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1 [The R.M.C. 803 session was called to order at 1020,
2 14 August 2017.]

3 MJ [Col RUBIN]: The commission is called to order. All
4 parties, when the commission was last recessed, are present.

5 Just to clarify, the commission does have Appellate
6 Exhibit 092B, which was the reaffirmation of the accused's
7 waiver for his presence today.

8 ATC [LCDR SPENCER]: Yes, Your Honor. Just for clarity of
9 the record, the government submits 092B, which was witnessed
10 by the SJA and signed by the accused this morning affirming
11 his voluntary waiver, and I believe defense counsel can verify
12 that that's the accused's signatures.

13 MJ [Col RUBIN]: Thank you.

14 DC [CDR COOPER]: Yes, Your Honor. I can verify that that
15 is Al-Tamir's signature and that he did wish to waive this
16 morning.

17 MJ [Col RUBIN]: Thank you very much.

18 TC [CDR SHORT]: Your Honor, there is one thing we forgot
19 to do in our preliminary issues. If I may, Your Honor, to
20 state that these proceedings are being transmitted stateside
21 via CCTV to remote viewing sites at Fort Meade, Maryland, and
22 Fort Devens, Massachusetts, pursuant to the commission's
23 order, Appellate Exhibit 005I.

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1 MJ [Col RUBIN]: Thank you, Commander.

2 Lieutenant Commander Lincoln, are you prepared to
3 proceed?

4 ATC [LCDR LINCOLN]: Yes, Your Honor.

5 MJ [Col RUBIN]: Very well.

6 ATC [LCDR LINCOLN]: Good morning, Your Honor. The
7 government's response to AE 091 and the argument this morning,
8 I will keep it brief since we have discussed this issue as you
9 noted in the past, I think in the 802, I don't recall if you
10 summarized this, but you said you would consider our arguments
11 on the previous motion.

12 MJ [Col RUBIN]: Yes.

13 ATC [LCDR LINCOLN]: So I do rest partially on that.

14 While it's fresh, I do want to reference the two
15 documents that defense brought up, the two documents Bates
16 1-027919 and Hadi 1-027932, just the notion, and I'll put this
17 to bed quickly, the notion that the government missed
18 something and somehow that's a basis for needing laptops is
19 misplaced. I mean, I have seen both those documents. I know
20 the signature that is on there and the name. And if you look
21 at the charge sheet, Appendix A, the aliases of Abd al Hadi
22 al-Iraqi, among others, one is Nashwan Abd al-Razzaq, Abd
23 al-Baqi. It was signed -- it does include Al-Tamir, but one

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1 was signed Abu Abdallah al-Razzaq, Nashwan Al-Tamir. Another
2 Nashwan Abd al-Razzaq, Abd al-Baqi Al-Tamir. So what is at
3 issue in this case is not exactly the name that the accused
4 has gone by. In fact, we have listed a number of aliases,
5 among others. It's the nature of the activity he was alleged
6 to have committed to have numerous kunyas or nicknames or
7 aliases, whatever it might be called.

8 So we are not trying the case right now, but just to
9 disprove the notion that that should be some support for the
10 accused's need for a laptop I think is entirely misplaced.

11 MJ [Col RUBIN]: We will get those documents marked as
12 Appellate Exhibits. We don't need to do that right now, but
13 at the next recess.

14 DDC [LCDR LOFLAND]: Yes, Your Honor.

15 MJ [Col RUBIN]: Thank you. Please continue.

16 ATC [LCDR LINCOLN]: Yes, Your Honor. So to the
17 government's argument and some of the new information we would
18 like to respond to, most importantly one of the key cases, I
19 mean, today we are hearing defense say we should be looking at
20 the other commissions. This is not a federal court. Yet in
21 AE 091, until it was rebutted by the government effectively in
22 091A, they looked closely to U.S. v. Neff. However, as it
23 says in U.S. v. Neff, "this fundamental right of access to the

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1 courts, however, does not include a constitutional right to a
2 personal computer."

3 The Supreme Court has said the same thing. In U.S.
4 v. Bounds, they are talking about a law library, but there is
5 no freestanding right to a law library. In Lewis, also both
6 cited by the defense and by us, the defense must demonstrate
7 the deficiencies of what is currently available to them."

