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1 [The R.M.C. 803 session was called to order at 0802,
2 28 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, Mr. Hadi, is also present.

6 Before taking up matters that are on the schedule for
7 this morning, one administrative note to correct the record.
8 On 21 August 2019, the government submitted a waiver statement
9 signed by the accused. It was initially marked as Appellate
10 Exhibit 143FF. That exhibit has been re-marked as AE 161D, as
11 it is more appropriate to be filed under the AE 161 series.

12 The first matter to be taken up today is a motion to
13 compel production of discovery relating to the rules of
14 engagement requested in the defense's 51st supplemental
15 request for discovery, Appellate Exhibit 156.

16 In support of that motion, the defense requested the
17 commission compel the testimony of Lieutenant Colonel Martin,
18 the director of the CLAMO at The Judge Advocate Army's --
19 General's Legal Center & School. The commission granted that
20 request, and he is prepared to testify this morning via VTC.

21 Government, is that all set up and ready to go?

22 DTC [CDR FLYNN]: Good morning, Your Honor. It is the
23 government's belief that the witness is in place.

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1 MJ [LtCol LIBRETTO]: Okay. Thank you. If we can get
2 that connection established, please.

3 [Pause to initiate VTC connection.]

4 DTC [CDR FLYNN]: Good morning. This is Commander Kevin
5 Flynn down at Guantanamo Bay. Can you hear me?

6 WIT: Yes.

7 DTC [CDR FLYNN]: Great. Could you please stand next to
8 the witness stand and raise your right hand, please.

9 LIEUTENANT COLONEL EDWARD B. MARTIN, U.S. Army, was called as
10 a witness for the defense, was sworn, and testified as
11 follows:

12 **DIRECT EXAMINATION**

13 Questions by the Deputy Trial Counsel [CDR FLYNN]:

14 Q. Please state your full name, spelling your last name
15 for the record.

16 A. My name is Lieutenant Colonel Edward B. Martin,
17 M-A-R-T-I-N.

18 Q. And obviously you are in the Army, correct?

19 A. Yes, sir.

20 Q. Where are you currently stationed?

21 A. I am currently stationed at The Judge Advocate
22 General's Legal Center & School.

23 Q. And where is that located?

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1 A. Charlottesville, Virginia.

2 Q. Briefly, what are your responsibilities at your
3 present job?

4 A. I'm the director for the Center for Law and Military
5 Operations.

6 DTC [CDR FLYNN]: Thank you. Defense counsel now will
7 have some questions for you.

8 WIT: Okay.

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

10 Q. Good morning, Lieutenant Colonel Martin.

11 A. Good morning, ma'am.

12 Q. My name is Susie Hensler, and I'm counsel for the
13 accused, Nashwan al-Tamir.

14 Sir, when did you join the U.S. Army?

15 A. I enlisted in the U.S. Army in 1989.

16 Q. And have you ever been deployed?

17 A. I have.

18 Q. Can you tell us about your deployments?

19 A. My first deployment was Desert Shield/Desert Storm in
20 1990/91; and then I received my Green Beret in 1994, deployed
21 as a Special Forces NCO in the SOUTHCOM AOR, Bolivia,
22 Colombia, Panama, throughout the Caribbean; and then
23 transitioned to the JAG Corps in 2001 -- 2002, excuse me.

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1 Deployed to Afghanistan in 2003; Iraq in 2004; back to Iraq in
2 2007; Iraq and Kuwait, 2010; and then 2013, Afghanistan.

3 Q. Sir, during the course of your deployments, were you
4 ever charged with training troops or did you have any role in
5 training troops on the rules of engagement?

6 A. During my deployments as a judge advocate, all but
7 maybe the first deployment, yes, ma'am.

8 Q. And what sorts of materials would you use in training
9 troops on the rules of engagement?

10 A. As a judge advocate, you start with the CENTCOM ROE
11 for both theaters -- well, they're separate ROEs, but for the
12 theater, you start with that, and then you work from that into
13 presentations in PowerPoint display for soldiers.

14 Q. So you would use -- you would rely on
15 theater-specific ROEs?

16 A. Yes, ma'am.

17 Q. And were there theater-specific ROEs -- sir, I'd like
18 to transition to -- actually, let me ask you a few questions
19 first about CLAMO.

20 A. Yes, ma'am.

21 Q. First, what is -- what is CLAMO?

22 A. CLAMO has got a few definitions. Internally, in
23 Charlottesville, it's a joint multinational interagency team,

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1 and so I've got a U.S. Marine, I've got a Navy officer, a
2 Coast Guard, two Army officers, an Army warrant officer, and a
3 British officer. And in -- our role inside of CLAMO at
4 Charlottesville is collect lessons learned from all over the
5 world and then train those lessons learned in the -- in the
6 national security realm. We have a large DOMOPS DSCA mission
7 in CONUS/OCONUS. We support exercises, you know, all over the
8 world. And so that's internally.

9 Externally, I also supervise all of the judge
10 advocates at the combat training centers worldwide, and so
11 I've got four employees at the National Training Center that
12 work for me training OPLAW at the brigade level. At the Joint
13 Readiness Training Center in Louisiana, I've got a team of
14 four as well that trains operational law there. At the Joint
15 Warfare Center in Stavanger, Norway, I've got a team of one
16 that trains multinational interoperability. And then at the
17 Joint Multinational Readiness Center in Hohenfels, Germany,
18 I've got a team of three that trains interoperability.

19 Q. You used the phrase "collect lessons learned."

20 A. Yes, ma'am.

21 Q. Does that process include the collection of
22 materials?

23 A. Yes, ma'am.

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1 Q. Can you tell us about the sorts of -- types of
2 materials you -- you retain at the -- at CLAMO?

3 A. It depends on the operation. We try and collect as
4 much as we can so that we -- we have a foundation and that we
5 can sift through it in the future, and so it's really
6 dependent on the CLAMO director. Unfortunately for us, we've
7 been focused on DOMOPS DSCA because of the hurricane season in
8 2017, '18, and so during those hurricane seasons we probably
9 collected every piece of paper we could from every
10 headquarters involved in that response. We're also working
11 the southwest border after-action review.

12 MJ [LtCol LIBRETTO]: Lieutenant Colonel Martin?

13 WIT: There's a lot of -- yes, sir.

14 MJ [LtCol LIBRETTO]: If you would -- this is Lieutenant
15 Colonel Libretto, the military judge. If you could, please
16 slow down a little bit. We're having a hard time keeping up
17 with you.

18 WIT: I'm sorry.

19 MJ [LtCol LIBRETTO]: Thank you.

20 A. So the southwest border, there's a lot of activity
21 there with judge advocates. And so we -- we've started that
22 collection. And it's just any documentation to support that
23 mission. When a mission -- for example, in Afghanistan, if we

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1 were to do an after action review on an element, judge
2 advocates in theater, if there was something that they were
3 referencing in that after-action review, we would ask for that
4 material as well.

5 Q. So with respect to the entire portfolio of the
6 materials that you obtain and retain, that would include
7 PowerPoint presentations?

8 A. Yes, ma'am.

9 Q. ROE cards?

10 A. Yes, ma'am.

11 Q. Tactical directives?

12 A. I can't say for certain. I have to imagine when --
13 when tactical -- and it predates me when tactical directives
14 were being published in Afghanistan. I would think the
15 previous CLAMO directors collected that.

16 Q. Operations orders?

17 A. We have some, yes, ma'am.

18 Q. Mission briefs?

19 A. Mission briefs?

20 Q. Just a moment, sir.

21 A. You'd have to define that for me.

22 Q. Let's move on from there because, as you can probably
23 tell, I'm a civilian.

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1 A. Yes, ma'am.

2 Q. Concepts of operations, CONOPS?

3 A. I would think we have CONOPS buried in there. How
4 many CONOPS, I couldn't tell you. CONOPS is not something --
5 so a very specific mission, you know, runs on a CONOP, and
6 that could be a 12-hour mission, 24-hour mission. I can't say
7 for certain we would have CONOPS.

8 Q. But you might?

9 A. We might.

10 Q. Fragmentary orders?

11 A. I'm sure we do.

12 Q. Special instructions?

13 A. I'm sure we do.

14 Q. Executive summaries?

15 A. In some form, whether that was done by a judge
16 advocate to summarize activities, sure.

17 Q. After action reports?

18 A. Thousands.

19 Q. And in what format -- is there anything else that I'm
20 missing that you collect and retain?

21 A. We collect, you know, whole hard drives. And so, for
22 example, the Multinational Corps-Iraq, Multinational
23 Force-Iraq, those two headquarters, I've got copies of those

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1 hard drives and those hard drives are probably in the
2 neighborhood of 50 gigabytes, and they really cover everything
3 from, you know, a 15-6, an investigation done, to the Law and
4 Order Task Force files, to everything in between. Some of it
5 has a nexus to -- to the law. A lot of it does not. It would
6 just happen to be, you know, on that shared drive that was
7 turned into a hard drive.

8 Q. What about with respect to the Afghan Area of
9 Responsibility and the multinational presence there?

10 A. We've got countless forms of documentation, and so
11 you probably should know that I've got hard drives, I've got
12 CD-ROMs, I've got DVDs, I've got files and files of hard
13 copies.

14 Q. Sir, are these documents and materials available in
15 your online repository?

16 A. No.

17 Q. Why not?

18 A. No. And -- I -- CLAMO has not done a good job
19 historically with knowledge management, and so we -- we --
20 we've got the luxury of having a knowledge manager assigned to
21 CLAMO as of this summer. And that was a request I made to the
22 Judge Advocate General and the Deputy Judge Advocate General
23 about two years ago, and they were able to finally send me a

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1 warrant officer.

2 So I've got a warrant officer whose primary duty is
3 knowledge management and that's really to get into our SIPR
4 vault and -- and collect, clean, put all of that stuff online,
5 where applicable. But our -- our SIPR repository doesn't
6 exist online.

7 There is an existence of a SIPR repository, but it
8 does not account for 99.9 percent of the materials that we
9 have.

10 Q. And in terms of the information in your SIPR
11 repository, is all of that classified?

12 A. No, ma'am. No, ma'am. The -- the CLAMO SIPR vault
13 has turned into a storage area in some regards for past CLAMO
14 regimes.

15 Q. Who can go to CLAMO and do research?

16 A. We have -- it's not common that folks would come to
17 CLAMO and do research. Most of the time, it's an RFI, a
18 request for information, from the field. They will ask us for
19 something very particular, and we'll go on the hunt and see if
20 we can find it.

21 Occasionally, we will have, you know, somebody come
22 to CLAMO that needs to take a look at a document or -- or the
23 like. And it's -- it's a SIPR vault so we go through the JPAS

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1 procedures and vet them, and then once they're vetted, we'll
2 let them into the vault to take a look. But unfortunately, we
3 escort everybody in there. We'll spend the day in there with
4 them if we have to.

5 Q. And you mentioned RFIs. Are you aware ----

6 A. Yes, ma'am.

7 Q. Are you aware of whether you've ever received an RFI
8 from the prosecution in this case?

9 A. Not a formal RFI. I know that they've paid us two
10 visits into the vault.

11 Q. When were those visits?

12 A. Probably in the last 90 days; since we started, you
13 know, the motion for my presence.

14 Q. Sir, with respect to theater-specific rules of
15 engagement for the Afghanistan Area of Responsibility, and
16 we're talking about the years from 2001 to 2006, are you aware
17 of whether there are records, any records of the -- any of the
18 types of materials that you have testified about already, are
19 you aware of whether any of those materials are available in
20 your repository with respect ----

21 A. So repository, not online, but in some format. I
22 would have to say absolutely, we've got -- we've got that
23 because I have the CD-ROMs from, you know, from the larger

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1 Army elements during those deployments; 10th Mountain, 82nd
2 Airborne Division, et cetera. I mean, I have a whole row of
3 CD-ROMs, DVD-Rs, from that time period from all of the Army
4 elements.

