this week's hearings except for the
8 portions which would require his presence to discuss an inquiry -- or
9 to discuss the matters regarding his continued representational
10 responsibilities in this case.

11 So to simplify that, while Mr. Nurjaman has waived the
12 presence of Mr. Hodes and Lieutenant Hirschler this week, the
13 commission will still require those two counsel to appear to discuss
14 matters regarding their continued representational obligations to
15 Mr. Nurjaman.

16 Defense Counsel, it's my understanding that Lieutenant
17 Hirschler will be available first thing this morning to discuss those
18 matters. Is that still the case?

19 LDC [MR. FANNIFF]: Yes, Your Honor.

20 MJ [Lt Col BRAUN]: Okay. With regard to Mr. Hodes, the
21 commission notes that on Friday, the defense filed a notice which has
22 been marked as AE 0104.013 regarding Mr. Hodes' availability this
23 week. According to that document, it appears that Mr. Hodes, due to

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1 non-defined, quote, personal and professional obligations, he will be
2 unavailable until the 26th of June.

3 Is that correct, Mr. Fanniff?

4 LDC [MR. FANNIFF]: Yes, Your Honor.

5 MJ [Lt Col BRAUN]: Okay. Mr. Fanniff, the court notes that
6 in AE 0104.001, which is a docketing order issued on 14 May 2025, the
7 commission made the parties aware that it would inquire into the
8 continued representation, specifically of Mr. -- the continued
9 representation of the accused by Mr. Hodes.

10 Defense received that docketing order, correct?

11 LDC [MR. FANNIFF]: That is correct, Your Honor.

12 MJ [Lt Col BRAUN]: And in AE 0104.004, which was an amendment
13 to that docketing order, that matter remained on the docket
14 subsequently on AE 01 -- in AE 0104.011, a second amended docketing
15 order, those matters continued to remain on the docket.

16 Is that also your understanding?

17 LDC [MR. FANNIFF]: Yes, it is, Your Honor.

18 MJ [Lt Col BRAUN]: Okay. When were those -- when was that
19 information communicated to Mr. Hodes, who is a detailed defense
20 counsel to this commission?

21 LDC [MR. FANNIFF]: Your Honor, the initial order of this
22 commission was provided to him on the 22nd of May.

23 MJ [Lt Col BRAUN]: Mr. Fanniff, can you explain or help the

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1 commission understand why it wasn't until the Friday before this
2 hearing that the commission was notified of Mr. Hodes' availability
3 for some prior personal and professional obligations?

4 LDC [MR. FANNIFF]: Yes, Your Honor. So at the time, your
5 order discussed the government coordinating his appearance from the
6 RHR. The defense misinterpreted that to mean that the government was
7 planning Mr. Hodes' travel arrangements to appear in the RHR and
8 operated under that assumption until Tuesday of this past week when
9 Mr. Hodes contacted Major Parsons and said no one had reached out to
10 him about his travel arrangements.

11 I received that information on Wednesday afternoon, which I
12 then e-mailed the government concerning "Do you have any issues with
13 this? What's going on?"

14 They told me that, no, he's a MCDO employee, they weren't
15 planning on traveling him. And I immediately took steps to try to
16 coordinate Mr. Hodes' travel at that point.

17 MJ [Lt Col BRAUN]: And I do note in AE 0104, which was that
18 defense notice of the availability of Mr. Hodes, defense did notify
19 the commission that the travel had been requested on 25 June and
20 is -- and at that time, at least as of Friday, was with the approval
21 authority.

22 Has that travel been approved?

23 LDC [MR. FANNIFF]: As of the time that I came here, Your

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1 Honor, no, I have not seen anything noting the approval of that
2 travel.

3 MJ [Lt Col BRAUN]: Who is the approval authority for that
4 travel?

5 LDC [MR. FANNIFF]: It was requested through the convening
6 authority, Your Honor.

7 MJ [Lt Col BRAUN]: Okay. Thank You, Mr. Fanniff.

8 Trial Counsel?

9 TC [Lt Col GOEWERT]: Your Honor, the United States has taken
10 steps to make the RHR available per the commission's order. We are
11 not responsible for providing this document to Mr. Hodes. He was
12 well aware of the commission's order. He is detailed counsel. And
13 the United States does not have responsibility to get him to this
14 commission. That is a MCDO responsibility.

15 We're very -- this is an unfortunate situation and we are
16 apologetic for any miscommunications that may have occurred regarding
17 that.

18 We did solicit information from the defense back
19 in -- May 27th to get information from the defense about -- that we
20 would need to get the RHR made available to him so that we could get
21 access to that and produce the access paperwork and then request the
22 waiver to have him available. However, that does not amount to an
23 obligation on our part to produce him for travel. That would be the

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1 requirement of his own organization for which he is a member.

2 MJ [Lt Col BRAUN]: Where is that requirement located?

3 TC [Lt Col GOEWERT]: Your Honor, it would be located in the
4 fact that he is a member of MCDO and a member of counsel, he has an
5 independent obligation to get here. He is not a witness. He is a
6 member of counsel -- he is a counsel. He has his own obligation to
7 get here, Your Honor.

8 MJ [Lt Col BRAUN]: Defense Counsel, while the commission
9 continues to not understand how prior personal and professional
10 obligations arose after the notification of Mr. Hodes that he needed
11 to be present for a commission hearing which was scheduled back on 11
12 July 2024 in AE 0087.001, the concern I have right now is that it
13 appears nobody's prepared to make Mr. Hodes available for the
14 commission and the commission has clearly identified that it desires
15 to talk to Mr. Hodes.

16 He has not been on the record for quite some time. Some
17 factual basis has changed based upon notices provided to the
18 commission, and it is appropriate and the commission finds necessary
19 to talk with him about his continued status in this commission.

20 What steps is the defense taking to ensure that he is
21 getting here?

22 LDC [MR. FANNIFF]: As I said, Your Honor, we have requested
23 for the travel. As you are aware, he has been applied for and was

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1 accepted for the deferred resignation program, which means he is no
2 longer required to be local to the National Capital Region area, and
3 therefore it was our belief that we would need to have travel paid
4 for to get him here.

5 MJ [Lt Col BRAUN]: Is that still your belief? I'm trying to
6 understand the status of him and his travel.

7 LDC [MR. FANNIFF]: That -- that is our belief, Your Honor.

8 MJ [Lt Col BRAUN]: Okay. Trial counsel states that there is
9 no authority requiring them to travel here -- travel him here as
10 detailed defense counsel. Do you have authority to point the
11 commission to showing their duty to fund the travel for his presence
12 here, whether that be in the Manual for Military Commissions or some
13 other authoritative U.S. Government document that the commission can
14 examine to help resolve this matter that the parties have been unable
15 to resolve?

16 LDC [MR. FANNIFF]: I do not, Your Honor.

17 MJ [Lt Col BRAUN]: Okay. So as we sit here, it appears that
18 while Mr. Hodes, based upon the availability provided the defense,
19 would be available to appear on -- I believe it's Thursday?

20 LDC [MR. FANNIFF]: That's correct, Your Honor.

21 MJ [Lt Col BRAUN]: There are currently no arrangements to get
22 him here for Thursday.

23 LDC [MR. FANNIFF]: Yes, Your Honor. We've taken all the

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1 steps we can at this point. Until we get approval from the convening
2 authority, we cannot actually book tickets.

3 MJ [Lt Col BRAUN]: Okay. I'm going to put this matter aside
4 so that the commission can conduct some of its own research as the
5 parties have been unable to point the commission to any authoritative
6 basis for their positions, aside from their general understanding of
7 how apparently funding works.

8 Then the commission will likely request additional
9 information from the parties at a later date. It will do that either
10 through an order or will directly from the bench advise parties of
11 what the commission needs.

12 You can expect probably a very fast turn on that,
13 understanding that the commission still desires to question Mr. Hodes
14 about the change in circumstances and how that may or may not impact
15 his continued representational obligations to Mr. Nurjaman, his
16 client. He does remain detailed counsel to this commission.

17 Are there any other matters that the -- that the parties
18 want to bring to the commission's attention with regard to Mr. Hodes
19 and his travel and his appearance? I will take that information at
20 this time.

21 Trial Counsel?

22 TC [Lt Col GOEWERT]: Your Honor, we're happy to inquire with
23 the convening authority about the status of his travel. We can do

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1 that. We were not aware that that was the issue, but we can do that
2 at the next break.

3 MJ [Lt Col BRAUN]: That would be prudent, Counsel. Thank
4 you.

5 Defense?

6 LDC [MR. FANNIFF]: Nothing significant. Just if Mr. Hodes
7 was treated as a witness, if the commission did subpoena him, then
8 the funding would be required, Your Honor.

9 MJ [Lt Col BRAUN]: While the rules would clearly articulate
10 that there are some considerations with calling detailed counsel as a
11 witness in particular matters that the commission also has to think
12 through, frankly, Mr. Hodes is a detailed counsel. He has made an
13 appearance before this commission. He has filed pleadings with this
14 commission.

15 The commission expecting him to be here to answer some
16 questions about the state of his continued representation seems
17 reasonable under the circumstances. But, as I said, the commission
18 will look into this matter further, and you can -- both parties can
19 expect additional requests for information as well as guidance from
20 the commission on this particular matter.

21 Anything further, Defense Counsel?

22 LDC [MR. FANNIFF]: Nothing further, Your Honor.

23 MJ [Lt Col BRAUN]: So to place it on the record, yesterday I

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1 had an R.M.C. 802 conference. Present were members from the
2 prosecution and the defense, with the exception of Mr. Hodes,
3 Major Parsons, Lieutenant Hirschler, and Lieutenant Fernandez. The
4 accused was also absent from that conference.

5 The commission discussed scheduled prayer times, use of the
6 RHR, status as to Lieutenant Hirschler for today's hearing. The
7 commission also made the parties aware of the general order it was
8 going to step through the various matters that it intended to take up
9 this week, and put the parties on notice that it would intend to hold
10 another R.M.C. 802 conference at the end of today to discuss the
11 logistics involved in consideration of matters in AE 016 and the
12 series of filings involved in that appellate exhibit.

13 No evidence was received, argument entertained, nor ruling
14 provided during that R.M.C. 802 conference.

15 Does either side wish to object or supplement my summary of
16 that latest R.M.C. 802 conference?

17 Trial Counsel?

18 TC [Lt Col GOEWERT]: No, thank you, sir.

19 MJ [Lt Col BRAUN]: Defense Counsel?

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

21 MJ [Lt Col BRAUN]: So it's my understanding that two of the
22 daily prayer times are scheduled during our normal court hours. One
23 will take place at approximately 1303, the other taking place shortly

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1 thereafter, around 1620. And then there is an evening prayer that it
2 appears is scheduled 19 -- around 1940.

3 Based upon those prayer times and the dining facility's
4 schedule for this week, I intend to make -- to take a lunch recess
5 from 1200 to 1330. I will then take an afternoon break from around
6 1515 to 1545. That should accommodate those prayer times as well as
7 allow the parties to grab customary meals.

8 We will reconvene after that 1525 prayer in the -- after
9 that afternoon break if we have the need to do so. And then I will
10 recess for the day at a natural breaking point, but the parties can
11 expect that will be around 1730. I assume that will work for the
12 parties.

13 Trial Counsel, any objection to that way ahead?

14 TC [Lt Col GOEWERT]: No, sir.

15 MJ [Lt Col BRAUN]: Okay. Defense Counsel?

16 LDC [MR. FANNIFF]: Just -- I believe you misspoke, Your
17 Honor, when you said 1515 to 1545. I believe it's 1615 to 1645?

18 MJ [Lt Col BRAUN]: You are correct, Defense Counsel, because
19 that evening prayer -- that afternoon prayer, I believe, was at 1620.
20 So, yeah, it would be 1615 to around 1645. Thank you. I did
21 misspeak.

22 Any objection based upon that?

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

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1 MJ [Lt Col BRAUN]: Okay. Trial Counsel?

2 TC [Lt Col GOEWERT]: No, sir.

3 MJ [Lt Col BRAUN]: So at this time I'd like to pivot to
4 taking up the excusal request of Lieutenant Hirschler.

5 So, Mr. Nurjaman, on 2 May 2025, in AE 0004.050, Lieutenant
6 Hirschler requested the commission authorize his permanent excusal.
7 Lieutenant Hirschler's request was based largely upon his permanent
8 change of station, or PCS, to a new assignment in the summer of 2024.

9 On 4 June 2025, your defense team informed the commission
10 that you do not consent to the excusal of Lieutenant Hirschler. Is
11 that still the case as we sit in this hearing today?

12 ACC [MR. NURJAMAN]: Yes, it still works until now.

13 MJ [Lt Col BRAUN]: Okay. So with that, do we have Lieutenant
14 Hirschler in the RHR at this time?

15 TC [Lt Col GOEWERT]: Your Honor, they are getting him from
16 the lobby.

17 MJ [Lt Col BRAUN]: Thank you.

18 **[Pause.]**

19 MJ [Lt Col BRAUN]: Lieutenant Hirschler, if you could
20 approach the podium there so that we can hear you from the RHR.

21 So I have some questions for you regarding your
22 responsibility -- responsibilities as an attorney detailed to
23 represent Mr. Nurjaman and your current duties.

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1 DDC [LT HIRSCHLER]: Yes, Your Honor.

2 MJ [Lt Col BRAUN]: So prior to your PCS in the summer of
3 2024, how much time during an average week did you spend working on
4 the accused's case?

5 DDC [LT HIRSCHLER]: Roughly 35 to 45 hours, with some time
6 for other responsibilities just that are incidental to military
7 service.

8 MJ [Lt Col BRAUN]: And when did you ultimately out process
9 and depart the Military Commission Defense Organization, or MCDO?

10 DDC [LT HIRSCHLER]: I believe it would have been June, July
11 of '24.

12 MJ [Lt Col BRAUN]: So your new job is with the Office of the
13 Judge Advocate General of the Navy in their criminal law division, I
14 think OJAG Code 20; is that correct?

15 DDC [LT HIRSCHLER]: That is correct, Your Honor.

16 MJ [Lt Col BRAUN]: And when did you report in to that duty
17 station?

18 DDC [LT HIRSCHLER]: That would have been July of '24 as well.

19 MJ [Lt Col BRAUN]: And my recollection was that you remained
20 detailed to this case initially so that you could provide continuity
21 and reach back support to the other new defense counsel that were
22 fairly recently detailed to this commission; is that correct?

23 DDC [LT HIRSCHLER]: That is correct, Your Honor.

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1 MJ [Lt Col BRAUN]: And have you had some contact with that
2 defense team since that change in your status, if you will?

3 DDC [LT HIRSCHLER]: Yes, Your Honor. There's been some.

4 MJ [Lt Col BRAUN]: Okay. I note in AE 0105.002, you
5 estimated that around July or August of 2024 would have been the last
6 significant contact you had with that defense team. Does that sound
7 correct to you?

8 DDC [LT HIRSCHLER]: That's correct, Your Honor. I do
9 maintain some -- some social connection with some of the other junior
10 officers on the team and we have discussed the case. I don't want to
11 go into too much detail about that, but there's been -- but it hasn't
12 risen anywhere near the level of when I was working full time at
13 MCDO.

14 MJ [Lt Col BRAUN]: How often since that July or August of
15 2024 interaction -- and just to be clear, I'm not asking for
16 contents. The commission isn't concerned about necessarily
17 the -- the commission isn't concerned about the substance of the
18 communications, more about the significance of the communications, if
19 that makes sense. So if we can try and talk in those terms, that
20 would be helpful.

21 But about how often would you say you've had communications
22 about this case with the current detailed defense counsel since that
23 July or August 2024 date?

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1 DDC [LT HIRSCHLER]: And, Your Honor, so some of it -- some of
2 it, Your Honor, is going to be about the current matter we're
3 discussing right now. That has been a more frequent topic of
4 conversation over the past few months.

5 As far as things unrelated to my own excusal, I would say
6 July of '24, with very rare exceptions, just to check in.

7 MJ [Lt Col BRAUN]: Okay. So pretty infrequent, then, since
8 that '24 -- that July '24, August '24 date, it sounds like, aside
9 from your pending excusal?

