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1 [The R.M.C. 803 session was called to order at 0802,  
2 26 August 2019.]

3 MJ [LtCol LIBRETTO]: This commission will come to order.  
4 All parties present when the commission last recessed are  
5 again present. The accused is also present this morning.

6 Good morning, Mr. Hadi. I'm glad to see you in the  
7 commission session this morning. As I reminded you the other  
8 day when we last saw each other, please feel free to get up,  
9 stretch, walk about as you did the other day. I believe, by  
10 my observations, that assisted you in some extended sessions,  
11 which was encouraging.

12 Also, if at any time you would like to use the remote  
13 viewing and participation accommodations, you can let me know  
14 that as well, and I'll make arrangements for that to occur.

15 This morning, we are going to be diving right into  
16 AE 157, the defense motion to dismiss on the basis that the  
17 convening authority has a personal interest in the outcome of  
18 the military commission. In support of that motion, the  
19 commission granted the defense request to produce the  
20 Convening Authority Rear Admiral Retired Christian L.  
21 Reismeier as a witness.

22 Government, is Rear Admiral Retired Reismeier present  
23 and available?

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1 ATC [MR. SPENCER]: Your Honor, the government's  
2 understanding is that he is standing by to testify via VTC, as  
3 referenced by the commission previously.

4 MJ [LtCol LIBRETTO]: Okay. Can we get that set up at  
5 this time, please.

6 ATC [MR. SPENCER]: Yes, Your Honor.

7 [Pause to initiate VTC.]

8 MJ [LtCol LIBRETTO]: Trial Counsel.

9 ATC [MR. SPENCER]: Sir, good morning. Can you hear me?

10 WIT: Good morning. Yes, I can.

11 CHRISTIAN L. REISMEIER, civilian, was called as a witness for  
12 the defense, was sworn, and testified as follows:

13 DIRECT EXAMINATION

14 Questions by the Assistant Trial Counsel [MR. SPENCER]:

15 Q. Please state your full name, spelling your last name.

16 A. Yes, my name is Christian Lee Reismeier, last name is  
17 spelled R-E-I-S-M-E-I-E-R.

18 Q. And what is your current position?

19 A. I am the convening authority -- convening authority  
20 and director of the Office of Military Commissions.

21 Q. Where is that located, sir?

22 A. The Mark Center, Alexandria, Virginia.

23 Q. Sir, is there anyone in the room currently with you?

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1 A. Just the IT person.

2 Q. And do you have any notes in front of you?

3 A. I have nothing but a glass of water.

4 Q. Thank you, sir.

5 Defense Counsel?

6 **Questions by the Detailed Defense Counsel [MS. HENSLER]:**

7 Q. Good morning, sir.

8 A. Good morning, ma'am.

9 Q. My name is Susie Hensler, and I am counsel for the  
10 accused. We met a few weeks ago, but I'm not sure if you  
11 recall.

12 A. I do recall. It's good to see you again.

13 Q. Nice to see you too.

14 Sir, I'd like to ask you some questions about your  
15 appointment as convening authority. When were you first  
16 approached about this position?

17 A. First approached? I couldn't tell you the date. The  
18 first time I was -- I was approached was prior to them  
19 deciding to go with Mr. Rishikof. I -- I couldn't tell you  
20 when exactly that was, but if you're talking more recently, it  
21 would have been last summer sometime. I couldn't tell you  
22 exactly what month it was.

23 Q. Let's start first with the first time that you were

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1 approached about assuming this position.

2 Can you please describe what interactions you had  
3 with individuals from the Department of Defense about  
4 potentially assuming this role?

5 A. I got a -- I don't know if I got an e-mail first or  
6 if it was a phone call. My recollection is it was a phone  
7 call asking whether I would be interested in the -- the  
8 position. I believe at that point I was completely retired.  
9 I don't think that I had begun doing anything in private  
10 practice. My response was if asked to serve, I will serve,  
11 but I like retirement. I'm not looking for a job.

12 That ultimately led to an interview, and they decided  
13 to go with Mr. Rishikof.

14 Q. Who -- who called you?

15 A. Jason Foster.

16 Q. And with whom did you interview?

17 A. Whoever the general counsel was at that point. I did  
18 not know her. A woman. Her -- I don't remember her name.

19 Q. Was Jason Foster there?

20 A. I think he was there during the interview, but he --  
21 he may have left the room. I just -- I don't recall if he was  
22 there during the whole interview. I think he was.

23 Q. Do you recall whether a military aide was present or

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1 anyone taking notes?

2 A. No, I do not.

3 Q. Can you briefly describe the contents of that  
4 interview?

5 ATC [MR. SPENCER]: Objection, Your Honor. Relevance.

6 MJ [LtCol LIBRETTO]: Ms. Hensler?

7 DDC [MS. HENSLER]: Sir, I request that the commission  
8 mute the feed so that I may have a conversation with  
9 Your Honor and counsel without the witness being privy to it.

10 ATC [MR. SPENCER]: Your Honor, if the witness were  
11 present, he would obviously be here for the conversation.

12 MJ [LtCol LIBRETTO]: Ms. Hensler, for purposes of  
13 judicial economy, let's just argue why -- why this line of  
14 questioning is relevant.

15 DDC [MS. HENSLER]: Sir, particularly given that this  
16 motion relates to Mr. Reismeier's potential bias, it's  
17 important that we be permitted to have a bench conference  
18 outside of the presence of the witness. So I again request  
19 that you mute the feed.

20 MJ [LtCol LIBRETTO]: Ms. Hensler, why is this line of  
21 questioning relevant?

22 DDC [MS. HENSLER]: Because the thrust of this motion,  
23 AE 157, as is the thrust of AE 158 and AE 160, is bias.

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1 Whether -- the question is whether a reasonable person knowing  
2 all the circumstances would infer that Mr. Reismeier has a  
3 personal interest in the outcome of this commission.

4 For that reason, Your Honor, questions about his  
5 interviewing for this position, particularly when he has given  
6 an answer indicating that General Martins -- one of  
7 General Martins' supervisors was present at that first  
8 interview, is -- is very important.

9 MJ [LtCol LIBRETTO]: The objection is overruled.

10 **DIRECT EXAMINATION CONTINUED**

11 **Questions by the Detailed Defense Counsel [MS. HENSLER]:**

12 Q. Sir, can you please describe the conversation that  
13 you had at your initial interview several years ago?

14 A. It was, I don't know, maybe -- maybe 20 minutes, 30  
15 at the most. There isn't -- there's not much to relay. It  
16 was a conversation. I don't -- I -- I don't remember the  
17 specifics of the conversation.

18 Q. Do you ----

19 A. I -- I just -- I don't remember.

20 Q. Okay. Do you recall whether or not you were asked  
21 about your role in drafting the Military Commissions Act?

22 A. In draft -- no. I -- the only thing I -- I know that  
23 I -- I'm not sure if disclosed is the right answer. I just

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1 said, "Look, you guys are aware of my past involvement with  
2 military commissions. You just need to realize that it is  
3 what it is."

4 I don't -- I don't recall any specific discussions  
5 about what those contacts were. I just -- I don't recall  
6 that.

7 Q. And at the time, you indicated that Mr. Rishikof was  
8 selected to assume the role of convening authority, so I'd  
9 like to move to the second time that you were under  
10 consideration for this position, sir.

11 Who reached out to you initially last summer?

12 A. The same person, Jason Foster.

13 Q. Okay. Did he ask you for any materials to be  
14 provided?

15 A. I don't believe so. I think it was the same  
16 conversation. I -- you know, was I interested in the  
17 position? My response was the same as it was last time. I'm  
18 not looking for employment, I liked where I was in life, but  
19 if asked to serve, I will serve.

20 Q. And at the time you were in private practice,  
21 correct?

22 A. By that point I was, yes. I was a defense attorney.

23 Q. Did you interview for the position at that time?

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1       A.    I did a couple of months later.  I believe it was the  
2 end of September or the beginning of October.

3       Q.    And who was present at that interview?

4       A.    I'm fairly certain for that interview it was just me  
5 and the general counsel.  I don't think anybody else was in  
6 the room.

7       Q.    Not even a military aide or a -- someone taking  
8 notes?

9       A.    I don't recall there being another person in the  
10 room.  There may have been, but I don't recall there being  
11 someone else in there.

12      Q.    And what was discussed at that meeting?

13      A.    Again, it was 20, 30 minutes.  Most of it was -- it  
14 was just a conversation.  Again, I said, "Look, you know what  
15 my background is."  I believe during that interview I  
16 indicated that if selected, the best approach would be for me  
17 to disclose my background to everyone.  That was pretty much  
18 the extent of sort of the position-related conversation.  Most  
19 of the rest of it was just sort of a meet-and-greet.

20      Q.    Was that the first -- but this was the second time  
21 you'd met the general counsel, or were you ----

22      A.    This was the first time I had met that particular  
23 general counsel.

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1 Q. Okay. And is this Paul Ney?

2 A. Yes.

3 Q. Sir, you mentioned with respect to both interviews  
4 that you were open and forthright about your prior  
5 involvements with the military commissions, correct?

6 A. Yes, ma'am.

7 Q. And I believe your words were, with respect to the  
8 first interview, "It is what it is."

9 A. That's what I said to you. I don't believe that  
10 those were the words I used with her.

11 Q. That was the thrust of your disclosure, though, sir,  
12 in your words?

13 A. The thrust of the disclosure was to say, "Look, I  
14 have a background that people need to be aware of."

15 When I say, "It is what it is," I mean, I'm not  
16 looking to editorialize it, I'm not looking to shy away from  
17 it. It -- it's my background. It is what it is.

18 Q. And the background that you were referring to is --  
19 sir, when you say that, are you referring to your time on the  
20 Detainee Policy Task Force?

21 A. Oh, it's all of the contacts that I've had with the  
22 system, going back to the first time that I was introduced to  
23 military commissions in 2006.

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1 Q. Okay. Sir, can you tell us -- excuse me. One  
2 moment.

3 [Pause.]

4 Q. Sir, you mentioned your first contact with the  
5 commissions in 2006. Are you referring to when you wrote --  
6 when you worked as the Navy representative on the working  
7 group for commissions rules?

8 A. Yes, I think that's the way I referred to it in the  
9 disclosure. I don't recall that that group actually had a  
10 name. Maybe it did.

11 I was in the trial judiciary when the Military  
12 Commissions Act of 2006 was passed, so when I got to -- to  
13 D.C., the law was already in existence. I was then directed  
14 to be the Navy's representative on this working group. So  
15 that was, quite honestly, the first time I even knew there was  
16 a Military Commissions Act.

17 Q. Who else was in the working group?

18 A. Service representatives from all of the services, so,  
19 you know, Army, Air Force, Marines. I believe the Coast  
20 Guard -- I think the Coast Guard had a rep there too. I  
21 believe there were DoJ representatives who were there,  
22 although honestly, I -- I don't know who they were. I'm sure  
23 that's who they -- who they were, I just don't know where in

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1 DoJ they were from.

2           And then there were some DoD representatives,  
3 civilian -- very senior DoD representatives. Are you looking  
4 for names of the individuals?

5           Q. Sir, with respect to the DoJ representatives and the  
6 senior DoD representatives, were you aware of why they were  
7 present or why they were involved with this working group?

8           A. I believe that the Act required that the attorney  
9 general and the Secretary of Defense work together to  
10 promulgate the rules. Honestly, I didn't give it much  
11 thought. I was there as a staff attorney working the rules.

12          Q. Was General Martins involved at all with that working  
13 group?

14          A. Not to my knowledge. I don't know whether he had any  
15 contact on the Army side of the house, but I -- I had never  
16 even heard of him at that point.

17          Q. Okay. And what about anyone -- was anyone from OCP  
18 or the predecessor to that office involved?

19          A. Not to my knowledge.

20          Q. Sir, you identified that as your first contact with  
21 the commissions. What was your second contact with the  
22 commissions?

23          A. Well, that lasted a couple of months. I believe that

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1 the next time -- I'm sure that there were, you know, phone  
2 calls and those sorts of things as people were coming back and  
3 asking questions about some of the work, but I don't have a  
4 specific recollection of any of that.

5 The next contact would have been 2008 when  
6 President Obama was President-Elect at that point. The  
7 transition team was there, and a number of us were asked to  
8 come in and give a briefing on the Military Commissions Act  
9 and the rules.

10 Q. What was your rank at the time?

11 A. In 2006 during the rule drafting, I was still a  
12 commander. I was the junior person in the room. By 2008, I  
13 was a captain.

14 Q. And, sir, it was your understanding that  
15 President Obama's position at the time was to close  
16 Guantanamo, right? That was in his campaign platform?

17 A. I -- yes, I know it was in his campaign platform. I  
18 don't know what his actual intentions were one way or the  
19 other. Again, as a staff attorney, I really wasn't paying  
20 attention to what exactly POTUS was saying one way or the  
21 other.

22 Q. You weren't privy to his internal thoughts?

23 A. Well, it's also just -- you know, my focus was to --

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1 to do what it was that I was sent there to do, as a service  
2 representative. I don't -- whether that was consistent or  
3 inconsistent with what he planned on doing later was  
4 irrelevant. There was a task at hand. And if he chose to end  
5 military commissions, so be it; I still had to do the job I  
6 had to do.

7 Q. So at the time you were a captain -- and what was  
8 the -- what was the scope of the sub-working group on military  
9 commissions?

10 A. That came later. So in 2008, initially there was a  
11 briefing to sort of lay out, okay, these are the things that  
12 could be changed by rule about military commissions. There  
13 were some specific issues that at least at the service level  
14 some people had concerns about.

15 Ultimately, after the inauguration when the President  
16 signed the task force orders, the executive orders, then we  
17 got to the sub-working group. So the sub-working group would  
18 have come in 2009, and that was as a component to the -- to  
19 the task force. And we were supposed to look at all lawful  
20 options for dealing with detainees.

21 The commission's portion of it was to look at fora  
22 options so we were asked to do some comparative analysis  
23 between Article III courts, national security courts, military

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1 commissions, courts-martial, all of those options. That was  
2 the focus at that point.

3 Q. And what other entities were involved in the  
4 sub-working group or had a stake in it?

5 A. Every agency within the U.S. Government that had any  
6 relationship with military commissions or the implications of  
7 military commissions. So the Department of State, you know,  
8 DoJ, DoD, various intelligence agencies. Virtually everyone.

9 Q. CIA?

10 A. Yes. Well, they were on the task force. I don't  
11 believe we had any of their representation on the -- the  
12 sub-working group. I'm not sure what you're asking about. On  
13 the sub-working group, I don't recall there being a CIA rep.

14 Q. What other -- you mentioned intelligence agencies.  
15 What intelligence agencies were on the ----

16 A. Let me step back and make sure I understand which  
17 group we're talking about. Are you talking about the  
18 Detention Policy Task Force or are you talking about the  
19 sub-working group?

20 Q. Sir, with respect to these questions, I'm talking  
21 about the sub-working group.

22 A. Okay. On the sub-working group, I don't believe that  
23 there were any intelligence agencies on the sub-working group.

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1 Q. What about the task force itself?

2 A. On the task force, yes, there would have been. I  
3 assume that there were reps from NSA. I know that CIA was  
4 there. I know that FBI was there. Yeah, I don't recall what  
5 other agencies.

6 Q. And you say that you know the CIA was there and you  
7 know the FBI was there. Do you recall who from those agencies  
8 was present?

9 A. It -- in all the meetings where I was, it would have  
10 been general counsel or someone from the general counsel's  
11 office. At least that's my recollection.

12 Q. Was General Martins involved with either the  
13 sub-working group or the Detention Policy Task Force at the  
14 time?

15 A. Involved with?

16 He was the co-executive director of the Detention  
17 Policy Task Force at that time, so overseeing the day-to-day  
18 operations of the staff. On the sub-working group, he was not  
19 a member of the sub-working group.

20 Q. But you mentioned he oversaw the day-to-day  
21 operations of the staff. Did you have regular interactions  
22 with General Martins at that time?

23 A. I mean, at that point, that was a part-time

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1 assignment. I still had a, you know, full-time assignment,  
2 you know, with the Navy running the Criminal Law Division.  
3 I'm not sure what you mean by "regular." I had contact with  
4 him whenever we needed to have contact with him.

5 Q. Sir, who provided input for your fitness report with  
6 respect to your work on the sub-working group?

7 A. Me. He wasn't part of my rating chain. He wasn't  
8 part of the -- you know, he wasn't part of the rating chain.  
9 He didn't provide any input.

10 Q. Do you know whether anyone ever verified or confirmed  
11 representations that you made in your performance reports  
12 about your time on the sub-working group?

13 A. My -- I -- you know, without going back and looking  
14 at those fitness reports, my guess is it probably would have  
15 been, you know, one or two lines of the fitness report  
16 indicating that this is what I was doing.

17 By that point, I was a captain with no particular  
18 allusions of any further upward mobility. I'm not sure I was  
19 paying much attention to what was going on in my fitness  
20 reports at that point.

21 Q. Sir, for every ----

22 A. I couldn't -- let me just say, I cannot tell you what  
23 somebody up the food chain from me was doing with regard to

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1 the input. I don't know.

2 Q. Fair enough.

3 Sir, for every meeting of the sub-working group, were  
4 you aware of who prepared the briefing?

5 A. I'm sorry. Can you ask that again?

6 Q. Were there regular -- were there briefings for the  
7 sub-working group? Paper briefings?

8 A. To whom? I'm not ----

9 Q. To members of the sub-working group. Were there  
10 documents associated with your meetings?

11 A. I'm sure we were coming up with draft proposals,  
12 discussion points. There were, you know, PowerPoints. Some  
13 of those would have been created by me, I'm sure.

14 I don't -- I don't recall them originating from  
15 someplace else. They probably would have been things that I  
16 would have generated, but they would have been, you know,  
17 PowerPoints that sort of just had bullets on them as to, you  
18 know, whatever the particular topic was.

19 Q. Sir, that was your second interaction with the  
20 military commissions. What about your third interaction with  
21 the military commissions?

22 A. When -- when the sub-working group completed its  
23 task, which really, I guess, was largely completed with the

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1 statutory rewrite, I guess that's probably when the  
2 sub-working group ended.

3 I was asked -- I'm not sure "asked" is the right word  
4 for it. I was directed to assume the position that  
5 General Martins was vacating as the executive -- co-executive  
6 secretary for the task force staff. So that would have been  
7 later 2009, probably September of 2009.

8 Then it became something more of a full-time job. I  
9 was down there, you know, with the -- the staff pretty much on  
10 a full-time basis.

11 Q. You mentioned that you were directed to assume the  
12 role of -- of chair -- of co-chair of the Detention Policy  
13 Task Force.

14 Who were you directed by?

15 A. By my boss, the Judge Advocate General. It was my  
16 assignment.

17 Q. And you were taking over the role of General Martins.  
18 You mentioned that at the time the Military Commissions Act  
19 had already been rewritten during his tenure as one of the  
20 chairs of the Detention Policy Task Force.

21 Your role, though, was different, right?

22 A. I'm sorry. Different than what?

23 Q. Than General Martins. The bill had already been

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1 written.

2 A. I don't -- I don't know when exactly that -- I mean,  
3 at some point, you know, the draft went into the legislative  
4 process. I don't know how long that took. I -- I'm not sure  
5 exactly where it went.