5 Q. Sir, from your time training military members on the
6 ground, what types of materials would you use in training
7 them?

8 A. The most common thing would be, you know, PowerPoint
9 with the projector. And that's the most common way judge
10 advocates train the ROE, and normally it is the -- it's the
11 formal portion that precedes the vignette training and so you
12 take them through the formal -- formal requirements of the
13 ROE, talk through that, and then the second half of most
14 presentations that I've given or been a part of conclude with
15 a -- a number of vignettes.

16 Q. Vignettes, by that do you mean scenario-based
17 trainings?

18 A. Yes, ma'am.

19 Q. Can you tell us about those?

20 A. You know, for Afghanistan, it -- it -- it's -- does
21 not compare to the old Iraq vignette training. You know, but
22 the -- the -- the vignette training just -- it's
23 scenario-based. You know, if X is occurring, you know, what

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1 is your proper reaction to X and those scenarios change with,
2 you know, with the engagements that are going on in theater.

3 Q. So you said those engagements change with the
4 engagements going on in theater, meaning the scenarios evolve
5 over time to keep up with the situation on the ground?

6 A. Yes, ma'am.

7 Q. Sir, at some point did an attorney from our team
8 reach out to you?

9 A. Yes, ma'am.

10 Q. Major Morgan Engling?

11 A. Yes, ma'am.

12 Q. And approximately when did she reach out to you?

13 A. I don't have the motion in front of me. I know that
14 the motion was correct on the dates a few months ago, a few
15 weeks ago.

16 Q. Okay. And do you remember what you discussed when
17 she called you?

18 A. She -- she told me who she was. She had asked me if
19 we had ROE materials from the time period of -- I think it was
20 2001 to 2005 or '6 related to Iraq. And I think she asked for
21 ROE trainings, and I said we -- you know, quite positively, we
22 do inside the SIPR vault somewhere. And she said can I come
23 down and do some research? And I'm not a crim law guy, but I

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1 know, you know, who she represents and so I said let me call
2 the commissions, specifically Mark Martins' office, to see if
3 she's a -- you know, authorized to come down to my SIPR vault.

4 And so I called Mary -- and I don't know Mary's last
5 name, who works for General Martins -- explained to her what
6 was going on. She said let me get you an answer. She called
7 back and said no. So I -- I called the major back and said
8 unfortunately, I can't let you in the vault.

9 Q. Typically when an individual with a security
10 clearance, with the necessary security clearance reaches out
11 to you from the JAG Corps for access to your materials, are
12 they permitted to access them?

13 A. I think in most cases, yes, but I can tell you most
14 folks reaching out to us are -- are headed down range on a
15 deployment, are down range on a deployment, and so we're
16 fulfilling what our mission is and that's to support
17 operational law professionals, you know, deployed in some
18 fashion.

19 And so this is the -- with the exception of some --
20 some stray FOIA requests, this would be the first request in a
21 justice matter. Or, you know, we've had some civil litigators
22 request information, and we normally push them to CENTCOM for
23 that response. I've had the Criminal Investigation Department

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1 from the Army call. They probably call about every three to
2 six months looking for something, and we will typically send
3 them to CENTCOM as well.

4 And so we don't dabble in the crim law or the civil
5 litigation realm. I can tell you with certainty that, you
6 know, every response that we provide an answer to -- or every
7 request that we provide a response to is an operational law
8 professional whether in -- in the fight, you know, CONUS
9 domestically or overseas.

10 Q. And to date, have you provided anyone from my team
11 access to the materials we requested to see?

12 A. No, ma'am.

13 Q. Sir, I have one other question. You mentioned in
14 your testimony that there are lots of foreign military
15 officers working in your facility.

16 A. No, just one. It's a UK officer who has no access to
17 our SIPR vault. A lot of what we have is SIPR -- is
18 SECRET//NOFORN, and so he's not authorized into our SIPR
19 vault.

20 Q. You mentioned a lot of what you have is
21 SECRET//NOFORN. But a lot of it isn't too; is that right?

22 A. Yes, ma'am. It runs the gamut up to Secret.

23 DDC [MS. HENSLER]: Okay. No further questions. Thank

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1 you.

2 WIT: Yes, ma'am.

3 MJ [LtCol LIBRETTO]: Trial Counsel?

4 **CROSS-EXAMINATION**

5 **Questions by the Deputy Trial Counsel [CDR FLYNN]:**

6 Q. Lieutenant Colonel Martin, good morning again.

7 A. Good morning.

8 Q. My name is Commander Kevin Flynn, and I'm one of the
9 prosecutors in this case. I have just a few questions for
10 you.

11 I'd like first to ask you about your contacts with
12 Major Morgan Engling. I think you testified that at some
13 point, obviously, she contacted you to look at materials down
14 there at CLAMO; is that correct?

15 A. That's correct.

16 Q. And I believe you testified that some materials she
17 wanted to look at were rules of engagement and other armed
18 conflict training materials; is that accurate?

19 A. With specificity, I couldn't tell you. With
20 specificity, it was materials from 2001 to 2005, '6, related
21 to Afghanistan, and from my memory it was ROE LOAC related.
22 She wanted to do research, so it wasn't a request for a
23 specific item from a specific unit.

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1 Q. Okay. Do you remember whether at some point
2 Major Engling asked you -- in fact, didn't she tell you that
3 she wanted to, quote, sit in the vault?

4 A. I think so. I mean, I think she wanted to come down
5 and do research, which implied sit in our vault.

6 Q. Okay. Do you remember if you told her that the CLAMO
7 repository was, in fact, a SCIF?

8 A. I don't know if I used the word "SCIF," but it is
9 a -- it's a classified -- it is a SCIF, but unfortunately we
10 don't always call it a SCIF.

11 Q. Okay. Let me ask it this way: Do you recall telling
12 her that some of the information in the repository that we're
13 talking about was classified?

14 A. It may -- it wouldn't surprise me if that came up
15 because it is a classified environment. And so I would say
16 with regards to ROE materials, with a lot of the LOAC
17 materials, they are classified.

18 Q. And would you agree that the -- the SCIF, or the
19 repository that we're talking about, is in a secured building
20 at the JAG school? Is that accurate?

21 A. Yes, it is.

22 Q. And to get into the repository would require some
23 type of badge access; is that accurate?

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1 A. That's correct, with escort.

2 Q. Now, in addition to the ROE and law of armed conflict
3 material with respect to OPERATION ENDURING FREEDOM, would you
4 agree that the SCIF also contains ROEs and LOAC material and
5 other types of material from other conflicts that the
6 United States has been involved in in the past?

7 A. Absolutely.

8 Q. Could you give the commission an example of that?

9 A. So the -- I just did some research for the U.S. Army
10 War College on Desert Storm. And unfortunately for us,
11 Desert Storm is all paper copies, but it's two filing cabinets
12 with hundreds of files just for Desert Storm.

13 Q. And would these ROEs and other material from
14 Desert Storm be classified, if you know?

15 A. They are, yes, sir.

16 Q. I just want to make sure I understand your testimony
17 with respect to your contact with the Office of the Chief
18 Prosecutor.

19 Why did you reach out to the Office of the Chief
20 Prosecutor when you received this call from Major Engling?

21 A. We had just gotten through moving a lot of FOIA
22 requests and some civil litigation down to CENTCOM, and so not
23 that our -- our radar was on, but in -- in justice matters, I

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1 think there's a procedure, you know, a discovery request, a
2 motion, et cetera. And so I wasn't comfortable with the
3 defense in the SIPR vault without General Martins' team
4 knowing about that.

5 Q. And I think you testified that the major, in fact,
6 told you she was a defense counsel working on a case at the
7 military commissions; is that correct?

8 A. That's correct.

9 Q. And I'm assuming you would have known that the Office
10 of the Chief Prosecutor would be the prosecutors on the --
11 this case?

12 A. That's correct.

13 Q. I think you indicated that when you called the Office
14 of the Chief Prosecutor, you spoke with an individual by the
15 name of Mary?

16 A. That's correct.

17 Q. Could that -- could that have been Mary Krivda?

18 A. I don't know her last name. I just -- you know, a
19 year before this, we had -- we had worked with Mary in regards
20 to allowing General Martins into our vault to -- to do an
21 SVTC. We do have Tandberg availability in there, and so that
22 was the only contact I had at the commissions.

23 Q. And when you called the Office of the Chief

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1 Prosecutor, you didn't speak with Brigadier General Martins;
2 is that accurate?

3 A. That's accurate. I did not speak with General
4 Martins.

5 Q. Would you agree that not everyone has access to the
6 on-site CLAMO SCIF?

7 A. I would agree. I mean, we've got an access roster
8 that accounts for probably about 12 to 15 folks that have
9 access, and it starts with the Judge Advocate General, the
10 Deputy Judge Advocate General, and works its way down to the
11 CLAMO members, which account for about seven at
12 Charlottesville.

13 Q. You need the proper security clearance to access the
14 SCIF, correct?

15 A. Yes, sir.

16 Q. You need to have a need to know to access the SCIF;
17 is that correct?

18 A. Yes.

19 Q. And was this request by Major Engling the first time
20 a defense counsel, either from the commission or from a
21 court-martial, ever contacted you to get information from the
22 on-site CLAMO SCIF?

23 A. Yes.

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1 DTC [CDR FLYNN]: Your Honor, may I have a moment?

2 MJ [LtCol LIBRETTO]: You may.

3 [Pause.]

4 Q. Lieutenant Colonel Martin, just one final question.
5 You are not an original classification authority; is that
6 correct?

7 A. No, no. And so that's one issue we run into on the
8 release, and we've run into that issue with FOIA requests in
9 some civil litigation. Typically it's CENTCOM or Army
10 Central, ARCENT, and so we don't release without their
11 permission.

12 Q. And just to make sure I'm clear, you personally are
13 not an OCA?

14 A. No.

15 DTC [CDR FLYNN]: Thank you, Your Honor. That's all I
16 have.

17 MJ [LtCol LIBRETTO]: Ms. Hensler?

18 DDC [MS. HENSLER]: No redirect, sir.

19 **EXAMINATION BY THE MILITARY COMMISSION**

20 **Questions by the Military Judge [LtCol LIBRETTO]:**

21 Q. Lieutenant Colonel Martin, this is Lieutenant Colonel
22 Libretto again, the military judge.

23 You've provided an example of the -- I believe

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1 Desert Storm is contained within two filing cabinets with the
2 hard copy documents contained therein. Are the -- is the
3 information that the defense was seeking, that is LOAC and ROE
4 types of materials associated with the 2001 to 2006 time
5 frame, similarly organized within the SCIF there at CLAMO such
6 that it is in a central location, it's not scattered
7 throughout the entirety of the -- the warehouse, if you will?

8 A. I would say scattered, Your Honor. Some of it's hard
9 copy. We've got binders from OIF, OEF that contain hard
10 copies. I've got DVDs, CDs, hard drives. It's scattered.

11 Q. Scattered, but an organized scatter? In other words,
12 you'd be able to identify where those things are?

13 A. I would say that the DVD-Rs and the paper copies are
14 fairly organized. What we don't know is we've got countless
15 hard drives, zip drives. We've got -- we've got a whole
16 cabinet full of hard drives and zip drives from that time
17 period.

18 Q. You indicated that on, I believe, two occasions,
19 members of the prosecution team came there to conduct a
20 walkthrough of the site with you?

21 A. Yes, sir.

22 Q. How long ----

23 A. Not with me.

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1 Q. I'm sorry. Go ahead.