10 DDC [LT HIRSCHLER]: Yes, Your Honor, I believe that's
11 correct.

12 MJ [Lt Col BRAUN]: How about with Mr. Nurjaman during that
13 same time frame? Any communications directly with him?

14 ACC [MR. NURJAMAN]: No, Your Honor.

15 MJ [Lt Col BRAUN]: Okay. And I appreciate that, based upon
16 your status, and we discussed that at length the last time we were on
17 the record discussing this matter with you, that is a little more
18 complicated but there are methods such as legal mail that you could
19 communicate with him if you had so desired to do so, correct?

20 DDC [LT HIRSCHLER]: Yes, Your Honor.

21 MJ [Lt Col BRAUN]: So now that you've had the benefit of
22 being in your current assignment for some time, can you provide an
23 estimate concerning how much time an average week you spend working

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1 on those duties?

2 DDC [LT HIRSCHLER]: I'm sorry. Could you say that again,
3 Your Honor?

4 MJ [Lt Col BRAUN]: Yes. I'm trying to get an understanding
5 of, now that you've been in your current position for quite some
6 time, about how much time you have to obligate to those duties per
7 week.

8 DDC [LT HIRSCHLER]: To Code 20, yes, sir. So probably the
9 same, around 35 to 45 hours a week on duties including collateral
10 assignments and other things incidental to naval service.

11 MJ [Lt Col BRAUN]: Okay. So in AE 0105.002, at Attachment B,
12 you provided an affidavit and that's from your supervisor, correct?

13 DDC [LT HIRSCHLER]: Yes, Your Honor.

14 MJ [Lt Col BRAUN]: So in that affidavit, your supervisor
15 stated that, in his assessment, you would be unable to perform both
16 the duties assigned to you by him as your supervisor and then
17 competently perform your duties as detailed defense counsel.

18 Do you agree with that assessment?

19 DDC [LT HIRSCHLER]: I do, Your Honor.

20 MJ [Lt Col BRAUN]: Why?

21 DDC [LT HIRSCHLER]: The fact is that I have to provide a
22 full-time -- full-time service to Code 20. Any additional time that
23 I would spend on the defense team would take away from that.

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1 And I do concur with Commander Davis' assessment that it is
2 a full-time job that does take up all of my working time.

3 MJ [Lt Col BRAUN]: So to put it simply, there just aren't
4 enough hours in the day for you to do both jobs?

5 DDC [LT HIRSCHLER]: That's correct, Your Honor. In addition,
6 just there's logistical challenges which make any assistance to the
7 team or contact with Mr. Nurjaman just even more time intensive.

8 MJ [Lt Col BRAUN]: What are those? Help me understand those
9 logistic challenges.

10 DDC [LT HIRSCHLER]: So, I mean, simply, for example, today I
11 wasn't allowed to come in and sit at counsel table even though I am
12 still detailed to the case as military defense counsel. I sat in the
13 hallway, being treated essentially as a witness. And that means I
14 didn't have a chance to speak to my client or discuss what was about
15 to happen with any members of the team.

16 MJ [Lt Col BRAUN]: So, in your opinion, does your continued
17 representation of Mr. Nurjaman and being a detailed counsel to this
18 commission create a conflict under either the naval Rules of
19 Professional Conduct or perhaps your state rules for professional
20 conduct? Is there a conflict that potentially exists now based upon
21 your two -- your two duties?

22 DDC [LT HIRSCHLER]: Yes, Your Honor. I believe that there
23 is -- there is an inability -- or I have an inability to competently

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1 represent Mr. Nurjaman with the standard of care that he's entitled
2 to.

3 In 2024, that might have not been the case, simply with the
4 government's assertion that there might be a trial coming up. And,
5 you know, to go into a trial with essentially a brand-new defense
6 team with no continuity, I believe it would have been a breach of my
7 duty to request withdrawal. I don't believe those factors exist
8 anymore.

9 In addition, I think there's also several, at the very
10 least, apparent or implied conflicts of interest just with the fact
11 is if I don't promote, I will be forced to leave the naval service
12 and if I'm splitting my attention between two jobs, naturally my
13 rater will most likely have to take that into consideration.

14 MJ [Lt Col BRAUN]: Okay. So do you perceive that there
15 potentially could be advancement limitations that could result from
16 you trying to occupy both -- both duties at the same time, those to
17 Mr. Nurjaman and then those to Code 20?

18 DDC [LT HIRSCHLER]: I believe a reasonable person could see
19 that situation and interpret it as such. I can't speculate fully as
20 to how the Navy will continue to conduct internal promotions but I
21 believe a reasonable observer would look at that and see a potential
22 conflict.

23 MJ [Lt Col BRAUN]: Okay. So whether -- whether real or

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1 otherwise, that is a concern that you have?

2 DDC [LT HIRSCHLER]: Yes, Your Honor.

3 MJ [Lt Col BRAUN]: Is there any way, short of ending your
4 representational responsibilities towards Mr. Nurjaman or having you
5 returned to MCDO, is there any other way to resolve this conflict?

6 DDC [LT HIRSCHLER]: There may be, Your Honor. They wouldn't
7 be within sort of the ordinary course of the way we conduct business
8 or detailing. I think the only real solution would be to essentially
9 order the naval personnel command to send me back here, either
10 immediately or when it's time for my next permanent change of
11 station.

12 MJ [Lt Col BRAUN]: Okay. Or significantly change your duties
13 at Code 20 to allow you to dedicate all of your time, then, to
14 Mr. Nurjaman versus their mission?

15 DDC [LT HIRSCHLER]: Yes, Your Honor. The commission would
16 essentially have to instruct that someone within the Navy create a
17 sort of hybrid work environment specifically for me.

18 MJ [Lt Col BRAUN]: Okay. Prior to your move out of MCDO,
19 did, to your knowledge, anybody from the MCDO leadership on your
20 behalf explore having your orders canceled or revoked?

21 DDC [LT HIRSCHLER]: I do not believe that ever occurred. I
22 certainly did not request it. I believe when we were looking at
23 precedent for this sort of thing, we were very -- we were unable to

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1 find examples of where the government had objected to a defense
2 attorney leaving.

3 Usually it was the opposite. The defense attorney would
4 request to stay and the government would object to that. So we don't
5 really have a whole lot of, at least when I was conducting that
6 research in '24, examples of where a defense attorney essentially is
7 in a position to have to argue for their own removal.

8 MJ [Lt Col BRAUN]: I can appreciate that.

9 Do you believe the accused could effectively waive the
10 conflicts that you've described, specifically trying to split your
11 time between two very demanding jobs?

12 DDC [LT HIRSCHLER]: I don't know the answer to that, Your
13 Honor.

14 MJ [Lt Col BRAUN]: And ----

15 DDC [LT HIRSCHLER]: And I believe that he could waive it.
16 I'm not sure how I would advise him, if that was the discussion we
17 were having, if we were able to even have that discussion.

18 MJ [Lt Col BRAUN]: Okay. Yeah. And I appreciate part of the
19 concern you have raised with regard to your professional
20 responsibility is that simply you don't feel, with all of the
21 obligations, you would be able to give the time and attention to the
22 case and fulfill your obligations to zealously advocate for your
23 client and provide competent advice. So that while there may be a

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1 waiver possible, that problems may still exist for you, which is a
2 personal assessment you have to make as an attorney. Fair?

3 DDC [LT HIRSCHLER]: I agree that it's fair, Your Honor. And
4 I would say that that decision becomes more clear as time goes on.
5 Again, the difference in circumstances between July of '24, when I
6 was relatively fresh, I knew all of the latest classified evidence.
7 You know, a year later my ability to help the team is, you know,
8 rapidly diminishing and in some ways might be burdensome is the fact
9 that we are spending time right now discussing myself instead of the
10 business of my client's defense.

11 MJ [Lt Col BRAUN]: Are any of the matters that you previously
12 worked on -- and I'm specifically talking about motions that would
13 have been filed with the commission, so unresolved legal questions
14 before the commission -- are any of those matters still lingering or
15 have they all been resolved, to your knowledge?

16 DDC [LT HIRSCHLER]: I do not have perfect knowledge of what
17 is still on the defense team's docket. I worked on a lot. It would
18 not surprise me if at least something came up. But I couldn't
19 speculate either way, sir.

20 MJ [Lt Col BRAUN]: If something were to come up, would you
21 have the ability to communicate with the defense team? Something
22 unexpected?

23 DDC [LT HIRSCHLER]: I certainly would, Your Honor.

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1 MJ [Lt Col BRAUN]: And I appreciate there may be
2 clearance -- and we discussed that a little bit last time on the
3 record -- there's some clearance concerns that would have to be
4 brought into consideration, but you would take a phone call if they
5 needed assistance?

6 DDC [LT HIRSCHLER]: Of course, Your Honor. You know, the
7 duties to former clients are ongoing, and I'm well aware of them, and
8 I would always take a call for the defense team, just mindful of
9 whatever conflicts might exist with future billets or, you know, my
10 ability to provide any sort of help within the rules.

11 MJ [Lt Col BRAUN]: Okay. Okay, Lieutenant Hirschler, I
12 believe those are all the questions that I had for you. I thank you
13 for assisting me in evaluating the reading between the lines of the
14 motion that you filed. If we have anything further for you, I will
15 get a message to you. But I believe that that will conclude my
16 inquiry with you. Thank you.

17 DDC [LT HIRSCHLER]: Thank you, Your Honor.

18 MJ [Lt Col BRAUN]: So, Trial Counsel, what's the government's
19 position on the request of Lieutenant Hirschler to be permanently
20 excused?

21 TC [Lt Col GOEWERT]: Your Honor, we believe it should be
22 granted. And any objection that we may have had to loss of defense
23 counsel was filed last year with Commander Nelson's departure when

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1 the defense team looked like it was going to disintegrate. And since
2 then they have well reconstituted their team.

3 Their present team has been filing intelligent, well-briefed
4 motions with this commission, has been actively working with
5 Mr. Nurjaman's defense, and from our vantage point any concerns we
6 had about their ability to represent him vanished long ago. He
7 should be excused, Your Honor.

8 MJ [Lt Col BRAUN]: Okay. Defense Counsel, based upon
9 filings, it's the commission's understanding that the defense opposes
10 the request. Is that still the case?

11 LDC [MR. FANNIFF]: Yes, Your Honor. I guess I would like a
12 clarification point now that Lieutenant Hirschler has left the RHR.
13 Is he free to leave the building?

14 MJ [Lt Col BRAUN]: And I appreciate that. The defense
15 made -- the defense made the commission aware that Lieutenant
16 Hirschler has a significant personal matter that he needs to attend
17 to. At this time I don't have additional questions for him, so he
18 would be free to depart, yes.

19 LDC [MR. FANNIFF]: Thank you, Your Honor.

20 MJ [Lt Col BRAUN]: On that note, then, Defense objects?

21 LDC [MR. FANNIFF]: Yes, Your Honor. You know, Mr. Nurjaman
22 has been dealing with significant turnover, especially within the
23 last year. And, you know, certainly as the team has been

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1 reconstituted, there's still future turnover that he can expect due
2 to the nature of military assignments, and it's a frustrating point
3 for him, Your Honor.

4 MJ [Lt Col BRAUN]: What has the defense done to try and
5 resolve this situation?

6 LDC [MR. FANNIFF]: Your Honor, as an almost entirely new
7 team, we have spent the last year, you know, learning the case,
8 learning the massive amounts of discovery that have been provided by
9 the government to this point. We have reached out to former counsel
10 when it is an issue that they worked in the past to discuss ways that
11 they could help us in arguing those motions or things of that nature.

12 But that is probably the extent of what we have done. We've
13 mostly been focused on learning the case so that we can be prepared
14 to defend Mr. Nurjaman.

15 MJ [Lt Col BRAUN]: Has the defense communicated about his
16 orders or getting him moved back to MCDO?

17 LDC [MR. FANNIFF]: No, Your Honor. We have not.

18 MJ [Lt Col BRAUN]: Okay. And I know Lieutenant Hirschler had
19 said perhaps a -- while he hasn't seen it, some kind of hybrid
20 assignment or direction from whoever controls military personnel
21 matters, direction from that office to create some kind of hybrid
22 situation for him to accomplish both duties.

23 Has the defense engaged in any of those conversations with

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1 anyone?

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

3 MJ [Lt Col BRAUN]: Has this been raised with the chief
4 defense counsel?

5 LDC [MR. FANNIFF]: Chief defense counsel is aware of it, but
6 certainly we have not requested the chief defense counsel to act in
7 any manner.

8 MJ [Lt Col BRAUN]: Okay. So not to raise this matter with
9 the Department of Defense, Department of the Navy, any of those
10 entities?

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

12 MJ [Lt Col BRAUN]: Should the commission deny Lieutenant
13 Hirschler's request, how much additional time does the defense feel
14 Lieutenant Hirschler is required before it can continue without his
15 continued presence?

16 LDC [MR. FANNIFF]: Your Honor, I think that would be tough to
17 give you a time frame on that as far as whether -- I mean, if
18 Lieutenant Hirschler was willing to still, you know, answer questions
19 that we have, obviously within the limitations of classification and
20 other aspects. We recognize, and Mr. Nurjaman recognizes, that this
21 is the system that we're in, and understands that military counsel
22 are on orders and are transferred at regular intervals. So I can't
23 give you a time frame that would change anything.

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1 As long as Lieutenant Hirschler is willing, as he indicated,
2 I think we can, you know, still reach back to him if necessary.

3 MJ [Lt Col BRAUN]: Thank you, Defense Counsel. I believe
4 that answers the questions that I had as it relates to Lieutenant
5 Hirschler's request for permanent excusal. The commission will
6 consider, in addition to the filings of the parties, the record
7 created the last time the commission considered this very matter, as
8 well as the matters that were discussed this morning by both counsel
9 and Lieutenant Hirschler in coming up with its ruling. The
10 commission will issue a written ruling on this particular matter.
11 I'm not going to rule from the bench, so...

12 Anything else, then, before we move on?

13 Trial Counsel?

14 TC [Lt Col GOEWERT]: No, sir.

15 MJ [Lt Col BRAUN]: Defense Counsel?

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

17 MJ [Lt Col BRAUN]: Okay. So we've been on the record now for
18 a little bit. My intent is to move into the consideration of
19 AE 0101.003. This is the defense request to compel the appointment
20 of a mitigation expert.

21 Before we do that, probably a good opportunity to take a
22 quick recess for everybody. Ten minutes sufficient or would the
23 parties prefer 15?

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1 Trial Counsel?

2 TC [Lt Col GOEWERT]: Fifteen, Your Honor, so we can inquire
3 with the convening authority, please.

4 MJ [Lt Col BRAUN]: Okay. Defense Counsel, 15 sufficient?

5 LDC [MR. FANNIFF]: Yes, Your Honor.

6 MJ [Lt Col BRAUN]: Very well.

7 This court's in a 15 -- or this commission's in a 15-minute
8 recess.

9 **[The R.M.C. 803 session recessed at 0952, 23 June 2025.]**

10 **[The R.M.C. 803 session was called to order at 1014, 23 June 2025.]**

11 MJ [Lt Col BRAUN]: The commission will come to order.

12 All parties that were present when the commission last
13 recessed are again present.

14 Just as a reminder, when we're in session in the courtroom
15 here, if everybody could please ensure that they secure their badges,
16 that would be most helpful.

17 Okay. So as indicated during the recess, the commission's
18 going to move into consideration of AE 0101.003 and its respective
19 filings. The commission did direct oral argument on this particular
20 matter, which is a defense motion to compel the convening authority
21 to appoint a defense mitigation expert.

22 Defense, in your filing you indicate that you bear burden as
23 the movant; is that correct?

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1 DDC [LT FERNANDEZ]: Yes, Your Honor.

2 MJ [Lt Col BRAUN]: Okay. Trial Counsel, do you concur?

3 ATC [MAJ PIROG]: We do, Your Honor.

4 MJ [Lt Col BRAUN]: So neither party filed a notice pursuant
5 to Military Commission Rule of Evidence 505(g), so I'm going to
6 assume that neither party will seek to disclose classified
7 information in their argument. Is that assumption correct, Trial
8 Counsel?