6 At the same time that we were producing the -- the  
7 draft that was supposed to originate from DoD, I think it was  
8 the Senate Armed Services Committee was completing their own  
9 draft. How those merged up, when that occurred, I don't -- I  
10 don't know. I don't know when exactly that process ended.

11 But at some point after it -- my level, we got done  
12 creating the draft, yes, then I -- I moved on to sort of the  
13 broader scope of the Detention Policy Task Force.

14 Q. And when you say "broader scope," what do you mean by  
15 that?

16 A. The specifics of military commissions were sort  
17 of -- were largely done, at least from our perspective, on the  
18 task force. We had moved on to much broader issues having to  
19 do with -- you know, I'm not sure how far I can go into the  
20 discussion here, but whether there should be a detention  
21 policy, where it should apply, who it should apply to. Just  
22 very, very broad policy questions.

23 Commissions were not -- I'm not even sure that they

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1 were talked about at that point. I say that -- I know that at  
2 some point in that process, the 2009 Act was actually passed  
3 and signed and then the rule drafting started again, but I  
4 just -- I had very little interaction with the rule drafting  
5 at that point except on a couple of specific rules. But  
6 that -- that was being handled by service representatives.

7 Q. But is it fair to say that one of your roles as chair  
8 of the Detention Policy Task Force was to promote this  
9 legislation in Congress?

10 A. No, I -- I didn't perceive it that way. Again, once  
11 that -- once the Act, you know, got into that process, I'm not  
12 sure who was doing what with it.

13 Q. What ----

14 A. But I don't think the task force had -- from my --  
15 from my knowledge, I don't think the task force had anything  
16 to do with it at that point.

17 Q. Sir, according to your June 14th memorandum, which is  
18 appended to the record at AE 157 Attachment D, page 2, you  
19 state that, quote, Extensive time was also spent responding to  
20 various congressional inquiries regarding policy options.

21 What did you mean by that? What were you describing?

22 A. I'm not sure how far we can go into this, but it's  
23 what I just described. It's the issue of, you know, whether

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1 to have a detention policy, where that policy might apply,  
2 locations for detention facilities, things of that nature.

3 Q. Sir, when you say, "I'm not sure how far I can get  
4 into this," are you referring to the fact that it may -- it  
5 may require that you give an answer involving classified  
6 materials?

7 A. I suppose that's part of it. Part of it also is that  
8 some of it may be deliberative in nature. Again, I was a  
9 staff attorney working on these things. I -- you know, I'm  
10 just a little uncomfortable getting into specifics on some of  
11 these things because they weren't -- they weren't being driven  
12 by me.

13 Q. Who were they being driven by?

14 A. Whoever the political people were who were making  
15 these decisions. We were providing input into a system where  
16 it would go from -- you know, from us up the food chain to the  
17 deputies committee, up the food chain from them to the  
18 principals. Yeah, I -- I couldn't tell you who exactly was  
19 making the decisions.

20 Q. Sir, while you served in this position as co-chair of  
21 the DPTF, did you have any contact with -- what, if any,  
22 contact did you have with your predecessor, General Martins?

23 A. Very limited because I think he was deployed. I'm

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1 not sure I had any contact with him, quite honestly.

2 Q. Sir, aside from -- sir, you mentioned that you --  
3 going back to your second interview for this role, you  
4 mentioned that you interviewed in September or October of  
5 2018, but that you weren't actually -- but you weren't  
6 actually appointed until May of 2019.

7 Do you know why there was a delay?

8 A. Part of it was because of me. I had some -- I don't  
9 remember when I was told that they had decided that they  
10 wanted to hire me, but, you know, by that point I had an  
11 active defense practice. I had a couple of cases that I  
12 needed to resolve, one of which, a court-martial homicide  
13 case, that had to be resolved that we just simply were unable  
14 to get a docket date.

15 So I had hoped that it would be done earlier. It  
16 just got pushed to the right and pushed to the right.  
17 Ultimately I was not able to finish it until -- it was  
18 literally, like, the Thursday prior to whatever that  
19 appointment date was when I finally was able to -- I'm  
20 sorry, the Friday before -- no, the Thursday before my  
21 appointment date was when I finally completed that case.

22 So part of it got pushed to the right, because I  
23 simply could not be a defense attorney and also be working for

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1 the U.S. Government.

2 Q. So they waited for you?

3 A. Yes.

4 Q. Did you at any point discuss your potential  
5 appointment as convening authority or prospective appointment  
6 as convening authority with General Martins or anyone on his  
7 staff?

8 A. No, I did not. The last -- I think, as I indicated  
9 in my disclosure, the last conversation I think I had with  
10 General Martins was three years ago prior to actually assuming  
11 this job.

12 Q. And what was that conversation about?

13 A. That would have been when -- 2016, I believe, was  
14 the -- the moot.

15 Q. And, sir, we'll get back to that. But going back to,  
16 again, your appointment as convening authority, at the time  
17 that your appointment was pending, what, if any, conduct --  
18 contact did you have with the Standards of Conduct Office?

19 A. I'm not sure that I had any.

20 Q. And, sir, you were in private practice at the time.  
21 Is it possible that someone on your staff would have had  
22 contact with the Standards of Conduct Office or was that  
23 something that you would have been personally aware of?

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1 A. I'm sorry, what staff?

2 Q. Excuse me, sir. I believed you had a staff while you  
3 were in private practice.

4 A. No, my practice wasn't that rich.

5 Q. Okay.

6 A. No, I -- you know, I was of counsel with a firm, so I  
7 just -- you know, I basically was working on one or two cases  
8 at a time. So it was, you know, pretty much just me and  
9 whatever other attorney I might be working with.

10 Q. Sir, one more question regarding your contacts with  
11 DoD prior to your appointment, but during your consideration.

12 During your consideration, you mentioned contacts  
13 with Jason Foster. Did you ever have any contacts with Ryan  
14 Newman?

15 A. No, not to my knowledge. I have -- it is possible  
16 that I met him at some point. You know, whether he was in the  
17 office when I arrived for my interview, you know, it's  
18 possible that I met him while walking through and en route to  
19 the GC's office, but nothing substantive.

20 Q. But he may have been in the same physical office  
21 space during the period where you had interviewed?

22 A. I believe that when I arrived for the interview, I  
23 didn't have access to the Pentagon, so Jason Foster met me.

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1 We went upstairs. Again, I may have met him in Jason's spaces  
2 en route to the GC's space, but if I met him, it literally  
3 would have been, "Hi," shook hands, and moved on.

4 I -- he -- to my knowledge, he did not go to the GC's  
5 office when we went up there. I walked up with Jason Foster.  
6 Jason Foster, I believe, stayed in the outer office, and I  
7 went in and interviewed with Mr. Ney.

8 Q. Sir, I'd like to move to your recusal and your  
9 recusal memo which is marked for the record as AE 157  
10 Attachment D. Sir, that memo is dated 14 June 2019,  
11 approximately three weeks after you were appointed.

12 Why the delay?

13 A. It took some time to be able to write that and be  
14 able to get it as complete and accurate as possible. It was  
15 something that I drafted, you know, personally, and it just  
16 took some time to get it all down.

17 Q. Had you begun drafting this memo before you assumed  
18 your role as convening authority?

19 A. No, I did not. And I should say that part of that,  
20 you know, was the necessary delay in working for the  
21 government, waiting to be able to actually get on a computer,  
22 waiting to get a CAC card, waiting to -- you know, just  
23 because I was appointed and showed up doesn't mean much of

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1 anything. You know, the DEER System went down, so I couldn't  
2 get a CAC card for, I don't know, probably at least a week.  
3 So I couldn't even get on a computer system.

4 Q. I feel your pain, sir.

5 Sir, who in the convening authority's office did  
6 you -- who, if anyone, in the convening authority's office did  
7 you communicate with about the substance of this memo; the  
8 June 14th draft, that is?

9 A. My legal advisor.

10 Q. Who is that?

11 A. Mr. Mark Toole.

12 Q. What about anyone -- what about anyone else?

13 A. I also asked Jennifer Smith to look at it because  
14 part of the recusal, you know, dealt with the case that she  
15 was the acting legal advisor on. So those were -- those were  
16 the two.

17 Q. Anyone else? And, sir, when you say "the case that  
18 she was the acting legal advisor on," which case are you  
19 referring to?

20 A. Mr. Nashiri's case.

21 Q. Did you interact with anyone else?

22 A. No.

23 Q. What about anyone outside of the convening

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1 authority's office?

2 A. No, not until I made the decision to recuse myself.  
3 I notified general counsel's office through Jason Foster that  
4 I intended on recusing myself. So I gave them a heads-up that  
5 I'd made the decision, you know, prior to actually forwarding  
6 the memo.

7 Q. When did you give them a heads-up?

8 A. It would have been a day or a couple of days prior.  
9 I don't remember the -- what -- what day of the week it was  
10 that I -- that I signed that. If memory serves me correctly,  
11 I -- I believe I gave them a heads-up on, like, a Thursday or  
12 a Friday and then signed the memo on Monday, but it would have  
13 been, you know, within one or two working days.

14 Q. Sir, I'd like to turn your attention to the al Bahlul  
15 case. And this you discuss in your supplement, which is  
16 marked as -- your supplement to the original memo to file on  
17 your recusal. And this is marked for the record as AE 157B  
18 Attachment B.

19 Sir, in your supplement on page 3 -- excuse me, on  
20 page 1, you state that you attended a briefing by OCP on the  
21 al Bahlul appeal because, quote -- because you were, quote, a  
22 subject-matter expert who had a professional interest in the  
23 issue.

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1           What did you mean by that?

2           A.   I'm not sure what you're asking.  I mean what I said.  
3 I was a subject-matter expert with a background in military  
4 commissions and national security law with a professional  
5 interest.  I'm not sure how to parse that out any further.

6           Q.   Sir, the issue in the al Bahlul case, the status of  
7 the conspiracy -- the conspiracy charge contained within the  
8 Military Commissions Act, was -- excuse me, the status of the  
9 conspiracy charge contained within the Military Commissions  
10 Act, in part.

11           So why would you have been a subject-matter expert on  
12 that?

13           A.   Because of my background with military commissions  
14 and with national security law.  The debate on whether  
15 conspiracy was triable by military commission was ongoing  
16 before I got to D.C., continued on through the post-2006 Act,  
17 continued on through the 2009 Act.  I had some background  
18 information on what some of those discussions were.

19           Q.   So you were a part of the -- you were part of the  
20 debate when conspiracy was being considered?

21           A.   Oddly enough, no.  I was simply aware of those --  
22 those debates.  I'm not sure that -- again, that -- that Act  
23 had already been passed in 2006.  In 2009, it was not part of

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1 the Act that we were asked to go back and rewrite. But I was  
2 aware of the discussions. I'm not sure that I was really --  
3 I'm not sure how much of a part of it I was.

4 Q. And, sir, after you left the Detention Policy Task  
5 Force but before you assumed your role as convening authority,  
6 did you follow the commissions in the news, for instance, or  
7 in the law?

8 A. Very little.

9 Q. Did you read articles by Carol Rosenberg or Charlie  
10 Savage?

11 A. Very little. I can't discount the possibility that I  
12 saw one or two of them, but, no. If something was brought to  
13 my attention, if somebody sent me a link and said, "Hey, look  
14 at this," yeah, I suppose I would have seen it.

15 But I didn't -- I didn't spend time going and reading  
16 the various blogs or Twitter feeds.

17 Q. By "blogs," do you mean Lawfare, things like that?

18 A. Yes. Yes.

19 Q. Let's talk about the briefing by the prosecutors on  
20 the al Bahlul case.

21 Sir, you state again in your memo, your supplement,  
22 that -- excuse me. Strike that.

23 You state in your original recusal memo, the

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1 June 14th memo, AE 157 Attachment D, that you -- with respect  
2 to Mr. al Bahlul's case, and this is page 3, quote, The issue  
3 was congressional authority in defining conspiracy as a  
4 violation of the Law of War. General Martins also contacted  
5 me about the issue, and I attended a briefing regarding the  
6 matter in his spaces.

7 Can you tell me about that briefing?

8 A. Yes, ma'am, to the best of my ability, anyway.

9 I -- to be honest with you, I don't know what the  
10 purpose of the briefing was. I don't know who it was created  
11 for. My impression was that this was a briefing that they had  
12 put together for sort of general educational purposes to say,  
13 you know, this is what the case is about.

14 It didn't seem to be tailored -- to me, it didn't  
15 seem to be tailored to any specific issue. And I actually  
16 don't know where in the process the case was at the time of  
17 that briefing. I just -- I don't -- I just -- I wasn't  
18 following the particular case at that point.

19 Yeah, I -- again, I remember sitting through the  
20 briefing, and I don't know who it was really for.

21 Q. Do you recall who else was there?

22 A. I do not. I believe that there was another retired  
23 Navy JAG there, but I'm not positive. No, I don't know who

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1 else was there.

2 Q. And ----

3 A. General Martins and people from his staff, but I -- I  
4 don't know who from his staff was there.

5 Q. And do you recall whether the status of conspiracy  
6 was referred to at all during that briefing?

7 A. I do not remember. I mean, it would seem logical  
8 that it would have been, but I don't remember that.

9 Q. What, if anything -- strike that.

10 Sir, you also signed -- excuse me. Going back to  
11 your prior testimony, you referred to a moot?

12 A. Yes.

13 Q. What were you referring to?

14 A. That was the moot with regard to the Nashiri case.

15 Q. Sir, what can you tell me about that?

16 A. The issue had to do with the scope of the evidence  
17 that could be admitted relative to damage to the areas  
18 surrounding the harbor. If -- in lawyer terms, the issue was  
19 whether the evidence was part-and-parcel evidence.

20 Q. And what was your role in the moot?

21 A. As a mock judge.

22 Q. Who were the other mock judges?

23 A. I don't recall who the other judges were. There was

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1 a -- I think that all three of us were retirees, but I'm not  
2 positive of that. I believe there was a former Army judge  
3 that I did not know. And I'm not sure who the third judge  
4 was.

5 Q. And did General Martins reach out to you about  
6 participating in this moot?

7 A. Yes, he would have been the one to contact me.

8 Q. Okay. Was he present during the moot?

9 A. I think so. I think so. He was not giving the  
10 argument, but I assume he was in the room, yeah.

11 Q. And aside from members of the al Nashiri prosecution  
12 team, who I assume were there, were there individuals -- were  
13 you aware of whether there were individuals from other  
14 prosecution teams at that ----

15 A. No, and I can't even tell you whether it was the  
16 al Nashiri prosecution team. I don't know if it was -- I  
17 don't know how they're structured over there. I don't know if  
18 it was members of an appellate unit. I just -- I don't know.  
19 Whoever the -- there was a female attorney arguing the -- the  
20 position for the -- for the government. It was somebody I did  
21 not know. I don't know how they're structured. I don't know  
22 where they came from.

23 Q. Sir, you also signed onto an amicus brief -- going

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1 back to the al Bahlul case. You signed onto an amicus brief  
2 in that case when it was, I believe, on en banc rehearing, and  
3 the brief was signed by the Washington Legal Foundation.

4 How did you come to be involved with that brief?

5 A. I got an e-mail from a staff attorney at the  
6 Washington Legal Foundation. It was somebody I did not know.  
7 As I indicated in my prior statement, I had never even heard  
8 of the Washington Legal Foundation before.

9 The person sent me an e-mail and said, "Hey, we got  
10 your name from somebody else who was a" -- I believe it was a  
11 reserve Navy judge advocate -- you know, "indicating that you  
12 had some background, was curious as to whether you would be  
13 interested in the issue." So that's how I was contacted.

14 Q. Did you review the brief?

15 A. The -- the one that I signed?

16 Q. Yes, sir.

17 A. Yes, ma'am.

18 Q. And you stand by the statements in that brief?

19 A. Yes, I do.

20 Q. Sir, in your supplemental memo, AE 157B Attachment B  
21 for the record, you also addressed your relationship with  
22 Commander Lockhart, who was a prosecutor on the al Nashiri  
23 team. You mention that she reached out to you to discuss the

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1 charge sheet in the Nashiri case because it was framed as a  
2 speaking indictment; is that correct?

3 A. I would phrase that a little bit differently. That's  
4 sort of out of context -- context.

5 She -- I had an ongoing professional relationship --  
6 well, professional and personal relationship with her. I had  
7 known her since she was a first-tour lieutenant. She worked  
8 for me as a first-tour lieutenant, so I was a -- a mentor of  
9 hers. So it's not like she reached out to me just because she  
10 wanted me to look at the charge sheet. I had an ongoing, you  
11 know, mentor/mentee relationship with her. And at some point  
12 during that, you know, she mentioned, you know, words to the  
13 effect of, "Gee, you should see this charge sheet," and  
14 started describing it. And my response was, "Yeah, it sounds  
15 like a speaking indictment."

16 She said, "Well, do you want to see it?"

17 And I said, "Yeah, sure. Go ahead and send it over."

18 And then I saw how big it was and didn't review it.  
19 Said thank you very much, and that was the end of it.

20 Q. And that -- it sounds like in your shared view the  
21 charge sheet in that case would have been notable, because a  
22 charge sheet in a typical courts-martial case does not contain  
23 common allegations, right? It does not contain an elaborate

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1 recitation of facts.

2 A. I have never seen a court-martial charge sheet that's  
3 stylized like that. Yeah, I think that's a fair statement.

4 Q. But as you mention in your supplement, you had seen  
5 indictments styled in that manner during your experience as an  
6 Article -- as a prosecutor in Article III courts, correct?

7 A. At some point -- I spent a year at the U.S.  
8 attorney's office in Philadelphia. And at some point when --  
9 you know, going back and looking for templates to -- to use, I  
10 had seen things that looked kind of like that. I couldn't  
11 tell you what case they were. They were just, you know, there  
12 in the archives. So I had seen them before, but I had never  
13 used one.

14 MJ [LtCol LIBRETTO]: Ms. Hensler, just for purposes of  
15 moving it along -- and I've given you quite a lot of latitude  
16 and I'm not suggesting you're going outside the bounds of  
17 where you should be going, but questions like that, what is  
18 the relevance of that?

19 DDC [MS. HENSLER]: I'm about to get there, sir.

20 MJ [LtCol LIBRETTO]: Okay. Please do so quickly.

21 Q. Sir, you -- as of the date of the July 18th memo, you  
22 state you hadn't seen the Nashiri indictment, correct?

23 A. That's correct.

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1 Q. Have you reviewed the charge sheet in my client's  
2 case?

3 A. I have not.

4 Q. Sir, moving on ----

5 MJ [LtCol LIBRETTO]: So Ms. Hensler, just so I can  
6 understand the line of questioning about him reviewing the  
7 al Nashiri charge sheet was to ask the question: Have you  
8 reviewed the charge sheet in this case?

9 DDC [MS. HENSLER]: Sir, I would request again that the  
10 court mute the feed.

11 MJ [LtCol LIBRETTO]: Go ahead. No, Ms. Hensler, go  
12 ahead.

13 DDC [MS. HENSLER]: Okay. Excuse me. The al Nashiri  
14 case, like the charge sheet in my client's case, contains a  
15 lengthy recitation of common allegations, which is, from my  
16 understanding, very unusual in the courts-martial practice,  
17 but it is common in a federal practice, in Article III courts.

18 So my question was this -- this is a -- sort of a  
19 general discovery question. I didn't know the answer. But  
20 the indictments are very similar in that way. And I was  
21 asking whether or not he had reviewed the charge sheet in our  
22 case to know whether or not he had seen the similarities.