2 A. Not with me. I've got a Marine captain, Josh Mast.
3 He was available to assist them.

4 Q. And how long do you know, if you know, were they in
5 the vault there with the captain?

6 A. I think the first visit, less than two hours. And
7 then the second visit happened I believe about a week, week
8 and a half later, and it was quick. It was less than an hour.
9 **[The military judge conferred with courtroom personnel.]**

10 MJ [LtCol LIBRETTO]: Lieutenant Colonel Martin, thank you
11 very much. That's all the questions we have for you today. I
12 appreciate you taking the time to provide me some information.
13 We're going to go ahead and disconnect the VTC at this time.

14 WIT: Thank you, Your Honor.

15 MJ [LtCol LIBRETTO]: Thank you.

16 **[The witness was excused and the VTC was terminated.]**

17 MJ [LtCol LIBRETTO]: Defense, do you have any additional
18 evidence to present?

19 DDC [MS. HENSLER]: Yes, sir. I have two pieces of
20 discovery which I'd like to show in my argument, one of them
21 was attached to one of our pleadings, but one of them was not.

22 MJ [LtCol LIBRETTO]: Has it been submitted to the review
23 teams such that it can get cleared prior to you displaying it?

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1 DDC [MS. HENSLER]: Not yet, sir, but we're not seeking to
2 display it to the gallery because of the classification
3 markings, but I would like to tender it to Your Honor so that
4 you can review it.

5 MJ [LtCol LIBRETTO]: Okay. And you said the other was
6 attached to the initial filing?

7 DDC [MS. HENSLER]: Yes, sir. And I will get the record
8 cite for you in one moment. AE 156 Attachment H.

9 MJ [LtCol LIBRETTO]: Attachment H to 156, the original
10 motion?

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

12 MJ [LtCol LIBRETTO]: Forgive me. I have three
13 attachments listed in the original motion: A, B, and C.

14 DDC [MS. HENSLER]: Sir, I think we have perhaps an
15 administrative mistake here. May we have a ten-minute
16 resource -- recess to get that sorted out before argument?

17 MJ [LtCol LIBRETTO]: You may. The commission is in
18 recess.

19 [The R.M.C. 803 session recessed at 0836, 28 August 2019.]

20 [The R.M.C. 803 session was called to order at 0844,
21 28 August 2019.]

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

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1 again present.

2 Ms. Hensler, did we get the administrative issues all
3 set?

4 DDC [MS. HENSLER]: Sir, we will need to introduce these
5 two documents during argument. I believe one is in the record
6 somewhere, but we weren't able to locate the record cite,
7 so ----

8 MJ [LtCol LIBRETTO]: Okay. Well, just mark them next in
9 order in the 156 series. They will not be displayed on the
10 screens or to the public.

11 [Pause.]

12 MJ [LtCol LIBRETTO]: Ms. Hensler, beyond those two
13 additional documents, is there any additional evidence that
14 you'd like to present?

15 DDC [MS. HENSLER]: No, sir.

16 MJ [LtCol LIBRETTO]: Does the government have any
17 additional evidence that they'd like to present on this issue?

18 DTC [CDR FLYNN]: No, Your Honor.

19 [Pause.]

20 MJ [LtCol LIBRETTO]: Okay, Ms. Hensler. You may argue.

21 DDC [MS. HENSLER]: Thank you, sir. I'll be -- we've
22 submitted pleadings on this, so I'll be brief.

23 We submitted a narrowly tailored request for

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1 discovery to the government. And we believe that this
2 information is critical to mounting a defense to these charges
3 and perhaps even more critical for mitigation purposes.

4 We have narrowly tailored our request to the period
5 of time in our case, 2001 to 2006, and we've also identified
6 the particular units which we believe that we are -- that we
7 need the material for.

8 Your Honor heard the testimony of Lieutenant Colonel
9 Martin. He has the materials which would have been used to
10 train these units on the rules of engagement within the CLAMO
11 repository, and the government has not looked for them. He --
12 as Your Honor asked how long the prosecution had spent in his
13 vault looking for these materials, and it -- which were
14 apparently scattered throughout the repository, and Lieutenant
15 Colonel Martin indicated that they'd spent less than three
16 hours there.

17 So I'd like to demonstrate why this material is
18 important, and that's why I've offered these two examples from
19 discovery to the court. Sir, the piece of discovery marked
20 HADI-1-4, which is marked for the record I understand now
21 as -- in this series AE 156, it includes an interview done
22 regarding the attack which is referred to in Charge III,
23 Specification 3. And that attack was a vehicle -- involved a

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1 vehicle-borne IED.

2 One of the last lines of this interview indicates
3 that the interviewee said that "As a result of the concerns
4 for VBIEDs, the rules of engagement policy was less stringent
5 than those of today."

6 Sir, this indicates that the question of what -- what
7 the status was of the vehicle which was carrying the IED is of
8 critical importance because Mr. al-Tamir is charged with
9 perfidy. If, for instance, troops on the ground would not
10 have afforded this particular -- this particular vehicle
11 civilian status or have -- would have been on high alert for
12 the possibility that it was carrying an IED, that would be of
13 critical importance to determining how much the disguise
14 mattered.

15 And this is probably, to be candid, less relevant for
16 the essential elements of perfidy, but it certainly is
17 relevant for mitigation. If, for instance, troops in this
18 unit understood that a vehicle of this type, displaying this
19 sort of behavior, was -- was -- for instance, could be fired
20 upon in certain circumstances, that is something that a panel
21 needs to know.

22 In addition, I've provided to the court another piece
23 of discovery, HADI-1-001970. Sir, this relates to Charge III,

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1 Specification 2. This is a suicide attack dated
2 27 January 2004. This photo is, we believe, a piece of the
3 suicide bomber's clothing. It is camouflage. If individuals
4 in this unit were trained to be wary of individuals wearing
5 camouflage and were permitted to fire upon individuals wearing
6 camouflage, again, that's something that a panel would need to
7 know.

8 We know that these materials exist. We have provided
9 the government with a narrowly tailored request, and they have
10 refused to provide the materials. So we've articulated in our
11 filings the basis for this request. We've explained why
12 they're essential to the preparation of our defense and our
13 mitigation, and we ask that the military judge order that the
14 government disclose them.

15 MJ [LtCol LIBRETTO]: Thank you, Ms. Hensler.

16 Trial Counsel?

17 DTC [CDR FLYNN]: Commander Flynn for the government.

18 Your Honor, I would like to highlight a few points in
19 addition to our response that I would submit are critical to
20 the resolution of this motion, and those two points relate to,
21 number one, the processes and the procedures that control the
22 information requested in the motion by the defense; and,
23 number two, the theories of relevance put forth by the defense

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1 and just argued a few minutes ago as to why the information
2 they are requesting or why they're entitled to that
3 information.

4 Now, the first point, Your Honor, relates to the
5 processes and procedures for the defense to access government
6 information, including classified information. A couple of
7 things with respect to that, Your Honor. It is the
8 government's position that the defense's purpose in contacting
9 Lieutenant Colonel Martin was twofold. First, they wanted to
10 determine if CLAMO had the information they were looking for;
11 and, second, if so, they were going to travel to CLAMO to sit
12 in the vault and to go through this information.

13 MJ [LtCol LIBRETTO]: To conduct an investigation?

14 DTC [CDR FLYNN]: To look at the information that
15 they've -- the ROEs, the laws of armed conflict, yes. There's
16 a procedure for that, Your Honor. This is -- we're talking
17 about classified information. There is a process to go
18 through controlled by the amended protective order, AE 013K,
19 and controlled by M.C.R.E. 505.

20 This is government information, Your Honor. The
21 defense can't do an end around to get this information without
22 going through the government. That's what the protective
23 order says. That's how it works in Military Commission

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1 Rule 505. I think it's important to address their allegations
2 in their original motion that the government directly
3 prevented them from carrying out its investigation, the
4 government's interference with the defense investigation
5 violates both the Rules for Military Commission and the
6 Military Commissions Act.

7 I would submit to you -- to Your Honor that these two
8 sentences highlight the defense's complete and continued
9 misunderstanding of the concept of the discovery process as
10 envisioned by the MCA generally and specifically with respect
11 to classified information.

12 MJ [LtCol LIBRETTO]: Let's forgo that argument. Let's
13 get to the heart of the matter, and that's the disclosure of
14 the information that the defense has requested.

15 The government has time and time and time again, and
16 this commission to a certain extent has time and again,
17 admonished the defense for their broad, sweeping and at times
18 ambiguous discovery requests.

19 Here, we have a very narrowly tailored discovery
20 request seeking very specific information and, in fact, in
21 this instance, as the commission has advised and directed the
22 government -- the defense to do, told the government where it
23 is that the information can be found.

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1 So here, we are left with the government conducting
2 what amounts to less than, as Lieutenant Colonel Martin said,
3 a three-hour search of the volumes of information that
4 apparently Lieutenant Colonel Martin believes they have on
5 this topic.

6 So how does this, number one, meet the -- satisfy the
7 government's obligation to go through and use due diligence in
8 searching for and obtaining the information at issue? And
9 also, how does it not call into question the entirety of the
10 government's discovery practices?

11 DTC [CDR FLYNN]: Two answers to that, Your Honor. And
12 the government appreciates the defense giving a specific --
13 giving us a specific discovery request, because that has not
14 been the practice, as you know, prior to this.

15 The fact that the defense gave the government a
16 specific request doesn't mean that that information is
17 discoverable. We still have to make the call. How is ----

18 MJ [LtCol LIBRETTO]: So are you -- is the government
19 representing to this commission that in a matter of less than
20 three hours, every DVD, every CD-ROM, and every piece of paper
21 that might have been responsive to this request was viewed by
22 a member of the prosecution team?

23 DTC [CDR FLYNN]: First of all, the government would

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1 dispute that the two prosecutors who went down and looked
2 through the -- at the SCIF spent three hours down there. They
3 spent the entire day down there, Your Honor. So I don't -- I
4 don't think that's an accurate statement, respectfully.

5 We still have to make a determination whether the
6 theories that the defense has put forth, whether those
7 theories make what they requested relevant. Again, we're --
8 we're ecstatic that they've given us a specific request. That
9 doesn't mean that that information is discoverable.

10 How are tactical directives, op plans, op orders, all
11 SOPs, all frag orders, all comms, how is this stuff relevant,
12 Your Honor? They have that obligation. They have to put
13 forth their theory of relevance. They've tried to do that,
14 but that just -- it doesn't -- it doesn't pass muster. And if
15 you let me discuss that, Your Honor, I will discuss how these
16 theories of relevance put forth by the defense are simply not
17 valid.

18 The defense counsel, her theory of relevance with
19 respect to why this material is discoverable -- and this is
20 also mentioned in their initial motion to compel. They argue
21 that the information is material to see if the government can
22 show deception with respect to the perfidy charge, and there's
23 also a discussion about how the information is material to

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1 hostilities, and then there's discussion about how the
2 information is mitigating.

3 With respect to this deception piece on the perfidy
4 charge, Your Honor, it is the intent of the accused and the
5 subjective belief of the victim that is relevant. The defense
6 has really not shown how ROEs and law of armed conflict and
7 all of those other things that they requested -- how are those
8 things relevant to the deception issue on the perfidy charge?
9 That's not our job, Your Honor; that's the defense's job.
10 They have to put forth valid theories of relevance, and they
11 have not done that.

12 Your Honor, I think a quick example can show you how
13 this theory put forth by the defense doesn't pass muster.
14 Let's suppose there's a convoy of U.S. vehicles traveling down
15 a busy road in Afghanistan. Let's say a taxi comes up and is
16 driving erratically. It's moving back and forth. It's
17 attempting to pass the rear vehicles and infiltrate the middle
18 of the convoy. Let's also say that the soldiers in this
19 convoy see this erratic driving and certainly have the ability
20 to fire on these people, and they don't.