8 In this motion, the defense has the burden. We have
9 had a lot of arguments. We have had a run-through of the
10 history of the 9/11 laptop litigation, which again, the
11 government still puts forward is not particularly relevant to
12 this case. As we went through and we have -- and the defense
13 has not disproven this -- but all the orders in 9/11 as cited
14 in 091A, they go back to the return of the laptops that were
15 provided when the defendant -- when the accused were pro se.

16 So to say that the fact that they were given laptops
17 pro se and it's been overcome by events, again, there is
18 nowhere in that litigation where -- even if we were to look to
19 the commissions cases as particularly compelling, I mean, it
20 was not based on any inherent right, because the right is of
21 access to the courts. And the defense has not shown why with
22 six detailed counsel and five sitting here today and one who
23 we know is actively involved but has been absent from the

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1 hearings, but is, as far as we know, assisting in his defense,
2 why they cannot effectively represent him in court without a
3 laptop.

4 In fact, we have seen them represent him quite
5 effectively on numerous motions and moving forward with this
6 litigation.

7 Also in U.S. v. Neff, like I say, I wanted to point
8 out while there were only 3,000 pages of physical information,
9 there were over 20 storage devices and hundreds of hours of
10 audio. In this case we are talking, we are close in numbers,
11 when you come to unclassified discovery, we come out at 31,258
12 pages. Not all of that is even viewable by the accused. Some
13 of it is UNCLASS//FOUO and I didn't break it down further.

14 But assuming, you know, if you want to indulge me for
15 a minute, if we want to get into the, you know, the really
16 specific facts here, I was stricken by the comment in their
17 reply, it said that this would fill up his room. So very
18 briefly I was looking at the copy paper at our office. One
19 box of copy paper is 10,000 pages of material. It's 5,000
20 sheets of paper. That's three boxes of copy paper. So even
21 if they weren't to -- I am not going to get into how they
22 analyze their case and communicate with their client, but even
23 if they were to drop every single page of unclassified

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1 discovery on the accused, we are not talking, you know, the 20
2 storage devices' worth of data that was in U.S. v. Neff and we
3 are not talking about information that was natively in most
4 cases electronic and has been printed out just as spreadsheets
5 upon spreadsheets. Most of these were originally physical.

6 Defense says under the circumstances of this case, no
7 defendant reasonably could be expected to comprehend and
8 utilize the vast amount and array of discovery material
9 without the benefit of a computer and various software.
10 That's -- that's a conclusory statement. We simply have no --
11 we have no facts or evidence that what they have available to
12 them has failed.

13 MJ [Col RUBIN]: Trial Counsel, I am sorry to interrupt.
14 If you could just speak a little bit more about the practical
15 considerations, particularly the matters set forth -- it's
16 page 5 of 8 of the defense reply, the practical considerations
17 of the accused accessing and storing tens of thousands of
18 pages, if you could just educate the commission on how that's
19 done. Are there bins? Where are these documents kept?

20 ATC [LCDR LINCOLN]: Your Honor, I will to the best of my
21 ability. I think defense might have better insight into that.
22 My understanding is that he has legal bins that he has access
23 to and we recently -- we had a protective order signed that

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1 deals with communication back and forth between defense
2 counsel. But physically how it's kept in his -- in his cell,
3 I would have to defer to defense to put forward evidence on
4 that. I can't speak in detail, Your Honor.

5 MJ [Col RUBIN]: Very well.

6 ATC [LCDR LINCOLN]: But as for practical considerations
7 in providing a laptop, I mean, one serious consideration is
8 that you are essentially in a SCIF, you are dealing with an
9 alleged terrorist, and -- I mean, we - when dealing in a
10 classified environment, we all, we do make compromises. And
11 when, you know, the defense is asking for a laptop and simply
12 not explaining why they haven't been able to effectively
13 communicate with their client, other than say -- I mean, they
14 say they can't, but they haven't submitted evidence to show
15 that that is the case.