23 MJ [LtCol LIBRETTO]: What is the relevance of that

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1 question in light of the motion for which we are here? That  
2 is, the disqualification issue.

3 DDC [MS. HENSLER]: Sir, again, Mr. Reismeier has made a  
4 determination that a reasonable person knowing all the  
5 circumstances would infer that he -- he could not be an  
6 impartial convening authority for the purpose of the  
7 al Nashiri case.

8 I am trying to determine whether or not he  
9 appreciates the similarities between my client's case and the  
10 al Nashiri case.

11 MJ [LtCol LIBRETTO]: It's my understanding that that  
12 decision was based on his involvement with that case, even if  
13 tangential. So if you want to ask him about his involvement  
14 in this case, please do so.

15 But in terms of establishing similarities just to say  
16 because one is similar to the other -- I mean, a lot of, for  
17 instance, courts-martial cases are similar because of the way  
18 in which they're charged. One convening authority might be  
19 disqualified from one and not the other.

20 So if there's specific facts and circumstances that  
21 you'd like to ask the witness about with respect to his  
22 involvement in this case, please do.

23 DDC [MS. HENSLER]: Sir, I understand you're becoming

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1 impatient, and I ----

2 MJ [LtCol LIBRETTO]: I'm not -- Ms. Hensler, do not try  
3 to characterize my questions and guidance to you as  
4 frustration or impatience. I am not. In fact, I've given you  
5 quite some latitude. I just want to make sure that we're  
6 focusing the questions on the issues before this commission,  
7 and that is whether or not based on Rear Admiral Reismeier's  
8 participation to whatever extent, if any, in his former  
9 commissions days disqualify him from serving as the convening  
10 authority over this case.

11 DDC [MS. HENSLER]: Yes, sir. I only have -- at the time,  
12 I only have one line of questioning left, but I may have an  
13 additional question after, sir, so ----

14 MJ [LtCol LIBRETTO]: Okay.

15 DDC [MS. HENSLER]: Wrapping up.

16 **DIRECT EXAMINATION CONTINUED**

17 **Questions by the Detailed Defense Counsel [MS. HENSLER]:**

18 Q. Sir, going back to the al Bahlul case, were you aware  
19 that the original charge sheet in my client's case did not  
20 contain a conspiracy charge?

21 A. No. I was not.

22 Q. But that -- so you weren't aware that during the  
23 pendency of the al Bahlul proceedings on conspiracy, the

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1 proceedings in which you submitted an amicus brief, that the  
2 current amended charge sheet was issued, which does contain a  
3 conspiracy charge?

4 A. Again, I've never -- I've never looked at a charge  
5 sheet for this case.

6 Q. Okay, sir. So from that, I draw that -- sir, you  
7 mentioned that you did, to some extent, follow press regarding  
8 the military commissions, though. Were you aware that Charlie  
9 Savage published an article in *The New York Times* at the time  
10 that my client was -- the amended indictment was issued on  
11 February 14th, 2014, noting that -- noting that my client's  
12 case, quote, potentially said -- set up a test of whether  
13 Congress has the power to make conspiracy a prosecutable  
14 offense in a war crimes tribunal despite its not being  
15 recognized as an international war crime.

16 Does that sound familiar?

17 A. No, it does not.

18 Q. Okay. And there was, at the time, a Lawfare briefing  
19 by, I believe, Steve Ladik. Do you recall reviewing that?

20 A. Reviewing -- reviewing what?

21 Q. A Lawfare briefing on my client's ----

22 A. Oh, no, ma'am. No.

23 Q. Sir, you -- in your supplement to your memo on

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1   recusal, you also discuss your role when you were chief judge  
2   of the Navy in detailing Captain Waits as the military judge  
3   to this commission, right?

4           A.   I would phrase that a little differently.  I'm not  
5   certain that I had any role in his detailing.  My recollection  
6   is that he was made available for detailing by my predecessor  
7   as the chief judge Department of the Navy, but I'm not -- I'm  
8   not positive of that.

9           The only conversations I remember having was how to  
10  backfill the position in Naples if he was assigned to -- to a  
11  case, a military commissions case, but that conversation could  
12  have occurred after he was detailed to the commissions case.

13           But I don't believe that I had -- I don't believe I  
14  had any involvement in him being made available.

15           Q.   And, sir, you state that in your supplement.  My  
16  question is:  At the time that he was detailed, you  
17  acknowledge you were the chief judge of the military -- of,  
18  excuse me, the Navy ----

19           A.   Oh, I'm sorry.  I may have misunderstood the  
20  question.

21           So I -- yes, I would have -- that was 2014.  Is that  
22  right?

23           Q.   Yes, sir.

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1           A.   Then, yes, ma'am, I would have been the chief judge  
2 Department of the Navy at the time he was actually detailed.

3           Q.   And you were aware that he was the judge that was  
4 detailed to this commission?

5           A.   I would phrase that a little differently and say I  
6 was aware that he was detailed to a military commission; I  
7 don't know that I knew what case it was. To be honest with  
8 you, I'm not sure that I ever heard your client's name until I  
9 got to this job.

10          Q.   Sir, my last question is: At the time that he was  
11 detailed, did you conduct -- did you or anyone on your staff  
12 conduct any sort of conflict screening to determine whether or  
13 not judges detailed to military commissions had any sort of  
14 personal interest in -- or personal stake in the matter?

15          A.   I'm not sure how that would be possible because the  
16 detailing decision was made by the chief judge for military  
17 commissions. So there would be -- there would be no way for  
18 me to know what he had been assigned to in order to figure out  
19 whether he had a conflict, and ultimately the question of  
20 conflict and the resolution of the conflict resides with the  
21 judge under the judicial canons.

22          Q.   So your -- okay. If I'm understanding this  
23 correctly, it was your role to offer a judge for detailing on

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1 the military commissions. And at the time that you did that,  
2 there was no sort of conflict screen in place to make sure  
3 that there would be an appropriate selection for a commissions  
4 case?

5 A. I would say I basically agree with that. Again, I  
6 don't know what was done prior to my time as the chief judge  
7 for the department, so I don't know what my predecessor did.

8 I know that what I did was that when we were notified  
9 that there was a request for nomination of candidates to be  
10 military commission judges, I would then go to the chief trial  
11 judge and say, "We need some nominations," and you'd be  
12 looking for someone who had two year -- was an O-6, had two  
13 years left on their orders. And the other thing I would ask  
14 is, "Hey, can you make sure that, you know, they haven't had  
15 any prior interaction with commissions that would make it  
16 impossible for them to sit as a judge."

17 So that would have -- that would have been part of  
18 what I would be asking for. But other than that sort of  
19 global conflict check, no. There was nothing else that --  
20 that -- nothing else that I did.

21 Q. Thank you, sir. No further questions.

22 A. Yes, ma'am.

23 MJ [LtCol LIBRETTO]: We've been going for quite some time

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1 now. We'll take a ten-minute recess before government counsel  
2 asks their questions.

3 The commission is in recess.

4 [The R.M.C. 803 session recessed at 0908, 26 August 2019.]

5 [The R.M.C. 803 session was called to order at 0918,  
6 26 August 2019.]

7 MJ [LtCol LIBRETTO]: The commission will come back to  
8 order. All parties present when the commission last recessed  
9 are again present.

10 Trial Counsel, do you have any questions for  
11 Rear Admiral Retired Reismeier?

12 ATC [MR. SPENCER]: Yes, Your Honor.

13 **CROSS-EXAMINATION**

14 **Questions by the Assistant Trial Counsel [MR. SPENCER]:**

15 Q. Good morning, sir.

16 A. Good morning.

17 Q. Sir, I'll remind you that you're still under oath  
18 from your prior testimony.

19 Sir, how long did you serve in the Navy?

20 A. 31 years.

21 Q. And how much of that 31 years was as a judge  
22 advocate?

23 A. 26 1/2.

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1 Q. Sir, during your time as a judge advocate, were you  
2 recognized as an expert in military law?

3 A. Yes, I guess. Yes.

4 Q. Sir, understanding your desire not to brag or your  
5 humble nature, can you describe where that expertise -- or how  
6 that expertise was recognized?

7 A. In -- well, cover my background real quickly. I've  
8 spent sort of equal part of my career in every seat in the  
9 courtroom. So about four years as a defense attorney and most  
10 of that as a chief defense counsel; four years as a  
11 prosecutor, most of that as a chief trial counsel; four years  
12 as a trial judge; three years as an appellate judge; three  
13 years doing criminal law policy. So I've been very  
14 stovepiped, for better or worse.

15 So in 2006 when the Judge Advocate General made the  
16 decision to create the military justice litigation career  
17 track, I was the one that they pinned the rose on to, say,  
18 stand up the career track.

19 Q. Sir, is it fair to characterize that career track as  
20 something you were an advocate for creating?

21 A. Yes, very much so.

22 Q. And is it fair to characterize your experience on --  
23 in all positions in the courtroom and your litigation

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1 experience generally within the Navy as something that was  
2 unusual even for a judge advocate of your generation?

3 A. It was extremely unusual. One of the reasons that  
4 they decided to do it was because guys like me didn't survive.  
5 You would be lucky to make O-4. Most people got out. There  
6 was just -- there's no place to go.

7 Q. Just to clarify, sir, the military justice career  
8 litigation track that you're referring to, that was in  
9 response to people with -- with significant litigation  
10 experience or staying in a litigation realm, not promoting  
11 historically prior to the creation of that track. Is that  
12 accurate?

13 A. I think that that was part of it, yes. Part of it  
14 was just the recognition that, you know, the Navy JAG Corps  
15 needed to develop the specialization in a very focused,  
16 purposeful way and not sort of by luck.

17 Q. Sir, I'd like to go back to your interviews for the  
18 convening authority position. Either during your first  
19 interview or your second interview, was there any discussion  
20 about -- within the Department of Defense about a desired  
21 result in any particular military commission case?

22 A. No.

23 DDC [MS. HENSLER]: Object to the form.

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1 MJ [LtCol LIBRETTO]: Objection to the what?

2 DDC [MS. HENSLER]: Form of the question. That he was  
3 aware of, sir.

4 MJ [LtCol LIBRETTO]: Overruled.

5 ATC [MR. SPENCER]: My question was specific to the  
6 interview, Your Honor.

7 MJ [LtCol LIBRETTO]: Overruled.

8 Q. Sir, just to restate the question given the  
9 objection, may have muted your answer.

10 During the interview, was there any discussion with  
11 any DoD personnel and yourself about a particular desired  
12 result in any military commission case?

13 A. No, there was not.

14 Q. When you were assigned to the Detainee Policy Task  
15 Force in 2006, you were a commander at the time, you said was  
16 your rank.

17 Where were you a military judge at that point?

18 A. No. I'm sorry. For The Detention Policy Task Force,  
19 no, I was not. That was when I was doing the criminal law  
20 policy job.

21 Q. The 2006 or 2008, sir?

22 A. Both times.

23 Q. Okay. So for 2006 and 2008, you were the director

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1 of -- or you were at Code 20, the Navy JAG Corps's Criminal  
2 Law Policy Division; is that correct?

3 A. I was the director. That's correct.

4 Q. Director both times?

5 A. That's right.

6 Q. Can you just briefly describe your duties as the  
7 director of Code 20?

8 A. We were the policy advisor to the Secretary of the  
9 Navy via the Judge Advocate General, obviously, on criminal  
10 law policy matters that related to the department's  
11 position -- Department of the Navy's position. With regard to  
12 the Navy as a service component, we were the criminal law  
13 policy directorate for the Navy. The Marines have their own  
14 stovepipe that deals with that as well.

15 The scope of the duties was basically everything in  
16 military justice or anything that sort of touched on military  
17 justice.

18 So at that point, a lot of it was sexual assault  
19 policy. You know, military commissions was sort of a -- an  
20 adjunct to this, but a lot of it was just general military  
21 justice. The updates to the JAG Manual, updates to  
22 instructions dealing with criminal law matters. Sat as a  
23 member of the Clemency and Parole Board as an adjunct duty to

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1 this.

2           So it was literally -- and we also did the reviews --  
3 any review of a court-martial that was not going through  
4 review by the court of criminal appeals came through my  
5 office, and we did the reviews of those also.

6           Q.    Sir, was it also part of your duties or Code 20's  
7 duties at the time to address any proposed changes to the  
8 Manual for Courts-Martial?

9           A.    Yes.  As, you know, part of the DoD group, yes, we  
10 would have been the service component that would have been  
11 working on any change to the UCMJ and any proposed legislative  
12 changes and any proposed changed to the rules, procedural and  
13 evidentiary.

14          Q.    Yes, sir.

15                So is it fair to characterize that subset of your  
16 Code 20 duties as similar to what you did at the defense --  
17 Detainee Policy Task Force?

18          A.    Yes, very much so.

19          Q.    Now, in the Code 20 context, is it -- does Code 20  
20 assist one side or the other in terms of prosecution or  
21 defense on any particular cases?

22          A.    Not from my perspective, no.  You know, from my  
23 perspective, we were the neutral, you know, policy advisor.

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1 You know, I'm not sure that the -- well, I can tell you that  
2 the defense bar didn't necessarily view it that way, but if  
3 you were to ask me as the division director, my answer would  
4 be absolutely. We -- we are a neutral policy advisor.

5 Q. Understanding that at the time the Trial Counsel  
6 Assistance Program, the Defense Counsel Assistance Program,  
7 did not exist formally, and that was later, did you view the  
8 functions of Code 20 as a quasi-trial counsel assistance  
9 program-type entity?

10 DDC [MS. HENSLER]: Objection. Relevance.

11 MJ [LtCol LIBRETTO]: Mr. Spencer?

12 ATC [MR. SPENCER]: Your Honor, the defense is attempting  
13 to suggest that the convening authority's position now -- or  
14 he is unable to be neutral. His history of maintaining  
15 neutrality in similar positions or roles is certainly  
16 relevant.

17 MJ [LtCol LIBRETTO]: The objection is overruled.

18 A. We actually fielded questions from anybody who was  
19 comfortable phoning in. So we maintained sort of a wall of  
20 separation so that there were some staff attorneys working for  
21 me who would field calls from defense counsel if they wanted  
22 to call and others who would field calls from prosecutors.

23 I personally had phone calls from -- from both sides,

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1 obviously not in the same case. But we were available to any  
2 attorney in the field who wanted to call and talk, looking for  
3 some advice, or facilitating connecting them with someone who  
4 was better suited to discuss whatever their needs were.

5 Q. Thank you, sir.

6 Sort of related to that in the context of your  
7 leadership role over the military justice career litigation  
8 track, the defense already asked you about mentoring Commander  
9 Andrea Lockhart.

10 Did you mentor other judge advocates?

11 A. I'd like to say that I -- I did. I guess the -- the  
12 most I could say is I tried to be of assistance to anybody,  
13 whether they were within the career track or not. But  
14 certainly, the folks that were in the career track, yes. It  
15 didn't matter where they were, where they were assigned, you  
16 know, they were mine from my perspective. So, yeah, I tried  
17 to mentor them all.

18 Q. Sir, what about judge advocates outside of the career  
19 track?

20 A. Certainly the ones that were looking to get in would  
21 come knocking at my doorstep. And I was -- you know, I had  
22 both formal and informal mentor-mentee relationships with some  
23 of them.

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1           But with folks who just decided for whatever reason  
2 that that wasn't the direction they were going, yeah,  
3 absolutely. As a -- as a senior naval officer, it's part of  
4 the job.

5           Q.    Sir, do you recall ever interacting with me in your  
6 career as a Navy JAG and my career as a Navy JAG?

7           A.    I do, yes.

8           Q.    And was that an informal or formal interaction, sir?  
9 Do you recall?

10          A.    I guess it would depend on your perspective. From my  
11 perspective, I would say it was probably a little bit of both.

12          Q.    And was that with -- related to the military justice  
13 career litigation track or my lack of being in the military  
14 justice career litigation track, as it were?

15          A.    Again, from my perspective, I would say a little bit  
16 of both.

17          Q.    And I was a defense counsel at the time, correct?

18          A.    That's right.

19          Q.    So from your perspective, you spoke equally and  
20 mentored equally defense counsel and trial counsel?

21          A.    I tried to.

22          Q.    Do you -- were you mentoring any Navy JAG defense  
23 counsel at the Military Commissions Defense Organization?

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1           A.    Again, I would say that I tried to.  You know, I  
2 certainly had ongoing discussions with a number of them.  You  
3 know, some more than others.  But the short answer is yes,  
4 absolutely.

5           Q.    Sir, thank you.

6                    Coming back to your time on the Detainee Policy Task  
7 Force, you mentioned on direct that between the election and  
8 the inauguration, your duties were slightly different than  
9 after the inauguration.

10                   For that three-month period -- three-and-a-half month  
11 period, what precisely were your duties?

12           A.    Again, that -- I don't recall there being a -- sort  
13 of a formal working group.  But my recollection is that  
14 there -- as happens whenever you have the -- you know, the  
15 administration transition, there are a series of briefings  
16 that are set up for incoming officials to get familiar with  
17 whatever the portfolio is that they're going to be -- they're  
18 going to be assuming.

19                   I happened to be one of a number of people at a  
20 meeting.  My recollection is there was a fairly large number  
21 of people who were there, who were briefing the person who  
22 ultimately was the incoming DoD general counsel with regard to  
23 military commissions.  So there were -- the -- and the

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1 briefings were broken up into segments. I happened to have  
2 been given a particular segment to brief.

3           And I, you know, briefed them on potential rule  
4 changes -- well, what some of the perceived difficulties were  
5 under the 2006 Act and the 2006 rules, what some of the  
6 potential changes might be both statutory and regulatory.

7           And my recollection is that it was just that one  
8 brief. There may have been some follow-on, you know, that's  
9 just not clear in my mind, but I recall the one brief. That  
10 ultimately led to, you know, come January when they -- when  
11 the President signed the executive orders that led to my  
12 assignment to the task force.

13         Q. Understood, sir.

14           Going back to that brief prior to the inauguration,  
15 did you advocate for a particular result in any military  
16 commission case at that point?

17         A. I'm sorry. The video feed and the audio just froze.

18         Q. I noticed that there's a lag, sir.

19           Did you advocate for a particular result in any  
20 military commission case during the brief that you provided as  
21 part of your Detainee Policy Task Force prior to the  
22 inauguration?

23         A. No, sir. That was not the subject matter of the

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1 brief.

2 Q. And what about afterwards, when you started taking a  
3 more active role in the sub-working group? Was the goal of  
4 that sub-working group stated or otherwise achieved -- to  
5 achieve a particular result in any military commission case?

6 A. No, absolutely not.

7 Q. And then fast forward, sir. In 2009 when you became  
8 the co-chair replacing then-Colonel Martins -- or was he --  
9 was he a brigadier general at that point already?

10 A. He was still a colonel when he was on the -- the task  
11 force. I -- my recollection is that he was promoted and left  
12 basically at the same time. I do not believe that he was a  
13 general officer when he was still on the task force.

14 Q. Understood, sir.

15 So when you replaced then-Colonel Martins as  
16 co-chair, did you have turnover with him in terms of the DP --  
17 Detainee Policy Task Force duties?

18 A. Sure. There would have been some. Yes, yes. You  
19 know, sort of here's where we are in the process, these are  
20 the -- you know, these are the things people are working on.  
21 Yeah -- yes, I'm sure there was some turnover.