21 Let's also say that there has been a perfidious
22 attack, Your Honor, in the past 30 days every day. Let's say
23 every single soldier in that convoy has been trained on ROEs

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1 and laws of armed conflict. That doesn't change the equation.
2 The -- the important point with respect to the perfidy charge
3 is the subjective belief of the victims.

4 In the certain scenario I gave you, sir, the fact
5 that the soldiers didn't fire on civilian -- on the civilian
6 taxi cab is what matters, not what the ROE was or should have
7 been.

8 Your Honor, you have -- and I'm sure you realize --
9 and I know you've looked at the defense -- original defense
10 request. How in the world is ROE -- or how in the world are
11 ROEs and LOAC information with respect to an infantry regiment
12 from Oklahoma, a unit that had absolutely nothing to do with
13 the perfidy charge -- how is that material in any way?

14 The defense has asked for vast amounts of material.
15 Ms. Hensler went through it in the direct examination. SPINS,
16 frag orders, tactical orders, directives, operational orders;
17 how in the world is any of that relevant to units that are not
18 even involved in the perfidy charge or the attempted perfidy
19 charge?

20 Now, defense counsel didn't touch on the hostilities
21 argument, but again, Your Honor, that argument doesn't make
22 sense. ROEs and hostilities are completely different animals.
23 Simply, ROEs are not a factor in the determination of

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1 hostilities.

2 MJ [LtCol LIBRETTO]: Commander Flynn, I appreciate your
3 argument. What I'd like then is for you to explain why you
4 even went to CLAMO. If you believed at the outset that none
5 of the theories that the government -- the defense advanced
6 were a justifiable discovery request, why go?

7 DTC [CDR FLYNN]: We didn't have to, Your Honor. We went
8 out of -- we wanted to look to see what was in that -- in the
9 vault. We didn't have to do that. We wanted to basically see
10 what was in the vault. And if Your Honor orders us to produce
11 ROEs or LOAC or tactical operational orders, we wanted to have
12 some idea as to whether or not that information existed.

13 MJ [LtCol LIBRETTO]: Does it?

14 DTC [CDR FLYNN]: I personally didn't go down there, sir.
15 Two attorneys on our team went down there. I can submit to
16 the court based on what I have talked to -- or what they've
17 told me -- that the -- this SCIF is organized poorly. There's
18 things scattered all over the place. So I don't know if that
19 answers your question.

20 What I will say, sir, is this: Even if, for some
21 reason, you find that some of the ROEs are relevant, it's the
22 government's position that there's only really two ROEs that
23 are relevant with respect to -- or that are discoverable with

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1 respect to this issue. Defense is arguing that these are
2 relevant to the perfidy charge. Sir, the perfidy charge
3 involves all foreign units: British soldiers, Estonian
4 soldiers, Canadian soldiers, German soldiers. No U.S. forces
5 were involved in that attack. The controlling ROE in that
6 situation was a NATO ROE, which was turned over five years ago
7 in the very first production to the defense.

8 Now, with respect to the attempted perfidy charge,
9 Charge IV, the only unit involved in that attack, sir, was a
10 special forces group -- 19th Special Forces Group from Utah.
11 That was the only unit involved in that attack. So this
12 request for other units that have nothing to do with these
13 attacks, it's just not material, it's not discoverable
14 information.

15 The only possible relevant ROE for the attempted
16 perfidy attack is the standing ROE for U.S. forces in
17 Afghanistan, which I believe has also been turned over. If it
18 hasn't been turned over, we can certainly obtain that if Your
19 Honor finds that this information is discoverable.

20 Unless you have any -- Your Honor, may have I one
21 minute, please?

22 MJ [LtCol LIBRETTO]: You may.

23 [Pause.]

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1 [The military judge conferred with courtroom personnel.]

2 DTC [CDR FLYNN]: Sir, just two final points.

3 The only way that the ROE or the LOAC information
4 would be relevant on the perfidy or attempted perfidy charge
5 is if there is an ROE that exists that allows U.S. forces to
6 light up all civilians. That's the only way that that would
7 be relevant on the perfidy charge and the attempted perfidy
8 charge.

9 And I'm pretty confident in saying, Your Honor, that
10 no such ROE exists. ROEs are, as you know, drafted and
11 completed at the very highest levels of the military. If
12 there was an ROE like that in Afghanistan at any -- during any
13 time period, that would certainly be known by all parties in
14 this commission.

15 Second, Your Honor, the defense request is for the
16 information. I just wanted to make clear that I don't believe
17 they're requesting access to the SCIF; they're requesting
18 information from that SCIF. If Your Honor finds any of the
19 requested information discoverable, we will get that -- or the
20 government will try to find that from other sources.

21 MJ [LtCol LIBRETTO]: Thank you.

22 Ms. Hensler?

23 DDC [MS. HENSLER]: Sir, the government's argued that this

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1 information is not relevant because the perfidy charges did
2 not involve U.S. troops. Count 4, an attempted perfidy
3 charge, does involve U.S. troops. So I wanted to put that
4 before Your Honor.

5 Second, the Count 3, which includes three
6 specifications, that does involve NATO troops, but the
7 testimony today shows that they have those materials. That's
8 why CLAMO exists, so that there is this collection of lessons
9 learned. So, Your Honor, if the question is do they have
10 these materials, the answer has been, through this witness,
11 that they do have them.

12 Second ----

13 MJ [LtCol LIBRETTO]: Commander Flynn indicated that you
14 have the responsive NATO ROEs for that issue. Do you dispute
15 that?

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

17 As Commander Flynn stated himself, and consistent
18 with the witness testimony, the SIPR repository of these
19 materials is a mess. And that's why they have this new
20 knowledge manager, to try to sort it out. So it would take a
21 great deal of time to go through these materials and find the
22 ones which would be potentially responsive and go through and
23 do the analysis required of prosecutors, particularly

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1 consistent with Brady.

2 Sir, the ----

3 MJ [LtCol LIBRETTO]: Back -- back up, Ms. Hensler.

4 You're saying that Commander Flynn's representation
5 that the NATO ROEs have not been provided to you is erroneous.

6 DDC [MS. HENSLER]: They have provided to us the standing
7 rules of engagement, but those alone are generic in
8 nature ----

9 MJ [LtCol LIBRETTO]: Aren't ROEs generally generic in
10 nature?

11 DDC [MS. HENSLER]: That's right, sir. And that's why we
12 asked this witness about the other materials that they have
13 fleshing out what the -- what the troops on the ground would
14 have been trained on specifically.

15 For instance, the witness testified about the
16 vignettes. The vignettes, the scenario-based trainings, that
17 is why we are asking for those materials because those would
18 have been given to military members when they were going
19 outside the wire, and those would give us insight into what
20 the rules of engagement would have been on the ground when
21 these attacks happened or what a -- what the -- as the
22 prosecution said, what the subjective view would have been.

23 The amount of time, whatever it is, three -- three

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1 hours, one day, it's not enough. The witness' testimony was
2 that it was three hours. He -- we know that there's a large
3 volume of material, and it's not organized. And we have
4 requested very specific categories of material that the
5 government would have to review and that would take more than
6 one day. It was represented to be that it would take a person
7 a month.

8 So again, sir, we've asked for specific materials in
9 a narrowly tailored discovery request, not simply the ROEs
10 themselves but documents which would suggest or which would
11 comprise what the training was because that is the information
12 which is essential to our diligence as defense counsel.

13 And finally, I wanted to address the process that
14 Commander Flynn started with. We know now that many of these
15 materials are not even classified. That was the witness'
16 testimony. They're simply contained in a SIPR vault in an
17 abundance of caution.

18 Major Engling was a new member of our team when she
19 reached out to CLAMO. She's an operations -- operations is
20 her specialty. She -- and that's why she reached out. She
21 certainly wouldn't have visited the facility without
22 consulting with our defense information security officer, so
23 there's -- to the extent there's any allegation that she

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1 intended to violate a protective order, we argue it's ----

2 MJ [LtCol LIBRETTO]: I did not take it as much.

3 DDC [MS. HENSLER]: Thank you.

4 If there are no further questions then?

5 MJ [LtCol LIBRETTO]: There are not.

6 The commission will take that issue under advisement
7 and issue a ruling here in the near future.

8 Moving on to the defense motion AE 159, the defense
9 motion to compel discovery of information related to public
10 statements made by Rear Admiral Ring concerning the conditions
11 of confinement.

12 Defense, do you have any additional evidence to
13 present on this issue?

14 DDC [LT DANIELSON]: Good morning, Your Honor. Lieutenant
15 Danielson for the defense.

16 MJ [LtCol LIBRETTO]: Good morning.

17 DDC [LT DANIELSON]: We do not have any additional
18 evidence.

19 MJ [LtCol LIBRETTO]: Does the government have any
20 additional evidence to present?

21 DTC [CDR FLYNN]: No, sir.

22 MJ [LtCol LIBRETTO]: Lieutenant Danielson, you may argue.

23 DDC [LT DANIELSON]: Yes, sir. As we mentioned before

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1 yesterday, we do have a presentation for the court's benefit.
2 Would it be wise to take a five- or ten-minute recess to set
3 those up, or should we just continue?

4 MJ [LtCol LIBRETTO]: We'll just continue, please.

5 DDC [LT DANIELSON]: Aye, sir.

6 MJ [LtCol LIBRETTO]: That's not to say you can't set it
7 up; I'm just not going to take a recess. So if you need to
8 take a few moments to set it up, go ahead.

9 DDC [LT DANIELSON]: Thank you, sir. I appreciate that.

10 And with Your Honor's permission, we would request
11 the opportunity to present the presentation to the commission.
12 These slides have been reviewed by the CISO and I believe are
13 approved.

14 MJ [LtCol LIBRETTO]: Very well.

15 DDC [LT DANIELSON]: This is AE 159, Mr. al-Tamir's motion
16 to compel discovery related to Rear Admiral Ring's publicly
17 stated concerns about Mr. al-Tamir's conditions of
18 confinement.

19 Your Honor, Mr. al-Tamir's conditions of confinement
20 as a detainee in Camp VII are rapidly deteriorating and are in
21 desperate need of replacement. JTF-GTMO has been and is
22 currently unable to provide Mr. al-Tamir, who suffers from
23 debilitating back pain due to multiple spinal surgeries, among

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1 other ailments, the appropriate level of medical care to
2 Mr. al-Tamir pursuant to U.S. law and international
3 conventions. Your Honor, how do we know this?

4 MJ [LtCol LIBRETTO]: Lieutenant Danielson, just so I can
5 narrow the focus of the issue, the issue as it's presented in
6 the motion is to compel information surrounding these
7 statements. This is not a motion to find the conditions of
8 confinement violative of any of Mr. Hadi's rights.

9 So what is it that the defense is requesting be
10 produced?

11 DDC [LT DANIELSON]: Well, as we can see here, Your Honor,
12 we're requesting the following. We believe that we are
13 entitled to information produced by Rear Admiral Ring, his
14 staff at JTF-GTMO, the immediate superior command in the
15 chain, SOUTHCOM, Southern Command; and any DoD assessment of
16 the current physical state of the structure of Camp VII; the
17 adequacy of the medical care provided to Mr. al-Tamir and
18 other detainees at Camp VII; any communications within or
19 between these agencies including JTF-GTMO, SOUTHCOM, and DoD,
20 or other agencies concerning Rear Admiral Ring's publicly
21 stated concerns; any actions taken by these same entities in
22 response to Rear Admiral Ring's concerns and his public
23 statements; and any other relevant information as may be

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1 appropriate.