9 ATC [MAJ PIROG]: That's correct from the government.

10 MJ [Lt Col BRAUN]: Defense Counsel?

11 DDC [LT FERNANDEZ]: That's correct, Your Honor.

12 MJ [Lt Col BRAUN]: Defense, are you -- as you bear the
13 burden, are you ready to proceed?

14 DDC [LT FERNANDEZ]: I am.

15 MJ [Lt Col BRAUN]: Okay. Do you have any evidence aside from
16 what is already been included in your filings that you'd like the
17 commission to consider?

18 DDC [LT FERNANDEZ]: Your Honor, at this exact moment, I do
19 not. However, in the event that it becomes relevant, I might, but
20 right now I do not, Your Honor.

21 MJ [Lt Col BRAUN]: Okay. Before we move into argument, then,
22 real quick, Trial Counsel, do you have any additional matters,
23 evidence that you'd like to present in support of your response?

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1 ATC [MAJ PIROG]: No, Your Honor.

2 MJ [Lt Col BRAUN]: Okay. So it appears we're ready to move
3 directly into argument. The commission will consider the attachments
4 to the parties' respective filings on this matter in ruling.

5 Defense Counsel, you may proceed.

6 DDC [LT FERNANDEZ]: Thank you, Your Honor.

7 Good morning, Your Honor. And may it please the court: The
8 defense requests that you grant their motion to compel the convening
9 authority to appoint a mitigation expert. Mr. Nurjaman has the right
10 to assistance of an expert upon a showing of necessity.

11 This court must begin its inquiry from the proposition that
12 the defense is entitled to such assistance equally with the
13 government. This court should grant their motion for two reasons:
14 First, Mr. Dworkin is necessary and would be of assistance to the
15 defense.

16 Second, the denial of his appointment would result in a
17 fundamentally unfair trial.

18 Your Honor, it has been 22 years since Mr. Nurjaman was
19 first apprehended. And in those 22 years, he has been inhumanely
20 tortured, held in solitary confinement, placed in deplorable
21 environments, and subject to questionable conditions of confinement.
22 Additionally, Mr. Nurjaman awaited 15 years before he was ever
23 charged by the U.S. Government.

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1 If Mr. Nurjaman is convicted, the panel members making the
2 decision of what a fair sentence is will not be an impartial jury of
3 his peers, which is a protection given by the Sixth Amendment to
4 guarantee and ensure that a defendant is judged by a group of
5 individuals from the same community rather than by solely government
6 officials.

7 The courts have not yet decided whether the Sixth Amendment
8 applies or does not apply to Mr. Nurjaman, which means that the jury
9 of his peers will be military officers who have been trained to view
10 people accused of the crimes Mr. Nurjaman is accused of as the enemy.
11 That is only one of the things that make this case greatly complex
12 and worthy of an expert.

13 Additionally, none of Mr. Nurjaman's defense counsel have
14 ever developed a mitigation case in a case such as this one, the
15 necessary expert assistance of a mitigation specialist is required.

16 MJ [Lt Col BRAUN]: Defense Counsel, I'm going to jump in
17 there.

18 DDC [LT FERNANDEZ]: Yes, Your Honor.

19 MJ [Lt Col BRAUN]: Explain to me how this case is different.
20 Because detailed counsel all do have experience litigating
21 courts-martial. A necessary part of sentencing in courts-martial,
22 from a defense perspective, is developing a mitigation case of some
23 sort.

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1 So there's clearly some experience there. Why is this case
2 different and, therefore, necessitating the appointment of a
3 mitigation expert such as Mr. Dworkin?

4 DDC [LT FERNANDEZ]: Yes, Your Honor. It is correct that some
5 of the detailed counsel have presented cases in mitigation for
6 military members. This has been in the cases of a courts-martial.
7 None have experienced developing a mitigation case in a case as
8 complex as this one. In the way that it's complex, Your Honor, it
9 starts with the fact that this -- the alleged offenses happened 20
10 years ago in a different country. The charge sheet is 30 pages long.
11 There are already due process issues, ethical issues, and situations
12 that none of the current present counsel has had training, such as
13 Mr. Dworkin who has had 18 years of experience in noncapital cases in
14 the commissions as well as in the federal government. He also has
15 cultural awareness, which is something that the current counsel does
16 not possess.

17 Another important point, Your Honor, which I think it's
18 important to point out to the commission, is that by the nature of
19 the commissions, we're already at a disadvantage since we have to
20 start at zero every time a new team comes to the commissions.

21 The government has been looking at the evidence for 22 years
22 when compared to how long we have. There have been six rotations of
23 teams since the first referral of team members in 2016.

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1 A mitigation expert is, therefore, necessary in order to
2 unpack and have the difficult conversations with Mr. Nurjaman because
3 it's not only his lifetime history that we need to explore. It's
4 also his family, his background, his education, and his psychosocial
5 history.

6 Another thing to point out, Your Honor, is that most, if not
7 all, of his detailed military counsel will not be here, and you will
8 be having the same conversation just as you have ----

9 MJ [Lt Col BRAUN]: Counsel, Counsel, if I could have you slow
10 down, please.

11 DDC [LT FERNANDEZ]: Yes. Your Honor, I will point out again
12 that most, if not all, of his detailed military counsel will not be
13 here in two years, and you will be having the same conversation that
14 you had this morning with Lieutenant Hirschler with all of us.

15 Mr. Dworkin offers continuity ----

16 MJ [Lt Col BRAUN]: Counsel, how does the commission know
17 that, though? Right? So the commission has to make findings of fact
18 based upon the record before it. I appreciate you may be estimating
19 what may happen in the future, but when we're talking about making
20 determinations of necessity, how does the commission know that?

21 DDC [LT FERNANDEZ]: Your Honor, I use the words, "there is a
22 high probability." I -- there's no way that we can say to a hundred
23 percent certainty. However, it is important to look at what the

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1 future looks like in order to discern as to what we need right now,
2 which is a mitigation expert to help us present sentencing since
3 sentencing could start as soon as the verdict is read. It could,
4 which means that the defense would have to simultaneously prepare for
5 the merits at the same time that it is preparing for sentencing, Your
6 Honor.

7 Your Honor, may I continue ----

8 MJ [Lt Col BRAUN]: Please.

9 DDC [LT FERNANDEZ]: ----- my argument?

10 MJ [Lt Col BRAUN]: Please do.

11 DDC [LT FERNANDEZ]: Okay. Give me one second.

12 Your Honor, Mr. Dworkin will assist the defense in order to
13 properly examine Mr. Nurjaman's case and develop a mitigation and
14 sentencing plan. Mr. Dworkin can give undivided attention to
15 Mr. Nurjaman's life story and ask him what happened to you, which is
16 a question the defense team could also ask him, Your Honor.

17 But when he answers, the defense team would not have the
18 appropriate training and experience to discern through that
19 information in the same way that an expert with 18 years of
20 experience who has served as a mitigation expert in the commissions
21 would. Mr. Nurjaman faces life in prison and his detailed defense
22 counsel are working on his defense on the merits.

23 Mr. Dworkin will help the defense team in developing

1 sentencing arguments, presenting mitigation evidence in order to
2 effectively argue for a sentence less than life without parole.

3 Although some of Mr. Nurjaman's detailed attorneys, like I
4 explained, have presented cases in mitigation, they have done so for
5 military members convicted in courts-martial. Thus, it would be
6 extremely difficult for the current team members to fully digest,
7 analyze, and develop more than 20 years of detention material along
8 with 40 years of life history.

9 Like I mentioned earlier, Your Honor, the alleged offenses
10 happened in a different country over 20 years ago. And the defense
11 is working on the case on the merits.

12 If we look at it in a more practical manner, defense
13 lawyers, especially those in the noncapital world, still possess a
14 limited view of mitigation. Lawyers are not trained in the
15 communication or listening skills needed for mitigation
16 investigation.

17 MJ [Lt Col BRAUN]: How so, Counsel? How so?

18 DDC [LT FERNANDEZ]: Your Honor, as attorneys, as the current
19 military detailed counsel and civilian attorneys, we have not
20 received training in how to do the listening communication skills and
21 have the sensitive conversations that will be needed. For example,
22 Mr. Dworkin, if you look at his CV, and also in the conversations
23 that I have had with me -- he has shared with me the various

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1 extensive training that he has received in order to be a -- sorry.

2 MJ [Lt Col BRAUN]: So, Counsel, I am looking at his CV, which
3 is in Appellate Exhibit 0101.001. Starting at page 18 of that
4 filing, it's Attachment 1.

5 I appreciate you may have had some conversations with
6 Mr. Dworkin. Those, however, aren't in the record before me. So the
7 CV is.

8 DDC [LT FERNANDEZ]: Yes.

9 MJ [Lt Col BRAUN]: So draw my attention to the CV to where
10 that experience exists in this -- in special training regarding
11 listening and communication, I think is how you termed it.

12 DDC [LT FERNANDEZ]: Yes, Your Honor. I explained that us, as
13 lawyers, we do not have training in the listening and communication
14 skills needed to have those sensitive conversations with
15 Mr. Nurjaman. And, as I point out, he will not only be having those
16 conversations with us, but he will be having those conversations over
17 and over again.

18 Mr. Dworkin, as a civilian, will be able to offer
19 continuity, which means he could ----

20 MJ [Lt Col BRAUN]: Though, Counsel -- and I appreciate the
21 continuity, and we can get to that piece. I want to bring you back
22 to my question. Where in the CV do I find that training and
23 experience from Mr. Dworkin ----

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1 DDC [LT FERNANDEZ]: Your Honor ----

2 MJ [Lt Col BRAUN]: ----- as it pertains to that particular
3 skill?

4 DDC [LT FERNANDEZ]: Your Honor, in that CV there will not be
5 delineated the exact words that he received training in listening and
6 in the communication skills in order to conduct the mitigation. So I
7 will not be able to point you to an exact page on the CV that you
8 have in front of you, Your Honor.

9 MJ [Lt Col BRAUN]: So, then, how is defense making that
10 argument? And I appreciate not everything's -- you're going to
11 summarize things for purposes of argument, and that's fine. I'm just
12 trying to make sure that I'm understanding where those summaries are
13 being derived from.

14 DDC [LT FERNANDEZ]: Your Honor, in my argument, I made the
15 statement that us, as military defense counsel, and also civilian
16 counsel, have not received the training in -- which the exact words
17 were in the listening and communication skills in order to conduct
18 the mitigation investigation, which is true. We have not.

19 And in my conversations with Mr. Dworkin, he shared with me
20 that he's received this training. I understand and agree with you
21 that that is not in front of you in his CV. However, him receiving
22 this training and us not having that training, it's not a requirement
23 in order to have him as an expert.

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1 It's only me pointing out the fact that we don't have the
2 training and how he -- there's several other things that are in his
3 CV, training that you can look at, that we as detailed defense
4 counsel do not possess.

5 MJ [Lt Col BRAUN]: So, then, let's do that, Counsel. Let's
6 move on to that.

7 DDC [LT FERNANDEZ]: Okay. Mr. Dworkin will assist the
8 defense in order to properly examine Mr. Nurjaman's case. And like I
9 mentioned before, he will develop a mitigation and sentencing plan.

10 The way that that is done, Your Honor, is when he first gets
11 to the case, he would review the evidence. He would meet with the
12 client in order to develop a relationship with him. He would assess
13 all of the discovery. And then he would look at, first, his life
14 background; his life history in Indonesia, which is a separate
15 country from here; his family, the ones that are still with us and
16 haven't passed away during his detention; friends; and then witnesses
17 who could also be a good type of witness that could testify during
18 the sentencing.

19 He will also do a full psychosocial background of
20 Mr. Nurjaman, both before the offense, during the time of the alleged
21 offenses, and during the last 20 years in confinement.

22 Additionally, he would also be conducting deep and long
23 interviews with each and every available family member, and he would

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1 be able to discern through all of that in order to then work along
2 the defense team and present to the attorneys what he has been able
3 to gather. And then we would use that when we are developing our
4 mitigation plan to present at sentencing, Your Honor.

5 MJ [Lt Col BRAUN]: Talk to me about the psychosocial
6 assessment. What is that and why is it so important to the defense?

7 DDC [LT FERNANDEZ]: Yes, Your Honor. So it is important
8 because it combines both the way that Mr. Nurjaman developed from the
9 moment that he was first born, the way that he was treated, and the
10 political effects in the country that he was in and the situation
11 that the country was in when he was being raised, his relationships
12 with his peers, and also the way that his mind, his brain, his
13 personality, his actions, and his desires have developed throughout
14 the first 40 years before he was apprehended.

15 Then you will add all of the things that have happened to
16 him in the 20 years of detention. And you will compare the two and
17 you will see how he has been affected not just psychologically, but
18 socially, in his personality, and his ability to relate to others,
19 and his ability to also understand what is happening to him, why it
20 has taken so long to bring him to trial, why the things that happened
21 to him happened to him. It can illuminate those things for him. And
22 Mr. Dworkin will be able to identify those, Your Honor.

23 MJ [Lt Col BRAUN]: And that's a capacity that the defense

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1 counsel organically does not have at this point?

2 DDC [LT FERNANDEZ]: Correct.

3 MJ [Lt Col BRAUN]: Okay. What -- is there anything in the CV
4 that discusses Mr. Dworkin's either experience or qualifications in
5 that particular area? I don't believe he's a psychologist.

6 DDC [LT FERNANDEZ]: No, Your Honor. He is not a
7 psychologist.

8 MJ [Lt Col BRAUN]: Okay. But you said he has worked on at
9 least one other commission? I believe the record is indicative of
10 that fact.

11 DDC [LT FERNANDEZ]: Yes, Your Honor. When we first submitted
12 our request, the convening authority identified a conflict, and then
13 we were able to waive that conflict by both his prior client and our
14 client.

15 Additionally, Your Honor, I also think that it would be
16 important if I could point you out to some significant case law that
17 also reiterates the points I have made thus far.

18 MJ [Lt Col BRAUN]: Okay.

19 DDC [LT FERNANDEZ]: I would like to start talking about a
20 noncapital commissions case, which is United States v. Omar Khadr.
21 In this case, the defense team had the assistance of a psychiatrist,
22 a mitigation expert approved by the convening authority, and a
23 clinical psychologist, in addition to other expert assistance. This

1 can be found in both their motions for appropriate relief in AE 152
2 and AE 131 from the Khadr case.

3 Next, Your Honor, we can look at U.S. v. Booker, which is a
4 United States Supreme Court decision on criminal sentencing, which
5 established a legal framework that supports the consideration of
6 mitigation in sentencing across various cases. This decision
7 underscored the necessity for courts to engage in a thorough inquiry
8 into the circumstances surrounding each defendant, helping to develop
9 a body of case law that values mitigation. This case represents a
10 pivotal moment in sentencing law in which mitigation can be
11 thoroughly examined.

12 Additionally, Your Honor, in Woodson v. North Carolina, it
13 is a U.S. Supreme Court case, in this case it was again pointed out
14 the importance of mitigation investigation when assigning an expert
15 and trying to decide what that expert could do.

16 Moving forward, Your Honor, if we also look at United States
17 v. Sawyer, which is a United States Court of Appeals Eighth Circuit
18 case decided in 2009, the court found that the judge erred by denying
19 the defendant's motion seeking a fully competent expert consultant.
20 That decision was reversed, and the findings of guilty and the
21 sentence were set aside.

22 Additionally, Your Honor, in U.S. v. McAllister, which is a
23 Court of Appeals Armed Forces case from 2007, the court found that

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1 the right to present a defense is a fundamental element of due
2 process of law.

3 In United States v. Lee, a United States Court of Appeals
4 for the Armed Forces case decided in 2006, the court stated that ----

5 MJ [Lt Col BRAUN]: Counsel, if I could have you slow down
6 just a touch, please.

7 DDC [LT FERNANDEZ]: My apologies, Your Honor.

8 In United States v. Lee, a United States Court of Appeals
9 for the Armed Forces case decided in 2006, the court stated that
10 fundamental fairness compels the military judge to be vigilant to
11 ensure that an accused is not disadvantaged by a lack of resources
12 and denied expert assistance in the preparation or the presentation
13 of his defense.

14 In this case, Lee was denied the assistance of an expert
15 during sentencing. The decision of the United States Air Force Court
16 of Criminal Appeals was reversed and the findings and sentence were
17 set aside.