22 Q. And during that turnover, do you recall discussing  
23 either his desire or your desire for any particular outcome in

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1 any particular military commission case?

2 A. No, I -- it's not that I don't recall it. I can say  
3 that there absolutely was none.

4 Q. Following on, after you assumed duties as the  
5 co-chair, was it the Detainee Policy Task Force position or  
6 mission to achieve or obtain any particular result in any  
7 military commission case?

8 A. No, absolutely not.

9 Q. Sir, with respect to the al Bahlul briefing, when you  
10 attended that briefing, were you aware generally of the law  
11 with respect to conspiracy from a law of war standpoint?

12 A. The way that the question is phrased sort of frames  
13 the issue. You know, part of the -- when people say "law of  
14 war," you know, from my perspective one of the questions -- or  
15 the response probably needs to be what are you talking about,  
16 because there's the U.S. law of war, which obviously is a bit  
17 different than the international law of war.

18 Typically when that question is asked people are  
19 referring to international law of war. So it's -- you know,  
20 where you go into that question probably answers where it is  
21 that you come out on that question. Was I aware of it? I was  
22 aware of the difference of opinion with regard to how  
23 conspiracy should be handled.

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1 DDC [MS. HENSLER]: Sir, excuse me. For the record, my  
2 client, I understand he just fell asleep. He took a Valium  
3 before coming to court this morning, so I would ask that we  
4 recess the proceedings for a period of time.

5 MJ [LtCol LIBRETTO]: For how long?

6 It appears Mr. Hadi is awake at this time, so if we  
7 can continue to keep on going and then if we need to take a  
8 break, we will. But ----

9 DDC [MS. HENSLER]: Just a moment to confer with him, sir.

10 [Pause.]

11 MJ [LtCol LIBRETTO]: Mr. Spencer, how much longer do you  
12 have for questioning?

13 ATC [MR. SPENCER]: Sir, I would anticipate not more than  
14 ten minutes, approximately.

15 MJ [LtCol LIBRETTO]: Okay.

16 DDC [MS. HENSLER]: Sir, he's sleepy, but he can continue.

17 MJ [LtCol LIBRETTO]: Okay. Thank you.

18 **CROSS-EXAMINATION CONTINUED**

19 **Questions by the Assistant Trial Counsel [MR. SPENCER]:**

20 Q. I understood with respect to your last answer, sir,  
21 there is a difference of opinion within the legal community on  
22 conspiracy as it relates to the law of war; is that fair to  
23 say?

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1 A. Yes, it is.

2 Q. Is that an uncommon scenario, that there are  
3 differences of opinion among groups of lawyers?

4 DDC [MS. HENSLER]: Objection.

5 MJ [LtCol LIBRETTO]: Basis?

6 DDC [MS. HENSLER]: What's the relevance?

7 MJ [LtCol LIBRETTO]: Mr. Spencer?

8 ATC [MR. SPENCER]: Your Honor, the defense has attempted  
9 to suggest that the convening authority is biased on a  
10 particular issue because he has an opinion about the state of  
11 the law. I should be allowed to explore this witness'  
12 knowledge of that generally within his community. It won't be  
13 a long series of questions, sir.

14 MJ [LtCol LIBRETTO]: Okay. I understand the objection.  
15 It's overruled, although it's a bit argumentative in the sense  
16 that it's an argument point, not necessarily a question for  
17 this witness.

18 But I understand that this witness also has some  
19 exposure to the opinions of others within the community and  
20 will allow him to answer the question.

21 **CROSS-EXAMINATION CONTINUED**

22 **Questions by the Assistant Trial Counsel [MR. SPENCER]:**

23 Q. Sir, would you like me to repeat the question?

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1 A. Yes, if you would, please.

2 Q. In your experience has this type of disagreement on a  
3 sort of major subset of the law -- is that common among  
4 attorneys?

5 A. I would say it's not uncommon.

6 Q. Now, with the Bahlul -- I'm sorry, the amicus brief  
7 in the al Bahlul opinion, you were obviously supporting a  
8 position that the government in that case happened to agree  
9 with.

10 Is that fair to say?

11 A. The difficulty I have in answering that is I never  
12 read the government's brief, so I don't know what position the  
13 government was actually taking. I was supporting a very  
14 narrow position of law that had to do with congressional  
15 authority under the define and punish clause.

16 Q. And, sir, are you aware of how the D.C. Circuit  
17 decided in the Bahlul case?

18 A. Generally, yes.

19 Q. Did they -- did the D.C. Circuit agree with the  
20 position which you and others took in the amicus brief?

21 A. I would say generally, yes.

22 Q. The defense asked you about the convening authority  
23 having -- at the time, the convening authority, which was not

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1 you -- having added a conspiracy charge to the charges in this  
2 case.

3 Ignoring for the sake of time how the -- how that was  
4 added in terms of mechanics, were you part of that process in  
5 any way?

6 A. No, I was not. As I said, I have not seen the charge  
7 sheet. I don't know what's on it.

8 Q. Were you part of the referral process in any military  
9 commission currently referred to the commissions?

10 A. No, I was not.

11 Q. And, sir, have you ever acted as a convening  
12 authority?

13 A. Prior to this job? No.

14 Q. So you were never a commanding officer of a RLSO or  
15 NLSO?

16 A. Regrettably, I was not.

17 Q. You're familiar generally with how convening  
18 authorities execute their duties. Is that fair to say?

19 A. It is fair.

20 Q. Is it fair to say that a convening authority, in  
21 order to refer charges, must agree with the government at  
22 least that there's a basis for the charge?

23 A. Yes. We'd have to at least conclude there's probable

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1 cause to move forward.

2 Q. A position with which the government would obviously  
3 have to agree or they wouldn't be having the discussion in the  
4 first place; is that fair to say?

5 A. I think that's fair to say.

6 ATC [MR. SPENCER]: Your Honor ----

7 Q. I'm sorry, sir. In your practice as a military  
8 judge, you said that you were a trial judge for four  
9 years ----

10 A. That's correct.

11 Q. ---- and an appellate judge for three years; is that  
12 correct?

13 A. Yes. So I was the chief judge for the Court of  
14 Criminal Appeals for three years.

15 Q. And during those seven years on the bench, can you  
16 estimate how many cases that you heard before you?

17 A. Oh, I've never thought about it. A lot. No, I -- a  
18 lot.

19 Q. Of those large number of cases, did you -- were there  
20 ever cases that had similar questions of law?

21 A. You mean, like, between ----

22 Q. From one case to the next.

23 A. I'm trying to understand the question.

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1           Similar questions of law spanning multiple cases that  
2 I've reviewed or -- or sat on as a trial judge? Yes.

3           Q. Yes, sir.

4           And ----

5           A. Yes.

6           Q. And how did you approach resolving those similar  
7 questions of law? In other words, you decided one issue in  
8 one case presumably as a trial judge, let's say. Did you  
9 necessarily decide it the exact same way in a similar or  
10 related case?

11          A. No. As a matter of fact, my practice was always to  
12 go back to source documents and start afresh on everything.  
13 Even when I did a providence inquiry, I never even reused  
14 providence inquiries that I created myself. I always went  
15 back to the source documents and did it all fresh to make sure  
16 that I was doing it right.

17          Q. And was that true in your appellate -- your time on  
18 the appellate bench as well?

19          A. Yes.

20          Q. And you noted earlier, sir, that you were a defense  
21 counsel for four years and then a trial counsel for four  
22 years, I believe. Were those back-to-back?

23          A. No. There was -- there was some time where I spent

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1 as a trial counsel, then flipped over and became a defense  
2 counsel during one tour, but the bulk of that time was  
3 actually separated by a couple of tours in between.

4 Q. And then once you left the appellate bench, is that  
5 when you took over as the chief of the Navy -- the chief judge  
6 of the Navy?

7 A. That's right.

8 Q. Just to clarify, you were not involved in the  
9 nomination process to place then-Captain Waits in the pool of  
10 available judges for commissions judges, correct?

11 A. My recollection is that that decision was made  
12 when -- when he was still the circuit judge in Jacksonville.  
13 And if that's correct, then that would have been done by my  
14 predecessor. Again, the only conversation I remember about  
15 him and military commissions had to do with when he was  
16 actually assigned a case, how it was that we were going to  
17 backfill his job in Naples. I just -- I have no recollection  
18 of being involved in him being nominated.

19 Q. Thank you, sir. One final question. Do you believe  
20 that you can be fair and impartial in this case?

21 A. I do. I've had no involvement in this case prior to  
22 coming to this job. As I said before, I never even heard  
23 about this case before coming to this job. Yes.

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1 Q. Thank you, sir. No further questions.

2 MJ [LtCol LIBRETTO]: Ms. Hensler, any follow-up  
3 questions?

4 DDC [MS. HENSLER]: Just a few, Your Honor.

5 MJ [LtCol LIBRETTO]: Go ahead.

6 **REDIRECT EXAMINATION**

7 **Questions by the Detailed Defense Counsel [MS. HENSLER]:**

8 Q. Sir, you noted that when you assumed the role of  
9 co-chair of the Detainee Policy Task Force that  
10 General Martins -- I believe you've testified he was deployed  
11 at the time ----

12 A. Well, he ----

13 Q. ---- would there be ----

14 A. I'm sorry. He deployed -- he deployed -- he left the  
15 task force and deployed. That's why I ended up slipping into  
16 the job.

17 Q. You took his job.

18 Would there be e-mails, documents, notes, guidance of  
19 any kind reflecting the turnover process that took place  
20 between the two of you?

21 A. I -- I don't know the answer to that. I don't know.

22 Q. Typically when you assume a role from a -- does your  
23 predecessor leave you guidance on things that you should have

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1 situational awareness about for the new position?

2 A. Generally speaking, yes. And again, there may have  
3 been, you know, some, you know, documents; I just -- I -- I  
4 have no recollection of it.

5 Q. Sir, with respect to the interactions with the Office  
6 of the Chief Prosecutor that you refer to in your memos, for  
7 instance the moot in the Nashiri case and the al Bahlul  
8 briefing, were your contacts with General Martins and others  
9 in his office, were they by e-mail, by phone call?

10 A. The -- there was one phone call. So the one contact  
11 that I mention in the disclosure that had to do with the  
12 timing of proof of jurisdiction, that was -- my recollection  
13 is that was a phone call. A fairly short phone call, not a  
14 lot to it. That was a phone call.

15 The other interactions, I -- I think that he may have  
16 sent me an e-mail just asking whether I was available for a  
17 phone call, and then we would have a -- a phone call. And if  
18 I went over there, that would have led to me actually going  
19 over there. But I -- but that's the sum total of my  
20 recollection.

21 Q. Did he ever provide to you materials in advance to  
22 review, for instance, for the moot?

23 A. I would assume that I was given something in advance

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1 of the moot, but I don't have a recollection of that.

2 Q. Sir, now with respect to the interview process --  
3 excuse me, both interview processes for the convening  
4 authority position, your interactions with General Martins --  
5 excuse me, with Jason Foster or his colleagues or individuals  
6 in the office -- in the general counsel's office, were those  
7 typically by e-mail or phone call?

8 ATC [MR. SPENCER]: Your Honor, the government objects.  
9 This is outside the scope of cross.

10 MJ [LtCol LIBRETTO]: Overruled.

11 A. My recollection is that the only person that I had  
12 interaction with was Jason Foster. And I believe that, again,  
13 it would have been him sending -- you know, I'm not sure if  
14 they started out with him sending the e-mail saying are you  
15 available for a phone call or if it was just a phone call. I  
16 don't remember. But I don't remember any substantive e-mails  
17 back and forth.

18 Q. You don't recall any. But there were e-mails?

19 A. I don't remember any substantive e-mails. There may  
20 have been an e-mail saying, "Hey, are you available for a  
21 phone call?" I just don't -- I don't remember that.

22 I think after the point of interview or approaching  
23 the interview, there may have been some e-mails just checking

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1 on status or talking about parking arrangements or something  
2 like that. I'm sure there were some e-mails that would have  
3 been dealing with the -- sort of the logistics of it, but  
4 again, I don't think there were any substantive e-mails at  
5 all.

6 Q. Sir, Mr. Spencer asked you some questions about the  
7 military justice litigation track, and he referred to the fact  
8 that you had had some interaction with him about potentially  
9 joining that track.

10 Can you tell us what you recall about those  
11 interactions with the prosecutor.

12 A. I believe -- yes, ma'am. I believe that he was in  
13 Europe at the time as a defense counsel. He was still on  
14 active duty, and there were, you know, discussions related to,  
15 you know, his performance, his future in the -- in the career  
16 track. I just -- I don't remember specifically what the  
17 discussions were, but I do know that I talked to him.

18 And again, I think it was when he was a defense  
19 attorney in -- again, still in uniform, just prior -- prior to  
20 his assignment with commissions. And I -- I think he was in  
21 Naples at the time.

22 Q. And is it fair to say, without getting too much into  
23 the substance, but -- that the purpose of your -- that

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1 Mr. Spencer first had a -- had a good reputation as an  
2 attorney?

3 A. I'm sorry. What ----

4 Q. Is it fair to say ----

5 A. Yes.

6 Q. ---- that Mr. Spencer had a good reputation as an  
7 attorney?

8 A. I would say that, yes, he had a -- he was a very  
9 aggressive defense counsel, but was very adept at making  
10 things happen. My impression was that he was pretty much  
11 running the docket, which is not something that you really  
12 want the attorneys to do; you want the judges to do. The fact  
13 that he was doing that got my attention. It says something  
14 about an attorney who's able to do that.

15 Q. And that's why you reached out to him with respect to  
16 the military justice litigation track?

17 A. I don't remember if he called -- if he contacted --  
18 contacted me or if I contacted him, but I certainly knew who  
19 he was.

20 Q. Sir, also with respect to the role of military  
21 justice litigation career track -- excuse me -- and your role,  
22 you mentioned that at the time that you were -- well, you  
23 mentioned that -- without characterizing your testimony too

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1 much, but you regarded it -- you were an 0-4 at the time that  
2 you first became involved with the Detention Policy Task Force  
3 and you -- and you weren't quite so focused on your promotion.

4 Is that -- is that correct? Is that fair to say?

5 A. I was an 0-5 when I was first involved. And I think  
6 it would be fair to say that I have never been focused on my  
7 promotion.

8 Q. Okay. Sir ----

9 A. You don't do what I did for a career and expect that  
10 anybody is going to promote you.

11 Q. Sir -- and when you assumed the role of co-chair of  
12 the Detainee Policy Task Force, you were a captain at that  
13 time?

14 A. I was, yes.

15 Q. And, sir, when you assumed the role of chief judge of  
16 the Navy, you were a rear admiral -- you were promoted to rear  
17 admiral at that time?

18 A. I was -- I was selected for rear admiral at that  
19 point.

20 Q. Thank you, sir. No further questions.

21 MJ [LtCol LIBRETTO]: Mr. Spencer?

22 ATC [MR. SPENCER]: Your Honor, very brief redirect.

23 [END OF PAGE]

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1 Commander Lockhart?

2 A. Oh, yes, absolutely. I mean, I knew her for her  
3 entire career. Again, she worked for me as a first-tour  
4 lieutenant, practiced in front of me when I was a trial judge  
5 and she was counsel. Yes, very much so.

6 Q. Sir, did I ever practice in front of you when you  
7 were on the bench?

8 A. No, you did not.

9 Q. Sir, do you -- are you familiar with Commander Kevin  
10 Flynn, also a detailed counsel representing the government in  
11 this case?

12 A. You know, I saw his name on something, and I keep  
13 looking at it going, boy, I know that name from someplace, but  
14 for the life of me, I can't -- can't come up with a face.

15 Q. Is it possible that you were stationed together at  
16 some point in the relatively distant past?

17 A. It's quite possible, which would explain why I  
18 recognize his name.

19 Q. Is that a common scenario within the JAG Corps?

20 A. Being stationed together?

21 Q. Having been stationed with someone that you're then  
22 in a different role such as a military judge or appellate  
23 judge.

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1 A. Absolutely. Yeah, it happens all the time.

2 Q. With respect to Commander Lockhart, how did you  
3 resolve the relationship that you had had with her prior to  
4 being on the bench once she was practicing in front of you?

5 DDC [MS. HENSLER]: Sir, objection. Beyond the scope of  
6 the redirect.

7 MJ [LtCol LIBRETTO]: Mr. Spencer?

8 ATC [MR. SPENCER]: Sir, the defense likely will argue  
9 that the relationship with Commander Lockhart has a tainting  
10 effect. Regardless of whether the convening authority recused  
11 himself in that case, the government has made clear its  
12 position on that.

13 In light of the revelation with respect to me and  
14 potentially Commander Flynn, I just would like to inquire of  
15 the witness how that's normally resolved in the military -- in  
16 the military system for -- largely more for the ----

17 MJ [LtCol LIBRETTO]: Overruled. Go ahead and ask the  
18 question briefly.

19 A. The answer is you maintain your -- your distance. I  
20 didn't socialize with her. I didn't go to command function --  
21 her command functions. She was a counsel practicing in front  
22 of me. And, you know, we were cordial, I knew her, but I  
23 didn't maintain an ongoing sort of personal relationship with

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1 her while I was a judge and she was practicing in front of me.

2 Q. So, in other -- is it fair to characterize, despite  
3 your prior contact with her, that you remained neutral and  
4 detached when presiding over her cases?

5 A. Absolutely.

6 Q. Thank you, sir.

7 MJ [LtCol LIBRETTO]: Ms. Hensler, do we need to take a  
8 recess?

9 DDC [MS. HENSLER]: Yes, sir.

10 MJ [LtCol LIBRETTO]: And for how long would you like to  
11 take a recess for?

12 DDC [MS. HENSLER]: 20 minutes, sir.

13 MJ [LtCol LIBRETTO]: Okay. The commission will stand in  
14 recess for 20 minutes. Before we do so, I just want to take  
15 care of a few housekeeping matters.

16 With respect to some exhibits that were submitted in  
17 support of ----

18 ATC [MR. SPENCER]: Your Honor, I apologize for the  
19 interruption. The witness has not yet been released.

20 MJ [LtCol LIBRETTO]: Oh, thank you very much,  
21 Mr. Spencer.

22 Sorry about that, Rear Admiral Reismeier. That's all  
23 the questions that we have for you. Thank you for your time

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1 today in answering the counsel's questions. You may step down  
2 and return to your normal duties. Thank you.

3 WIT: Thank you, Your Honor.

4 [The witness was excused and the VTC was terminated.]

5 MJ [LtCol LIBRETTO]: Okay. And Rear Admiral Reismeier  
6 (Retired) has left the witness stand.

7 Taking care of a few housekeeping matters, with  
8 respect to the motions that were previously litigated, both  
9 163, 166, several matters were attached to the record while we  
10 were off the record. That is, 166A through I, which are the  
11 accused's activities logs associated with his detention,  
12 that's A and B. C is the accused's medical records. D, E, F,  
13 G, H, and I are all affidavits by -- submitted by defense team  
14 personnel. And then 167 has been attached. Those are the  
15 petitions to the D.C. District Court that the commission  
16 ordered be provided.

17 We are going to stand in recess once again for 20  
18 minutes. At that time, we will come back and the commission  
19 will hear argument on 157. That is the motion to disqualify  
20 the convening authority. We will then proceed into argument  
21 on AE 160 and AE 158.

22 To the extent that there is still outstanding  
23 evidence to be taken on those matters, specifically the

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1 [The R.M.C. 803 session was called to order at 1018,  
2 26 August 2019.]