2 Now, Your Honor, to set the background for our
3 request, we intend to go through a brief timeline of events
4 for the context to be clear.

5 Rear Admiral John Ring, United States Navy, a naval
6 flag officer with over 30 years of military experience and
7 with over four command tours to his credit, including as
8 commander of JTF-GTMO, the boss of Camp VII, as the court is
9 aware, engaged in a year-long public media campaign to bring
10 attention to the need to completely -- to completely replace
11 Camp VII due to its rapid physical deterioration and its
12 inadequacy in providing necessary medical care -- due to the
13 rapid deterioration and its inadequacies in providing
14 necessary medical care to Mr. al-Tamir and the other detainees
15 held in Camp VII.

16 However, as we will discuss, Rear Admiral Ring was
17 suddenly and unceremoniously dismissed from his position as
18 JTF-GTMO commander, just as his public media campaign reached
19 its crescendo when Rear Admiral Ring notified the world that
20 the United States Government was not in compliance with
21 international law regarding the medical care currently being
22 provided to Mr. al-Tamir.

23 Now, Rear Admiral Ring, as commander of Joint Task

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1 Force GTMO and Camp VII itself, made it clear that the
2 Camp VII facilities were and are inadequate to properly house
3 and care for Mr. al-Tamir.

4 Rear Admiral Ring came to this conclusion no doubt
5 based on his own personal observations and likely based on the
6 formal and informal observations of JTF-GTMO personnel,
7 including the military jailers at Camp VII, the medical staff
8 at Camp VII, and other personnel familiar with facilities
9 management, engineering, construction, and other disciplines.

10 It is also safe, Your Honor, to presume that Rear
11 Admiral Ring communicated his concerns and the concerns of his
12 staff to his superiors at SOUTHCOM and elsewhere. In light of
13 Rear Admiral Ring's public statements about the conditions of
14 Camp VII and the chain of events that led to Rear Admiral
15 Ring's eventual firing during his public media campaign about
16 the conditions of Camp VII, Mr. al-Tamir now requests that the
17 military commission order the government to provide discovery
18 and information related to Rear Admiral Ring's conclusions
19 about the conditions of Camp VII as well as the reactions of
20 Rear Admiral Ring's superiors during and after Rear Admiral
21 Ring's public statements.

22 Again, a comprehensive order from the military
23 commission to compel discovery would include, but not be

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1 limited to, discovery related to the assessment of the
2 physical state of the structure of Camp VII, the inadequacy of
3 medical care provided to Mr. al-Tamir and other detainees at
4 Camp VII, all communications between relevant personnel as it
5 relates to Rear Admiral Ring's concerns about Camp VII ----

6 MJ [LtCol LIBRETTO]: Slow down, Lieutenant Danielson.

7 DDC [LT DANIELSON]: Aye, sir.

8 ---- and any actions taken by relevant personnel in
9 response to Rear Admiral Ring's publicly stated concerns about
10 the conditions of Camp VII.

11 Now, Your Honor, on or about 17 April 2018, Rear
12 Admiral Ring, a naval officer with 30 years of experience and
13 with three previous command tours, including command of an
14 aircraft carrier approximately with 5,000 personnel aboard,
15 became commander of Joint Task Force Guantanamo, a command
16 with several hundred members. After only two months in this
17 position in early June 2018, Rear Admiral Ring participated in
18 a press conference with international media at Guantanamo Bay
19 to bring attention to the need for a brand new facility to
20 replace Camp VII, to house and to provide care for
21 Mr. al-Tamir and other detainees in the coming years.

22 One second, please, Your Honor.

23 [Pause.]

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1 DDC [LT DANIELSON]: Now, as an aside, Your Honor, I
2 intended to play video clips of Rear Admiral Ring speaking
3 himself, in his own voice, saying some of the statements at
4 issue for Your Honor's benefit. But to be clear, I was
5 informed by some powers that be -- not the CISO present here
6 today and not even the local OCA, Your Honor, but some other
7 unnamed entity -- that I could not play these clips in court,
8 not because the clips are classified, mind you, but because I
9 was just not allowed to play them in court.

10 MJ [LtCol LIBRETTO]: It's the commission's understanding
11 that although the slide deck was provided well in advance,
12 there was some misunderstanding as to the nature of the
13 pictures contained therein. In other words, it's my
14 understanding that the review teams believed them to be
15 pictures as opposed to videos. And, thus, despite the defense
16 complying with the timelines associated with the review
17 process, it was overlooked that there were videos contained
18 embedded in the file.

19 Having said that, the commission, if provided a
20 digital copy, will review them prior to and during
21 deliberations.

22 DDC [LT DANIELSON]: Thank you, Your Honor.

23 And because of the decisions made by those who've

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1 reviewed the slides, I'll provide the sum and substance of
2 Rear Admiral Ring's statements myself.

3 Now ----

4 TC [CDR SHORT]: Your Honor, it's my understanding that
5 it's the sum and substance that hasn't been cleared.

6 DDC [LT DANIELSON]: Has been cleared?

7 TC [CDR SHORT]: Has not been cleared.

8 MJ [LtCol LIBRETTO]: The sum and substance of the public
9 statements?

10 TC [CDR SHORT]: That was embedded in the video,
11 Your Honor.

12 DDC [LT DANIELSON]: My understanding is that they have
13 been cleared. They've been reviewed repeatedly and ----

14 MJ [LtCol LIBRETTO]: These slide -- the slide decks --
15 you don't intend to go outside the scope of the slide decks?

16 DDC [LT DANIELSON]: No, sir.

17 MJ [LtCol LIBRETTO]: Go ahead.

18 DDC [LT DANIELSON]: Aye, sir.

19 Now, again, after only two months in position as
20 Joint Task Force Guantanamo commander in early June 2018, Rear
21 Admiral Ring participated in an international press conference
22 with international media present at Guantanamo Bay to bring
23 attention to the need for a brand new facility to replace

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1 Camp VII to house and to provide care for Mr. al-Tamir and
2 other detainees in the coming years. Rear Admiral Ring dubs
3 this new facility he envisions Camp VIII.

4 On 7 June 2018, Rear Admiral Ring tells the
5 Associated Press, "We know that we're going to be in a
6 wheelchair situation sooner rather than later, so a new
7 facility, a new Camp VIII, would replace the current capacity
8 and it would have the ability to maybe roll a hospital" ----

9 MJ [LtCol LIBRETTO]: Hold on, Lieutenant Danielson. One
10 moment.

11 DDC [LT DANIELSON]: I'm sorry?

12 [The military judge conferred with courtroom personnel.]

13 MJ [LtCol LIBRETTO]: Lieutenant Danielson, I have no
14 issues with where you're going. My only issue is the
15 commission, by way of the filing, is aware of the timeline
16 associated with Rear Admiral Ring's comments. I'd like you to
17 focus your argument on why the information that you're
18 requesting is material to the preparation of the defense as
19 opposed to reiterating the timeline that the commission is
20 very familiar with by way of the pleading.

21 DDC [LT DANIELSON]: Yes, Your Honor.

22 MJ [LtCol LIBRETTO]: And specifically the question that I
23 do have is if the defense is interested in learning of the

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1 conditions of confinement and the adequacy of care being
2 provided, what materiality does actions taken by Rear Admiral
3 Ring's superiors, regardless of what they were for, have to do
4 with that?

5 DDC [LT DANIELSON]: Well, Your Honor, that question, I
6 believe, is twofold. First and foremost, again, the timeline
7 of events will show that Rear Admiral Ring requested funding
8 for these upgrades for a new facility, a new Camp VIII, for
9 medical facilities, medical supplies, and so forth. We would
10 believe that that request would go through SOUTHCOM and to DoD
11 officials, however that chain of command may work, so ----

12 MJ [LtCol LIBRETTO]: But isn't it the underlying reasons
13 for the request in the first instance that is relevant to the
14 issues for which you seek to explore?

15 DDC [LT DANIELSON]: Could you please restate that, sir?

16 MJ [LtCol LIBRETTO]: Sure.

17 I mean, at the heart of the issue, as I understand
18 the defense's position, is you want to explore the conditions
19 of confinement relative to certain motions that you'd like to
20 bring. So why does anything beyond that -- why is anything
21 beyond that material to the preparation of those issues?

22 DDC [LT DANIELSON]: Yes, sir. Again, I believe the
23 answer is twofold. First and foremost, what were SOUTHCOM and

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1 superior command's response to Admiral Ring and his request?

2 MJ [LtCol LIBRETTO]: Why? Why is that material?

3 DDC [LT DANIELSON]: To determine -- to determine whether
4 there has been unlawful influence, to determine whether there
5 has been outrageous conduct, as we'll get to.

6 MJ [LtCol LIBRETTO]: Unlawful influence as it relates to?

7 DDC [LT DANIELSON]: As it relates to the second answer to
8 your question, which is that Rear Admiral Ring was dismissed
9 after invoking the Geneva Conventions and the United States'
10 failure, in his opinion, to meet those conventions as it
11 relates to Mr. al-Tamir's medical care, the very next day he
12 was fired by SOUTHCOM.

13 MJ [LtCol LIBRETTO]: Why does that matter?

14 DDC [LT DANIELSON]: That would show unlawful influence
15 and outrageous government misconduct, among other things.

16 MJ [LtCol LIBRETTO]: Unlawful influence of what?

17 DDC [LT DANIELSON]: Of a superior commander sending a
18 message to his jailers to not speak positively about
19 Mr. al-Tamir, to not bring attention to issues related to
20 Mr. al-Tamir's medical care, to bring public scrutiny on the
21 U.S. military and their operations in Guantanamo.

22 MJ [LtCol LIBRETTO]: But not to influence the
23 presentation of the defense's case or the ability of the

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1 defense to explore certain matters relative to the base issue,
2 conditions of confinement.

3 DDC [LT DANIELSON]: Well, both issues are relevant, so
4 we're looking for any discovery relating to both those
5 questions, sir.

6 MJ [LtCol LIBRETTO]: What issues specifically -- and be
7 more specific than you have been already. What issues do you
8 believe could come of this inquiry?

9 DDC [LT DANIELSON]: That's a broad question, sir. What
10 issues do we believe?

11 MJ [LtCol LIBRETTO]: Yes. What motions do you anticipate
12 filing? Let's say there was some sort of investigation, not
13 of Rear Admiral Ring's firing but an investigation of the
14 conditions of confinement, perhaps that Rear Admiral Ring
15 might have initiated. What motions does the defense
16 anticipate filing if it were to be -- if that investigation
17 were to substantiate or even aggravate Rear Admiral Ring's
18 comments in the first instance?

19 [Pause.]

20 DDC [LT DANIELSON]: First and foremost, Your Honor, this
21 goes to the heart of our mitigation case. We are looking to
22 develop medical evidence to determine Mr. al-Tamir's current
23 medical condition but also ----

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1 MJ [LtCol LIBRETTO]: And the commission has provided a
2 mitigation -- or a doctor, has ordered the government to
3 produce a doctor for that very purpose.

4 DDC [LT DANIELSON]: Correct, sir. But in addition, we
5 believe -- and it's pretty clear from the record and from
6 common sense -- that the physical conditions of Mr. al-Tamir's
7 confinement go to that question as well to determine if the
8 conditions themselves are a part of the cause of his
9 deteriorating health, if there's enough medical treatment
10 there to determine if, again, the United States Government is
11 providing sufficient care, to determine if there's unduly
12 harsh pretrial conditions of confinement, pretrial punishment.
13 There's a long list of motions to bring.

14 MJ [LtCol LIBRETTO]: Do you have any evidence -- and
15 perhaps this is where we're going, but do you have any
16 evidence to refute the amount of evidence that has been
17 presented from witnesses indicating the -- particularly as it
18 relates to the medical piece?