18 Then again, we can look at Outen v. Kearney, which is a case
19 from the Third Circuit in 2006, when ----

20 MJ [Lt Col BRAUN]: Counsel, can you give me the citation to
21 that particular case?

22 DDC [LT FERNANDEZ]: Yes. Outen v. Kearney, 464 3d
23 district -- it can be found at 401 in 2006.

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1 MJ [Lt Col BRAUN]: Thank you.

2 DDC [LT FERNANDEZ]: Yes, Your Honor. This is a federal case
3 that involves a claim of ineffective assistance of counsel due to the
4 failure to present mitigation evidence during sentencing. In this
5 case, the petitioner, William Outen, argued that his attorney did not
6 adequately prepare for sentencing by failing to gather and present
7 crucial mitigating evidence regarding his background.

8 The court found that the defense attorney's performance fell
9 below an objective standard of reasonableness because the mitigation
10 evidence was significant and should have been presented to the court.
11 The absence of this evidence adversely affected Outen's sentencing
12 outcome as it could have provided context for the court to consider a
13 lesser sentence.

14 This case further emphasizes the critical role of mitigation
15 experts and thorough investigation in criminal defense, illustrating
16 how their absence can lead to a fundamentally unfair trial.

17 Your Honor, we also have U.S. v. Kreutzer, which is a U.S.
18 Supreme Court case reminding us again mitigation specialists possess
19 clinical and information-gathering skills and training that most
20 lawyers simply do not have.

21 Your Honor, all of the cases I have mentioned -- and I
22 have mentioned ----

23 MJ [Lt Col BRAUN]: Counsel, I'm sorry. U.S. v. Kreutzer?

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1 DDC [LT FERNANDEZ]: Yes, Your Honor.

2 MJ [Lt Col BRAUN]: Give me the citation for that.

3 DDC [LT FERNANDEZ]: Yes. One second, Your Honor.

4 MJ [Lt Col BRAUN]: I believe you said it was a Supreme Court
5 case, correct?

6 DDC [LT FERNANDEZ]: Yes, Your Honor. I have the full
7 citation if you just give me one second.

8 MJ [Lt Col BRAUN]: I'm tracking a citation of 61 M.J. 293. I
9 believe you cited it in your filing.

10 DDC [LT FERNANDEZ]: Yes. Yes, Your Honor. You're correct.

11 MJ [Lt Col BRAUN]: Okay.

12 DDC [LT FERNANDEZ]: Your Honor, as I was saying, all of these
13 cases do not have the complexity of our case. All of these cases do
14 not have the due process issues of our case. What they do have is a
15 mitigation expert. What they do have is the notice of the importance
16 of a deep and thorough mitigation investigation.

17 Your Honor, this is a serious case, and this is not a case
18 where the person simply has to spend the night in jail and that's
19 where their biggest trauma comes from, when they have access to food,
20 to warmth, to medical attention and silence and they do not have the
21 threat of harm around every corner for years of their life.

22 There are a lot of things that have to be unpacked in the
23 present case and with the aid of a mitigation expert, that would be

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1 possible. Every commissions team presently and in the past has had
2 civilian attorneys and military attorneys, both capital and
3 noncapital cases.

4 If the fact that they have military attorneys and civilian
5 attorneys was a reason to deny the motion, then no team could have
6 ever afforded themselves the appointment of a mitigation expert,
7 which leads me to the conclusion of my argument.

8 Your Honor, Ake v. Oklahoma tells us that a criminal trial
9 is fundamentally unfair when a defendant does not have access to the
10 materials necessary to build a defense. If the members are able to
11 place Mr. Nurjaman ----

12 MJ [Lt Col BRAUN]: Counsel, stop. I'm going to have you
13 pause for a moment there.

14 INT: Your Honor, this is the interpreter. Would you please
15 ask the counsel to slow down?

16 MJ [Lt Col BRAUN]: Counsel, can you see the -- okay. I'm
17 going to ask you to be -- just be aware of it on the podium there.
18 Thank you.

19 DDC [LT FERNANDEZ]: Yes, Your Honor, I saw that. My
20 apologies.

21 Ake v. Oklahoma tells us that a criminal trial is
22 fundamentally unfair when a defendant does not have access to all the
23 materials necessary to build a defense. If the members are able to

1 place Mr. Nurjaman's excruciating history on the mitigating side of
2 the scale, the panel will visit up to make a fair decision.

3 Because this case may be noncapital, but when looking at
4 Mr. Nurjaman, he has spent the last 20 years in confinement. He is
5 over 60 years old. And this is all before he has ever been given an
6 actual sentence.

7 Mr. Nurjaman has been punished for the last 20 years, and
8 based on the charges brought by the government, and if they obtain
9 the verdict they seek, there is a high probability that Mr. Nurjaman
10 will not leave this place alive.

11 When the possibility is life in prison without the
12 possibility of parole, after already serving what some jurisdictions
13 consider a life term, then the stakes are higher and the need is
14 amplified. The denial of this motion would compromise the fairness
15 of the trial.

16 Your Honor, in closing, I ask the court to consider these
17 critical points: First, the importance of mitigation during the
18 findings and sentencing phase.

19 Second, the uniqueness of this case, the defendant, and this
20 court.

21 And third, all of the legal framework supporting the
22 inclusion of well-gathered mitigation evidence and the necessity of a
23 mitigation expert consultant.

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1 Your Honor, your decision to compel this expert will be in
2 line with those precedents. Thank you.

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

4 Before you sit down, I do have a couple follow-on questions
5 for you. So in the government's response to your motion, they rely
6 heavily on the fact that this case is not capital. Why don't you
7 take an opportunity and address for the commission why the fact that
8 this is a noncapital case should or should not matter, specifically
9 as it relates to your request for a mitigation expert.

10 DDC [LT FERNANDEZ]: Yes, Your Honor. Give me one second, as
11 I have some relevant case law and things.

12 MJ [Lt Col BRAUN]: Take a moment.

13 DDC [LT FERNANDEZ]: Thank you.

14 **[Pause.]**

15 DDC [LT FERNANDEZ]: Your Honor, I think that the first thing
16 that's important to point out is the noncapital cases that
17 Mr. Dworkin has worked on while he has been a mitigation specialist.
18 Of course, I have made the court aware that he worked with the
19 commissions before, so we are all aware of that. He has also been
20 routinely court appointed to assist the defense team in mitigation
21 and sentencing investigation in noncapital proceedings.

22 To give an example of those cases is United States v.
23 Maurice Fells, which is a United States case, along with United

1 States v. Robert Burton, United States v. Lamiek Kareem Fortson,
2 United States v. William Meek, and United States v. Anthony Collier.

3 Hundreds of hours were authorized for this appointment to
4 conduct mitigation investigation for sentencing purposes in these
5 noncapital cases. All of these cases are noncapital and they also
6 face life in prison, which is similar to what Mr. Nurjaman faces.

7 Mr. Dworkin has also been appointed to cases which were
8 capital. But when the death penalty was taken off the table and was
9 no longer sought out, he was asked to remain on the case because they
10 noticed that even though this was no longer a capital case, his help
11 was still needed.

12 It is also important to point out, Your Honor, as I pointed
13 out the commissions case, Omar v. Khadr, where the convening
14 authority appointed an mitigation expert, appointed a clinical
15 psychologist, appointed a forensic psychiatrist, and this was a
16 noncapital case. They were able to gather a lot of information
17 related to the client, which is the attempt that we would like to
18 make so that when we make our argument in front of the members, they
19 can make a decision based on the evidence in front of them for the
20 leniency that we will be seeking.

21 Additionally, Your Honor, you mention the case that the
22 government brought up in their argument. And if we look at the cases
23 that they cite in their motion, Your Honor, they start with Ross v.

1 Moffitt. And an important thing that Ross v. Moffitt reminds us of
2 is that a state cannot arbitrarily cut off appeal rights for
3 indigents while leaving open avenues of appeal for more affluent
4 persons.

5 They also cite Ayestas v. Davis, which they mention a
6 funding applicant must not be expected to prove that he will be able
7 to win relief if given the services he seeks. The reasonably
8 necessary test, which is the one that we use here, requires an
9 assessment of the likely utility of the services requested.

10 They also cite Ake v. Oklahoma, which I cited in my motion,
11 Your Honor, when they say that a criminal trial is fundamentally
12 unfair if the state proceeds against an indigent defendant without
13 making certain that he has access to all the materials he needs.

14 MJ [Lt Col BRAUN]: Counsel, I'm going to ask you to slow
15 down.

16 DDC [LT FERNANDEZ]: Yes, Your Honor. They also cite United
17 States v. Kreutzer. And we also look at a case which is United
18 States v. Martinez. This is a Second Circuit case from 2010. It's a
19 federal case. It shows the mitigation specialist can be utilized in
20 noncapital cases, particularly to develop background information
21 relevant in sentencing.

22 Specifically in this case, defense counsel requested that
23 this mitigation specialist be authorized to work up to 70 hours at a

1 rate of \$100 per hour. After allowing defense counsel to explain the
2 opportunity why this request was necessary, the court agreed and
3 authorized the mitigation specialist to work up to 150 hours at a
4 total cost of \$1500.

5 The mitigation specialist investigated and prepared a
6 seven-page report describing Martinez's personal background. That
7 report was appended to defense counsel's sentencing submission. The
8 defendant was charged and received a lenient sentence.

9 Most of the cases I have presented, Your Honor, as I pointed
10 out, other than the Omar case, are not cases exactly this one. They
11 do have a mitigation expert, they are noncapital. Because in a way,
12 Your Honor, if you will agree with me, this case is a case of first
13 impression in many ways because there's not a lot of case law
14 precedent that can be utilized to show that a case just like this one
15 has had a certain outcome in sentencing.

16 I also hope that you would agree with me that there are
17 already many reasons and many issues that this case, if a conviction
18 happened, would find itself in appeal. The denial of a mitigation
19 expert is not an issue that should be added to an already very long
20 list.

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

22 One last question for you.

23 DDC [LT FERNANDEZ]: Yes, Your Honor.

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1 MJ [Lt Col BRAUN]: I think one last question. So as I piece
2 through the request of the defense, it appears you were asking for
3 600 hours of assistance. Is that accurate?

4 And you shook your head "no" there. It -- how -- let me
5 ask, how long is the -- how many hours is the defense asking for?
6 And equally important, why?

7 DDC [LT FERNANDEZ]: Yes, Your Honor. If you -- I have my
8 request right in front of me. If you give me a second to grab it so
9 I can see what it reads. Thank you.

10 MJ [Lt Col BRAUN]: Please do. And I can direct you to where
11 I'm seeing 600 hours, if that's helpful.

12 DDC [LT FERNANDEZ]: Yes, Your Honor.

13 MJ [Lt Col BRAUN]: So if you go to AE 0101.001 Attachment B,
14 Tab A. And I believe that's your request to the convening authority.

15 Because in your motion you don't specifically ask for hours,
16 just that the court compel the appointment. The court's trying to
17 understand the confines of that appointment.

18 DDC [LT FERNANDEZ]: Yes, Your Honor. So I have the motion in
19 front of me. It says defense counsel estimates that the expert would
20 require funding for an initial 600 hours, which is Mr. Dworkin is an
21 expert, a mitigation specialist with over 18 years. His standard
22 rate is \$165 an hour.

23 That is an accurate representation of the hours that we

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1 first required because we estimate, again, not making certain
2 statements, but estimating that it would take that amount of time.
3 Other experts that we have requested have had the similar amount of
4 hours, although it has been a different rate. But that would be the
5 initial amount that we're requesting, mainly because he would need to
6 review a lot of discovery, he would need to meet the client, he would
7 need to conduct thorough interviews with family members, he would
8 have to confer with counsel, and he would have to analyze and digest.

9 However, this would be his sole job, his sole requirement.
10 So that is what we estimate, Your Honor, yes.

11 MJ [Lt Col BRAUN]: Okay. So that 600 hours is based upon,
12 one, conversations with other expert mitigation -- mitigation
13 experts, excuse me, as well as an assessment of the amount of
14 discovery, the meetings, the pretrial meetings, interviews, and then
15 just time to produce a report or analyze all that information to
16 produce something useful to the defense?

17 DDC [LT FERNANDEZ]: Yes, Your Honor. You would be correct in
18 that. And as you have seen, or as the commission has seen with other
19 experts, there's always an opportunity to renew hours. So we are not
20 tying ourselves off to a request. But right now we believe that
21 that's what's reasonable. In the event that he exhausted those hours
22 and needed more, we would renew our request for more hours, Your
23 Honor.

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1 MJ [Lt Col BRAUN]: Okay. And the commission appreciates that
2 you can always come back to the convening authority or, if necessary,
3 the commission to request additional funding should that be
4 appropriate under the circumstances.

5 Those are the questions that I had for you, Defense Counsel.
6 Anything additional you would like to add at this time?

7 DDC [LT FERNANDEZ]: Your Honor, not at this time. But I will
8 save those points for rebuttal ----

9 MJ [Lt Col BRAUN]: Okay.

10 DDC [LT FERNANDEZ]: ----- if you allow me.

11 MJ [Lt Col BRAUN]: I will. As you bear burden, I'll permit
12 you to have last word on this matter, Defense Counsel.

13 DDC [LT FERNANDEZ]: Thank you, Your Honor.

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

16 ATC [MAJ PIROG]: Yes, Your Honor. May I approach?

17 MJ [Lt Col BRAUN]: Please.

18 ATC [MAJ PIROG]: Thank you, Your Honor. Ready to proceed
19 when you are.

20 MJ [Lt Col BRAUN]: Proceed.

21 ATC [MAJ PIROG]: Thank you.

22 Good morning, Your Honor. There are two issues presented in
23 this matter for the commission to consider. First is: Did the

1 defense demonstrate that the appointment of the proposed expert, the
2 proposed mitigation specialist, was it necessary to the defense? Is
3 it necessary?

4 The second issue is: Did the defense demonstrate that the
5 convening authority's denial of the proposed mitigation expert, would
6 that result in a fundamentally unfair trial? And the answer to both
7 of those questions and issues, Your Honor, is no.

8 The defense argues that somehow a team of at least six
9 highly qualified and experienced attorneys, and numerous other
10 paralegals, analysts, investigators are unable to competently prepare
11 for this noncapital case.

12 This assertion is incredible on its face, Your Honor. This
13 commission has already ruled that the defense team is expected to,
14 quote, educate themselves to attain competence in defending an issue
15 presented in a particular case. That's at AE 0097.003 (TJ).

16 And there's nothing that the defense has highlighted, in
17 their filings or today in argument, that their proposed expert
18 consultant could do that they could not do for themselves.

19 And, Your Honor, I would also like to discuss the CV of
20 their proposed expert. And if you look at, you know, some of the
21 lectures, trainings, and awards that is listed on there, on the CV,
22 I'd like to just highlight for the record what some of the topics of
23 those trainings is listed in his CV.

1 We have "Interviewing With Awareness to Gather the Story," a
2 presentation; "Using Investigators and Interviewing"; "Fundamentals
3 of Mitigation Practice"; "Mitigation Interviewing"; "Federal Death
4 Penalty: Authorization Process"; "Fundamentals of Mitigation
5 Investigation and Development of Intellectual Disability Diagnosis";
6 "Fundamentals of Mitigation Practice"; and "Mitigation Interviewing";
7 "Mitigation and Sentencing Investigation: Fundamentals, Purpose,
8 Methods"; "Fundamentals of Mitigation Practice"; and "Mitigation
9 Interviewing," and similar trainings on that, Your Honor.

10 And the reason I highlight that, Your Honor, is presumably
11 these are trainings that were designed for attorneys to go to to
12 educate themselves on mitigation principles. And the defense has not
13 presented any evidence on why ----

14 MJ [Lt Col BRAUN]: How is that relevant? The fact that he
15 went to, perhaps continuing legal education courses versus some type
16 of mitigation expert continuing courses, how does -- why should that
17 matter?

18 ATC [MAJ PIROG]: Well, Your Honor, I -- yes, Your Honor, if
19 you look closely at the CV, it indicates its presentations. I'm
20 presuming those are panels that he sat on or trainings that he
21 offered. Even if that's not entirely the case, it still demonstrates
22 the existence of a professional practice that individuals are able to
23 avail themselves of in terms of educational training.