3 MJ [LtCol LIBRETTO]: The commission will come back to  
4 order. All parties present when the commission last recessed  
5 are again present.

6 When we went off the record a moment ago, the defense  
7 requested an 802 session with the military judge to discuss  
8 the proposed way ahead in arguing the various motions that are  
9 still outstanding to take up this session. Specifically the  
10 defense requested that we reserve argument on 157, 158, and  
11 160 until tomorrow's session and take up 137, 139, and other  
12 motions as we may be able to this afternoon -- or I'm sorry,  
13 for the remainder of this morning.

14 The commission granted that request, so we will take  
15 up those motions tomorrow. We will also hear from Lieutenant  
16 Colonel Martin on Wednesday morning. The government is going  
17 to arrange his testimony that we were unable to take a few  
18 days ago.

19 During the initial 802 conference that was held  
20 several days ago last week when we first arrived, the parties  
21 were going to discuss to what extent, if any, classified  
22 information would have to be argued during the 137 and 139  
23 series.

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1           Do either -- does either side believe that they will  
2 need to argue classified information with respect to either of  
3 the motions?

4           TC [CDR SHORT]: Your Honor, the government made several  
5 attempts to contact defense counsel and we tried to actually  
6 get together at one point. It just never happened. I did  
7 have a conversation with Lieutenant Ball who indicated that he  
8 is not going to trigger any classified information. I don't  
9 intend to either, Your Honor.

10          MJ [LtCol LIBRETTO]: Okay. Very good.

11           Okay. Then turning to AE 137, the defense motion to  
12 compel discovery of information related to and access to  
13 buildings in which the accused or any potential witness has  
14 been confined.

15           Defense, you may proceed.

16          DC [LT BALL]: Thank you, Your Honor. Your Honor, before  
17 we begin, I did have a set of slides that I had prepared for  
18 the argument. We have provided a copy of the slides to the  
19 government, and they indicated that they didn't object to  
20 these. With your permission, I would like to publish these  
21 slides to the gallery, sir.

22          MJ [LtCol LIBRETTO]: You'd like to publish them to what?

23          DC [LT BALL]: To this court.

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1 MJ [LtCol LIBRETTO]: Oh.

2 DC [LT BALL]: The commission.

3 MJ [LtCol LIBRETTO]: Stand by.

4 DC [LT BALL]: And the gallery as well, yes, sir.

5 Oh, for the record, it's AE 137D.

6 MJ [LtCol LIBRETTO]: AE 137D, Lieutenant Ball, has this  
7 been cleared through the appropriate channels before, or are  
8 you simply asking it to be displayed to the commission?

9 DC [LT BALL]: To the commission and the gallery, sir. My  
10 understanding was it had been cleared through the appropriate  
11 channels. It had been reviewed.

12 [The military judge conferred with courtroom personnel.]

13 MJ [LtCol LIBRETTO]: Lieutenant Ball, has -- I understand  
14 in speaking with my security officer that this is the document  
15 that was submitted in accordance with the rules of court  
16 approximately a week ago.

17 DC [LT BALL]: Yes, sir.

18 MJ [LtCol LIBRETTO]: Have there been any changes since  
19 that time when it was initially submitted?

20 DC [LT BALL]: No, sir. These are exactly the same that  
21 were published -- or that were sent -- yeah, it would have  
22 been about two weeks ago at this point, sir.

23 MJ [LtCol LIBRETTO]: Very well. You may proceed.

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1 DC [LT BALL]: Thank you, Your Honor.

2 Okay, thanks. Your Honor, this motion requests  
3 access to the sites, the buildings where Mr. al-Tamir and  
4 other possible witnesses were held prior to his confinement on  
5 board Guantanamo Bay.

6 I would like to highlight to you that this 137 motion  
7 was filed right after 136. The two are a little related or  
8 somewhat related because they do both relate to the same  
9 program that we're requesting information in 136, so I wanted  
10 you to know that as we proceed.

11 The government's case hinges on statements that were  
12 provided by the so-called clean team, statements that were  
13 taken after Mr. al-Tamir was transferred here to Guantanamo  
14 Bay. However, it is our position that these statements were  
15 never clean, that they were derived. A number of these  
16 statements were made while he was detained by the CIA, and  
17 that information was later shared with the FBI and the DoJ and  
18 those who were interrogating him after.

19 The so-called clean team had access to the  
20 information that the CIA took, and anything that the clean  
21 team reported on at a later stage flowed directly from those  
22 statements taken during his time prior to his confinement on  
23 board Naval Station Guantanamo Bay, statements that were taken

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1 from my client at a CIA black site. It is our position that  
2 the statements made prior to this time were coerced and  
3 involuntary.

4 We expect this information will be relevant in  
5 relation to the impeachment of other witnesses as well,  
6 namely, Mr. Darbi, Mr. Babar, and Mr. Spin Ghul or Hassan  
7 Ghul. Secondly, we expect this information that we are  
8 requesting will be useful in formulating our mitigation case  
9 as well.

10 The prosecution may argue that all of Mr. al-Tamir's  
11 statements that they will use at trial will be after his  
12 transfer to Guantanamo Bay. And we can see this in their  
13 filing in Appellate Exhibit 110G. However, the information  
14 from those documents all flowed directly from those custodial  
15 interviews at the CIA black site in late 2006, early 2007.  
16 The Intelligence Reform and Terrorism Prevention Act of 2004  
17 makes it very clear that the 16 members of the intelligence  
18 community -- now 17 -- were required to share information.

19 The IRTPA, as it's called, and the subsequent  
20 executive orders even established a requirement for the  
21 intelligence agencies to share information between federal,  
22 state, local, tribal, and even private sector entities.

23 MJ [LtCol LIBRETTO]: Lieutenant Ball, if you would, just

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1 slow down a little bit, please.

2 DC [LT BALL]: Yes, sir.

3 MJ [LtCol LIBRETTO]: Thank you.

4 DC [LT BALL]: This act -- those executive orders were  
5 issued two years before my client was detained. In fact, as  
6 early as 2002, April 2002, Robert Mueller, then-director of  
7 the FBI, made a public statement. In a speech, he described  
8 the FBI's role in the war on terror. He explained that the  
9 FBI had become part and parcel of a governmentwide campaign to  
10 protect America that now formed part of the Homeland Security.

11 You can see this full speech attached to Appellate  
12 Exhibit 136N Attachment B.

13 Anything subsequent that my client -- my client  
14 provided to the FBI or the government after his time at the  
15 CIA was derived from his time at the black site. The FBI had  
16 the information that the CIA obtained at their black site  
17 while Mr. al-Tamir was being tortured.

18 In this commission during the 9/11 trial, the agents  
19 in the Hawsawi case testified that they shared information.  
20 Former Special Agent Abigail Perkins and James Fitzgerald took  
21 the stand and they noted that they had information that was  
22 shared from the CIA to the FBI. It will be the same in our  
23 case.

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1           We -- our team was also able to obtain telegraphic  
2 disseminations, "TD reports" as they're called. These are CIA  
3 reports from the May and June 2000 time frame, when we still  
4 had access to the SIPRNet. We don't have access anymore, but  
5 when we had, we were able to do internal investigations and  
6 find reports that show information is being shared per the  
7 IRTPA. I should note that we never received those reports in  
8 our discovery.

9           As I learn about how interagency sharing is, I learn  
10 that there is other databases, something called a TIDE  
11 database. All of these indicate that there's information  
12 being shared across agencies.

13           Now, as I outlined in our arguments in March, we have  
14 hundreds of documents that are 505 substitutions of our  
15 client's interrogations in late 2006, early 2007. Those  
16 substitutions are substituted from the interrogations that  
17 occurred at the black site with the CIA.

18           As we've highlighted in our motions in 136, it  
19 highlights issues with the rendition, detention, and  
20 interrogation policies, and we need to understand better the  
21 conditions of confinement in late 2006 and 2007. I use that  
22 term "conditions of confinement" very carefully because that  
23 is the crux of our argument.

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1           When I say "conditions of confinement," I use that  
2 term as it was used in the Senate Select Committee on  
3 Intelligence report that was published in April 2014, the SSCI  
4 report, as it's called. That is an unclassified report.

5           It is important to understand the background of the  
6 CIA's rendition, detention, and interrogation program, because  
7 by the time Mr. al-Tamir was in custody in late 2006 with the  
8 CIA, the CIA had developed its program. It was sophisticated,  
9 it was mature. The terms used to describe torture are very  
10 subtle.

11           From the SSCI report, we know the program started in  
12 2002. They developed methods and they described those methods  
13 using terms such as: enhanced interrogation techniques,  
14 nonenhanced interrogation techniques, standard interrogation  
15 techniques. But over the next four years those techniques,  
16 torture, would evolve, as would the terms. The CIA even  
17 appeared to drop the distinction between the enhanced  
18 interrogation techniques and standard interrogation techniques  
19 in 2005, just as is outlined in the SSCI report.

20           We see other terms used to describe that torture, but  
21 most importantly, by the time we are in 2006 we see that it's  
22 all referred to conditions of confinement. You have to  
23 understand, sir, the context, because outside of this -- the

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1 Congress was looking at this. Hamdan was decided. Both the  
2 judiciary and the legislature were looking at these issues.  
3 The Detainee Treatment Act was later passed.

4           So we needed the CIA to -- to -- we -- when I say  
5 "we," the government, the United States, was pushing the CIA  
6 to bring their methods in line with the Geneva Convention in  
7 Common Article 3. As an example, I was able to find an  
8 unclassified memo from the DoJ Office of Legal Counsel to  
9 the CIA's general counsel John Rizzo, dated August 31, 2006.  
10 This is an unclassified document.

11           The Office of Legal Counsel reviewed six, quote,  
12 conditions of confinement, end quote, to test whether they  
13 complied with the Detainee Treatment Act or, quote, shocked  
14 the conscious -- conscience, end quote. Within the meaning of  
15 the Fifth Amendment, nowhere in this document is there a  
16 reference to enhanced interrogation techniques or standard  
17 interrogation techniques. At this point, it is all conditions  
18 of confinement. This is six months before my client was  
19 detained at the CIA black site.

20           So we see how mature and how developed the program  
21 was. I should also note that we did not receive a copy of  
22 this Rizzo report in our discovery. The ACLU got this report  
23 in response to a FOIA request and published it on the

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1 Internet. I received this. I took this from the Internet.

2 Now, because of these -- because of these unclear  
3 terms and the regular use of these conditions of confinement,  
4 it is unclear what the CIA did to our client. These polite  
5 terms that they use to describe torture make it all the more  
6 complicated, which make it all the more important that we have  
7 access to the black site where Mr. al-Tamir was held.

8 We know from the unclassified Senate report and the  
9 unclassified Rizzo memo that there was sensory deprivation,  
10 which included hooding and goggling. There was isolation,  
11 which we have seen repeatedly our client does not like. We  
12 know there was also noise, white noise. Those reports include  
13 that there was loud music. And we know from those reports  
14 that the lights were left on 24 hours a day as well. At the  
15 time Mr. al-Tamir was in detention, the CIA had perfected its  
16 conditions of confinement or means of torture.

17 The purpose of this program and these sites was to  
18 break Mr. al-Tamir's will to resist, to break him down, to get  
19 him to talk, to force him to talk. In those -- in their own  
20 words, he was forced to comply. And it worked. They broke  
21 him. They made Mr. al-Tamir comply. You can see this in the  
22 Senate report.

23 Because of the close connection to our client's

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1 detention during his time with the CIA and the RDI program and  
2 the issue that he was not providing statements voluntarily, we  
3 must understand and know better these conditions of  
4 confinement. What were the cell measurements? What were the  
5 sanitary conditions like? What was the lighting like? Was it  
6 natural, unnatural? the air quality? the temperature? the  
7 bedding?

8 All of this information will help to demonstrate to  
9 this condition that Mr. al-Tamir's statements given at his  
10 time at the black site were coerced.

11 Because of the sharing between the CIA and the FBI,  
12 there is no distinction between a clean team or a dirty team.  
13 All of this information gathered during his time with the CIA  
14 was passed on. Anything provided after his capture is derived  
15 from his time at the black site. We must have details to  
16 these sites and those cells.

17 Now, we certainly recognize, Your Honor, that we are  
18 approaching 13 years since Mr. al-Tamir was detained outside  
19 of Guantanamo Bay. It may be longer for the witnesses that  
20 are involved in his case. Still, we need to have access to  
21 these sites so that we can photograph, make diagrams, take  
22 measurements. If these sites have been destroyed or altered  
23 in any way, then we need to know. We need to know when. We

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1 need to know who made that decision, what was saved. If it's  
2 been altered or destroyed, we need to file a motion related to  
3 the destruction of evidence, and that's why it's important for  
4 us to know the status.

5           We've heard repeatedly that the prosecution have said  
6 that they've provided us with everything. And I will say  
7 this: There is one, one file. I will not go into detail  
8 because that file is labeled Top Secret, but it is at Tab 39  
9 of Appellate Exhibit 141Q. But that one file is wholly  
10 inadequate. We need to have access to the sites in order to  
11 determine what is important to us.

12           Your Honor, my client is facing the rest of his life  
13 in jail based on statements that were coerced from him by  
14 means of torture. We need to have the information, Your  
15 Honor, in order to prove our case. The government's case  
16 hinges entirely on those statements that were coerced from  
17 him.

18           We respectfully request that you provide us access to  
19 the sites, to the information that we have requested in  
20 alphabet -- excuse me, Appellate Exhibit 136 and 137. Allow  
21 us to litigate this properly. Mr. al-Tamir deserves this  
22 discovery. It is part of the American way, to uphold the rule  
23 of law, the idea that he deserves justice. We deserve the

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1 opportunity to prepare a defense on his behalf.

2           This concludes our position for now, pending any  
3 questions, Your Honor.

4           MJ [LtCol LIBRETTO]: Thank you, Lieutenant Ball.

5           DC [LT BALL]: Thank you, sir.

6           MJ [LtCol LIBRETTO]: I'd like to hear from the government  
7 before I perhaps turn back to you for questions.

8           TC [CDR SHORT]: Good morning, Your Honor.

9           MJ [LtCol LIBRETTO]: Good morning.

10          TC [CDR SHORT]: Your Honor, the site that the defense is  
11 so adamant to go see is -- was and is a classified location to  
12 which the government has invoked the classified national  
13 security privilege in AE 044. This commission issued an order  
14 protecting that, and substitution was provided pursuant to  
15 that order, Your Honor.

16                 That substitution, Your Honor, which defense  
17 categorized as Tab -- which was referring to Tab 39 and  
18 categorized as "that file is inadequate" included detailed  
19 photographs, video of the site in question, Your Honor.

20                 Site A, or the site in question, is a CIA -- was a  
21 CIA site, Your Honor. It was associated with the accused; and  
22 again, it is a classified facility. Site A was a detention  
23 facility in a foreign location, the burden of which to go

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1 there is -- is high, Your Honor. Videos and still pictures,  
2 drawings, measurements as part of the substituted evidence has  
3 already been provided to the defense. To classify it or  
4 categorize it as "that file" to diminish what has been  
5 provided to them is somewhat misleading, Your Honor.

6           Additionally, Your Honor, today they presented two  
7 bases for the request in their charts. They indicate that the  
8 government has provided a lot of substitutions, hundreds of  
9 substitutions. What they don't indicate is that as part of  
10 AE 023FF, which has also been provided as a Bates stamp  
11 HADI-3-001193 to the defense, links the conditions of  
12 confinement to the actual statements that were made while in  
13 that site. Additionally, the defendant indicates that the  
14 prosecution appeared to be ready to use statements while he  
15 was at that site. That is far from the truth, Your Honor.

16           The government is prepared to use statements while  
17 Abd al Hadi al-Iraqi was detained in Guantanamo Bay,  
18 statements and confessions -- multiple confessions that he  
19 made to FBI and TCIU. The government does not intend to use  
20 any statements that were used while he was at Site A, Your  
21 Honor.

22           It appears that the defense is arguing AE 136, Your  
23 Honor, not AE 137. Granted, it is referred to in AE 137,

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1 however, that argument was mostly part of AE 136. And we look  
2 forward to the argument that Lieutenant Ball has made when he  
3 makes -- when the defense makes their arguments to suppress  
4 any statements by Abd al Hadi al-Iraqi. But as of for right  
5 now, Your Honor, the government has provided all the detailed  
6 information that the defense would need.

7           And what they have now, going out to the site would  
8 not produce any other additional information, anything that  
9 would be helpful to the defense or anything that would be  
10 material to any of the arguments that Lieutenant Ball just  
11 laid out for this -- this commission, Your Honor.

12           MJ [LtCol LIBRETTO]: Commander Short, just so I can  
13 understand what the government's position is more fully, on  
14 page 3 of your response, you reference certain Bates numbers.  
15 Are those duplicative of what has been referenced as the -- by  
16 the defense as Tab 39? Is it the same thing?

17           TC [CDR SHORT]: Let me pull up the Bates stamp, Your  
18 Honor.

19           Yes, Your Honor. HADI-4-001816 is, I believe, Tab 39  
20 of their -- of their argument.

21           MJ [LtCol LIBRETTO]: And what about 235 through 259?

22           TC [CDR SHORT]: Your Honor, I can't tell you exactly what  
23 those -- what those Bates numbers are right now, what they

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1 refer to. I can get that information for you, however.

2 MJ [LtCol LIBRETTO]: It's the government's position, just  
3 so I'm clear, that the information that was provided to the  
4 defense by way of the 505 substitutions identifies those  
5 characteristics that the defense is after; i.e., measurements,  
6 conditions, lighting, and all the pertinent characteristics  
7 that they would rely upon in order to challenge the  
8 reliability, credibility, or admissibility of statements later  
9 on given while at Guantanamo Bay.

10 TC [CDR SHORT]: Yes, sir. However, I'm not really sure  
11 it captures the ambient air temperature. But certainly the  
12 measurements, the conditions, there's detailed photographs,  
13 Your Honor, in the -- it's kind of a walkthrough. So it's an  
14 interactive detailed substitution, Your Honor.

15 MJ [LtCol LIBRETTO]: Okay. Thank you.

16 TC [CDR SHORT]: Thank you, Your Honor.

17 MJ [LtCol LIBRETTO]: Defense, if you would, why is the  
18 information not provided other than -- well, let me ask it  
19 this way: Does 137 amount to a request to visit or also an  
20 objection to that which has already been provided as being  
21 inadequate?

22 DC [LT BALL]: Your Honor, it is a request to visit and  
23 have access to those sites.

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1 MJ [LtCol LIBRETTO]: Okay. So the information that has  
2 been provided in Tab 39, the walkthrough, the photographs, it  
3 is the defense's belief that absent a site visit, those  
4 provide adequate -- I mean, obviously by visiting the site you  
5 gain more appreciation or more information. But absent actual  
6 physical on-site observation, it's the defense's position that  
7 Tab 39 and the information associated with it provides the  
8 defense a sufficient understanding of the location?

9 DC [LT BALL]: Well, it -- we don't need to know that.  
10 We'd need to visit the site and see it. The point is, we need  
11 to physically be there and see it. It is insufficient, Your  
12 Honor. We wouldn't ----

13 MJ [LtCol LIBRETTO]: Lieutenant Ball, let me ask the  
14 question a little bit more clearly.

15 Obviously, anytime you visit a location, it is going  
16 to provide richer, perhaps more expansive, more descriptive  
17 information than seeing a picture.