19 DDC [LT DANIELSON]: Well, Your Honor, it would appear
20 that Rear Admiral Ring disagrees with them.

21 MJ [LtCol LIBRETTO]: Specifically to Mr. Hadi?

22 DDC [LT DANIELSON]: Yes.

23 [Pause.]

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1 DDC [LT DANIELSON]: We've, for example, submitted e-mails
2 recently, Your Honor, as to whether there was agreement
3 amongst the medical staff and relevant staff as to whether
4 Mr. al-Tamir should have his third or fourth surgery at
5 Guantanamo Bay. Again, we've presented statements from Rear
6 Admiral Ring himself. He says that there are not sufficient
7 medical capabilities in Camp VII and at Guantanamo to support
8 Mr. al-Tamir's medical needs.

9 MJ [LtCol LIBRETTO]: Stand by.

10 [The military judge conferred with courtroom personnel.]

11 MJ [LtCol LIBRETTO]: Lieutenant Danielson, just to point
12 the commission in the right direction, what e-mails that have
13 been filed recently are you referring to? I don't -- it could
14 have been something that I reviewed in connection with some of
15 the other motions, but I just don't recall it off the top of
16 my head.

17 DDC [LT DANIELSON]: Your Honor, we will provide that to
18 the court forthwith with the AE number and hopefully copies as
19 well for your review.

20 MJ [LtCol LIBRETTO]: Okay. So they've not been
21 submitted?

22 DDC [LT DANIELSON]: They've been submitted previously,
23 not in this Appellate Exhibit.

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

2 DDC [LT DANIELSON]: Plenty else, sir.

3 MJ [LtCol LIBRETTO]: Okay. Without going ----

4 DDC [LT DANIELSON]: You seem to have a specific question,
5 though.

6 MJ [LtCol LIBRETTO]: I do, and my questions are answered.
7 If there's anything else that is relevant and responsive to
8 those questions, I invite you to further explain your
9 position. But again, I want to narrow the focus of what we're
10 doing, what we're litigating here.

11 DDC [LT DANIELSON]: Yes, sir.

12 [Pause.]

13 DDC [LT DANIELSON]: So to answer Your Honor's primary
14 questions during this proceeding, what are we looking for?

15 We've made several requests, Your Honor, as the
16 commission is aware, for documents related to all these
17 matters. And again, the requests serve two general purposes:
18 One being the actual conditions of Mr. al-Tamir's confinement
19 but, two, the curious case of Rear Admiral Ring's sudden
20 firing after his publicly stated concerns about the conditions
21 of Camp VII.

22 Both issues are very relevant to the case, both
23 factually in a defense on the merits and also in a case on

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1 mitigation. Now, we believe that the conditions of Camp VII,
2 Rear Admiral Ring's investigation and subsequent actions
3 related to those conditions, the investigations and subsequent
4 actions of SOUTHCOM and superior agencies regarding the
5 conditions of Camp VII, and Rear Admiral Ring's statements,
6 and the firing of Rear Admiral Ring himself after publicly
7 stating his concerns about the lack of medical care, so we are
8 here before Your Honor requesting an order for the production
9 of these items forthwith.

10 We should also note, as the commission is aware, the
11 defense has made multiple requests to physically visit
12 Mr. al-Tamir's conditions of confinement as other defense
13 teams in other commissions have been allowed to do on numerous
14 occasions. These requests, the requests that Mr. al-Tamir and
15 his counsel have made, have been denied without much
16 explanation, leaving Mr. al-Tamir no choice but to file, as
17 the court is aware, AE 139, which is currently before the
18 commission.

19 We believe that at the very least the factual record
20 proves beyond a propensity, and perhaps more, that responsive
21 documents do exist and are in the possession of the United
22 States Government.

23 Again, responsive documents would include formal and

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1 informal JTF assessments of the physical structure of
2 Camp VII, Rear Admiral Ring's and JTF-GTMO's formal and
3 informal assessments of the medical facilities and
4 capabilities of Camp VII, correspondence within and between
5 any commands or agencies responsible for addressing these
6 matters, including JTF-GTMO and SOUTHCOM, and any actions
7 taken by those same commands or agencies responsible for these
8 matters, going so far as to include the decision to dismiss
9 Rear Admiral Ring should it be determined that his dismissal
10 was related to his concerns about the sufficiency of Camp VII
11 and the nature in which he expressed those concerns.

12 MJ [LtCol LIBRETTO]: Thank you, Lieutenant Danielson.

13 DDC [LT DANIELSON]: Thank you, sir.

14 MJ [LtCol LIBRETTO]: Government?

15 DTC [CDR FLYNN]: Commander Flynn for the government.

16 Your Honor, before I launch into factors I wanted you
17 to consider, I think it's important to correct several
18 misstatements and twisting of facts by the defense counsel.
19 This may be because of the newness of him being on the case,
20 but there's a few things I think that need to be pointed out.

21 First of all, Rear Admiral Ring never said that Hadi
22 was getting -- that the accused was getting inadequate care.
23 He was concerned about the long-term care of these detainees

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1 as they age.

2 I'm a little bit concerned, the government is a
3 little bit concerned about a number of new theories that the
4 defense counsel raised in his presentation that were not in
5 the pleading. They presented a theory in the pleading as to
6 why this information they requested was discoverable, and I
7 don't remember seeing anything about unlawful command
8 influence or outrageous conduct. That was not the theory that
9 they were putting forth as to why they were entitled to this
10 information.

11 Rear Admiral Ring never said that JTF couldn't meet
12 the needs of the accused. That was a misstatement. The
13 slides that they have, Your Honor, I don't believe they even
14 requested one and two. And there was a lot of information
15 defense counsel was talking about that was never requested,
16 either in the initial discovery request or the motion.

17 Your Honor, in their original motion, the defense
18 puts forth a theory that, quite frankly, is fantastical, if
19 that's a word. Pure fantasy. This -- before I launch into
20 that, Your Honor, I'd also like to point out they gave this
21 commission three reasons why this information was
22 discoverable. It was discoverable because it related to the
23 accused's conditions of confinement, his defense on the

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1 merits, and to a case of mitigation.

2 Now, we can throw out the defense on the merits
3 argument, because in the initial motion to compel that phrase
4 is mentioned one time. There is no analysis, no information,
5 no discussion on how this information requested on that issue
6 is relevant or material. The same is -- the same can be said
7 of the reply. No analysis, Your Honor, just bald assertions.

8 What they do discuss in their motion is how the
9 information requested is relevant to the accused's conditions
10 of confinement and mitigation. And when you closely examine
11 that, the theory, as defense counsel discussed somewhat, is
12 that this information is relevant because there's some
13 allegation, according to the defense, that Rear Admiral Ring
14 was fired in order for SOUTHCOM to hide that -- the
15 information about the deteriorating state of Camp VII, to hide
16 it from the American public, to hide it from you, Your Honor.

17 And that's the theory they put forth in the motion.
18 Again, they raised two new theories that I've never seen.
19 That was -- that's new information.

20 MJ [LtCol LIBRETTO]: Commander Flynn, much like I
21 narrowed the focus of Lieutenant Danielson's, I'd like to
22 narrow the focus just so we can cut to the chase.

23 DTC [CDR FLYNN]: Sure.

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1 MJ [LtCol LIBRETTO]: Does the government believe that
2 the -- generally that the conditions of the accused's
3 confinement is material to certain issues that might be
4 raised, to include mitigation on sentencing, such that if
5 there was an investigation and findings that perhaps Rear
6 Admiral Ring or somebody else initiated and that went into the
7 conditions of confinement and issues that are presented by
8 them, it would be discoverable? Or is that a wholesale
9 objection to any type of information concerning that?

10 DTC [CDR FLYNN]: Of course not, Your Honor. The
11 conditions of confinement -- the confinement of the accused,
12 I'm not arguing that that's not -- that that's not
13 discoverable. We've turned over massive amounts of discovery
14 with respect to the conditions of the accused.

15 Again, it's the defense's job to give us a theory of
16 relevance as to why that information is discoverable. That's
17 not on the government, Your Honor. The defense has to
18 articulate a theory of relevance. And I guess the point I'm
19 trying to make is the theory that they have articulated for
20 this information is pure fantasy.

21 MJ [LtCol LIBRETTO]: Well, they articulate one theory is
22 mitigation, to explain to the finder of fact, if sentencing is
23 required, what the accused's conditions of confinement have

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1 been like for an extended period of time. And I believe the
2 government just conceded that they too believe that would be
3 appropriate evidence to put before the members.

4 DTC [CDR FLYNN]: And that -- again, Your Honor, massive
5 amounts of that information have been turned over with respect
6 to the accused's conditions of confinement.

7 MJ [LtCol LIBRETTO]: Okay.

8 DTC [CDR FLYNN]: And I guess -- and I -- I know you're
9 understanding what my point is, which is this theory -- they
10 have to have a theory. They just can't say this is relevant
11 to mitigation. Why?

12 MJ [LtCol LIBRETTO]: Do you believe that if Rear Admiral
13 Ring -- and I don't know at this point if he had -- initiated
14 or created a report or an investigative report or a
15 preliminary inquiry or something along those lines, that
16 documented/memorialized the issues that he had, that that
17 would be discoverable?

18 DTC [CDR FLYNN]: Two answers to that, Your Honor. First
19 of all, I'm pretty certain that a document like that doesn't
20 exist. We've searched -- the government has requested that
21 JTF search for certain information.

22 Number two, I don't think that would be discoverable.
23 What would be discoverable is his public statements that were

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1 made on the -- on the conditions of -- and it's not just the
2 accused's confinement, it's the conditions of the prison
3 facilities. And ----

4 MJ [LtCol LIBRETTO]: Why would his public statements
5 concerning the investigation that he did be discoverable but
6 not the investigation or the findings of the investigation?

7 DTC [CDR FLYNN]: Again, Your Honor -- may I have one
8 minute?

9 MJ [LtCol LIBRETTO]: Sure.

10 [Pause.]

11 DTC [CDR FLYNN]: Sir, I would -- I'm a little confused as
12 to what you're asking me.

13 The investigation that took place had to do with ----

14 MJ [LtCol LIBRETTO]: I'm not talking about any
15 investigation that might have had to do with Rear Admiral
16 Ring's firing.

17 DTC [CDR FLYNN]: Okay.

18 MJ [LtCol LIBRETTO]: I'm talking about an underlying
19 investigation that Rear Admiral Ring may have based his public
20 comments on relative to the conditions of confinement.

21 So, for instance, if he were to have done a
22 walkthrough of Camp VII and then made these public statements,
23 the public statements alone form the basis for his -- or

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1 provide the nature of the evidence that he was relying upon.

2 But if his public statements are based on a more
3 comprehensive review initiated by him or someone else,
4 conducted by him or somebody else that memorialize specific
5 findings that then form the basis for his public comments,
6 that is what I'm trying to get at, not -- not an investigation
7 that may or may not have anything to do with why he was fired.

8 DTC [CDR FLYNN]: Understood. I understand now.

9 And the answer I believe I gave earlier was I don't
10 believe that exists. If that -- such an investigation by Rear
11 Admiral Ring took place, certainly there may be discoverable
12 information in that and probably some classified information
13 in that. If it exists, we will -- we would go through that
14 information or the report and discover -- and determine what
15 in that report was discoverable. Quite possibly we'd have to
16 go through the 505 process.

17 MJ [LtCol LIBRETTO]: Okay.

18 DTC [CDR FLYNN]: Your Honor, it doesn't seem like you're
19 much interested in this -- their original theory, in talking
20 about that.