1 And that's the point that the government is making, is that
2 these are not skills that are unique to this by-name-requested
3 individual. These are skills where there's a professional practice
4 that presumably these attorneys could also participate in to the
5 extent they believe that they -- additional training would be
6 beneficial to them, which clearly by nature of the request they
7 believe that mitigation is something that they -- is important and
8 that it is in our sentencing construct when you present, you know,
9 cases in extenuation and mitigation, Your Honor.

10 MJ [Lt Col BRAUN]: But isn't the analysis whether this expert
11 or perhaps an expert in this field, if the commission decides that
12 it's not going to grant a by-name request, but grant the appointment
13 of an expert in this field, which I believe the commission has
14 authority to do if it so finds it appropriate, isn't the analysis
15 whether this particular expert would be necessary to this defense
16 team? Isn't there a factual analysis that goes into this?

17 ATC [MAJ PIROG]: Yes, Your Honor. There's a three-factor
18 analysis, and I could have done a better job of postmarking for the
19 commission, specifically with a third prong.

20 But I'll list all three just for the benefit of the record.
21 First is to determine why the expert is needed. The second factor is
22 what the expert would accomplish for the accused. And third is why
23 the defense is unable to gather and present evidence that the expert

1 assistance would be able to develop.

2 And so speaking to that third prong, there clearly exists
3 education out there for the defense to avail themselves of.

4 And also, just if I could pivot real quickly to the second
5 prong, too, what the expert would accomplish for the accused. The
6 defense in their filings and today in oral argument have listed many
7 different things that they believe that this expert would be able to
8 do for them. But in just naming those items, they've identified,
9 yes, those are things that the defense needs to do and presumably
10 with the staff of the counsel that's detailed to the case, the
11 assistants that are there as well. Those are things that they are
12 perfectly capable of doing.

13 And, Your Honor, just to help focus some of the point on
14 that, if you look at the CV, I believe it's the first page of the CV,
15 and it has the employment history. It has the Dworkin Investigation,
16 LLC, duties include but are not limited to. It lists presumably the
17 summation of what this proposed individual would bring to the table
18 for the defense.

19 I won't read each one, Your Honor, but just picking one, the
20 second one, the second bullet point, identifying, locating ----

21 MJ [Lt Col BRAUN]: Second bullet point on which page of the
22 CV, Counsel?

23 ATC [MAJ PIROG]: Your Honor, it's not numbered. I believe

1 it's the first page. It would be under the employment history under
2 the Dworkin Investigation, LLC, which is April 2012 to present. So
3 this is current information, lists some bullets of what duties
4 include but are not limited to, a summation, if you will, Your Honor,
5 of this expert's abilities.

6 Each one is something that the defense themselves are fully
7 capable of doing, whether it's identifying, locating, interviewing
8 witnesses, whether it's performing in-depth records and looking at
9 different cites. There's nothing unique about this. And so going
10 back to the construct that the -- that we have in our system of, one,
11 is the expert necessary? And two, would it result in a fundamentally
12 unfair trial?

13 That's a high standard, Your Honor. The duties and the
14 assistance that this expert would bring to the defense, we would
15 present that that -- we would submit that that would be in the "nice
16 to have" bucket, not the is it necessary, is it going to result in a
17 fundamentally unfair trial.

18 The standard that is -- the court is to apply, if it is to
19 compel the convening authority to do something that the convening
20 authority, in their discretion, exercising the applicable laws and
21 regulations around it, declined to do so.

22 Your Honor, quite simply, the defense fails to demonstrate
23 something more, quote, than a mere possibility of assistance from

1 their requested expert. And that's -- that goes back to that "nice
2 to have" bucket.

3 Certainly this individual would be performing actions and
4 doing things that they've argued in their briefing and in oral
5 argument. But, again, it goes back to the rules that govern the
6 appointment of experts that -- that controls, not, hey, is this
7 individual -- would they be able to do something for the defense?
8 Certainly. But is it something that the defense cannot do for
9 themselves? The answer to that is no, Your Honor.

10 The defense lacks any specific examples of information that
11 is inaccessible to them without the proposed specialist's unique
12 skill set or why the robust team of attorneys, paralegals, case
13 analysts, investigators and other expert consultants that they have
14 on their team cannot present a compelling mitigation case, should
15 that become necessary.

16 Finally, Your Honor, the defense has not met their burden to
17 show that denial of their request would result in a fundamentally
18 unfair trial. A trial is fundamentally unfair where the government's
19 conduct is so outrageous that due process principles would absolutely
20 bar the government from invoking judicial processes to obtain a
21 conviction. That's U.S. v. Anderson, 68 M.J. 378.

22 And going back to the size of the team, of the defense team,
23 the amount of experience that they bring to the table, Mr. Nurjaman's

1 defense team has the requisite qualifications and resources to
2 adequately represent him at trial.

3 Now, before we close this out, Your Honor, it bears
4 mentioning some of the aspects pertaining to the case law that the
5 defense has cited, and particularly U.S. v. Kreutzer.

6 So Kreutzer was a capital case, Your Honor, and so much of
7 the reasoning that CAAF applied in that case, it has to be viewed
8 through that lens. And I would just point to the citation in
9 Kreutzer at 61 MJ 302 to 303.

10 If I could just read this one sentence. It says: In
11 addition to the general importance of a mitigation specialist in
12 death penalty cases, mitigation specialists may play a particularly
13 important role in ensuring the fair and full adjudication of military
14 death penalty cases where, as here, counsel have little training or
15 experience in capital litigation.

16 And, Your Honor, additionally, when you read Kreutzer and
17 you actually look at the quotations that the defense cited to with
18 respect to the expert mitigation consultant that was at issue in that
19 case, these were not sweeping statements from the court saying expert
20 mitigation consultants are necessary in every case and, you know,
21 this is -- this is absolutely what they bring to the table.

22 You've got to remember that Kreutzer was evaluated -- the
23 record in that case and the factual record that was built in that

1 case, it was looking at reasoning from the Army court, service court
2 that they were reviewing. And so it -- much of what it says about
3 the expert consultant needs to be viewed through that lens.

4 For example, the quotations about the defense mitigation
5 specialists, one was that the appellant's trial was not, and I quote,
6 unusual case -- oh, I'm sorry. Was not the, quote, usual case. And
7 so Kreutzer was already recognizing that -- the Kreutzer court was
8 recognizing that the facts at issue in that case were unique and
9 largely hinged on the defense attorneys in those -- in that case,
10 inexperienced in capital litigation.

11 The CAAF also quotes some ABA -- the American Bar
12 Association comments as well in explaining for the record, hey, this
13 is what a mitigation specialist does. This is how they may be able
14 to assist.

15 Your Honor, I think -- not "I think" -- our own Rules for
16 Military Commissions also recognize the difference between capital
17 and noncapital litigation. For example, when you review R.M.C. 1004,
18 in capital cases, it says if the accused is specifically, quote,
19 given broad latitude to present evidence in extenuation and
20 mitigation. So clearly there's a baseline that is being deviated
21 from when you're talking about a capital case.

22 MJ [Lt Col BRAUN]: Yeah, but aren't we comparing apples to
23 oranges a little bit? You're talking about 1001 and its

1 permissibility to present evidence at sentencing. I think that's a
2 different standard than preparing a case in mitigation for potential
3 consideration of presentation at sentencing, right?

4 ATC [MAJ PIROG]: That's correct, Your Honor. But I still
5 think it's important when looking at the cases that the defense cites
6 and looking at mitigation experts in those cases, the capital nature
7 of those cases can't be -- you can't get away from the fact that when
8 an appellate court is examining the record in capital litigation,
9 they're going to make statements and they're going to make findings,
10 as they should and they do.

11 But then to try to take that body of law and apply it in
12 noncapital litigation is not to say that there's not always going to
13 be principles that are going to be true in both contexts. That's not
14 the government's point. But just that it needs to be viewed through
15 that lens. It would be helpful for the commission to keep that in
16 mind when it's evaluating this issue.

17 And, Your Honor, counsel -- defense counsel during argument,
18 you know, cited to a bunch of cases that this expert has purportedly
19 worked on and some of the facts and circumstances of -- some of the
20 facts and circumstances of those cases. I'm not entirely sure that's
21 in the record, but even if Your Honor was -- so we would object to
22 you considering any facts and evidence not in the record.

23 But, you know, there was some discussion about, you know,

1 this expert was appointed to a capital case, and then when it became
2 noncapital they were asked to stay on, et cetera.

3 We're not entirely sure what the rules are in those
4 jurisdictions with respect to how they appoint their experts, what
5 the funding source is, whether this was a public defender office with
6 their own pot of money. You know, just how helpful those examples
7 are. Without more facts, those really aren't good data points to
8 rely on in considering, okay, what are these other jurisdictions
9 where he worked doing mitigation expert consulting work, Your Honor.

10 And just to -- on that note, Your Honor, importantly,
11 neither case law nor ethical guidance suggests that a mitigation
12 specialist is required in noncapital cases. And neither the CA, the
13 convening authority, nor the prosecution were able to find any
14 case -- any cases where the denial of a mitigation specialist
15 resulted in any sort of reversible error.

16 There is no authority, case law or otherwise, that grants
17 the accused the right to assistance from a mitigation specialist.
18 And because the existing defense team is absolutely qualified to
19 investigate and present their mitigation case, should it become
20 necessary, this motion should be denied.

21 Pending any questions.

22 MJ [Lt Col BRAUN]: Trial Counsel, what expert assistance, if
23 any, has the government or does the government anticipate using in

1 developing its sentencing case?

2 ATC [MAJ PIROG]: Your Honor, I'd have to defer to lead trial
3 counsel on that point. Certainly we're always evaluating the case
4 and thinking sentencing, thinking, hey, what arguments are going to
5 be made, what evidence are we going to present, you know, victim
6 impact-wise, those sorts of matters.

7 MJ [Lt Col BRAUN]: The government would concede that part of
8 the analysis the court has to conduct, or one of the factors that the
9 court would conduct in its analysis is determining if the government
10 has assistance, defense should be placed on an equal footing, right?

11 ATC [MAJ PIROG]: Your Honor, I understand that that is going
12 to be on the commission's mind, but I would not say that that's not
13 something that should be always, you know, thought of in a broad
14 sense, Your Honor. I want to be very clear, in a broad sense,
15 because case law on what is a standard, what is the test for the
16 military judge to apply in appointing an expert consultant, I would
17 just note that there is no factor that talks about -- about that.
18 But you ----

19 MJ [Lt Col BRAUN]: You wouldn't concede in, let's say
20 a -- let's take a typical drug case, drug use case, the government
21 having access to an expert toxicologist and the defense being denied
22 access to an expert in the form of a forensic toxicologist would
23 create a fundamentally unfair situation?

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1 ATC [MAJ PIROG]: Your Honor, I understand that that's a -- I
2 would agree with that observation, that second part, fundamental
3 unfairness, that could potentially be where the commission could
4 perform that analysis. But you've still got to get through the first
5 part, which is the necessary -- is it necessary, Your Honor.

6 And to that point, without getting into too many
7 hypotheticals for Your Honor, I don't -- you know, I want to be
8 helpful -- we do not have any expert aggravation experts, if you
9 will, kind of the other side of the coin that we could present
10 matters in aggravation, et cetera, for a sentencing case. We do not
11 have one of those types of individuals detailed to our case or
12 appointed to be an assistant in that way.

13 MJ [Lt Col BRAUN]: I think those were -- I think that was the
14 only question I had for you at this time.

15 ATC [MAJ PIROG]: Could I have a brief moment and just check
16 with my counsel table?

17 MJ [Lt Col BRAUN]: You may have a brief moment.

18 **[Counsel conferred.]**

19 ATC [MAJ PIROG]: That's all. That's all, Your Honor. Thank
20 you.

21 MJ [Lt Col BRAUN]: Thank you.

22 Trial Counsel?

23 TC [Lt Col GOEWERT]: Your Honor, may I add one quick addendum

1 from here? The prosecution has not at this point requested any
2 expert assistance from the convening authority in this case, and
3 would only do so in the findings portion as relates to findings
4 issues, not sentencing matters.

5 So to the degree that we have not requested, do not
6 anticipate requesting a jury consultant or other such consultants
7 that might be in this category, the defense currently has a forensic
8 psychologist, and were that person to be utilized in litigation, we
9 might request something in that regard in relation to motions that
10 might appear before the court, the commission, but not as regards
11 sentencing.

12 So we have no expert assistance that is relevant for
13 sentencing at this point and do not anticipate any such thing.

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

15 Defense Counsel, I promised you last word, as you bear
16 burden, so now is your opportunity.

17 DDC [LT FERNANDEZ]: Thank you, Your Honor.

18 Your Honor, during the government's argument, which a large
19 part of it was a rereading of their response, they talked about
20 Mr. Dworkin's qualifications and experience in the cases that I
21 mentioned.

22 And it is true that in his CV those cases aren't fleshed
23 out. However, if the commission was inclined, I do have a five-page

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1 signed affidavit from Mr. Dworkin where he talks about his experience
2 in both capital and noncapital commissions. He goes into detail
3 about the cases that he took part in. He also refers ABA Guidelines
4 in certain cases.

5 I would not be intending to display it to the gallery. I do
6 have copies for all the parties if Your Honor is so inclined.

7 MJ [Lt Col BRAUN]: Counsel, wouldn't that have been helpful
8 to attach to your filing?

9 DDC [LT FERNANDEZ]: Yes, Your Honor. I did not have that
10 when I filed the motion. That has come into conversations in
11 anticipating the response, as conversation with the teams, we decided
12 that we would only use that to inform our argument. However, I do
13 have that if the commission would like to see that.

14 MJ [Lt Col BRAUN]: Here's what we're going to do. I want you
15 to provide that to opposing counsel at this time so that they can see
16 it.

17 DDC [LT FERNANDEZ]: Yes, Your Honor.

18 MJ [Lt Col BRAUN]: Well, you plan to present it to the
19 commission, so, yeah, show it to opposing counsel first.

20 DDC [LT FERNANDEZ]: Yes, Your Honor.

21 **[Counsel conferred.]**

22 MJ [Lt Col BRAUN]: Trial Counsel, I'm going to give you an
23 opportunity -- actually, we'll take a recess. I'm going to let you

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1 digest that information before we move forward. I plan to ask if you
2 have objection to the commission considering the information in that
3 affidavit, understanding that we are -- we're considering a motion
4 here, so the rules are -- the rules permit a wider -- a wider view
5 towards admissibility, if you will.

6 But take a moment, talk with co-counsel, consider that
7 information. I'm going to give you 10 minutes to do that. We'll
8 come back on the record, and we'll figure out where the commission
9 wants to go based upon input from both parties at that time.

10 Is there anything else we can do before I place us in a
11 10-minute recess?

12 Trial Counsel?

13 ATC [MAJ PIROG]: No, Your Honor. Thank you.

14 MJ [Lt Col BRAUN]: Defense Counsel?

15 DDC [LT FERNANDEZ]: No, Your Honor. Thank you.

16 MJ [Lt Col BRAUN]: Very well.

17 This commission's in a 10-minute recess.

18 **[The R.M.C. 803 session recessed at 1115, 23 June 2025.]**

19 **[The R.M.C. 803 session was called to order at 1126, 23 June 2025.]**

20 MJ [Lt Col BRAUN]: This commission will come to order.

21 All parties that were present when the commission last
22 recessed are again present.

23 Trial Counsel, did you have an opportunity to review the

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1 affidavit the defense referenced?

2 ATC [MAJ PIROG]: Yes, Your Honor.

3 MJ [Lt Col BRAUN]: Okay. We should probably mark that at
4 this time. Let me get an appellate number to identify that affidavit
5 with.

6 Okay. So we're going to mark that as Appellate
7 Exhibit 0101.006 (NUR).

8 Defense Counsel, if you could please assist me with fully
9 identifying that document for the record.

10 DDC [LT FERNANDEZ]: Yes, Your Honor. It's a five-page
11 document. It was signed on 3 April 2025. It's an affidavit by
12 Mr. Samuel Dworkin.

13 MJ [Lt Col BRAUN]: I note that counsel has provided me a
14 copy -- has provided the court reporter a copy of that appellate
15 exhibit, and that copy has been -- or that appellate exhibit has been
16 provided -- then provided to me by the court reporter.