16 If Your Honor would like me to get into the specific
17 software requests, I could. The government, again, though,
18 stands that he doesn't need a laptop at all, so I don't intend
19 to get into that unless Your Honor wants me to.

20 MJ [Col RUBIN]: I think it's covered in the government's
21 response.

22 ATC [LCDR LINCOLN]: Yes, Your Honor.

23 MJ [Col RUBIN]: Thank you.

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1 ATC [LCDR LINCOLN]: So subject to your questions,
2 Your Honor.

3 MJ [Col RUBIN]: No additional questions. Thank you.
4 Defense, I will give you the final word.

5 DDC [LCDR LOFLAND]: I'll be brief, Your Honor. The
6 government consistently makes reference to the size of the
7 defense team as somehow that is relevant to the level of
8 representation or the effectiveness of that representation.
9 That argument relative to trial counsel representing the
10 sovereign power of the United States of America and ability to
11 marshal all of the resources of the executive branches and
12 still despite having the documents referenced earlier in its
13 possession for a week shy of a decade, and the second one a
14 little -- a little less than nine years, unable to find and
15 reference those documents to even get Mr. Al-Tamir's name even
16 referenced as an alias, the government simply, as a practical
17 matter, wants to hold Mr. Al-Tamir to a higher standard of
18 being able to process the voluminous information in this case
19 as it is able to adhere to itself.

20 Turning to your questions regarding the practical --
21 you know, practicalities of printing and accessing the volume
22 of information in this case, Mr. Al-Tamir is a detainee. I
23 know it sounds pedantic to point that out, but as a matter of

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1 just that status, he is confined in a cell that would not
2 accommodate him, and even if you -- and I have slightly
3 different numbers than Lieutenant Commander Lincoln, if you
4 take your average banker's box that lawyers are accustomed to
5 receiving documents in, roughly four to -- 4,000 to 4,500
6 pages fit into one of those standard bankers boxes. That
7 would be sufficient to take up approximately a third of the
8 available living space that Mr. Al-Tamir currently inhabits.

9 MJ [Col RUBIN]: Are there bins for storage?

10 DDC [LCDR LOFLAND]: Yes. Yes, Your Honor, but it would
11 take several additional bins. Currently he has a bin for not
12 only his legal documents, but also miscellaneous sundry items,
13 clothing and the like.

14 MJ [Col RUBIN]: Are those bins located in his cell or
15 externally?

16 DDC [LCDR LOFLAND]: There is at least one bin that is in
17 his cell, rather large -- and I am expanding my arms to
18 represent roughly a three-foot-by-three-foot storage, clear
19 plastic storage bin. At least that was what is typically
20 there when we are able to visit him.

21 MJ [Col RUBIN]: And outside of the cell, is there a
22 storage area?

23 DDC [LCDR LOFLAND]: No -- there is not typically, when I

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1 have been there. There may be, and I would frankly have to
2 confer with the JTF regarding what additional storage he is
3 entitled to.

4 But again turning to the practicalities of this, and
5 specifically referencing the e-mail chains appended to both
6 Appellate Exhibit 091 and the government's reply in Appellate
7 Exhibit 091A, there is nothing that the government has cited
8 to, other than a desire not to, that precludes them from
9 allowing a detainee access to a laptop computer. There are
10 regulations, procedural screening in place for, you know, the
11 technical requirements of that laptop that balance the JTF's
12 mission concerns with, you know, security and other
13 penological interests with the rights of the detainees to
14 access and have possession of these laptops.

15 This is only a question of whether or not the
16 convening authority and the government wants to be
17 inconvenienced, however incrementally, by, at minimal,
18 allowing the defense to provide Mr. Al-Tamir a laptop. There
19 is no other legal or other practical impediment to the relief
20 requested. In response, the government has not cited to any.
21 In their response, they have not cited to anything other than
22 just the convening authority saying they are not going to do
23 it unless ordered by this commission.