18 DC [LT BALL]: That's right.

19 MJ [LtCol LIBRETTO]: My question is: Is there something  
20 about -- putting aside whether or not a site visit is granted,  
21 are there certain -- is there certain information that you  
22 are -- that is absent based on the pictures that you could  
23 otherwise get from pictures or videos or ----

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1 DC [LT BALL]: Yes, sir.

2 MJ [LtCol LIBRETTO]: Okay.

3 DC [LT BALL]: As I mentioned in my argument, it would be  
4 the temperature, the actual feel of the room, the size, the --  
5 the noise, the sound ----

6 MJ [LtCol LIBRETTO]: And those are all things that could  
7 not necessarily, unless previously captured, be captured  
8 unless you visit the site?

9 DC [LT BALL]: That is correct, yes, sir.

10 MJ [LtCol LIBRETTO]: Okay.

11 DC [LT BALL]: That is our position.

12 MJ [LtCol LIBRETTO]: Putting aside things that could only  
13 be captured by way of a site visit, are there things, pieces  
14 of information that the defense is without based on the  
15 discovery already provided?

16 DC [LT BALL]: I think so. May I have a moment?

17 MJ [LtCol LIBRETTO]: Yeah. And I could perhaps not be  
18 asking that very clearly.

19 [Pause.]

20 DC [LT BALL]: Well, I think the question -- the answer to  
21 that question is yes, Your Honor. But we are starting to get  
22 into areas that we can't go into, so we would be happy to  
23 produce a supplemental briefing if that would help us.

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1 MJ [LtCol LIBRETTO]: So you understand the question.

2 DC [LT BALL]: Yes, I do. And the answer to that is yes,  
3 sir, but we are getting into areas that we can't discuss ----

4 MJ [LtCol LIBRETTO]: Okay.

5 DC [LT BALL]: ---- so I'd like ----

6 MJ [LtCol LIBRETTO]: Yes ----

7 DC [LT BALL]: Okay.

8 MJ [LtCol LIBRETTO]: ---- there are things still  
9 outstanding that would be helpful to your arguments that  
10 cannot be obtained by the pictures and videos that are  
11 currently available to you?

12 DC [LT BALL]: That's correct, yes, sir.

13 MJ [LtCol LIBRETTO]: And that could be made available to  
14 you by other pictures, videos, things of that nature.

15 DC [LT BALL]: It is possible. Again, the best would be  
16 if we could get the site visits, but ----

17 MJ [LtCol LIBRETTO]: Okay.

18 DC [LT BALL]: ---- we understand.

19 MJ [LtCol LIBRETTO]: So, if you can, identify for me what  
20 other things you would hope to obtain, if we can in an open  
21 session.

22 DC [LT BALL]: Not necessarily in an open session, sir.

23 Can I just ----

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1 MJ [LtCol LIBRETTO]: Go ahead.

2 [Pause.]

3 DC [LT BALL]: Yeah, it would be best if we provide this  
4 in a supplemental briefing to the court. We -- we've seen the  
5 line -- that the line to us isn't entirely clear at times.  
6 I've tripped the red light enough already, Your Honor, so I'd  
7 like to ----

8 MJ [LtCol LIBRETTO]: Okay. Fair enough.

9 DC [LT BALL]: ---- just take some time to get together  
10 with our information security officers and go through that.

11 MJ [LtCol LIBRETTO]: All right. Good to go. Thank you.

12 DC [LT BALL]: Your Honor, if I could make a quick  
13 summation just to argue back.

14 MJ [LtCol LIBRETTO]: Please.

15 DC [LT BALL]: Again, we wouldn't -- you wouldn't  
16 produce -- you wouldn't purchase a home without seeing it  
17 first. We're in the same position. We need to go to visit  
18 those sites. The -- the word that Commander Short used was --  
19 was interesting.

20 As I argued earlier, we do -- we would like to have  
21 a -- any information about the status. If it was destroyed,  
22 we would like to know that, because we would like to know  
23 whether or not the evidence that our client needs was

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1 destroyed. And we could bring the appropriate motion for  
2 that.

3           Again, the government argued that there were multiple  
4 confessions. Our position is very clear: All of those  
5 confessions were derived from his time at that black site. He  
6 deserves the information, he deserves this discovery so that  
7 we can make a proper defense on his behalf.

8           Thank you.

9           MJ [LtCol LIBRETTO]: Thank you, Lieutenant Ball.

10          TC [CDR SHORT]: Your Honor, may I add a couple of things  
11 just very briefly?

12          MJ [LtCol LIBRETTO]: You may, and I have a couple of  
13 questions for you.

14          TC [CDR SHORT]: Do you want me to add or do you want to  
15 ask the questions first?

16          MJ [LtCol LIBRETTO]: Go ahead, please.

17          TC [CDR SHORT]: Your Honor, just real quick. I didn't  
18 discuss also the -- defense also indicates that this is  
19 applicable to Darbi, Babar, and Spin Ghul.

20          MJ [LtCol LIBRETTO]: That's where -- that's what my  
21 questions pertain to.

22          TC [CDR SHORT]: Okay. Excellent. None of those three  
23 were ever detained at this Site A. That's -- that's the first

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1 thing.

2           Darbi was fully vetted. He was subject to search and  
3 cross-examination by the defense during a deposition, so they  
4 have all that information, plus all the -- all the discovery  
5 was provided. And -- in that matter, Your Honor -- in the  
6 lead-up to Darbi in the AE 070 series, Your Honor.

7           Babar was never in CIA or overseas detention at all.  
8 In fact, he was interviewed by the FBI kind of -- not even in  
9 a detention. So it doesn't -- any of those arguments do not  
10 apply to Babar at all.

11           And Spin Ghul, Your Honor, was detained by the Libyan  
12 government, my understanding, and then was later detained by  
13 the Italian government and gave a full confession while at a  
14 magistrate. So his confession was before a magistrate in the  
15 Italian court, and that is a matter of the record that the  
16 defense has, Your Honor.

17           So regarding those three, none of these things are  
18 applicable, Your Honor.

19           MJ [LtCol LIBRETTO]: Okay. Are you aware of any other  
20 witnesses that the government may call that it would be  
21 applicable to?

22           TC [CDR SHORT]: No, Your Honor.

23           Your Honor, the last thing I think that just needs to

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1 be -- Site A is unused and partially destroyed. It is  
2 decommissioned. There is nothing the defense could glean from  
3 their -- a visit to Site A.

4 And again, the -- the government has invoked the  
5 National Security Classified Information Privilege. And under  
6 044 that was accepted. So to the extent that they're trying  
7 to relitigate AE 144 or look -- you know, undo 140 -- or  
8 AE 044, that is highly inappropriate, Your Honor, and it's --  
9 they have everything that they need.

10 Pending your questions, Your Honor, that's all I  
11 have.

12 MJ [LtCol LIBRETTO]: Bear with me for just a moment.  
13 [Pause.]

14 MJ [LtCol LIBRETTO]: All right. Thank you, Commander  
15 Short. I have nothing further.

16 TC [CDR SHORT]: Thank you, Your Honor.

17 MJ [LtCol LIBRETTO]: Lieutenant Ball, any remaining  
18 thoughts that you'd like to share on the AE 137?

19 DC [LT BALL]: Your Honor, he -- Commander Short just  
20 mentioned that -- partially destroyed. It would be great, as  
21 we requested in our argument earlier, just to have more detail  
22 around what, when, who decided it, et cetera. So we will need  
23 to bring the appropriate motion.

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1 Thank you.

2 MJ [LtCol LIBRETTO]: Very well.

3 Moving on to AE 139. Defense?

4 DC [LT BALL]: Your Honor, if you can give me a minute  
5 here ----

6 MJ [LtCol LIBRETTO]: Sure.

7 DC [LT BALL]: ---- I'm just pulling my notes out.

8 MJ [LtCol LIBRETTO]: Go ahead.

9 [Pause.]

10 DC [LT BALL]: When you're ready.

11 MJ [LtCol LIBRETTO]: Go ahead, Lieutenant.

12 DC [LT BALL]: Thank you, sir.

13 Sir, as before, I did prepare some slides. We have  
14 presented those to the government. They did not object. We  
15 provided those to your security officer and the clerk. And I  
16 understand that all the procedures have been met.

17 MJ [LtCol LIBRETTO]: And these have not changed since  
18 they were originally submitted?

19 DC [LT BALL]: Yes, sir, they have not changed.

20 MJ [LtCol LIBRETTO]: Okay. Very well.

21 DC [LT BALL]: Okay. With your permission, sir, I'd like  
22 to publish these to ----

23 MJ [LtCol LIBRETTO]: You may.

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1 DC [LT BALL]: ---- the commission and the gallery.

2 Thank you, sir.

3 Your Honor, the focus of this motion was simply to  
4 access Mr. al-Tamir's cell and other detention facilities on  
5 Camp VII. If this were a -- one of the 9/11 cases, this  
6 argument today would likely be unnecessary.

7 I've spoken to some of the other teams who simply  
8 liaised with the prosecutors and the staff judge advocate's  
9 office to arrange a time to go over, to visit cells. The  
10 prosecutors -- and this certainly explains the prosecutors'  
11 initial reaction to our requests, which we provided to them in  
12 December of 2018 when I first came onboard this team, and they  
13 appeared to be okay with our requests and that we could go and  
14 visit and see the sites -- the Camp VII site.

15 We now are requesting an order from this court in  
16 order for us to complete this and do our job. We request  
17 access not only to his current cell but also to his previous  
18 cells, the infirmary ward where he was kept last year, the  
19 current infirmary wards where he is treated, as well as the  
20 vans, the ambulances, and the other vehicles that transport  
21 him.

22 The reason, Your Honor, is outlined in our pleadings,  
23 the legal reasons are there. He's entitled to discovery of

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1 all documents, other tangible items that are material to the  
2 preparation of his defense. 701 makes it clear that we need  
3 to review these documents. We need to have access to these  
4 documents that we could provide a positive case on defense as  
5 well as mitigation. And really the focus of this when we  
6 started was on mitigation.

7 As you've seen, Your Honor, over the last eight  
8 months now, access to his cell, access to sites where he's --  
9 where he's being treated, the transportation, it may help in  
10 helping us to discover and uncover possible evidence,  
11 determine whether any of the statements he made post-detention  
12 here on Guantanamo Bay were voluntary as well. This is  
13 notwithstanding my argument in 137 that I just made. So I  
14 wanted to note a few things to you.

15 First, as I mentioned, the prosecution initially  
16 appeared to agree with this. E-mails between myself and  
17 Commander Short are very clear. Commander Short acts very  
18 reasonably, and he says he's working with the JTF. He says,  
19 "We're coordinating your requests with the appropriate  
20 authorities." And then a few weeks later he says, "I'm  
21 working with the JTF and will have an answer for you." And  
22 then ultimately, another week or so later, we hear that the  
23 requests were denied.

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1           This military commission, Your Honor, as in other  
2 cases, ordered other teams the same exact request. Access to  
3 these sites. We're asking for exactly the same, nothing more.  
4 Indeed, in January/March when Colonel Yamashita took the  
5 stand, he acknowledged on the record that he knew other teams  
6 had been granted access to the site and yet he denied ours.  
7 We want to know why. Just like the other teams, sir, we would  
8 like access to those sites as well.

9           So, Your Honor, there's a pattern of the government  
10 saying they will do one thing and then retract it. And this  
11 is frustrating, particularly given the government's response  
12 in 139A. In their response, they argue that the true request  
13 was to intervene with the JTF. This is not true. We need to  
14 have this information to help prepare for his defense. His  
15 full defense, his ongoing defense, and his case in mitigation.

16           If we see, however, the JTF are not complying with  
17 the orders of this commission or the recommendations of his  
18 doctors, then we will highlight these issues and bring them to  
19 your attention. This is what we've been detailed to do. We  
20 need to do our job. We're not here to intervene. We're here  
21 to provide a defense for our client.

22           He appears to be injuring himself, again, because of  
23 his -- the method of transportation, how he's being

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1 restrained. We need to have a closer look of the  
2 transportation, his cell, and again, like we just discussed,  
3 not just photos. We don't purchase a house based on  
4 photographs alone. We need to go and have a look firsthand,  
5 ourselves. We need to make sure he's provided the proper  
6 protections that are afforded him under international law, the  
7 Geneva Conventions, the U.S. law, and orders of this  
8 commission.

9           And Admiral Ring, sir, he's a topic of future motions  
10 that you will hear. He's even highlighted publicly there are  
11 problems with the facilities here. And we'd like to have a  
12 look and make sure of this ourselves.

13           Mr. al-Tamir suffers every day from his back and his  
14 injuries. He needs to be able to recover and we need to be  
15 able to help him do so. We also need to help develop the  
16 facts of our case and the mitigation strategy in our case in  
17 order to take this forward. It is the JTF, apparently, who  
18 are the ones intervening and allowing us to do our job. And  
19 they are preventing us from accessing his cell and the other  
20 facilities here on Naval Station Guantanamo Bay. And this  
21 prevents us from doing our jobs.

22           Access to this information is important to our  
23 defense and the protection of our client, and to deny access

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1 is to deprive Mr. al-Tamir of a proper defense.

2 I'd mentioned previously in March when we were  
3 arguing the Taliban structure, and I want to repeat it again.  
4 In 2002, President Bush issued a statement that the Geneva  
5 Conventions apply. In his written statement made by Press  
6 Secretary Mr. Fleischer on 7 February 2002 -- we can provide a  
7 copy of this statement -- he said: "I have an announcement to  
8 make. Today President Bush affirms our enduring commitment to  
9 the important principles of the Geneva Convention. Consistent  
10 with American values and the principles of the Geneva  
11 Conventions, the United States has treated and will continue  
12 to treat all Taliban and al Qaeda detainees in Guantanamo Bay  
13 humanely and consistent with the principles of the Geneva  
14 Convention."

15 He highlights in that statement that they will  
16 continue to receive excellent medical care. He even  
17 highlights shelter and showers, the opportunity to worship.  
18 Your Honor, despite this statement, our client still complains  
19 about his accommodations to us.

20 You've heard a number of times about the shower.  
21 This is very important for him. We need to be sure by looking  
22 and having access to the sites -- all of the sites that he's  
23 receiving the proper medical care, but it also, sir, goes to

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1 his mitigation as well.

2 MJ [LtCol LIBRETTO]: What evidence have you put before  
3 this commission that these things that you're citing to have  
4 not been afforded to Mr. Hadi?

5 DC [LT BALL]: Well, we've made a number of arguments so  
6 far this week. And you've heard through witnesses this week  
7 that he does object to the shower, for example. Is that the  
8 question you're asking, sir?

9 MJ [LtCol LIBRETTO]: I'm asking what evidence have you  
10 put forth that there's a reasonable basis to believe that a  
11 motion lies -- well, any motion, for that matter, lies with  
12 respect to the conditions of confinement?

13 DC [LT BALL]: Your Honor -- well, just the discussions  
14 that we've had with him. Allowing us to go in and view the  
15 site ----

16 MJ [LtCol LIBRETTO]: What evidence have you put before  
17 this commission?

18 DC [LT BALL]: Your Honor, we've been denied evidence.  
19 We've been denied access to that site so far. We can't put  
20 any evidence that -- without having access to these sites.  
21 We're prevented from moving forward without them.

22 MJ [LtCol LIBRETTO]: Let me take it outside what is  
23 probably reality, but to emphasize my point.

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1           If -- you're referencing statements made by your  
2 client to you during the course of your representation of him.  
3 If those statements said that he was provided a king-sized  
4 bed, three showers with complete privacy -- you see where I'm  
5 going. I'm being -- exaggerating and being sarcastic in a  
6 way, but it's just an attempt to prove my point. That would  
7 arguably not raise any issues by which you would seek relief.

8           DC [LT BALL]: Right.

9           MJ [LtCol LIBRETTO]: So what evidence have you put before  
10 the commission that demonstrates a reasonable basis to believe  
11 that further investigation of these matters would raise an  
12 issue that you could seek relief for?

13          DC [LT BALL]: Your Honor, it is the evidence that has  
14 been provided to you with regards to the SMO, with regards to  
15 the neurosurgeon, and those -- it goes to the way he's been  
16 restrained during the time that he's -- he's receiving his  
17 medical care, when he goes to the physical therapy sessions  
18 and other times where he's receiving medical treatment.

19                 So we do know that those do aggravate his current  
20 situation as well. So that, Your Honor, has been put before  
21 this commission.

22          MJ [LtCol LIBRETTO]: Okay. Anything else?

23          DC [LT BALL]: Oh, and my co-counsel has just reminded me

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1 that there were Ring's -- Admiral Ring's statements, as I had  
2 mentioned earlier. Those statements make it very clear that  
3 there were inadequacies. He lost his job as a result -- we  
4 believe, we don't know, but Admiral Ring is no longer here.  
5 He did make public statements about the adequacy of the  
6 facilities here, sir. So I know that will be taken up in  
7 another motion going forward, but I want that to be noticed as  
8 well.

9 MJ [LtCol LIBRETTO]: Okay.

10 DC [LT BALL]: I mean, those are already in the public  
11 domain.

12 MJ [LtCol LIBRETTO]: The commission notes.

13 DC [LT BALL]: Thank you, sir.

14 MJ [LtCol LIBRETTO]: Thank you.

15 DC [LT BALL]: I'm sorry. If I could just summarize, Your  
16 Honor.

17 The United States has an adversarial system. It's  
18 the linchpin of justice in America. We need to have the  
19 opportunity to build a case in mitigation for him as well as a  
20 defense, if there are any other issues. We need to be able to  
21 represent our client to the fullest. We just request this  
22 commission provide us, the defense team, with the transparency  
23 that we deserve, because without that transparency we are

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1 unable to prepare a proper defense and we face an injustice  
2 system where we have a small group who possesses all the  
3 powers and to keep us on a short lease, unable to fight  
4 for ----

5 MJ [LtCol LIBRETTO]: Slow down, Lieutenant Ball.

6 DC [LT BALL]: ---- our cause/results. What we're asking  
7 for, Your Honor, is reasonable. Like the other teams, access  
8 to the site, photographs, diagrams, measurements of the cells,  
9 entries, the sally ports, the vans, the ambulances, the  
10 hospital room, and the recreational areas. We want to see it  
11 firsthand, not in a diagram, and not in a photograph and not  
12 in a summary.

13 MJ [LtCol LIBRETTO]: Do you have any -- have you found  
14 any legal authority for the proposition that a defense team  
15 gets access to locations within a detention facility, whether  
16 it be state or federal, sort of free reign to look where they  
17 want to basically discover things that may be useful to a  
18 motion?

19 DC [LT BALL]: I would simply cite back to this  
20 commission, Your Honor. This commission -- Colonel Pohl  
21 issued that decision and ordered ----

22 MJ [LtCol LIBRETTO]: Is that this commission or is that  
23 another commission?

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1 DC [LT BALL]: That is Colonel Pohl in the 9/11 case.

2 MJ [LtCol LIBRETTO]: Okay. I understand you submitted  
3 that with your order.

4 DC [LT BALL]: Yes, sir.

5 MJ [LtCol LIBRETTO]: I'm wondering if there is any legal  
6 precedent outside of Colonel Pohl's order. And there may be.  
7 Frankly, I haven't -- I did a little bit of research, but not  
8 to the extent that I intend to. Have you obtained any legal  
9 precedent outside of the -- Colonel Pohl's order that stands  
10 for the proposition that a defense team gets access to, let's  
11 say, you know, a death row inmate in a maximum security -- or  
12 death row cell in a maximum security prison or anything along  
13 those lines?