17 Trial Counsel -- Defense, I believe you want the commission
18 to consider this affidavit?

19 DDC [LT FERNANDEZ]: Yes, Your Honor. That's correct.

20 MJ [Lt Col BRAUN]: Trial Counsel, objection?

21 ATC [MAJ PIROG]: Your Honor, while we don't necessarily
22 object to this commission considering the affidavit in substance,
23 certainly the process in which it's been delivered to the commission

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1 and the parties, we would object to the process that was used to get
2 this before the commission being presented.

3 How helpful that is to the parties to actually digest it,
4 you know, and really look at it with a fine-toothed comb, while not
5 necessary for this particular matter that we're addressing, this
6 affidavit, just we would raise that to the commission's attention,
7 the concerns that we have in that regard. Thank you.

8 MJ [Lt Col BRAUN]: Yeah. And that's noted, Trial Counsel,
9 that the commission would have very much preferred that defense
10 counsel had either amended its -- supplemented its original filing
11 prior to today or included this in its original filing when it filed,
12 but that's not where the commission finds itself.

13 Given this is information that substantively the trial
14 counsel doesn't object to the commission considering and the defense
15 is offering this as relevant to the commission's consideration of the
16 defense request, the commission will consider AE 0010.006 in ruling
17 upon the defense request.

18 ATC [MAJ PIROG]: And, Your Honor, if I may briefly?

19 MJ [Lt Col BRAUN]: You may.

20 ATC [MAJ PIROG]: We do believe that the commission should
21 give it the weight it deserves, however, and we would like an
22 opportunity to, at the appropriate time, offer our thoughts.

23 MJ [Lt Col BRAUN]: Yeah. So what the commission will do -- I

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1 appreciate that may change some positions you had. The commission
2 will give you an opportunity to summarize those thoughts that you'd
3 like to bring to the commission's attention after it finishes with
4 defense's rebuttal argument here.

5 The commission of course will give, as it does all evidence,
6 weight that it deems appropriate in arriving at a ruling.

7 Defense Counsel, with that, then, please continue with your
8 rebuttal argument.

9 DDC [LT FERNANDEZ]: Yes, Your Honor. Just a couple brief
10 points on rebuttal.

11 As I stated, some of the points made by the government, and
12 the first one was about the defense team making themselves available
13 to the training and getting trained and educated on all of the ways
14 that could help in presenting the mitigation evidence. Your Honor,
15 the amount of time -- point number one, the amount of time that it
16 would take for the defense team to get trained and qualified is
17 something to consider.

18 Second, also, the -- when requesting funding to attend a
19 training, it's not as simple as it seems. It takes time and it
20 takes considering.

21 MJ [Lt Col BRAUN]: Okay. So let's delve into that a little
22 bit.

23 DDC [LT FERNANDEZ]: Let's.

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1 MJ [Lt Col BRAUN]: So you kind of stated two sub-points.

2 One, it will take a long time. Explain to me what you mean.

3 DDC [LT FERNANDEZ]: Yes, Your Honor. For the defense team
4 presently on the team for the next however months we're here for, the
5 amount of time that it would take for all of us to become acquainted
6 with the necessary training that Mr. Dworkin has been able to
7 efficiently develop in the last 18 years of his practice would take a
8 substantial amount of time.

9 But let's say that we're able to get trained and qualified
10 in the time that we have left, then we also have to use all of the
11 training to conduct the mitigation investigation, which would also
12 take a substantial amount of time. Following that, we have to think
13 about how to present that as mitigation evidence, which will also
14 take a substantial amount of time.

15 All of that could be avoided with the appointment of a
16 necessary expert which the rule says necessary to the defense and
17 also a reasonable probability that it would result in a fundamentally
18 unfair trial, Your Honor.

19 MJ [Lt Col BRAUN]: Okay. So it's the commission's
20 understanding, based upon the filings, that the -- and I believe it's
21 in the government's response, the defense team consists of
22 investigators that assist the defense; is that accurate?

23 DDC [LT FERNANDEZ]: Yes, Your Honor.

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1 MJ [Lt Col BRAUN]: How are those investigators not able to
2 help cover some of that gap in resources that Mr. Dworkin is
3 necessary to fill?

4 DDC [LT FERNANDEZ]: Yes, Your Honor. And I don't think that
5 I can offer information as to what the investigators are currently
6 doing because I believe that ----

7 MJ [Lt Col BRAUN]: And, yeah, the commission is not looking
8 for that. The commission is trying to understand why the
9 investigators you currently have on your team would be insufficient.

10 DDC [LT FERNANDEZ]: They are insufficient because they are
11 currently extremely busy with doing other tasks that also require
12 investigation. Your Honor, the sentencing phase is only one phase of
13 the trial. The merits phase is another, as we are all aware, and
14 they are currently in the developing of that along with the
15 developing of the discovery, interviewing witnesses in order for the
16 merits and for evidence, not for mitigation. Nor is that what they
17 were hired to do. Nowhere in their hiring memorandum will you find
18 the words "mitigation assistance."

19 MJ [Lt Col BRAUN]: Okay. Then let's move on to the second
20 point. You made a reference as to resourcing or funding, I believe.
21 Explain that to me a little more.

22 DDC [LT FERNANDEZ]: Yes, Your Honor. So if -- first of all,
23 we would have to identify what kind of training is necessary for us

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1 to get trained on because it has not been required of us thus far.
2 Once we do and we were able to identify some classes that we could
3 attend, some schooling while still working on the merits of the case
4 Monday through Friday all day. We will have to request funding for
5 that training and for those classes. That is not always granted.
6 And then we would also have to find somewhere where that is
7 available ----

8 MJ [Lt Col BRAUN]: Counsel, I'm going to remind you to slow
9 down a touch, please.

10 DDC [LT FERNANDEZ]: My apologies.

11 Your Honor, like I mentioned, first, we would have to submit
12 a request in order to have funding for those trainings. We would
13 have to identify those trainings. We would have to attend those
14 trainings while still making sure that manning of the team is done
15 and that all of our other responsibilities are also being attended
16 to.

17 Once, let's say -- because, again, I am not aware of these
18 trainings, where they exist or where an attorney can become a
19 competent mitigation specialist, but if they do, then once we're done
20 receiving all this training, then we would have to gather the
21 evidence, gather the investigation, and then have all of these
22 interviews. That would also take time, Your Honor.

23 I was simply showing the reference to time, which I think

1 it's an important consideration to have when thinking about all of
2 the things that defense counsel could do while we have someone
3 readily and able to assist.

4 Your Honor, you also mentioned to the government whether
5 they would be making themselves -- availing themselves to an expert.
6 And, Your Honor, they didn't have an answer for that.

7 However, they have had 22 years to find aggravating factors.
8 And in order to find aggravating factors, the amount of deep
9 investigation to find mitigating factors completely opposite and
10 completely different. So if they do not avail themselves to an
11 expert, that does not mean that we are not in necessity of one.

12 Like I have made many points, also, Your Honor, I presented
13 several cases to the court -- I don't know, somewhere between 8 and
14 11 cases -- and they decided to talk about Kreutzer which is a
15 capital case, Your Honor. Nowhere in the case law or in the rules
16 does it say that Mr. Nurjaman has the right to expert assistance only
17 if his case is capital. That is not why we're here.

18 I understand that sometimes the word "capital case," the
19 government can use it as a buzz word to show that we are not entitled
20 to that. However, it doesn't stand and it is baseless with that
21 case.

22 However, Kreutzer is helpful, Your Honor, because it does
23 point out the importance of mitigation and the defense felt that it

1 was worthy of considering among with the other several cases that we
2 pointed out, including a noncapital commissions case when a
3 mitigation expert was appointed.

4 Those are all the points I have, Your Honor.

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

6 Trial Counsel, I was going to give you an opportunity to
7 address anything specific to AE 0101.006. I'm going to ask that you
8 keep it confined to that, that particular exhibit, please.

9 ATC [MAJ PIROG]: Yes, Your Honor. May I approach?

10 MJ [Lt Col BRAUN]: Please.

11 ATC [MAJ PIROG]: And, Your Honor, thank you for the
12 opportunity to just address a couple points in the affidavit.

13 Sir, there's really three points that the prosecution would
14 raise for your consideration about this affidavit. The first one is
15 that the foundation of this affidavit really is the ABA Guidelines
16 pertaining to death penalty cases.

17 And not going back to prior argument that I made on that
18 point, Your Honor, but when you read the affidavit, it's clear that
19 the standards that is being invoked by this declarant, it's citing
20 guidelines pertaining to capital cases.

21 The second one pertains to -- I believe it's paragraph 12 of
22 the affidavit -- and, again, just going back to this list -- these
23 lists of cases where this individual was appointed as an expert

1 consultant, these were capital cases that became noncapital.

2 And, you know, what's devoid of this affidavit is what the
3 standard was that is involved in his appointment initially in that
4 regard, particularly the permissiveness of those jurisdictions,
5 whether it's the office who appointed him or whether it was a court
6 that appointed him. Even being unaware of those specific facts, we
7 really just don't know what standards are at play in those cases,
8 where in our cases, in our military case law, which is very clear
9 about what the standard is for the appointment of an expert.

10 Your Honor, the third point kind of goes back to the
11 trainings. And just looking at the first paragraph of this
12 affidavit, it talks about -- I believe it's ten -- ten or -- ten
13 lines into the paragraph. It talks about how this individual was the
14 lead author of a chapter titled "Capital Case Sentencing
15 Evaluations." But it is inside the text of an *"Inside Forensic
16 Psychology"* book that presumably defense counsel could make
17 themselves available to review.

18 It also -- the following sentences says that, quote: I have
19 also attended and presented at numerous state and federal conferences
20 across the country about mitigation and sentencing investigation
21 issues. I have provided trainings on the mitigation function and
22 sentencing consideration for both capital and noncapital cases to
23 the -- and, Your Honor, just note the bodies, professional bodies,

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1 which I would assume are somewhat local, Virginia Trial Lawyers
2 Association, the Virginia Indigent Defense Commission, and the
3 Washington, D.C. Public Defender Service.

4 So, again, just going back to the point about defense
5 counsel's, should they assess that trainings in this regard to be
6 helpful for them, there's clearly a body of training out there that
7 defense -- and this is the defense's burden, Your Honor, just going
8 back to -- this is not the government's burden to prove why it's not
9 necessary. This is their burden to prove why it's necessary and to
10 show why they are unable to develop, learn, educate themselves.

11 For that reason, when reviewing the affidavit, Your Honor,
12 we just ask that you keep those thoughts in mind. Thank you.

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

14 Those are all the -- I believe that concludes the
15 commission's consideration of this matter. The commission will
16 provide a written ruling to the parties based upon the defense motion
17 at AE 0101.003.

18 So given the hour, it appears it would be appropriate to
19 take our lunch recess. The parties will have a slightly longer
20 recess. But it would be my intent, then, to reconvene at 1330. At
21 that time, the commission will move into consideration of AE -- the
22 AE 103 series, which is the defense motion regarding R.M.C. 1001(g).

23 Before I recess for lunch, are there any other matters that

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1 the commission can take up at this time?

2 Trial Counsel?

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

4 MJ [Lt Col BRAUN]: Defense Counsel?

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

6 MJ [Lt Col BRAUN]: Very well.

7 This commission's in recess until 1330.

8 **[The R.M.C. 803 session recessed at 1142, 23 June 2025.]**

9 **[The R.M.C. 803 session was called to order at 1335, 23 June 2025.]**

10 MJ [Lt Col BRAUN]: This commission will again come to order.

11 All parties that were present when the commission last
12 recessed are again present.

13 During that recess, I did provide back to the court reporter
14 Appellate Exhibit 0101.006 (NUR).

15 Okay. Counsel, at this time the commission would like to
16 take up AE 0103.001, which the defense requests the commission hold
17 unlawful and set aside R.M.C. 1001(g), which purports to revoke the
18 military judge's authority to grant Mr. Nurjaman day-for-day
19 sentencing credit for pretrial confinement.

20 Defense, in your filing, you indicate that you bear burden
21 as movant; is that correct?

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

23 MJ [Lt Col BRAUN]: Okay.

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1 Trial Counsel, you concur?

2 TC [Lt Col GOEWERT]: We do, Your Honor.

3 MJ [Lt Col BRAUN]: Very well. Neither party filed a notice
4 pursuant to Military Commission Rule of Evidence 505(g), so I'm going
5 to assume we are not going to refer to classified information in
6 argument.

7 Is that correct, Defense Counsel?

8 DDC [Capt HOPKINS]: That's correct, Your Honor.

9 MJ [Lt Col BRAUN]: Trial Counsel?

10 TC [Lt Col GOEWERT]: Correct, Your Honor.

11 MJ [Lt Col BRAUN]: Okay. Very well.

12 Defense, any additional evidence, aside from what has been
13 attached to your filings, you would like the commission to consider?

14 DDC [Capt HOPKINS]: Yes, Your Honor. And I've provided two
15 documents to the court reporters for marking. I've also provided
16 those to trial counsel earlier today. These are purely responsive to
17 some of the materials submitted by the trial counsel last week on
18 Wednesday in their notice of intent to offer evidence.

19 So I don't really anticipate referring to these in argument.
20 But I do believe that when the trial counsel offers the evidence that
21 they've indicated they intend to offer that these materials provide
22 context for some of that.

23 So with that said, I'm happy to wait to walk the commission

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1 through these until after the trial counsel, you know, formally
2 offers their evidence into the record, or just to identify them now,
3 put them into the record, and refer to them, you know, if necessary,
4 later on in argument.

5 MJ [Lt Col BRAUN]: Since we've been referring to them on the
6 record, let's at least identify them and mark them at this time. I
7 note the court reporter did provide me working copies, Counsel, so
8 thank you.

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

10 So the first, which I believe has been marked for
11 identification at this point, AE 0103.005 (NUR), is the -- is a
12 printout of the "About the PRB" page from the Periodic Review
13 Secretariat website. This is a two-page document in the form in
14 which it has been provided, which also contains a link indicating the
15 time that this -- the date on which this website was last accessed.

16 The second, which I believe has been marked for
17 identification as AE 0103.006 (NUR), is a 32-page document that is
18 the final report of the Guantanamo Review Task Force dated
19 January 22nd, 2010. And that report is referenced in the first piece
20 of evidence to which I referred, simply to provide, you know, that
21 context for that reference, Your Honor.

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

23 Trial Counsel, understanding the caveat that defense gave

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1 that this is in essence response to the additional items the
2 government noticed, any objection you'd like to place on the record
3 with regard to these two appellate exhibits?

4 TC [Lt Col GOEWERT]: No, Your Honor. Thank you.

5 MJ [Lt Col BRAUN]: Okay. Very well. The court will consider
6 these two appellate exhibits in addition to what has already been
7 attached to the filings in ruling upon the defense motion.

8 Is there any other evidence or material you'd like the
9 commission to consider, Defense Counsel?

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

11 MJ [Lt Col BRAUN]: Okay. Thank you.

12 Then, Trial Counsel, before we get into arguments, let's
13 take up any -- I know you provided notice to the commission that you
14 had additional documentary evidence that you'd like the commission to
15 consider. Remind me, was that -- were those already attached to your
16 filings or are they additional -- are they in addition to what has
17 been attached to your filings?

18 TC [Lt Col GOEWERT]: Your Honor, this was just what was in
19 the AE 0103.004 (Gov), which was provided the commission
20 18 June 2025, and we provided four attachments in that notice to the
21 commission. And that would be -- we have nothing further other than
22 those items that were noticed.

23 MJ [Lt Col BRAUN]: Okay.

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1 Defense Counsel, any objection to the commission considering
2 those attachments to the government's filing?

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

4 MJ [Lt Col BRAUN]: Okay. Very well. The commission will
5 consider those attachments as well.

6 Anything additional, Trial Counsel?

7 TC [Lt Col GOEWERT]: No. Thank you, Your Honor.

8 MJ [Lt Col BRAUN]: Okay.

9 Defense, are you prepared to present argument?

10 DDC [Capt HOPKINS]: Yes, Your Honor. May I approach the
11 lectern?

12 MJ [Lt Col BRAUN]: Please do. When you're ready, proceed.

13 DDC [Capt HOPKINS]: Good afternoon, Your Honor. May it
14 please the court, the question presented by the defense motion is not
15 how much pretrial confinement credit should be awarded to
16 Mr. Nurjaman in the event of a conviction. The question is whether
17 the Secretary of Defense has the power to revoke the judiciary's
18 authority to grant any pretrial confinement credit at all in any
19 military commission under any circumstances.