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1 And referencing the e-mails that we appended specific
2 to our interactions with the convening authority on this
3 question, we are only here today further litigating this
4 question because attempts at an administrative remedy that we
5 thought we were in the process of achieving, as referenced in,
6 I believe, Attachment B to our motion, fell through. There
7 were every representation made by the convening authority that
8 a laptop would be provided to Mr. Al-Tamir. At some point
9 approximately three weeks after that initial colloquy with
10 Ms. Kelly, Captain Fischer received an e-mail saying that for
11 whatever reasons that are inscrutable to us and only known to
12 the convening authority, that decision process was
13 sidetracked, culminating in the -- I guess we could call it a
14 blanket denial recently in June that was appended to 091A.

15 We don't know what the rationale was for that. We
16 don't know why the sea change from "we are working on getting
17 Mr. Al-Tamir a laptop" to "no," we don't know what terrain,
18 what rationale was crossed from point A to point B in that
19 decision-making process. What we do know is that at no point
20 has anyone in the government articulated a substantive
21 penological mission-related reason why Mr. Al-Tamir cannot be
22 afforded access to a laptop computer consistent with the
23 laptops that have been provided to Mr. Mohammad and the other

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1 9/11 detainees.

2 Accordingly, we maintain the position that as a
3 matter of not just procedural right, but just as a matter of
4 prudential concern with Mr. Al-Tamir's rights, this commission
5 should either compel the convening authority to issue
6 Mr. Al-Tamir a similar laptop computer or, alternatively,
7 permit the defense to furnish him one that does comply with
8 the JTF's stated security and other concerns.

9 Pending your questions, Your Honor, that concludes my
10 argument.

11 MJ [Col RUBIN]: No questions, thank you.

12 DC [CDR COOPER]: Your Honor, may I have a minute with
13 co-counsel?

14 MJ [Col RUBIN]: You may.

15 DDC [LCDR LOFLAND]: Begging Your Honor's pardon, just two
16 points of clarification. I might have been somewhat
17 misleading in referencing that we have the opportunity to
18 visit Mr. Al-Tamir in his cell. I was referencing the
19 visitation areas that we have the opportunity to meet with him
20 in and referencing the rough dimension of those where he --
21 where we meet him and he receives other visitors.

22 MJ [Col RUBIN]: Does he view multimedia evidence
23 information in his cell or in the meeting areas?

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1 DDC [LCDR LOFLAND]: When -- if we are able to get a
2 laptop cleared through the Privilege Review Team, it would be
3 on a laptop that we brought in. But, however, the second
4 point of clarification is, you know, consistent with the
5 litigation regarding the privileged written communications
6 order, we have had significant issues getting even written
7 material in to Mr. Al-Tamir, which prompted the need for that
8 order.

9 And just similarly, as we alluded to in litigation of
10 that motion, we just want to harmonize the rights Mr. Al-Tamir
11 receives with those of Mr. Mohammad and all the other
12 detainees that are currently in an active commissions
13 litigation with referred charges.

14 MJ [Col RUBIN]: If you could, just to ensure that I am
15 tracking, how has he viewed multimedia in the past? Has it
16 been an issue? Are you reviewing these items with him?

17 DDC [LCDR LOFLAND]: A moment to consult, Your Honor.

18 MJ [Col RUBIN]: Yes.

19 DC [CDR COOPER]: Your Honor, if you don't mind, I can
20 handle this issue.

21 MJ [Col RUBIN]: Yes, please.

22 DC [CDR COOPER]: Your Honor, we do bring multimedia when
23 we go to the meeting cites which are not in his camp. We have

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1 had difficulty at times getting some multimedia in through the
2 Privilege Review Team. He can view multimedia in his cell on
3 his DVD if he has it, but it's more a DVD player that's within
4 the camps, so it's not a laptop. But if he had one, he could
5 review multimedia in his cell and provide information by
6 typing it onto documents and then bringing it to client
7 meetings, which would help facilitate his defense, Your Honor,
8 and would make it more effective.

9 When we come to see him, we cannot bring in
10 handwritten notes, only a clean notebook. So then we have to
11 mail him mail so that we can have an agenda so that we
12 remember all the things we need to go over with him. But if
13 he could pre-do that on his laptop, he could bring it to the
14 meeting and that would help facilitate preparation of his
15 defense, Your Honor.