14 DC [LT BALL]: Your Honor, I'm sure that there are. I  
15 believe that I've cited to the relevant cases in my pleadings.  
16 I'd like to go back and review those pleadings, if possible.  
17 And if necessary, I can supplement those.

18 If you would allow me the opportunity to go back and  
19 review those, I could certainly supplement my pleadings and  
20 provide you with those citings.

21 MJ [LtCol LIBRETTO]: Okay. Anything else?

22 DC [LT BALL]: No, sir.

23 MJ [LtCol LIBRETTO]: Thank you.

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1 DC [LT BALL]: Thanks.

2 MJ [LtCol LIBRETTO]: Trial Counsel?

3 TC [CDR SHORT]: Thank you, Your Honor.

4 To the extent that defense is relying on Colonel  
5 Pohl's order as precedent, it's far from the -- from the case  
6 here, Your Honor. To the extent that they're referring to it  
7 as a -- as guiding to this commission, I would submit that  
8 this case is seemingly different than the 9/11 five accused  
9 that are facing capital charges.

10 The government in that case did initially agree to  
11 allow defense counsel back there, based on the Skipper  
12 analysis, so that they could view the facilities and make  
13 their case in mitigating the death penalty, Your Honor.  
14 That's the basis of the agreement from the government in that  
15 case.

16 The litigation ensued in that case over what they  
17 would get to see and how much time they would see -- be there,  
18 Your Honor. So there is -- there is a marked difference  
19 between this case and that case.

20 Your Honor, also ----

21 MJ [LtCol LIBRETTO]: So the government's position is that  
22 because that is a death penalty case and this is not, that is  
23 the distinguishing characteristic that permits one but not the

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1 other?

2 TC [CDR SHORT]: It's a major characteristic, Your Honor.  
3 If I may also, the -- that was some time ago. I don't  
4 remember exactly how long ago that was, but there have been  
5 some changes in -- in Camp VII since that time. Some of the  
6 details I can't go into here, some of them have been brought  
7 up in the other litigation in AE 163. However, the intrusion  
8 upon the other detainees would be significantly greater now  
9 than it was at that time, Your Honor.

10 I would ask Your Honor also -- and I have a few other  
11 points, but I don't want to forget this, that if Your Honor  
12 does order the government to provide a tour of Camp VII to the  
13 defense, that it would be limited to anything that they can  
14 articulate of what they actually need for -- to make any of  
15 the arguments in their upcoming motions, Your Honor.

16 To date, the government has not seen any, I guess,  
17 articulate arguments of the why and wherefore of what they  
18 would need a tour. And just because another case, just  
19 because somebody else has been allowed there, doesn't give a  
20 right to open the doors and allow anybody in just because  
21 they -- they say somebody else was allowed in there, Your  
22 Honor.

23 MJ [LtCol LIBRETTO]: Well, typically, you need evidence

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1 in order to raise issues, support your positions. What about  
2 Rear Admiral Ring's public statements that talk to the  
3 deteriorating condition of the facilities such that a, let's  
4 say, Article 13 or -- well, what we know as Article 13 in the  
5 military justice practice, pretrial punishment, outrageous  
6 government conduct, those sorts of things?

7 TC [CDR SHORT]: Your Honor, Commander Flynn will be  
8 arguing the Admiral Ring motion shortly. However, there is  
9 nobody, including Admiral Ring's statements or nobody that's  
10 testified before this commission, that has indicated anything  
11 to the contrary of the safe and humane detention of a law of  
12 war detainee.

13 So even if there is the deteriorating facilities  
14 as -- well, a lot of facilities are deteriorating. Almost  
15 everybody is looking to get money to increase their facilities  
16 in the government. I would say that nowhere did  
17 Admiral Ring -- that I'm aware of at least and that he  
18 indicated that there was anything to the contrary of the safe  
19 and humane detention of the law of war detainee, Your Honor.

20 MJ [LtCol LIBRETTO]: Does the government believe there's  
21 something short -- that the government does agree to, short of  
22 an on-site visit, that would adequately inform the defense of  
23 the conditions of confinement such that they could raise a

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1 motion of any kind that they deem appropriate?

2 TC [CDR SHORT]: Your Honor, yesterday we provided to the  
3 defense, pursuant to your order, photographs of Camp VII.  
4 They will be provided to the court as soon as the AE number is  
5 provided and we can provide them to the court. I think it's  
6 just a matter of putting a notice to the filing. But they  
7 were provided to the defense, Your Honor, as of yesterday.

8 MJ [LtCol LIBRETTO]: Okay. Thank you.

9 TC [CDR SHORT]: So that is one thing.

10 Your Honor, I also want to state that the defense has  
11 made a -- I guess a big -- big deal out of what they  
12 categorize as an agreement between me and Lieutenant Ball.  
13 Nowhere did I ever agree that he -- I don't have the authority  
14 to agree to let them go back to Camp VII. Even in the words,  
15 I -- in what he presented, we told them that we were checking  
16 with the authority -- the proper authority.

17 When the proper authority got back to us, it was  
18 denied. And I -- I relayed that information. There was never  
19 an agreement that we were going to allow them -- that the  
20 prosecution team was going to allow them in Camp VII. And  
21 again, they knew that when they filed this motion because when  
22 Colonel Yamashita testified, he said he was the authority to  
23 make those decisions; and he told them that they didn't -- he

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1 didn't -- he was the one that denied that -- that decision.

2           So there is -- there was no agreement either

3 implied ----

4           MJ [LtCol LIBRETTO]: There certainly seemed to be some  
5 indication that the government was not opposing.

6           TC [CDR SHORT]: Your Honor, I was working with JTF to see  
7 what their position was. That's absolutely -- I think that's  
8 absolutely, as I have been doing for the last couple of days  
9 in other situations, trying to make sure that I coordinate  
10 with the proper people and make sure that we get the people  
11 where they need to be.

12           In this particular case, maybe it was a -- at least  
13 in my view, when I was pumping out a one-line e-mail saying,  
14 you know, I'm working with JTF, it was not to say I'm working  
15 with JTF for your visit. It was working with JTF to seek  
16 authority.

17           And so that part was -- was not in my e-mail, but I  
18 thought it was implied, at least. And any conversations that  
19 we had with the defense counsel, it was certainly implied that  
20 I did not possess the authority to provide them access to  
21 Camp VII, Your Honor.

22           MJ [LtCol LIBRETTO]: Okay. Thank you.

23           TC [CDR SHORT]: Your Honor, just a couple of quick

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1 things. I do note, again, Your Honor, that it's the defense's  
2 burden. This motion has been pending for some time, just like  
3 in AE 137, and they -- they now seek to supplement to try to  
4 make their burden. I don't think that's proper. They haven't  
5 met their burden, Your Honor. I ask that Your Honor deny this  
6 motion.

7           And the other thing that Your Honor may be -- may  
8 help that not only do I not lack the authority to provide  
9 access to Camp VII, I have been denied authority, access to  
10 Camp VII. I requested it, and I was denied. I've never been  
11 to Camp VII, and nobody from my team has been to Camp VII,  
12 Your Honor.

13           MJ [LtCol LIBRETTO]: Okay. Thank you.

14           TC [CDR SHORT]: Thank you.

15           MJ [LtCol LIBRETTO]: Lieutenant Ball, any follow-up?

16           DC [LT BALL]: Yes, sir. If I may.

17           Your Honor, just with regards to the -- two points  
18 I'd like to make briefly is, again, we receive -- we did  
19 receive the photographs yesterday. We do appreciate that.  
20 However, we just -- we wouldn't purchase a house without  
21 viewing the house in person first. The same principle  
22 applies. We would like to see it in person to take the  
23 measurements ourselves, take the photographs ourselves, to

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1 have the -- the full sense of the human senses that we can by  
2 making a visit to this site.

3 MJ [LtCol LIBRETTO]: Okay. So I have not -- as Commander  
4 Short indicated, I have not yet seen the photographs ----

5 DC [LT BALL]: Okay.

6 MJ [LtCol LIBRETTO]: ---- that were taken at the  
7 commission's direction. Where do they lack in providing the  
8 defense an understanding of the accommodations afforded  
9 Mr. Hadi?

10 DC [LT BALL]: Your Honor ----

11 TC [CDR SHORT]: Your Honor, those photographs were  
12 SECRET//NOFORN. And if we go into the details, I think we may  
13 be crossing a line, unless he can generally state how they  
14 lack, Your Honor.

15 MJ [LtCol LIBRETTO]: That was the intent of the question.

16 Can you provide a general description of where they  
17 lack? I mean, are there other angles that, for instance, that  
18 were not memorialized that you'd ----

19 DC [LT BALL]: I can be general.

20 So I think when you do view photographs, oftentimes  
21 of anything, your -- the eye, the human eye, doesn't  
22 necessarily see the same as the camera, the lens of the  
23 camera. It's very different. So we would like to be

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1 physically present to see this. It just would be a -- much  
2 more helpful to have physical, full human senses to lay eye on  
3 the -- on the areas that we're seeing in photographs. It's  
4 just not the same, Your Honor.

5 MJ [LtCol LIBRETTO]: Okay. Thank you.

6 DC [LT BALL]: I would also -- sir, I was just answering  
7 that question.

8 MJ [LtCol LIBRETTO]: Go ahead.

9 DC [LT BALL]: But I would also like to note that the  
10 federal -- Federal Sentencing Guidelines, 18 -- sorry, the  
11 federal sentencing statute -- I misread my notes here --  
12 18 U.S.C. Section 3553 provides us with general guidelines as  
13 to how we can have access to the site, the place where the  
14 detainees are detained and use that in the defense of our  
15 case.

16 And, finally, I'd just like ----

17 MJ [LtCol LIBRETTO]: Can you repeat that, please?

18 18 U.S.C.

19 DC [LT BALL]: Section 3553.

20 MJ [LtCol LIBRETTO]: Thank you.

21 DC [LT BALL]: Yes, sir.

22 And finally, just to -- the difference between a life  
23 sentence and a death sentence was made -- the point was made

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1 by the government. I'd just like to respond to that, to say  
2 that although -- there is a difference.

3 The government is still seeking a life sentence,  
4 which means that my client, in the government's view, will be  
5 confined until the day that he dies. It's very simple and  
6 it's not a marked difference. Thank you.

7 MJ [LtCol LIBRETTO]: If you can share with the commission  
8 in open session, are there portions -- well, never mind. You  
9 won't be able to.

10 DC [LT BALL]: No.

11 MJ [LtCol LIBRETTO]: Okay. Anything else?

12 DC [LT BALL]: No, sir. Thank you.

13 MJ [LtCol LIBRETTO]: Thank you.

14 DDC [MS. HENSLER]: Sir, with respect to the -- Lieutenant  
15 Ball's point regarding the federal sentencing statute, I think  
16 it's my duty to correct the record on that point.

17 MJ [LtCol LIBRETTO]: Okay.

18 DDC [MS. HENSLER]: The federal sentencing statute allows  
19 a sentencing judge to take into account a variety of factors,  
20 one of them is the Sentencing Guidelines, but also an  
21 individual's, for instance, medical condition in  
22 determining -- in fashioning an appropriate sentence.

23 And the progeny, the cases which interpret that

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1 statute, do permit a judge to consider, for instance, a  
2 medical condition in determining whether or not an  
3 incarcerated's sentence needs to be shortened. If a sentence  
4 of incarceration would be more difficult for one person than  
5 another, a sentencing judge under federal law is permitted to  
6 take that into account.

7 MJ [LtCol LIBRETTO]: Okay. I understand. Thank you.

8 Okay. The commission will take under advisement 137  
9 and 139 and then issue a ruling in the short-term future.

10 One of the matters that was not on the docketing  
11 order but that I want to circle back to very quickly to -- in  
12 a very narrow sense is AE 079 and the discovery surrounding  
13 the 16th discovery request. Both -- does either party need a  
14 brief recess before we take that matter up in order to get  
15 your documents?

16 ATC [MR. SPENCER]: Yes, Your Honor.

17 MJ [LtCol LIBRETTO]: Okay. We'll take a ten-minute  
18 recess at this time. The commission is in recess.

19 [The R.M.C. 803 session recessed at 1123, 26 August 2019.]

20 [The R.M.C. 803 session was called to order at 1141,  
21 26 August 2019.]

22 MJ [LtCol LIBRETTO]: The commission will come back to  
23 order. All parties present when the commission last recessed

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1 are again present.

2           We are going to take up, as the commission previously  
3 indicated, the AE 079 series. Prior to this session, the  
4 commission had ordered the government to provide a  
5 representative sample of discovery provided to the defense  
6 that was responsive to their discovery requests. The  
7 commission has had an opportunity to review that sampling. In  
8 response to it, the defense had filed a reply identifying what  
9 they perceived as deficiencies both in the summary as well as  
10 continued deficiencies within the scope of the government's  
11 production.

12           So with that, I'd like to start with government  
13 counsel. Who will be addressing this matter?

14           ATC [Capt SQUIRES]: Sir, Captain Squires for the  
15 government, although depending on the nature of the  
16 commission's question, I may have to call on the expertise of  
17 my co-counsel.

18           MJ [LtCol LIBRETTO]: Okay. Very well. If you would,  
19 please, approach.

20           Sir, with respect to the way in which the government  
21 conducted its -- and has conducted its discovery practice and  
22 the prudential search requests that are submitted to various  
23 different agencies, the defense points out that it appears

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1 that they were based on inculpatory as opposed to more general  
2 and potentially exculpatory requests. That is to say, even  
3 based on the summary and the information contained therein, it  
4 appears that everything references Mr. Hadi, the accused, such  
5 that there could be a broad spectrum of discovery that is not  
6 directly related or does not directly mention the accused and  
7 could thus form the basis of arguments that Mr. Hadi is not  
8 the person or the -- of the seniority that the government  
9 claims he is.

10 So if you could initially -- and I'll have some  
11 follow-up questions -- explain to the commission more narrowly  
12 in that regard as to how it is that you identify -- let's say,  
13 taking, for instance, targeting charts as an example because  
14 there was, I believe, one turned over in discovery to the  
15 defense.

16 How does the government go about identifying  
17 responsive information that may fit the general criteria of  
18 the information that the defense is looking for, but not  
19 necessarily identify or include Mr. Hadi by name?

20 ATC [Capt SQUIRES]: Sir, I can say that when the initial  
21 discovery -- the PSRs and discovery efforts began in this  
22 case, they were extraordinarily broad and they pulled in a  
23 significant amount of information relating to the accused and

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1 al Qaeda generally.

2 We have not, in any of our review of the evidence,  
3 located any documents or exhibits that are exculpatory in  
4 nature, in that they give reason to believe that the accused  
5 was not a member of al Qaeda.

6 The overwhelming majority of the documents ----

7 MJ [LtCol LIBRETTO]: Slow down.

8 ATC [Capt SQUIRES]: ---- in this case that discuss  
9 al Qaeda at all during the relevant charge periods also  
10 discuss the accused.

11 It is within the world of theoretical, speculative,  
12 or even fantasy to argue that if a document lists, for  
13 example, Khalid Shaikh Mohammad and Usama Bin Laden, but not  
14 Abd al Hadi al-Iraqi, that that is exculpatory. The fact that  
15 one piece of intelligence of a personnel compartmentalized  
16 organization such as al Qaeda omits mention of the accused  
17 does not permit any inference that he was not a member of  
18 al Qaeda. It simply reflects that intelligence and evidence  
19 by its nature is not always the entire picture, but rather  
20 sometimes is a piece of a puzzle.

21 I can assure the court that every attorney in this  
22 case has, for the past several years, exhaustively searched  
23 for mitigating, exculpatory, helpful evidence, and we have

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1 turned over all that is discoverable.

2 MJ [LtCol LIBRETTO]: With the caveat that is invoked  
3 routinely and that is not cumulative.

4 ATC [Capt SQUIRES]: Correct, sir. At some point when  
5 we've given, you know, hundreds upon hundreds, if not  
6 thousands, of pages of evidence that all say the same thing,  
7 secondary materials based on that evidence would be merely  
8 cumulative.

9 And the example would be, like, for instance a  
10 targeting chart. The underlying source documents that were  
11 used to make that chart are actual evidence, but the chart  
12 itself is a depiction of the belief of the targeter or the  
13 military intelligence agency that was seeking to take action  
14 against al Qaeda. It does not reflect the accused's  
15 participation; rather, it reflects the belief of the  
16 individual that was analyzing the intelligence. So it's  
17 hearsay within hearsay and oftentimes within hearsay.

18 MJ [LtCol LIBRETTO]: So the government has turned over  
19 one targeting chart during the relevant period of time. In  
20 that instance, the government found it to not be cumulative.  
21 Why is that?

22 ATC [Capt SQUIRES]: So ----

23 MJ [LtCol LIBRETTO]: Because certainly there's more than

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1 one targeting chart that covers the span of the charged time  
2 frame.

3 ATC [Capt SQUIRES]: Yes, sir. And I would agree that  
4 there are obviously more org charts or targeting charts,  
5 infinite number for hypothetical argument purposes.

6 First, the decision to turn over that chart, I'm not  
7 sure who spoke to it or whether it was required for the  
8 government to turn it over. It -- certain times, discovery  
9 decisions are made simply to err on the side of caution and  
10 things that may not be required to be produced are still  
11 produced.

12 So I can't make a concession that because we turned  
13 over one targeting chart ----

14 MJ [LtCol LIBRETTO]: Slow down.

15 ATC [Capt SQUIRES]: Aye, sir. Because the government  
16 turned over one targeting chart without some reason from the  
17 defense that more are required, that all targeting charts  
18 become relevant.

19 MJ [LtCol LIBRETTO]: Well, I mean, if the government is  
20 asserting that targeting charts -- and we're using that as the  
21 example for a broader discussion on discovery generally. If  
22 the government's position is that that is a cumulative piece  
23 of evidence that is derived from other source documents by

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1 which an analyst or targeter creates, why shouldn't the  
2 commission use that as the baseline to say, Well, if the  
3 government believed it to be noncumulative or discoverable in  
4 one instance, why shouldn't the commission say all of them  
5 are?

6 ATC [Capt SQUIRES]: Your Honor, in a case of this  
7 magnitude, with discovery as broad as it has been, the  
8 government begins the process trying to, as best we can,  
9 produce as broad amount of information as we can.

10 At some point, however, the defense has everything  
11 it's entitled to and everything it needs to prepare for trial.  
12 And the government must begin at least narrowing its efforts  
13 and turning to preparation of its case in chief.

14 The defense has never articulated why it is required  
15 and what the targeting charts would do to them for the  
16 government. They simply insist that it's discoverable and  
17 there's always more.

18 And so I -- I don't think it's a fair analysis to say  
19 that because the defense is in possession of one type of  
20 document that the government is then required to search for  
21 and produce all of those types of documents. Certainly if it  
22 is discoverable, the government will search for and produce  
23 it. But the fact that the government -- the defense has

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1 simply one targeting chart doesn't make, you know, for  
2 infinity all targeting charts relevant.

3 MJ [LtCol LIBRETTO]: So you, again -- continuing on with  
4 this targeting chart as an example. Is it the government's  
5 representation to this commission today that there are  
6 multiple targeting charts, not out there in the universe but  
7 ones that the government has, in fact, reviewed, that they've  
8 made a determination that this is cumulative or -- and/or not  
9 discoverable for a separate reason?