20 And specifically, the question is whether the Secretary can
21 revoke that authority here in military commissions despite the fact
22 that he has given military judges broad authority to grant such
23 credit for both formal pretrial confinement and other forms of

1 pretrial restriction in courts-martial.

2 The answer to those questions is that the Secretary does not
3 have that power. And key to understanding why that is the answer is
4 to recognize that the Secretary does not have plenary rulemaking
5 authority for military commissions. Rather, Section 949a(A) of the
6 MCA states that: Except as otherwise provided by the MCA or other
7 applicable law, that procedures and Rules of Evidence applicable in
8 trials by general courts-martial shall apply in trials by military
9 commission.

10 The limited exception that follows in Subsection (b) of that
11 provision says that: The Secretary may make such exceptions to
12 courts-martial rules and procedures as are required by the unique
13 circumstances of the conduct of military and intelligence operations
14 during hostilities or by other practical need.

15 That provision is plainly intended to incorporate the
16 standard articulated by the Supreme Court in Hamdan v. Rumsfeld in
17 articulating what is necessary in order for a military commission to
18 be a regularly constituted court. And what is necessary is that it
19 apply the same rules and procedures as courts-martial unless there is
20 a genuine practical need for deviation.

21 That is the only exception. The practical need standard is
22 the only exception given to the Secretary to justify some deviation
23 from court-martial procedures. Therefore, unless there is a genuine

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1 practical need to impose a divergent rule, the Secretary is
2 prohibited from issuing rules and procedures for military commissions
3 that deviate from the rules and procedures governing courts-martial.

4 R.M.C. 1001(g) undoubtedly deviates from court-martial
5 procedures. For courts-martial, the Secretary has enacted a rule
6 mandating pretrial confinement for both formal pretrial confinement,
7 as well as other restriction amounting to confinement arising from
8 crimes for which an accused service member is later convicted. That
9 is a pro-credit rule that is even broader than the rule used in the
10 federal system. Importantly, that rule does not purport to revoke
11 any other inherent or equitable authorities that a military judge may
12 have in courts-martial. It gives servicemembers an enforceable right
13 to credit in certain circumstances and it leaves military judges free
14 to fashion remedies as may be appropriate in unique cases involving
15 pretrial restriction on an accused's liberty even when it's not
16 formally categorized as pretrial confinement.

17 R.M.C. 1001(g), on the other hand, seeks to prevent the
18 entry of pretrial confinement credit across the board. The
19 government's response says that the government's position is that it
20 even prevents you, as the military judge, from granting Mr. Nurjaman
21 pretrial confinement credit for the last four and a half years of his
22 law of war detention, even though that detention has undoubtedly and
23 quite formally been tied directly to the pendency of this military

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1 commission under Section 1021(c) of the 2012 National Defense
2 Authorization Act.

3 There is no practical reason to enact a rule that claims
4 that law of war detention can never amount to pretrial confinement in
5 a law of war military commission. At best, the Secretary, through
6 R.M.C. 1001(g), has sought to enforce a flawed legal argument by
7 fiat. That legal argument lost when the government first attempted
8 to make it at the trial level in the military commission case of
9 United States v. Hamdan. And the military judge's decision in that
10 case to grant credit for most of -- most but not all of Mr. Hamdan's
11 confinement in United States custody prior to his trial was not
12 disturbed on appeal.

13 The MCA simply does not permit the Secretary to refashion a
14 losing legal argument into a new Rule for Military Commissions. That
15 is not a practical need. It is a purely capricious action designed
16 to take a lawful remedy away from criminal defendants.

17 To illustrate this, it would undoubtedly have been unlawful
18 for the Secretary of Defense to say, following Mr. Hamdan's
19 sentencing, that he was ordering all military judges in the
20 Department of Defense that in future military commissions cases, they
21 may not follow the persuasive precedent set by the military judge in
22 the Hamdan case.

23 That would have been unlawful because Section 949b of the

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1 MCA prohibits the Secretary from admonishing military judges about
2 how to rule on legal questions. It cannot be the case and is not the
3 case that the Secretary is permitted to achieve the same result more
4 efficiently and more effectively by formally promulgating that
5 admonishment and calling it a rule.

6 The government response argues that Mr. Nurjaman's detention
7 to date does not merit pretrial confinement credit. It is crucial
8 for the commission to note that the motion now at issue does not seek
9 to prevent the government from putting those same arguments forward
10 at the appropriate time on their own merits following any potential
11 conviction in this case.

12 If R.M.C. 1001(g) were based on a correct legal premise, as
13 the government claims that it is, then the rule would be entirely
14 unnecessary. The commission can set aside R.M.C. 1001(g) today and
15 still give the government's arguments appropriate consideration at
16 the appropriate time on their own merits.

17 In other words, ruling for the defense on this motion does
18 not commit the commission to any particular position or outcome
19 whatsoever on the question of how much pretrial confinement credit to
20 grant Mr. Nurjaman if he's later convicted.

21 But this commission, like the military judge in Mr. Hamdan's
22 commission, must be permitted to answer that question for itself,
23 free from the improper influence of an ultra vires rule. The

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1 Secretary exceeded his statutory authority and acted arbitrarily and
2 capriciously when he enacted R.M.C. 1001(g). It is, therefore,
3 unlawful and must be set aside. And I'm happy to answer any
4 questions the commission has at this time.

5 MJ [Lt Col BRAUN]: No additional questions, Counsel. Thank
6 you.

7 DDC [Capt HOPKINS]: Thank you, sir.

8 MJ [Lt Col BRAUN]: Trial Counsel?

9 TC [Lt Col GOEWERT]: Good afternoon, Your Honor, and members
10 of the commission. I will do my absolute best to try to speak as
11 slowly as possible. And I apologize to the interpreters and other
12 court officials for speaking so quickly earlier today.

13 Your Honor, the issue or, rather, I should say the
14 resolution to this question comes in two very simple parts: One, the
15 premise of the defense argument is inherently and fundamentally
16 flawed from the very beginning. Because when this commission
17 actually starts to look at what the defense is saying, you'll see
18 that the fundamental premise, the beginning of their argument, is
19 wildly incorrect.

20 And that's because in the actual language of the NDA -- I'm
21 sorry, not the NDA. Excuse me -- 849(a)(a), the Congress told the
22 Secretary of Defense that you will provide modes and orders of proof
23 to matters, procedures -- post-trial and trial procedures that are

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1 derived from military law, but specifically -- gave us two specific
2 sources. Those specific sources were the procedures and Rules of
3 Evidence applicable to trials by courts-martial. So the fundamental
4 problem is in the very premise of their argument.

5 Pretrial confinement is nowhere to be found. And what
6 they're talking about is day-for-day pretrial confinement, right?
7 The pretrial confinement that you would give in a courts-martial is
8 derived from a DoDI. A DoDI and DoDM. It is not derived from the
9 MCM. It is not derived from the M.R.E.s. It comes from a source
10 outside the core matrices of military law and that's the first flawed
11 premise.

12 The only law that commissions had derived from and to follow
13 were the core matrices of military law which were procedures, which
14 would be the rules for courts-martial and the Military Rules of
15 Evidence. Those are the two things that are stated right here in the
16 beginning, Rules of Evidence and Rules of Procedure.

17 Things that are outside of that core don't exist.
18 Otherwise, we would have to follow every rule in DoDIs, DoDMs,
19 service regulations, and many regulations, this whole other series of
20 sequelae and branches that surround the core that Congress first
21 initiated. So there's no reason to even begin to take their argument
22 at all because there's no basis for it.

23 Secondly, and if this court goes to the seminal case of

1 U.S. v. Smith, and reads -- which it describes where courts -- where
2 the authority to grant pretrial confinement credit comes from. And
3 we're not talking about illegal pretrial confinement under 305.
4 We're talking about day-for-day pretrial confinement as defined by
5 DoDI and the DoDMs at issue in this case.

6 You'll read that in civilian cases, credit for lawful
7 pretrial detention is regarded as a matter of legislative grace and
8 not a constitutional guarantee. So the first thing that U.S. v.
9 Smith is saying, and this is at 7, is that the legislature gives
10 judges, it gives someone in your position the power to grant that.
11 Right?

12 In this case, the legislature gave plenary authority to the
13 Secretary of Defense to define the rules and the procedures that we
14 use here in these commissions. All right? And nowhere in any
15 document, in the MCA or elsewhere, did Congress, the legislature
16 speak to pretrial confinement. It didn't grace us with a requirement
17 to have pretrial confinement credit.

18 You'll see just a paragraph down that Smith said there is no
19 provision in the UCMJ or the Manual for Courts-Martial that requires
20 credit against an adjudged sentence for lawful pretrial confinement.
21 This is an odd concept to us because we're so used to it. We're so
22 used to the idea that if you've done time for something, then you
23 ought to receive credit for it.

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1 But that's not because there's a rule embedded in the UCMJ
2 or the M.R.E.s or the R.C.M.s. It's something totally outside of
3 that, that imports that, and it imports that legislative grace.
4 There is no operative legislative grace in this case. All right. So
5 the fundamental premise that it even exists to draw upon is not
6 there.

7 The defense has said and has tried to argue in their motion
8 to this commission that Mr. Nurjaman is here because he is a pretrial
9 detainee, or a pretrial confinee, or some combination of the two.
10 And they cite to the September 6th, 2006, statement by President Bush
11 to that regard in which he addressed the nation and he addressed
12 members of his cabinet about the war on terror.

13 And we included that as an attachment because we start
14 looking at that to try to understand the history of this and try to
15 understand their contention that he is here because he is somehow a
16 law of war detainee -- I'm sorry, more than a law of war detainee,
17 that he is a pretrial detainee or a pretrial confinee, and he would
18 only be here for that reason. It's absurd.

19 This entire statement begins with the premise that the
20 people that we're fighting are enemies, that they're dangerous. If
21 one looks at the second page of that attachment, you'll read that the
22 President said that we've captured and detained thousands of
23 terrorists and enemy fighters in Afghanistan and Iraq on the front

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1 lines in this war on terror.

2 These enemies, these are enemy combatants who are waging a
3 war on our nation. We have a right under the laws of war, and we
4 have an obligation to the American people, to detain these enemies
5 and stop them from rejoining the battle.

6 He was very clear from the very front that these are law of
7 war detainees. These are not people here who are somehow in some
8 separate category or class. And he never abrogated their status as
9 law of war detainees. He said quite squarely that we continue to
10 view these people as threats, and we continue to hold them.

11 They are in our custody so they cannot murder our people,
12 and describes on page 3: These are dangerous men with unparalleled
13 knowledge about terrorist networks and their plans for attacks.

14 Moving on, he discusses at length the CIA's RDI Program, and
15 describes the treatment that he expects them to receive in the future
16 following the International Committee of the Red Cross, who would be
17 advised of their movements.

18 But he says later on the principal reason that we haven't
19 been able to close Guantanamo Bay is that some of these people, and
20 referencing and talking about people like Mr. Nurjaman, is that we
21 can see that they will -- should not return to the battlefield, as
22 more than a dozen other people have.

23 And you'll see consistently throughout this, this isn't a

1 simple document announcing the creation of military commissions and
2 creating a status for people like Mr. Nurjaman. It is a
3 multi-pronged document with lots of interest in it, one of which is
4 to say firmly and most clearly that the AUMF still applies; that the
5 reason, Congress, that you gave us the authority to detain them still
6 very much exists. And we view them as people falling within that
7 status. He never abrogated, he never created a second class of -- a
8 second group of people, as the defense would have you believe.

9 Our next exhibit, the Combatant Status Review Tribunal
10 document, Your Honor, was a document that was written on 12
11 February 2007. The CSRT inquired into Mr. Nurjaman's case and
12 decided that he supported al Qaeda forces and associated forces that
13 were engaged in hostilities against the United States and its
14 coalition partners. That was the conclusion of the tribunal, found
15 at paragraph 7.c.

16 And why does that matter? It's because the idea that he is
17 here solely because the United States at some point wanted to try him
18 is absurd. The United States, in all its forms and functions and all
19 its offices, viewed him first and foremost as an enemy combatant
20 under the AUMF, and has treated him as such.

21 Your Honor, we have provided to you the various documents
22 that came from the PRB. So the PRB first examined Mr. Nurjaman's
23 case in 19 September of 2016. And you'll see that there are multiple

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1 full and file reviews of his case.

2 The first finding by the PRB is that the law of war
3 detention of Mr. Nurjaman remains necessary to protect against a
4 continued significant threat to the security of the United States.

5 Mr. Nurjaman is not and was not at that point in time
6 pending trial here. That's quite correct. But I provide these
7 knowing that these would eventually end, but to point out to the
8 commission that the United States Government viewed him as a law of
9 war detainee and treated him as such.

10 In 2017, the Periodic Review Board said that we have to
11 protect against the -- a significant threat to the security of the
12 United States, and that holding him does just that. And there were
13 no questions, no significant questions that warranted his release.
14 Again, the PRB reviewed his case in 18 October of 2018 and they made
15 the same conclusion.

16 They reviewed his case on 11 March of 2020, and said that
17 they determined it was necessary to continue to detain him because he
18 constituted a significant threat to the security of the United
19 States.

20 On 16 September 2020, that board reviewed his case, and they
21 noted that there was no significant questions as to his continued
22 detention and that their prior consensus stood.

23 Your Honor, this is because -- it isn't -- he isn't here

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1 because he was awaiting a trial or that we would have to try him
2 first to release him. He's here because the United States considered
3 him an alien unprivileged enemy belligerent from the very beginning.
4 The trial that the defense is talking about is sort of track two of
5 all of this. And that's their argument in relationship to the 2012
6 NDAA.

7 If you look at the 2012 NDAA, it bears mentioning first that
8 the first thing Congress did was it affirmed the AUMF. In the first
9 passage it said the AUMF is the law of the land, we're not -- we
10 continue to support it and uphold it, and it's the authority for the
11 U.S. to detain these folks.

12 The authority to detain them isn't the authority to try
13 them. It isn't the authority of the commissions or the MCA. It's
14 the AUMF square, front, and foremost.

15 MJ [Lt Col BRAUN]: But, Counsel, there's overlap there, too.

16 TC [Lt Col GOEWERT]: There's some overlap, but they are
17 ultimately parallel tracks, right? One's status within the AUMF
18 isn't dependent upon the trials occurring in this commission. Now,
19 we can only try alien unprivileged enemy belligerents in these
20 military commissions, that's true. So there is a little overlap, but
21 that's about the extent of it. Otherwise, they're parallel
22 processes.

23 So for instance, the AUMF does not create classes and

1 categories and distinctions of types of detainees. It simply says
2 there are four ways in which you may treat them, right? You may hold
3 them as a detainee, you may try them, you may transfer them to
4 someone else's custody, or you can transfer them to an alternate
5 court or competent tribunal having lawful jurisdiction.

6 And so interestingly, the reason we provided the Obama
7 administration signing declaration on this is because they affirmed
8 that the -- the Obama Administration looked at what Congress is doing
9 and said there is no new law here. Right? This is on, I believe,
10 page 2 of that document. The President came out and said, look, this
11 section breaks no new ground and is unnecessary. Congress, there was
12 no reason that you should have told us about this or given us this,
13 these particular passages because the AUMF gave us the plenary and
14 all the authority we ever needed to do what we are doing and we're
15 doing this under the laws of war. We can already hold you, we can
16 already try you, that is abundantly clear under the laws of war.
17 Everything that you're talking about are the executive prerogatives
18 that we already have, so why are you giving us this, Congress? They
19 said that all you're doing is codifying the established authorities.

20 So in nowhere in this document did we create distinctions,
21 categories, or classes that are separate. There isn't such a thing
22 as a pretrial detainee who is all subject to the laws of war versus
23 someone who is just a detainee under the laws of war.

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1 They are not distinct categories or classes. One has trial
2 rights that are a subset of the fact that they are in a commission,
3 but that doesn't extend to their status otherwise.