16 MJ [Col RUBIN]: Thank you, Commander.

17 DDC [LCDR LOFLAND]: Pending your questions, Your Honor.

18 MJ [Col RUBIN]: No additional questions, thank you.

19 ATC [LCDR LINCOLN]: Your Honor, there is a lot of new
20 information. Can I have like two minutes to ----

21 MJ [Col RUBIN]: Yes.

22 [Pause.]

23 ATC [LCDR LINCOLN]: Very briefly, Your Honor, I'd like --

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1 Lieutenant Commander Lincoln again. Like I said, there is a
2 lot of new information we just wanted to address briefly.

3 You know, right at the very end the issue came up
4 with trouble getting information into and out of meetings. I
5 think that's an entirely separate issue which hopefully will
6 be resolved by the protective order that -- or the order that
7 you recently issued in response to the motion filed, I think
8 in June. But I think it would be appropriate to see how that
9 plays out. And again, that's -- whether it's electronic or
10 written, that's another issue which obviously would have to be
11 resolved, but it won't be fixed by a laptop.

12 Secondly, again, the defense keeps saying there is no
13 penological interest in preventing a laptop and that we
14 haven't submitted any evidence. As I said, this is a SCIF.
15 He is an alleged terrorist. The government certainly has
16 significant interests and has very tight controls on
17 electronic media in these types of facilities, including in
18 this one.

19 So again, the government strongly, you know, is
20 against your ordering a laptop be provided to the accused;
21 however, should you be inclined to do so, we just want to
22 point out that there are a lot of logistical issues that were
23 not specifically addressed by defense. I mean, do they expect

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1 him to have 24/7 access to this laptop? Would he have to go
2 somewhere? I mean, how -- I mean, all the security
3 requirements that would have to be addressed are not -- are
4 not proposed by the defense. So the government just wants to
5 make it clear that just ordering the CA or allowing the
6 defense to provide him one doesn't -- wouldn't alleviate the
7 security issues that have to be surmounted.

8 So again, we do oppose him being given a laptop. We
9 oppose the idea that he has a right to one, that he needs one
10 in the situation. But if you were to order one, there is a
11 lot more to consider, Your Honor.

12 MJ [Col RUBIN]: Thank you.

13 Defense, I will give you the final word if desired.

14 DDC [LCDR LOFLAND]: Very briefly, Your Honor. Just
15 pointing out that the government's argument regarding the
16 confinement facility being a SCIF fails simply based on the
17 fact that the other detainees, Mr. Mohammad and the other 9/11
18 detainees, have been issued or are under an order to receive
19 laptops. If that were a concern, it has certainly been
20 weighed and considered in those cases, and there are
21 mechanisms in place for those concerns to be addressed in the
22 context of those cases.

23 Accordingly, we reiterate that there is no legitimate

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1 penological interest that has not been appropriately weighed
2 and considered that is an impediment to Mr. Al-Tamir being
3 afforded a laptop computer.

4 Thank you, Your Honor.

5 MJ [Col RUBIN]: Thank you.

6 Counsel, let's turn to AE 070CC. In AE 070CC, the
7 defense requests that the commission compel discovery of full
8 and unredacted statements of Ahmed al Darbi. The government
9 opposes the defense motion as set forth in AE 070KKK.

10 Defense, do you wish to present oral argument?

11 DDC [LCDR LOFLAND]: Thank you, Your Honor. Once again,
12 on Appellate Exhibit 000 -- pardon me, 070CCC, the defense has
13 the burden of proof by a preponderance.

14 The question before this commission, honestly, both
15 on CCC and FFF, the legal issue is what is the applicable
16 discovery standard at this stage of the litigation. Rule for
17 Military Commission 701(c) and 701(e)(1) impose broader
18 discovery obligations on the government at this stage of the
19 litigation than the government's apparently very narrow
20 reading of its obligations in light of R.M.C. 701(e)(2).

21 The standard under R.M.C. 701(c) is that we are
22 entitled at this juncture to any books, papers, documents,
23 photographs, tangible objects, buildings or places, copies or

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1 portions thereof, which are within the possession, custody and
2 control of the government, the existence of which is then
3 known by the government through the exercise of due diligence
4 or may become known to trial counsel and which are material to
5 the preparation of the defense or are intended for use by the
6 trial counsel as evidence in the prosecution case-in-chief at
7 trial. The primary point of contention at issue in these two
8 motions seems to be that the government only reads the clause
9 after the disjunctive "or" in that.