21 MJ [LtCol LIBRETTO]: I would like to hear -- the final
22 piece that I'd like to hear your position on is the
23 representation regarding, number one, that the relief of Rear

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1 Admiral Ring had nothing to do with the public statements; and
2 then, number two, whether or not they did, whether or not
3 your -- the government's position is that any information
4 surrounding that -- that relief would be discoverable.

5 DTC [CDR FLYNN]: Yes, sir.

6 And to answer that question, I think we -- we need to
7 make sure we're all on the same page.

8 The defense has postulated the theory that Rear
9 Admiral Ring was fired because he was making these public
10 statements, and SOUTHCOM -- the commander of SOUTHCOM wanted
11 to hide the true state of Camp VII's condition from you and
12 from the American public. And I think you need to look at
13 whether that theory holds water.

14 Rear Admiral Ring -- Your Honor, here are the actual
15 facts in evidence. Rear Admiral Ring was not the first
16 person/commander to come up with this idea that there was a
17 deteriorating facility -- deteriorating facilities at
18 Guantanamo Bay for detainees and for the soldiers down here as
19 well. That's been in the public knowledge for years. DoD,
20 the Pentagon, have requested funding years ago, as far back as
21 2014, for detention facilities.

22 So this argument by the accused -- by the defense
23 that Rear Admiral Ring was some maverick, you know, rowing

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1 against the tide and against SOUTHCOM, is pure fantasy. And
2 that's what they based their -- that's their theory.

3 MJ [LtCol LIBRETTO]: Okay.

4 DTC [CDR FLYNN]: So ----

5 MJ [LtCol LIBRETTO]: Commander Flynn, going back to the
6 two questions that I have. Number one, the government
7 represented in its brief that the relief of Rear Admiral Ring
8 had nothing to do with his statements concerning the
9 conditions of confinement. And, in fact, I believe if my
10 memory serves, it was a -- on one hand, the government argued
11 based on reason and belief that it had nothing to do with it,
12 and yet -- or -- and on the other hand, it was not ripe yet
13 because that investigation had not concluded.

14 So what is the government's position at this point as
15 to the nature of the relief? Did it or did it not have
16 anything to do with his public statements?

17 DTC [CDR FLYNN]: Your Honor, of course not. The
18 government can categorically say that his relief by
19 Admiral Faller had absolutely nothing to do with this -- with
20 the -- with the case -- with this case. He was relieved, and
21 we've given the defense the executive summary of the JAG man.
22 He was relieved for mishandling classified information and not
23 being truthful with respect to classified information. It had

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1 nothing to do with this case.

2 MJ [LtCol LIBRETTO]: Okay. Let me turn it back over to
3 the defense briefly.

4 DTC [CDR FLYNN]: I'm sorry, Your Honor. And that's
5 AE 159C. We have attached that so you can look at that.

6 Any other questions, sir?

7 MJ [LtCol LIBRETTO]: Stand by a moment, please.

8 [Pause.]

9 MJ [LtCol LIBRETTO]: When was that filed?

10 DTC [CDR FLYNN]: Sir, that's -- it's been made an exhibit
11 to this. It's 159C. We received that report ourselves while
12 we were down here the first week.

13 [The military judge conferred with courtroom personnel.]

14 MJ [LtCol LIBRETTO]: Okay. Apparently it has not made it
15 through the filing pipeline such that -- I have not reviewed
16 it at this time. I have just been presented it.

17 [Pause.]

18 MJ [LtCol LIBRETTO]: Thank you, Commander Flynn. I have
19 no further questions. Thank you.

20 DTC [CDR FLYNN]: Sir, just one further item.

21 I think I mentioned that this was produced to the
22 defense last week. And I would also like to point out that
23 two prosecutors did travel to SOUTHCOM and reviewed the entire

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1 investigation and determined that there is no discoverable
2 information in the materials that they reviewed. This was --
3 the summary was given as a courtesy to the defense basically
4 in an effort to foreclose any further litigation on this
5 issue.

6 Thank you, sir.

7 MJ [LtCol LIBRETTO]: Commander Flynn, based on that
8 representation, I do have one more question.

9 Did the government come to the conclusion that it had
10 nothing to do with the -- Rear Admiral Ring's public
11 statements about the conditions of confinement or that the
12 government concluded no discoverable information existed?

13 DTC [CDR FLYNN]: The latter, sir.

14 MJ [LtCol LIBRETTO]: So ----

15 DTC [CDR FLYNN]: I'm sorry, Your Honor. Again, I didn't
16 go -- it wasn't me personally who went down there. I've been
17 informed that actually the former is our position. Both of
18 them.

19 MJ [LtCol LIBRETTO]: Both -- both of what?

20 DTC [CDR FLYNN]: We concluded that -- okay.

21 MJ [LtCol LIBRETTO]: It had nothing to do ----

22 DTC [CDR FLYNN]: The information in the report was not --
23 the information in the report was not discoverable, nor was --

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1 it was determined that his relief had nothing to do with his
2 public advocacy of, you know, improvements of detention
3 facilities.

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

5 Lieutenant Danielson, any brief follow-up?

6 DDC [LT DANIELSON]: Yes, sir.

7 Your Honor, with all respect, the government's
8 apparent misunderstanding of the nature of this request, as
9 evidenced by today's argument session, I think, is
10 indicative -- or is further displayed in their responses to
11 our pleadings.

12 We believe, as the court has suggested, this is
13 clearly discoverable on a very basic level. The nature of
14 Mr. al-Tamir's confinement is always discoverable, classified
15 or not, and should be turned over.

16 Your Honor, a point of note. We did find the
17 appellate exhibit referring to the e-mails, the evidence that
18 the court has requested, discussing the adequacy of the
19 physical and medical facilities. We respectfully point the
20 commission's attention to Appellate Exhibit 131E. These
21 contain e-mails between doctors and other staff at Camp VII
22 discussing the adequacy or lack thereof of the medical
23 facilities to be able to perform spinal surgery on

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1 Mr. al-Tamir safely.

2 I believe -- and please forgive me if I'm wrong, but
3 I believe in these e-mails there's a quote that essentially
4 one of the attending physicians was scared to perform surgery.
5 It scared the hell out of him. Forgive my language.

6 MJ [LtCol LIBRETTO]: Okay. So this -- these e-mails
7 aren't evidence of other information that exists, it's simply
8 an opinion that provides you the evidence that you need in
9 order to make the motions that you want to make?

10 DDC [LT DANIELSON]: Correct. I believe that's what the
11 court was asking for. I believe the court asked what evidence
12 do we have that there were questions about the adequacy of the
13 facilities.

14 MJ [LtCol LIBRETTO]: Okay. Fair enough. The commission
15 did ask that question. But more importantly to the litigation
16 of this issue is what establishes that there are more
17 discoverable materials out there that this court -- this
18 commission can actually grant relief in ordering produced?

19 DDC [LT DANIELSON]: Yes, Your Honor. We believe that it
20 defies common sense, and again, going along the lines of
21 questioning that the commission had itself to the government.
22 Rear Admiral Ring did not make structural assessments of the
23 physical facilities of Camp VII by himself. He's not an

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1 engineer by trade. He clearly had engineering help,
2 structural help, facilities management, architects, you name
3 it, who -- whatever specialists were available to give him
4 this information upon which to base his publicly made
5 statements. We believe we are entitled to those reports.

6 We have heard from our client himself that engineers
7 have visited the facilities, have made representations about
8 the condition of the foundation, the condition of the floors,
9 the power systems, and on and on. Again, going back to our
10 presentation, which we do hope Your Honor will take the time
11 to review in chambers, Rear Admiral Ring again did not make
12 these statements up in his own mind out of thin air. He was
13 given a basis upon which to make these statements.

14 There is absolutely going to be documentary evidence
15 supporting his beliefs. He would not have gone so publicly
16 with his concerns had there not been.

17 Responding to government's stance that the defense
18 did not present enough of a basis upon which to request these
19 documents, that we didn't express all possible legal theories
20 that would make these documents relevant, it's, of course, not
21 our responsibility to telegraph our entire case to the
22 government. We presented several very relevant theories,
23 including, of course, the most basic conditions of

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1 confinement. There are plenty more that we have not
2 discussed, more that will come as additional evidence is
3 received.

4 Finally, Your Honor, as to the government's
5 contention that defense counsel has misstated the facts as to
6 Mr. al-Tamir's personal medical care, it is Rear Admiral Ring
7 himself who stated that in his belief, in sum and substance,
8 the Geneva Conventions are not being met as it relates to all
9 Camp VII detainees. So, of course, that includes
10 Mr. al-Tamir.

11 We bring to the court's attention our presentation,
12 news reports that specifically reference Mr. al-Tamir and his
13 five spinal surgeries and Rear Admiral Ring's concern about
14 the adequacy of the facilities to perform future medical
15 procedures. So we're not making these things up. Again, this
16 is all in the public record and can easily be found. And
17 again, it defies common sense to believe that Rear Admiral
18 Ring made these statements up and that there's no
19 documentation of any such thing.

20 As it relates to the reason for Rear Admiral Ring's
21 firing, we did receive discovery a short time ago, a very
22 vague executive summary, not providing much in the way of
23 direct information as to the basis for Rear Admiral Ring's

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1 dismissal. Something about people just didn't like him and
2 didn't like his leadership style and that he wanted to route
3 communications from his command to superior commands through
4 himself, which people apparently did not like. And so those
5 were two of the main points made in the discovery.

6 It hardly seems serious enough to call a flag officer
7 into the office on a Saturday to fire him. It is also curious
8 that the firing happened the day after Rear Admiral Ring
9 invoked the Geneva Conventions and the United States' failure
10 to meet them. The timing of these events speak for
11 themselves, Your Honor, and we believe that provides us a
12 strong basis to request any documentation which we do believe
13 exists as to the reasons for these firings.

14 MJ [LtCol LIBRETTO]: Thank you, Lieutenant Danielson.
15 We'll take a 15-minute recess, at which time we'll come back
16 in and take up the final motion for this session, the motion
17 to compel expert mitigation assistance.

18 ATC [MR. SPENCER]: Your Honor, with apologies to the
19 commission. May I clarify one thing for the record in terms
20 of moving forward?

21 MJ [LtCol LIBRETTO]: Moving forward?

22 ATC [MR. SPENCER]: With respect to references just made
23 by defense counsel.

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1 Sir, the conditions of confinement and any reports
2 and any engineering structural -- anything that Admiral Ring
3 relied on to his -- for his public statements, as
4 Commander Flynn referenced, were never requested by the
5 defense. This is the first that we've heard of it. If there
6 are such documents or reports or an investigation, if -- even
7 if the defense doesn't request it, I can assure the commission
8 that the government will diligently search for such documents
9 as they relate to conditions of confinement, which certainly
10 would potentially contain discoverable information.

11 MJ [LtCol LIBRETTO]: Thank you.

12 The commission is in recess.

13 [The R.M.C. 803 session recessed at 1005, 28 August 2019.]

14 [The R.M.C. 803 session was called to order at 1018,
15 28 August 2019.]

16 MJ [LtCol LIBRETTO]: The commission will come back to
17 order. All parties present when the commission last recessed
18 are again present.

19 In AE 159, the defense moved the commission to compel
20 production of information related to the public statements
21 made by Rear Admiral Ring concerning the accused's conditions
22 of confinement. R.M.C. 701(c)(1) requires the government to
23 permit the defense counsel to examine, among other things, any

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1 books, papers, documents, photographs, tangible objects,
2 buildings, or places or copies thereof which are in the
3 possession, custody, or control of the government, the
4 existence of which is known or by the exercise of due
5 diligence may become known to the trial counsel which are
6 material to the preparation of the defense.