4 Your Honor, it's important to note in all of this that the
5 Secretary did not leave someone like Mr. Nurjaman bereft of any
6 recourse in terms of requests for mitigation or the fact that they
7 may have been held as a detainee is not -- is not lost or forgotten.

8 The Secretary provided in R.C.M. 1001, in sentencing, that
9 the nature and length of detention is a matter in mitigation which
10 can be considered by the panel. So it isn't like the executive
11 forgot about that and said no one will ever worry about that or
12 consider it forever.

13 What they're saying is that there is a way for it to be
14 considered. The weight and the degree of consideration, the degree
15 of merit of the type and length of detention shall be considered by
16 the sentencing authority.

17 And we fully expect that you will instruct the panel at some
18 point that they are to consider that as a matter of mitigation. Now,
19 the degree to which they consider that could be day for day. It
20 could be 10 to one day. It could be whatever ratio they consider to
21 be the right balance when coming to -- in arriving at a sentence. It
22 may be worth something, it may be worth a lot, it may be worth
23 nothing. But the point is it's for the panel members to ultimately

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1 consider.

2 So the fact that he was a pretrial detainee for a lengthy
3 period of time, first of all, doesn't exist as a status. What exists
4 as a fact is the length and conditions of his confinement which will
5 not be lost on the panel. They can consider it and they will
6 consider it because I expect that you will instruct them. We expect
7 that the defense will present evidence in that regard. So it's not
8 like the -- that it isn't lost as an issue.

9 Additionally, if the panel -- not only can they bring it up
10 as a matter for the panel, but they can raise it as a matter for the
11 convening authority. They can raise it as a matter in clemency for
12 the convening authority and the Secretary to act upon. So this issue
13 isn't lost just because the secretary has clearly defined the law for
14 the commission. The Secretary, in enacting 1001(g), was quite right.
15 There is no such thing as pretrial confinement in military
16 commissions because that is a separate rule not drawn from the
17 R.C.M.s or the M.R.E.s for which I'm bound to do. So commissions
18 don't consider pretrial confinement.

19 Also, you need to understand commissions that pretrial
20 detention, because it is a -- formed from the AUMF, it draws its
21 legal authority from the AUMF, similarly doesn't constitute pretrial
22 confinement. You cannot grant credit for it.

23 However -- however, there is a body that should consider it

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1 and there is a body that will consider it and will factor it into
2 whatever ultimate sentence occurs in this case. So the justness and
3 the morality of it, to the extent it exists at all, is still a matter
4 which the defense can argue at the appropriate time.

5 Your Honor, do you have any questions for us?

6 MJ [Lt Col BRAUN]: I do not, Counsel. Thank you.

7 Defense Counsel?

8 DDC [Capt HOPKINS]: First in rebuttal, Your Honor, I would
9 note that trial counsel used a phrase during his argument that I
10 think is plainly incorrect. He said the legislature gave plenary
11 authority to the Secretary of Defense to make Rules for Military
12 Commissions.

13 And that's exactly what didn't happen. It didn't happen for
14 a very clear reason, which is that the Executive Branch tried to
15 create military commissions that were obviously kangaroo courts early
16 in the war on terror, and those were held to be unlawful by the
17 Supreme Court. And the Supreme Court set out a standard by which to
18 evaluate whether a military commission might be able to pass the
19 barest international law standards provided by Common Article 3 of
20 the Geneva Conventions. And that standard related directly to
21 whether or not the rules and procedures used by courts-martial were
22 then incorporated into military commissions, the presumption being
23 that we treat our own servicemembers with something like fairness.

1 In light of that Supreme Court ruling, Congress specifically
2 did not give plenary authority to the Secretary of Defense to repeat
3 the same mistakes that the Executive Branch had previously made.

4 Congress, in fact, created a rule that's pretty clear: You
5 shall use the same rules and procedures that you use in
6 courts-martial in military commissions, except in some specific ways
7 that we've put into the statute and except where there's some other
8 genuine practical need that you could articulate.

9 No practical need has been provided to you in the briefing
10 cycle by the government or at oral argument. They have only doubled
11 down again on a legal argument that lost when they put it forward in
12 the first military commission case to go to trial under a post-MCA
13 military commission regime.

14 So this idea that pretrial confinement is legislative grace,
15 it's not a constitutional guarantee, the idea that Mr. Nurjaman has
16 recourse to the panel, all of these things, they're simply irrelevant
17 because that's not the procedure or the rule that our members get in
18 courts-martial, the procedure that is presumed to be fair, the
19 procedure that is very similar to the federal system but, in fact,
20 more favorable to the accused than in the federal system because it
21 acknowledges that there is such a thing as informal restriction
22 amounting to pretrial confinement.

23 So Mr. Nurjaman should have access to the same remedy as

1 servicemembers do. Trial counsel says that because this remedy is
2 derived from a DoDI and not from the MCM, it is therefore not a rule.
3 But that is not how CAAF has treated this rule. If you read the case
4 cited in the defense's initial motion, United States v. Harris, that
5 is a case in which CAAF very clearly treats the DoDI in question as a
6 rule that gives servicemembers an enforceable right, as a rule that
7 can be interpreted much like a rule for court-martial or a statute
8 and that requires certain actions of military judges. So regardless
9 of the source of the rule or that procedure, if judges misapply that
10 rule, on appeal a servicemember can ask an appellate court to apply
11 the rule correctly. It, is therefore, a rule or procedure to which
12 they have recourse in the legal system.

13 Going on to Mr. Nurjaman's history, I do want to point out
14 that all the discussion of why the government believes he should not
15 be entitled to credit going back to 2003 or going back to 2006 is not
16 really relevant, I will discuss it some because it has, you know,
17 been brought up repeatedly in this litigation, but it's not really
18 relevant. What's really relevant is that R.M.C. 1001(g) purports to
19 take away the right for Mr. Nurjaman to even ask for this. It takes
20 away the right for him to put forward the same argument that
21 Mr. Hamdan put forth in his military commission and takes away your
22 right as the military judge to consider, you know, when in fairness,
23 using perhaps the court-martial rules as a starting point, other

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1 equitable principles, when in fairness should I start to give
2 pretrial confinement credit.

3 1001(g) just takes away your right to do that completely.
4 So that's the real problem, is that according to the government,
5 Mr. Nurjaman cannot even claim credit for these last four and a half
6 years, which one of the reasons that we asked for oral argument was
7 in hopes, you know, that Your Honor would ask the government, if
8 there is some sort of declared end of hostilities under the AUMF, if
9 say the three men who remain detained here purely under, you know,
10 AUMF authority and are not charged in a military commission, if they,
11 you know, win a case at the Supreme Court where the Supreme Court
12 recognizes that sometime between, say, 2021 and now after the
13 withdrawal of Afghanistan there no longer are hostilities between the
14 United States and al Qaeda and those men are released as a result,
15 will the government try to still detain Mr. Nurjaman? Will the
16 government say, well, here, when you look at the 2012 NDAA, it says
17 pretty clearly that the government can detain certain people until
18 the end of hostilities but it can continue to detain you because
19 you're being charged in a military commission.

20 I think it's very clear that they would make that argument
21 if push came to shove. And though I cannot, you know, certainly
22 would never deign to instruct the military commission on what
23 information to gather, I think we can assume and infer that that's

1 the government's position in light of the 2012 NDAA.

2 It's also a position where I think the specific controls the
3 general. So we have an AUMF that doesn't say anything about
4 detention authority. In Hamdan v. Rumsfeld, of course, the Supreme
5 Court said detention authority is inferred from that broad grant of
6 authority. And then Congress came back in 2012 and put more precise
7 definitions on that authority.

8 The government is free to say that the Executive Branch
9 doesn't interpret that as placing, you know, additional restraints on
10 the authority. But if they weren't concerned that that's exactly
11 what happened, President Obama probably wouldn't have put that
12 statement out.

13 And this military commission is a court. So it has its own
14 independent obligation to interpret the law. And as we've cited in
15 many motions to the court, you know, the law is what's in the
16 statute. The law is other sources of legal authority, be it the
17 Geneva Conventions, the Constitution, the statute.

18 The law is certainly not an argument of a president who's
19 trying to frame what the law means at the time of its enactment.
20 That is not a source of binding legal authority. The text is the
21 source of legal authority.

22 So, again, Your Honor, all that to say Mr. Nurjaman is
23 clearly confined right now in furtherance of this military

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1 commission. And there's a rule that says he can't get credit for
2 even that period of time.

3 That is a problem. It is deeply flawed to say that law of
4 war confinement can never be pretrial confinement when he is facing a
5 law of war military commission. That simply does not make sense.

6 But going back to his earlier confinement for which the
7 defense would, of course, at the appropriate time, if Mr. Nurjaman is
8 convicted of any offense, like to have the opportunity to argue that
9 he is entitled to credit for that period of time. We have put
10 evidence in the record, supported by, you know, now the submissions
11 of the government that in 2006, the President of the United States
12 said that the government had largely completed its questioning of the
13 14 men who it called high-value detainees and was now bringing them
14 to Guantanamo Bay to, quote, face justice.

15 So the President of the United States didn't want to say
16 we're just going to hold these men indefinitely as part of our
17 claimed global permanent war on an ideology. They knew that that was
18 politically untenable. They knew that that was an illegal claim of
19 power, honestly. So instead they said we're going to have these men
20 face justice.

21 You heard testimony in the 81 series from Special Agent
22 Frank Pellegrino that at that time he and the FBI sprung into action
23 to try to question Mr. Nurjaman and other detainees in support of

1 those charges. And in the evidence that we have put forward today in
2 the two in-court submissions shows -- in the second in-court
3 submission shows that President Obama then initiated a review
4 designed to see how and where to prosecute those who remained in
5 Guantanamo Bay when he took office.

6 It does not say what the precise recommendations for each
7 detainee were. But, again, you also heard testimony from Special
8 Agent Pellegrino back in October that around that time Mr. Nurjaman's
9 case was brought before a federal grand jury.

10 So we can safely infer from those two data points that the
11 government not only in 2006, 2007 started trying to gather evidence
12 to bring Mr. Nurjaman to trial either in a military commission or in
13 an Article III court, but then in 2009 or 2010 started then the
14 process of bringing him to trial in an Article III court based likely
15 on the recommendation of that Guantanamo Detainee Review Task Force,
16 the report of which has now been provided for the record.

17 The PRB, which the government has cited as, you know, making
18 decisions about whether to detain Mr. Nurjaman pending an end of
19 hostilities, has access to that recommendation. So the PRB on its
20 "About" page, which was provided, as the other in-court submission
21 today says, that it's not considering the law of war detention of
22 detainees in a black box.

23 It's not giving them the equivalent of, like, an

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1 administrative separation board in the military where you're supposed
2 to have impartial members who don't know anything except what's
3 presented at the board. That board is comprised of senior officials,
4 including from the Department of Defense and the Department of
5 Justice. And they are explicitly made aware of the recommendation of
6 that task force that was convened under the Obama Administration to
7 decide whether to prosecute these men. So that board is not making
8 its decisions, you know, absent any information about whether there's
9 a desire to prosecute.

10 So the desire to prosecute Mr. Nurjaman has definitely been
11 part of his continued detention going back to 2006, when President
12 Bush said he was one of the 14 men who was being brought here to face
13 justice, going back to 2009, when President Obama sent his case to a
14 grand jury, and going through that period of time where he did
15 receive a couple looks from the PRB when they received that
16 recommendation as well, certainly through to 2017, when charges were
17 first sworn, and then certainly through to 2019, when the current
18 charge sheet was sworn, and then 2021.

19 All that to say the defense should have the same opportunity
20 that Mr. Hamdan had, if there's a sentencing in this case, to put all
21 that evidence before the military judge and say, at this point, be it
22 2003, 2006, or some other time, Mr. Nurjaman was held, if not in
23 formal pretrial confinement under restriction equating to pretrial

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1 confinement with an eye toward prosecuting him, and that the
2 government's decision to defer prosecution, to delay prosecution
3 should not be counted against Mr. Nurjaman for sentencing purposes
4 and that he's entitled to credit for that period of time.

5 The rule that says he can't do that was enacted to rebuke
6 the decision of a military judge in a similar position as you. That
7 is not justice. That is not fair play. That is not a practical
8 need. It is an admonishment of future military commissions. It is
9 arbitrary. It is capricious. It is in excess of statutory
10 authority, and the commission should therefore set that rule aside.

11 Thank you, Your Honor.

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

13 So the commission will consider the matters attached to the
14 parties' filings as well as the two appellate exhibits marked by the
15 defense, 0103.005 and 006, as well as arguments on ruling upon the
16 defense request. Commission will issue a written ruling in due time
17 on the defense motion.

18 I believe that resolves those matters which the commission
19 desired to address today.

20 Consistent with the information I provided the parties at
21 yesterday's R.M.C. 802 conference, I intend to have another
22 R.M.C. 802 conference this afternoon.

23 It's my understanding that the parties would like a brief

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1 recess before we move into that R.M.C. 802 conference to get some
2 updates and crosstalk.

3 Is 15 minutes going to be sufficient before we commence that
4 R.M.C. 802 conference or do we think we need a little more time than
5 that?

6 Trial Counsel?

7 TC [Lt Col GOEWERT]: Your Honor, at this point 15 minutes is
8 fine. We just have to check back and see if we have got any final
9 information.

10 MJ [Lt Col BRAUN]: Okay.

11 Defense Counsel?

12 LDC [MR. FANNIFF]: Fifteen minutes would be sufficient for
13 that, Your Honor.

14 MJ [Lt Col BRAUN]: Is there any other business we can take up
15 today, then, before I terminate this portion of the proceedings for
16 today?

17 Trial Counsel?

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

19 MJ [Lt Col BRAUN]: Okay.

20 Defense Counsel?

21 LDC [MR. FANNIFF]: There's one other piece of business I'd
22 like to draw your attention to, Your Honor. I was made aware during
23 the break that my counsel, military counsel, are being denied access

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1 to my client in the back there during the breaks, the issue being the
2 pins on their uniforms, and they're being asked to remove their
3 uniforms, which would require them under their regulations to change
4 completely out of their uniform in order to visit my client during
5 the break if they need to have a conversation with him. And I think
6 that is an issue that needs to be drawn to the commission's
7 attention.

8 MJ [Lt Col BRAUN]: Okay. Have you discussed this with the
9 government, by chance? Have you had an opportunity?

10 LDC [MR. FANNIFF]: I did make them aware of the issue, but I
11 haven't had a chance to have a more significant discussion with them,
12 Your Honor.

13 MJ [Lt Col BRAUN]: Okay. So at this time, I appreciate the
14 notice on this. I'm going to give you and the government an
15 opportunity to talk to see if there's a misunderstanding or where the
16 parties are at on that. If it's something that the commission needs
17 to intervene in, likely inclined to require the defense file a motion
18 requesting whatever relief that may be so that the government can
19 properly provide the commission with whatever authority is being
20 utilized, and the commission kind of will have a more clear-sight
21 picture of what the situation is and what authorities are being used.

22 The commission clearly isn't going to provide any relief
23 based merely upon assertions of counsel. I need a little more than

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1 that. So -- but I'm going to give you all an opportunity to talk
2 through that. It's also something we can, if we think it's something
3 we can take up this week, we can talk about it in the R.M.C. 802
4 conference, just kind of where the parties are at and where they
5 think they need to go on that particular issue.

6 We have some time this week, so if we need to address
7 additional matters, we'll do that, so...

8 LDC [MR. FANNIFF]: Thank you, Your Honor.

9 MJ [Lt Col BRAUN]: Yes. Anything else, Defense Counsel?

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

11 MJ [Lt Col BRAUN]: Okay. So, then, it is -- we will recess
12 for today. We will reconvene tomorrow, as of right now, at 0900.
13 That may adjust a little bit based upon the conversation we're about
14 to have in the R.M.C. 802 conference. If that's the case, you know,
15 I'll make sure you're all aware. But as of right now, we'll plan on
16 reconvening at 0900 tomorrow morning.

17 Counsel, you will stay behind. Then in 15 minutes we'll
18 have that R.M.C. 802 conference. I'm going to ask that the gallery
19 be cleared, of course, for that R.M.C. 802 conference prior to that
20 start.

21 So, bailiffs, if you could assist me with that.

22 Absent that, we are in recess.

23 **[The R.M.C. 803 session recessed at 1423, 23 June 2025.]**