10 The analogous standard in federal courts is Federal
11 Rule of Criminal Procedure 16, which defines the discovery
12 standard as enabling the defendant access to any information
13 that would significantly alter the quantum of proof in his or
14 her favor, making this discovery discoverable "as long as
15 there is a strong indication that it will play an important
16 role in uncovering admissible evidence, aiding witness
17 preparation, corroborating testimony, or assisting impeachment
18 or rebuttal" citing to U.S. v. Lloyd, which postdated Yunis,
19 which was cited by the government and relied upon.

20 To summarize, the basis for discovery at this stage
21 in the litigation are uncovering admissible evidence,
22 corroborating testimony, assisting impeachment or rebuttal
23 and, you know, extenuation of mitigation if we get to a

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1 sentencing stage in this case. That is a broad aperture of
2 discoverable evidence.

3 For purposes of CCC, I think it's appropriate to
4 defer discussion of the specific exhibits at issue for a
5 closed session because some of those obviously implicate some
6 classification issues. But the government seems to, in
7 reference to CCC, have a very narrow reading of
8 R.M.C. 701(e)(2), which triggers their discovery obligation
9 only after they would have intended to call Mr. al Darbi as a
10 witness. For the reasons that we elaborated upon in the
11 argument on AE 091, the bases for asserting surprise and shock
12 that Mr. al Darbi is or might be relevant to the question of
13 identity, first, neither should not have been a surprise to
14 the government. Again, it's information regarding
15 Mr. Al-Tamir's identity that has been in the government's
16 possession for more than almost a decade at this point.

17 That, in and of itself, begs questions about the
18 standard that the government has applied to not only the
19 discovery at issue, but also more broadly, and we anticipate
20 that that will be a point of contention for future litigation
21 regarding the discovery issues.

22 Turning to page 3 of the government's response, they
23 specifically say that at the time of this response, the

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1 government considered the information to not be relevant and
2 material because the government had not yet deemed
3 Mr. al Darbi's testimony necessary. That is essentially a
4 recapitulation of the standard in R.M.C. 701(e)(2). However,
5 the bases for the discoverability of information relevant to
6 Mr. al Darbi are for the broader bases articulated and stated
7 in R.M.C. (c) and (e)(1). And based on those bases, the
8 discovery production specific to just the documents that we
9 enumerated thus far in our review and our exercise of due
10 diligence going through the discovery that has been produced
11 to date is found wanting.

12 Turning to one of the legal bases for the
13 government's objections, they rely upon Pennsylvania
14 v. Ritchie to essentially argue that the defense is not
15 entitled to the broad range of discovery that is implicated by
16 R.M.C. 701(c) and (e)(1). The reliance on Ritchie is somewhat
17 inapt under these circumstances because, quite frankly, the
18 defense is not engaged in any type of fishing expedition or,
19 you know, an overbroad search of trial counsel's files that
20 was implicated in that case just for -- to elaborate briefly
21 on the facts in Ritchie, that case involved a father accused
22 of a sexual assault of a minor child and the court determined
23 that he was at least entitled to an in camera review of

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1 documents related to the investigation held by the state child
2 protective services enforcement agency, and that was a
3 procedure that under those facts was sufficient to balance the
4 state's needs and the confidentiality of individuals involved
5 in that process and the rights of the accused at a criminal
6 proceeding.

7 In this case, those concerns simply are not
8 implicated. We are not asking for broad access to government
9 files, you know. We are asking for a fairly narrow scope of
10 additional production regarding a very narrow subset of
11 documents produced thus far. By our count, we have -- just
12 since December when we were first notified by the government
13 that Mr. al Darbi was a likely subject of a deponent --
14 deposition, we have received over 7,000 pages of additional
15 discovery regarding Mr. al Darbi. AE 070CCC implicates under
16 200 pages of that. So this is anything but a broad-net
17 fishing expedition, as the government claims.