10 ATC [Capt SQUIRES]: May I have just a moment, Your Honor?

11 MJ [LtCol LIBRETTO]: You may.

12 [Pause.]

13 ATC [Capt SQUIRES]: To answer the court's question, yes,  
14 the prosecution has reviewed other targeting charts that they  
15 have found to be merely cumulative, not of help to the  
16 defense, or not relevant. And when ----

17 MJ [LtCol LIBRETTO]: And does -- so moving outside the  
18 scope of targeting charts, would that also be similar for  
19 organizational charts?

20 ATC [Capt SQUIRES]: Yes, Your Honor.

21 MJ [LtCol LIBRETTO]: So why then is -- has the  
22 government -- other than -- because, frankly, just from  
23 practice before -- and I'm certainly mindful of the scope of

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1 discovery that could theoretically be turned over in this  
2 case, and I understand that there's got to be certain criteria  
3 that are used to limit the -- the amount to a reasonable but  
4 yet sufficient amount.

5           But there's targeting charts and organizational  
6 charts that the government has taken the time to review during  
7 the charged time frame but have not yet turned over. Coming  
8 from the military justice practice where it's a -- generally  
9 an open book where if it's cumulative, it's cumulative. For  
10 instance, when an NCIS agent writes up a report of results of  
11 interview, the report is typically turned over along with the  
12 actual statement by the witness.

13           It appears by the commission's understanding of the  
14 government's representations that in that instance, the  
15 government would review both of them together, separate them,  
16 and say, "You can have this but not this."

17           Is that a good understanding from the commission's  
18 perspective as to the discovery practice that the government  
19 has employed and using the targeting charts and organizational  
20 charts as an example?

21           ATC [Capt SQUIRES]: I'm not entirely sure that's a --  
22 yes, sir, it's a fair comparison, although I think really to  
23 emphasize the volume of evidence in this case, it would not

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1 just be, you know, an interview and a report of interview.

2 We would have turned over in this case the interview  
3 and the report of interview and then the report of the report  
4 of interview. What we declined to turn over was merely  
5 cumulative as in the defense had massive amounts of discovery  
6 related to the same subject, and any further production would  
7 result in just the needless, duplicative, cumulative  
8 production of classified information.

9 What -- if I could say it this way, what the defense  
10 is asking this commission to compel is inculpatory evidence  
11 that the government does not intend to use. And there's --  
12 there's no rule of discovery or authority that they've  
13 provided that that's discoverable.

14 MJ [LtCol LIBRETTO]: Just so I can characterize that and  
15 perhaps understand the government's position in that regard,  
16 is it the government's position that inculpatory evidence,  
17 even if slightly cumulative, would not be material to the  
18 preparation of the defense to make decisions to include -- and  
19 taking it out of the context of this case even?

20 If you're presented one piece of inculpatory  
21 information vis-a-vis a hundred pieces of inculpatory  
22 information, one would presumably say, well, the case against  
23 us is not good on one hand and is better on the other, thus

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1 making tactical decisions as it relates to pleas or similar  
2 decisions.

3           So is it the government's position that even if  
4 slightly cumulative information inculpatory, there's no basis  
5 for the government to have to turn that over?

6           ATC [Capt SQUIRES]: No, sir. And it's the government's  
7 position that this is not slightly cumulative. It is  
8 overwhelmingly merely cumulative.

9           If the -- for example, the representative sample that  
10 we provided to the commission, when every member of al Qaeda  
11 in United States custody has named and identified Abd al Hadi  
12 al-Iraqi as their commander, the summaries and org charts  
13 putting all of that together, does -- does nothing else. It  
14 merely restates the same information over and over again. And  
15 the government doesn't intend to use this as evidence. It's  
16 not discoverable under any rule of discovery.

17           This is not a question of slight discrepancies. It  
18 is a request for the commission to compel production of  
19 evidence that the defense already has. And they cannot  
20 articulate to the court, with any specificity, why what  
21 they've been given isn't enough, what else they think exists.  
22 And I understand the argument, you know, "we don't know what  
23 we don't know" might sound persuasive, but it ignores the

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1 reality of the years of discovery produced in this case, the  
2 amount that the defense has already reviewed.

3           If based on at this stage their pretrial  
4 investigation of their own defense, they can't articulate with  
5 specificity what else is in there ----

6           MJ [LtCol LIBRETTO]: Slow down.

7           ATC [Capt SQUIRES]: Thank you, sir.

8           ---- it is either willful ignorance or evidence that  
9 there is no other information out there, that they actually  
10 have everything. We are -- we are not talking about the  
11 slight discrepancies that you would normally have in a  
12 120 court-martial. The defense is either unable or unwilling  
13 to actually articulate to the commission the actual quantity  
14 and degree of evidence that has been produced to them thus  
15 far.

16           And the fact that they can't articulate with any  
17 specificity at all what else they think is out there that's  
18 helpful, relevant, material, mitigating is -- it's a product  
19 of the timing of this case and the amount of evidence they  
20 already have.

21           MJ [LtCol LIBRETTO]: Why not just turn over the targeting  
22 charts and organizational charts that the government has  
23 reviewed and made a determination, as opposed to -- because,

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1 frankly, this motion was filed and has been outstanding for  
2 quite an amount of -- a significant amount of time, and  
3 presumably the amount of time it would have taken to -- for  
4 the government to turn them over is far less.

5           So it appears that while -- and the commission has  
6 indicated this on numerous times before, that the requests,  
7 the motions for discovery, have been extremely broad and at  
8 times ambiguous. It appears that at least with respect to  
9 targeting charts and organizational charts, the government  
10 knew what was -- what the defense was looking for, had them,  
11 reviewed them, and made a determination not to turn them over.

12           So why not just turn them over?

13           ATC [Capt SQUIRES]: Sir, as appealing as it may be to,  
14 you know, simply produce it because the defense asks for it  
15 without regard to whether it's even discoverable may be -- it  
16 would not be more expeditious because that applies to a  
17 virtually unlimited amount of information.

18           The government will produce everything that is  
19 required under the rules, but we will not engage in, on behalf  
20 of the defense, unnecessary fishing expeditions, primarily for  
21 the reason that every time we do that, what the defense wants  
22 changes. So today they may say we need all the targeting  
23 charts in possession of the United States Government. And if

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1 the commission orders that, tomorrow they will say, you know,  
2 we need -- pick a category that they come up with.

3 Our position is, and what's apparent, it is not want  
4 of information that is behind the defense's discovery motions.  
5 Rather, it is their continued campaign to disrupt and delay  
6 the case. They cannot articulate to the commission with any  
7 specificity what it is they believe the rules entitle them to.  
8 The government cannot simply, particularly with the  
9 classification of the information, produce an endless,  
10 unlimited stream of irrelevant, inculpatory, merely cumulative  
11 evidence.

12 MJ [LtCol LIBRETTO]: With respect to the cumulative  
13 nature of the vast majority of the evidence that is at issue  
14 here, the government has asserted that the underlying  
15 documents -- and in most cases that is source documents being  
16 from other detainees or similar forms. Is it the government's  
17 position that a synthesized version -- so if -- and let's put  
18 it into context.

19 If three or four al Qaeda members were to say this is  
20 the organizational chart of al Qaeda, and an analyst gets that  
21 and filters it to check credibility, check reliability,  
22 cross-check it with other information that they have, and  
23 comes to a conclusion that some of it is or some of it is not

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1 reliable, accurate, and then creates a document saying this is  
2 based on a compilation of information that I have available to  
3 me, this is what the organizational structure is -- is that --  
4 from the government's perspective, is that a cumulative  
5 document? The analyst's synthesis -- synthesization -- if  
6 that's a word; probably not ----

7 ATC [Capt SQUIRES]: I understand, Your Honor.

8 MJ [LtCol LIBRETTO]: ---- of the underlying information  
9 that may or may not be credible, because they are tapping into  
10 other sources of information that can lend or detract  
11 credibility to the underlying statements?

12 ATC [Capt SQUIRES]: The difficulty with this hypothetical  
13 is the targeting chart is just a list of names and pictures.  
14 It doesn't identify what bases were used to create the chart.

15 So there is always a theoretical world where, you  
16 know, a type of document is discoverable in any case. The  
17 facts of each case are obviously unique and those specific  
18 events come up as they do.

19 But that possibility doesn't render, you know, every  
20 chart with a picture of Abd al Hadi al-Iraqi on it  
21 discoverable. If there was ever evidence in the possession of  
22 the government that said a potential witness or source was  
23 unreliable, it would have been produced in discovery.

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1 MJ [LtCol LIBRETTO]: Okay. Thank you.

2 Defense? The government has indicated that they have  
3 turned over all information that is relevant, noncumulative,  
4 that can be useful to the defense's preparation. And you  
5 identify -- and I'm going to stick with the same sort of  
6 examples that I used with the government.

7 The government is saying that in the case of, let's  
8 say, the organizational charts, they provided the source  
9 documents -- the baseline source documents that would  
10 establish any analyst's ultimate conclusions and subsequent  
11 documents. So why isn't that enough?

12 DDC [LCDR MEUSCH]: Your Honor, I think there are several  
13 reasons why that is not enough. The first is -- and you heard  
14 it from the government, talk about how there's multiple  
15 documents that are being -- and you referenced this too --  
16 synthesized. They're like pieces of a puzzle that are being  
17 put together.

18 So the analyst is going to look at that information  
19 and come to conclusions about it, its reliability, the  
20 circumstances under which it was made, what it means in the  
21 context of the United States fighting a war in Afghanistan,  
22 and then represent that to -- probably up the intel chain of  
23 command and then to operators, who will engage in actions.

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1 And so there is a number of things in there, in that sequence  
2 of events I just described, that are relevant and material.

3 The -- the second piece is it doesn't tell us  
4 anything about the circumstances under which those documents  
5 were created. It doesn't tell us how they were considered and  
6 viewed ----

7 MJ [LtCol LIBRETTO]: Do you have any evidence to suggest  
8 that information exists?

9 DDC [LCDR MEUSCH]: Not at this time, Your Honor.

10 And I will say -- let me just caveat what I'm  
11 presenting to the commission at this time. As you noted  
12 earlier, I'm one of the newest members of the commission. I  
13 am doing my best to get up to speed on all of the discovery.  
14 And when I came to the case, the first thing I asked for were  
15 the -- was the charge sheet and I looked at jurisdiction.

16 And so in the charge sheet -- and the government made  
17 a charging decision in the charge sheet. Like in the common  
18 allegations they talk about by virtue of his position as a  
19 superior commander or in Charge I, while in a position of  
20 effective command and control.

21 By the nature of those charging decisions, the  
22 government has put into play -- and sticking with the example  
23 that Your Honor suggested is put into play -- the

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1 organizational structure, the targeting charts. And there is  
2 a -- a difference between the presence on that, where in the  
3 chart, and the absence. It's not that, you know, throughout  
4 Afghanistan there was perfect information always flowing in.

5           And so, you know, it's an operational environment.  
6 Information has to be construed, pulled together, gathered,  
7 and then presented. And that's what we're asking for, Your  
8 Honor.

9 [Pause.]

10           MJ [LtCol LIBRETTO]: Is it the defense's position that  
11 right now, and based on the representative sample -- and I  
12 understand it's just simply a sample and not perhaps the  
13 entire universe of -- and discovery on that point -- on this  
14 point, that is the organizational structure --

15           But is it the defense's position that by virtue of  
16 the discovery provided to date that the defense does not have  
17 an understanding of where Mr. Hadi was or was not within that  
18 organization at any given time during the period of the  
19 charged time frame?

20           DDC [LCDR MEUSCH]: Yes, Your Honor, that is our position.

21           MJ [LtCol LIBRETTO]: Okay. So based on the summaries  
22 that -- or the -- the representative sample, there are  
23 documents that have been created by the sources, if you will,

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1 of the organizational structure and Mr. Hadi's place in it.

2 Why don't they provide enough information for the  
3 defense to understand his purported role and position? Is it  
4 the reliability of them that the defense is taking issue with?

5 DDC [LCDR MEUSCH]: Your Honor, it -- I mean, there are a  
6 number of things that come into play there. I believe that  
7 the government has effectively argued that he was number three  
8 in al Qaeda. But there's also periods of time that are at  
9 play.

10 So, like, was he always in that same position? Did  
11 it change over time? What are the relevant time periods that  
12 we're talking about? Reliability is certainly a factor. Did  
13 the person who created that have -- what information did they  
14 have? I mean, was the information flow within al Qaeda  
15 compartmentalized so that the person who created that wouldn't  
16 have access to the information necessary to accurately  
17 describe ----

18 MJ [LtCol LIBRETTO]: Slow down.

19 DDC [LCDR MEUSCH]: Sorry, sir.

20 ---- necessary to accurately describe where or  
21 whether he was in that hierarchy? And, I mean, it was a hot  
22 issue over that period of time.

23 So it was something that intel analysts would have

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1 been looking at and trying to make determinations about.  
2 That's the information the government has reviewed. The  
3 government has -- has presented to the commission that there  
4 is more evidence of targeting charts, of organizational  
5 charts, additional evidence that would be in our view helpful  
6 to the defense as we prepare.

7 MJ [LtCol LIBRETTO]: My final question or questions  
8 relates to what the defense is searching for, and that is, I  
9 think you'd agree that there are -- I mean, we're talking  
10 about a period of ten years or so. There are certainly  
11 documents that were generated during that period of time from  
12 various different agencies in the United States government  
13 that either would be completely unrelated, unhelpful, despite  
14 being organizational charts or targeting charts that covered a  
15 different and a very unique and narrow window.

16 But if the government has provided you what it  
17 believes is enough information to make determinations in terms  
18 of Mr. Hadi's position in al Qaeda and the role that he played  
19 allegedly, isn't the absence of additional information what  
20 the government -- what the defense -- isn't it just as  
21 helpful, the lack of information, as it would be to get the  
22 information that is irrelevant?

23 Doesn't that allow the defense to make the same

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1 arguments that it would otherwise make with information that  
2 is not responsive to a request with Mr. Hadi? Does that make  
3 sense?

4 DDC [LCDR MEUSCH]: I -- I'm struggling, Your Honor, a  
5 little bit.

6 MJ [LtCol LIBRETTO]: Okay. So let me put it in terms of  
7 an example.

8 If you have 100 pieces of paper with Mr. Hadi's name  
9 on one of them as opposed to 100 pieces of paper with  
10 Mr. Hadi's name on all of them, do you need the 99 pieces of  
11 paper without his name on it to make the argument that the  
12 government has very little information that establishes  
13 Mr. Hadi's role in the organization?

14 DDC [LCDR MEUSCH]: Your Honor, I hate to fight the  
15 hypothetical, but it's more than just a name, a signature on a  
16 paper; it is a document that synthesizes and, you know,  
17 explains what the government's view was at the time that it  
18 was created based on information that was provided.

19 I mean, we -- I mean, the defense is just looking for  
20 the information that is helpful in the preparation of its  
21 case. And I mentioned that there's the relevance under the  
22 charged offenses given that the use of the superior commander  
23 charging language, but there's also the point with regards to

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1 jurisdiction that the government must prove at some point in  
2 the case, and that's that he is an alien unprivileged enemy  
3 belligerent.

4           And as Your Honor will note under the definitions  
5 section that ties back to Article 4 of the Geneva Convention,  
6 that definition. And so their status within an organization  
7 that we've declared to be in a conflict with matters and the  
8 information that would be related to that, that the government  
9 is relying upon in making those decisions is relevant, would  
10 be helpful in the preparation of our case.

11           MJ [LtCol LIBRETTO]: Okay. And I appreciate the  
12 ambiguous nature of my question. Let me rephrase it a little  
13 bit, and then if we can't get to where I want to go, then  
14 we'll drop it and move on.

15           With respect to, let's say, that issue, the status of  
16 Mr. Hadi as it relates to the jurisdiction. If the government  
17 can point to, let's say, one piece of paper or one statement  
18 by one detainee in the course of its entire investigation that  
19 says Mr. Hadi was this person within this organization,  
20 doesn't that provide the defense the ability to say, "Look at  
21 how weak the government's evidence is" as opposed to being  
22 produced the infinite number of documents that don't point to  
23 him to be able to say -- in other words, can't you make the

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1 same arguments and prove the same points without the  
2 information that is not responsive to the requests that the  
3 government has put out there?

4 DDC [LCDR MEUSCH]: May I have a moment, Your Honor?

5 MJ [LtCol LIBRETTO]: Sure.

6 [Pause.]

7 DDC [LCDR MEUSCH]: I believe the answer to that, Your  
8 Honor, is no. And the reason for that is, the government has  
9 identified it and has cited the basis for not providing it in  
10 discovery as being cumulative. If we get to trial and we  
11 present an argument like that, the government may very well,  
12 having identified that evidence, circle back around to it at  
13 that point.

14 MJ [LtCol LIBRETTO]: I have a hard time believing that  
15 this commission would permit that.

16 DDC [LCDR MEUSCH]: Very well, Your Honor. But that's  
17 our -- that is our concern. And understanding that there  
18 is -- there must be limits at some point somewhere to the  
19 information that's provided in discovery. Where the  
20 government has identified the relevant material and cited it  
21 as cumulative, we believe that that is not the proper basis to  
22 deny the discovery at this time.

23 MJ [LtCol LIBRETTO]: Okay. Thank you. Anything else?

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1 DDC [LCDR MEUSCH]: No, Your Honor.

2 MJ [LtCol LIBRETTO]: All right. The commission is going  
3 to take that under advisement, along with 137 and 139, AE 079,  
4 and come to a decision on that issue very soon in light of the  
5 extended period of time that it has been outstanding.

6 That will be -- conclude the -- today's session with  
7 respect to the issues to be taken up.

8 To give the parties an understanding of where we will  
9 be going for the remainder of the week, tomorrow we will be  
10 convening again at 0-8, and we will take up argument on  
11 AE 157, 158, and 160. On Wednesday, we will convene at 0-8,  
12 take the testimony of Lieutenant Colonel Martin, hear argument  
13 on AE 156, which is what his testimony is relevant to. We  
14 will take up AE 150 -- argument on AE 150, that is, and  
15 AE 159. And I believe that that will conclude all of the  
16 outstanding matters that we have on the docket this session.

17 With respect to a request that -- by the defense that  
18 was provided informally to the commission earlier today  
19 related to AE 165, and that is the motion to disqualify  
20 Commander Short, the defense has requested an opportunity to  
21 supplement its initial filing and has withdrawn its motion to  
22 hear that issue immediately. The commission will provide a  
23 timeline associated with the litigation of that issue, which I

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1 foresee taking up at the next session to the parties here  
2 in -- later on this afternoon.

3           Once -- so basically what the commission is going to  
4 do is provide a filing deadline for the supplemental from the  
5 defense and then the normal litigation or filing cycle will  
6 apply ahead of the October session.

7           Any questions about the way ahead for the remainder  
8 of this week and the litigation of AE 165?

9           TC [CDR SHORT]: Nothing from the government, Your Honor.

10          DDC [MS. HENSLER]: No, sir. Thank you.

11          MJ [LtCol LIBRETTO]: Very well. The commission is in  
12 recess until 0-8 tomorrow morning.

13 [The R.M.C. 803 session recessed at 1219, 26 August 2019.]

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