18 And further, even within Ritchie, Justice Powell's
19 rationale for the majority opinion in that case makes a clear
20 distinction between the scope of the confrontation clause
21 rights at trial and the rules of pretrial discovery.

22 Here, we are merely asking for the broad range of
23 discovery that we are entitled to at this stage of the

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1 litigation in accordance with R.M.C. 701(c) and (e)(1), for
2 all the purposes implicated by those rules, not simply to
3 effectively cross-examine Mr. al Darbi as would be implicated
4 by a narrow reading of (e)(2) and/or the confrontation clause
5 issues that were also at issue in Ritchie.

6 And with that, I will defer further discussion of the
7 specific documents for a closed session out of an abundance of
8 caution, pending your questions, Your Honor.

9 MJ [Col RUBIN]: No questions.

10 Trial counsel?

11 ATC [Capt DEPUE]: Good morning, Your Honor.

12 MJ [Col RUBIN]: Good morning.

13 ATC [Capt DEPUE]: Captain Depue for the government. But
14 for a certain few redactions in a number of the documents, the
15 defense's motion is entirely moot. In reading the
16 government's response, it's hard to see how it can be
17 interpreted that the government is taking a narrow view of
18 701. The government agrees that the defense is entitled under
19 701(c), R.M.C. 701(c), to information that is material to the
20 preparation of the defense. Exercising its responsibilities
21 under R.M.C. 701 (b) and (c) and United States v. Brooks and
22 Briggs, which the government cited, the government reviewed
23 and determined the discoverability of the 62 documents. Of

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1 the 62 documents, the government determined that 16 of them
2 contain R.M.C. 914 material. Those documents are currently
3 undergoing the equity review process.

4 The government further determined that 13 of the
5 documents contain potentially discoverable material and
6 material information under 701. Those documents are also
7 undergoing equity review for discoverability. If any of those
8 16 914 documents or 13 701 documents are not cleared for
9 disclosure, the government will utilize appropriate procedures
10 to deliver the information to the defense.

11 MJ [Col RUBIN]: Do you know when the equity review will
12 be completed?

13 ATC [Capt DEPUE]: I do not know that information, sir.
14 The documents have been in the process for a few weeks now. I
15 do not know how much longer it will take. Another 16 of the
16 documents have already been disclosed in full to the defense.

17 And finally, the government, again exercising its
18 responsibility to determine discoverability, determined that
19 17 of the documents contained completely irrelevant and
20 immaterial information, which is solely limited to linguists'
21 names and file numbers.

22 The defense cited Pennsylvania v. Ritchie, and again,
23 that case stands for that the prosecution's call on disclosure

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1 is final unless and until the defense identifies the specific
2 document or piece of information and argues for its
3 materiality. The defense has simply not done that with this
4 case.

5 The defense also seems to think that the government
6 has taken the stance that the defense is on a broad-net
7 fishing expedition, and again, given the government's response
8 in AE 070KKK, it's hard to see how the defense could feel that
9 way, given that the government has already put forth the
10 16 914 documents and the 13 potentially 701 documents into
11 equity review for disclosure.

12 The only information we are talking about for AE
13 070CCC is the linguists' names and the file numbers, and that
14 information is simply -- it's not material, it's not relevant,
15 and the defense is not entitled to it.

16 Pending any questions, sir, that's all the government
17 has.

18 MJ [Col RUBIN]: No questions. Thank you.

19 Defense Counsel?

20 DDC [LCDR LOFLAND]: Your Honor, there is very little that
21 we can I think get into regarding the specific bases of
22 dispute in open session, so I think we will defer pieces of
23 that conversation until then. However, I just wanted to ----

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1 MJ [Col RUBIN]: Let's discuss this. You are asking for a
2 closed session?

3 DDC [LCDR LOFLAND]: Yes, Your Honor, because ----

4 MJ [Col RUBIN]: Has the defense given 505(g) notice?

5 DDC [LCDR LOFLAND]: No, Your Honor.

6 MJ [Col RUBIN]: All right. So there is going to be no
7 closed session absent 505(g) notice. So to the best that you
8 can argue this motion, if you intend to disclose classified
9 information, you have to give 505(g) notice.

10 DDC [LCDR LOFLAND]: Understood, Your Honor.

11 MJ [Col RUBIN]: All right. It has not been given and the
12 government has not had the opportunity to request a 505(h)
13 hearing, so I don't intend to hold a closed session on this
14 motion absent 505(g) notice. So to the extent that you can
15 argue the remaining 17 documents, why it's material to the
16 preparation of the defense to have the linguists' name and
17 file numbers, I will allow you to be heard on that. But it
18 sounds like the remainder of the documents will be disclosed
19 to the defense, if I understand the government's argument and
20 pleading.

21 DDC [LCDR LOFLAND]: And we dispute part of that,
22 Your Honor. Regarding some of the documents that they assert
23 have been produced in full, wholly unredacted form, there are

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1 perhaps inartfully characterized as redactions, but there
2 are -- I guess you would characterize them as numerical
3 identifiers that allied out the names we believe in the
4 context of those documents to be potentially relevant and
5 material witnesses that impact on the, you know, credibility,
6 for instance, and potential scope and weight of Mr. al Darbi's
7 testimony, and those were the documents that we appended, that
8 we referenced in our first flight of documents and that the
9 government asserts have been whole -- have been fully
10 provided. That is our basis of contention with their
11 assertion that those documents have been provided in, you
12 know, completely unredacted form.

13 MJ [Col RUBIN]: So it is the defense's position they have
14 not -- some of those documents have not been provided?

15 DDC [LCDR LOFLAND]: That is correct, Your Honor.

16 We concur with the government that regarding the
17 second flight of documents that they have submitted for equity
18 review, it's appropriate to defer a ruling on those documents
19 until such time as those documents have in fact been produced
20 and, you know, appropriate litigation regarding the
21 sufficiency of the production of those documents can be had.
22 We would take issue with the government's assertion that it's
23 appropriate to deny the defense's motion in light of that

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1 posture of the defense, certainly deferring ruling until an
2 appropriate time when those matters can properly be brought
3 before this commission would likely be the more appropriate
4 and prudent course of action in light of the government's
5 stated posture in terms of processing those documents.

6 And to the extent that the linguist issues are at
7 issue, we aver that, you know, consistent with, you know, you
8 know, reasons that have been alluded to regarding the need to
9 potentially voir dire or otherwise test the capabilities and
10 qualifications of the respective linguists, we at a minimum
11 need the ability to identify some of those individuals in
12 order to establish what documents they touched, translated,
13 and in order to test the veracity and accuracy of the
14 translations and otherwise test the documents as they have
15 been provided and the sufficiency and weight with which those
16 documents should be afforded.

17 And finally, Your Honor, we take issue with the
18 government's consistent misstatement of the applicable, you
19 know, legal standard regarding the review of discoverable
20 material. Your Honor, as the gatekeeper of evidence in this
21 case, is primarily responsible for determining the materiality
22 and discoverability of documents. It is not the province of
23 the government exclusively to make these determinations

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1 regarding what evidence is or is not material to the defense.

2 There is a purpose behind the 505 rules, as
3 Your Honor has referenced, and it is so that Your Honor can
4 provide that gatekeeping function. The discovery rules should
5 not be utilized as a tool for the government to basically
6 skirt those scant procedural protections that are afforded
7 Mr. Al-Tamir in the rules. So we, at a minimum, would request
8 some in camera review of any redacted documents consistent
9 with 505 in order to ensure that those procedural protections
10 are -- are respected and not summarily relying upon the
11 government's internal determination of materiality and
12 relevance prior to production.

13 And pending Your Honor's questions, I have no further
14 argument.

15 MJ [Col RUBIN]: No questions. Thank you.

16 Trial Counsel, any further argument?

17 ATC [Capt DEPUE]: Your Honor, as to the defense's last
18 point taking issue with our characterization of your rule in
19 discovery, it's not the military judge's role to make
20 discovery calls. The prosecution's call on discovery is
21 final -- the defense may have missed the clarifying point --
22 unless and until they bring up a specific piece of information
23 or document and argue for its materiality.

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