7 In AE 159, the defense moved the commission to compel
8 the underlying information relative to Rear Admiral Ring's
9 statements for the following three purposes: That is, to
10 explore his conditions of confinement; a defense on the
11 merits, which was largely overlooked by both the filing, and
12 the argument on the -- in the commission session today; but
13 more importantly, a case in mitigation.

14 The commission views and the rules on this issue
15 relative to those three theories of materiality. Having
16 reviewed the pleadings, heard argument, and reviewed the
17 evidence submitted by counsel, the court hereby -- the
18 commission hereby directs the government to conduct a search
19 or a request with the various different agencies that may be
20 in possession of reports or documents directly tied to the
21 accused's conditions of confinement that may have formed the
22 basis for Rear Admiral Ring's statements.

23 That is to say, if there are investigatory materials,

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1 reports from knowledgeable experts in various different fields
2 that opine or find as fact certain conditions that -- of the
3 deteriorating nature of Camp VII, the government shall
4 disclose them to the defense.

5 The commission does not find, based on the theories
6 relied upon by the defense, that the reasons behind Rear
7 Admiral Ring's relief are relevant to any of those three bases
8 of relevance. And, therefore, the commission denies any
9 information -- denies the production of any information
10 concerning why Rear Admiral Ring may have been relieved and
11 any communications or documents going to that issue.

12 Before moving on to the defense motion to compel
13 mitigation assistance, one matter to briefly close the loop on
14 that was outstanding was from yesterday relating to the
15 defense motion to compel information relevant to the defense
16 motion to disqualify the convening authority. The one
17 outstanding issue at that time, as the commission noted, was
18 whether or not the commission found any read-aheads of any
19 sort ahead of the moot court that Rear Admiral Reismeier
20 participated in, whether or not the commission was to find
21 that material to the issues at hand.

22 Having reviewed again the documents submitted in
23 support of the parties' motions as well as the arguments

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1 contained therein and the arguments placed on the record, the
2 commission does not -- the commission does not find it
3 material to its decision on the matter as to whether or not
4 Rear Admiral Reismeier may sit as the convening authority in
5 this case. And, therefore, the motion to compel that subset
6 of information is also denied.

7 Moving then to AE 150, does the defense have any
8 additional evidence to present?

9 DDC [MS. HENSLER]: Sir, we have no additional evidence to
10 present with respect to AE 150, but given that Your Honor has
11 put a few points of clarification -- excuse me, issued rulings
12 from the bench with respect to other motions, I would ask
13 either before or after argument on AE 150 to clarify one thing
14 put on the record yesterday with respect to AE 160.

15 MJ [LtCol LIBRETTO]: Okay. Not related to the rulings I
16 just put on the record. Something else?

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

18 MJ [LtCol LIBRETTO]: Okay. Let's -- just remind me after
19 we do -- take up AE 160 -- 150, and then I will allow you to
20 do it at that time.

21 DDC [MS. HENSLER]: Thank you.

22 MJ [LtCol LIBRETTO]: Government, any additional evidence
23 to present on AE 150?

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1 ATC [Capt SQUIRES]: No, sir.

2 MJ [LtCol LIBRETTO]: Defense, without reiterating what's
3 contained within the written filing, would you like to provide
4 any additional argument?

5 DDC [LT DANIELSON]: We would, Your Honor.

6 MJ [LtCol LIBRETTO]: You may proceed.

7 DDC [LT DANIELSON]: Your Honor, we do stand on our
8 pleadings. In addition to the pleadings, we'd like to bring
9 to the commission's attention modern thought on the need for
10 mitigation in noncapital cases.

11 We respectfully bring to the court's attention the
12 following. Under the standards that are currently promulgated
13 by the American Bar Association, defense counsel has a strong
14 duty to present any ground which will assist a judge or a jury
15 in reaching a proper disposition that is favorable to the
16 accused. This goes without saying in death penalty cases, but
17 scholarship and modern cases have looked to expand this
18 concern to noncapital cases, particularly in the federal
19 courts.

20 Modern cases now look to investigate into an
21 accused's childhood, upbringing, education, relationships,
22 friendships, formative experiences, traumatic experiences,
23 personal psychology, and present feelings. The case law also

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1 talks about the need to address these factors in noncapital
2 cases.

3 In Woodson v. North Carolina found at 428 U.S. 280, a
4 1976 case, the Supreme Court noted that in noncapital cases,
5 quote, for the determination of sentences, justice generally
6 requires consideration of more than the particular acts by
7 which the crime was committed and that there be taken into
8 account the circumstances of the offense, together with the
9 character and propensities of the offender, close quote. And
10 that's at page 304 of Woodson.

11 The Supreme Court again addressed the issue of
12 mitigation in noncapital cases in the 2005 case Booker found
13 at 543 U.S. 220, where the court effectively held that federal
14 sentencing mandates in noncapital cases violated a defendant's
15 Sixth Amendment right to a trial by jury.

16 The Booker court instead made the Federal Sentencing
17 Guidelines advisory and one of several factors that a court
18 should consider at sentencing. In addition to the Sentencing
19 Guidelines, however, the Booker court instructed judges in
20 noncapital cases to consider factors such as the history and
21 characteristics of the defendant and the nature and
22 circumstance of the offense.

23 The Booker case in essence, Your Honor, more formally

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1 introduced the concept of mitigation into federal noncapital
2 cases, and as a result, it expanded the defense team's role in
3 highlighting factors favoring the defendant in federal
4 sentencing. Saying all that, Your Honor, to say the need for
5 a strong mitigation case in noncapital cases has never been
6 more important and a mitigation expert has never been more
7 essential to the effective assistance of counsel in this case
8 under the Sixth Amendment.

9 It's important, Your Honor, to remember that the
10 defense will eventually -- assuming a finding of guilt in any
11 charge, that we will be presenting a case in mitigation to
12 nonlawyers. So scholars in current research agree that the
13 story of the accused's life and circumstances stripped of any
14 legalese is at the heart of effective sentencing in modern
15 cases, especially when there are members. Juries, member
16 panels are less focused on legal considerations regarding
17 appropriate ranges of punishment, unlike attorneys and judges.

18 Furthermore, Your Honor, in this case, as the
19 commission is aware, the attorneys detailed to represent
20 Mr. al-Tamir are not capital qualified. We need assistance in
21 fashioning an effective nonlegal mitigation case that will
22 resonate with a members panel, particularly a members panel
23 that is from such a subset of society as a members panel in a

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1 courts-martial or a military commission would be essentially
2 senior military officers in this case.

3 Their unique set of experiences, values, and training
4 would make it even more imperative that the defense has
5 additional assistance from an experienced mitigation expert to
6 prepare our case. We'd like to bring to the court's attention
7 for further review of these theories and subjects the
8 following legal articles: Hugh Mundy, Mundy spelled
9 M-U-N-D-Y. The article is, It's Not Just for Death Cases
10 Anymore found at 50 Cal. Western Law Review at 31, a 2013
11 scholarly writing. A Miriam Gohara, Gohara is spelled
12 G-O-H-A-R-A. The article is called Grace Notes: A Case for
13 Making Mitigation the Heart of Noncapital Sentencing, a 2013
14 Yale Law School article.

15 Now, turning to the -- the law that governs this
16 matter, Your Honor, briefly, there has been some
17 misunderstanding, we believe, by the government in applying
18 the correct standard of review. Also, a mistake in the review
19 of the convening authorities who have reviewed Mr. al-Tamir's
20 request for a defense mitigation expert, and we bring again to
21 the court's attention Mr. al-Tamir has requested this three
22 times over the past seven years in 2012 and 2017 and again in
23 2019.

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1 The Military Commissions Act of 2009 requires that
2 the accused should have the same opportunities available to a
3 criminal defendant in an Article III court to obtain witnesses
4 and evidence.

5 In an Article III court, Your Honor, the reasonable
6 attorney test is the proper standard to apply, not necessarily
7 the UCMJ test articulated in the government's briefs.
8 However, we believe under both tests the correct Article III
9 test, the reasonable attorney test, and the UCMJ standards we
10 meet both. And thus, the convening authority should have
11 approved our requests.

12 Under the reasonable attorney test, necessity for an
13 expert such as we've requested is found when counsel makes a
14 timely request for expert services that a reasonable attorney
15 would engage in, would the client have the independent
16 financial means to pay for them. And without question, I
17 don't think there's anyone here who would argue that had
18 Mr. al-Tamir had his own financial means to pay for a defense
19 mitigation expert to help his client -- his counsel prepare
20 for what could be a life sentence, should he be found guilty
21 of any offense, that he would pay for it himself.

22 The question then goes to is this reasonable? Is it
23 reasonable for counsel to request this assistance? And we

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1 think it is, very clearly.

2 First and foremost, Your Honor, the court has set an
3 aggressive litigation schedule, creating certain time
4 pressures on defense counsel, and understandably so. But
5 nonetheless, we're talking about one of the most complex -- if
6 not the most complex -- criminal litigation matters in U.S.
7 history.

8 The court is aware that sentencing begins right after
9 any potential finding on the merits. And so in essence, while
10 defense counsel has to prepare a case on the merits, we must
11 also simultaneously prepare a case in mitigation on this
12 complex matter. And with our lack of experience, with our
13 lack of additional resources, but particularly our experience,
14 we need assistance in preparing a mitigation case.

15 So is it reasonable under the federal standards?
16 Absolutely. And would Mr. al-Tamir pay for it? Without
17 question.

18 Going to the UCMJ standard, which is rather similar,
19 though just worded differently, we look at two or three
20 factors, depending on how the courts word the test. But
21 essentially courts look at whether the expert assistance is
22 needed, what it would accomplish, and why defense counsel
23 can't do it; again, very similar to the reasonable attorney

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1 test stated differently.

2 And we believe expert assistance is needed because of
3 counsel's general lack of experience, because the assistance
4 would greatly assist counsel and Mr. al-Tamir in creating an
5 effective mitigation case in this matter. And because of time
6 pressures, lack of experience, and lack of resources, we are
7 unable at this time to prepare such a case on our own.

8 Now, Your Honor, I'm sure the government will stress
9 the fact that this is a noncapital case, and we do not
10 disagree, at least in a very literal sense. But let's look at
11 this matter from a practical sense in consideration of the
12 accused, Mr. Nashwan al-Tamir. He is an older man,
13 approaching 60 years old. And any finding of guilt in this
14 case could potentially lead to an extensive sentence, if not a
15 life sentence, for Mr. al-Tamir.

16 So though not legally, not according to the letter of
17 the law, but according to the operation of the law, should
18 there be a finding of guilt, this is a case approaching a
19 death scenario. If Mr. al-Tamir is sentenced to life in
20 prison or sentenced to an extended -- an extended stay in
21 Guantanamo Bay after a finding of guilt, we would be looking
22 at his potential demise here in this place.

23 The only difference between an actual capital case

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1 and this case is the method of death, whether we rush death
2 along or whether death comes on its own. And so the nature of
3 this case, the severity of the potential sentences, and the
4 needs of Mr. al-Tamir and his counsel all point to treating
5 this as a quasi-death penalty case and providing the defense
6 appropriate resources so that we can meet the challenges that
7 we have been detailed to address.

8 Thank you.

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

10 Trial Counsel?

11 ATC [Capt SQUIRES]: Sir, good morning. Captain Squires
12 for the government.

13 MJ [LtCol LIBRETTO]: Good morning.

14 ATC [Capt SQUIRES]: Addressing briefly the standard that
15 is to be applied, both the law of the case and the applicable
16 law, are the three-prong tests stated in Gonzalez, briefed
17 extensively in our case. I would invite the commission and
18 opposing counsel to review -- I believe it's Appellate
19 Exhibits 090M and 103G for the law of the case in which this
20 commission has ruled as to what the standard for appointment
21 of expert assistance is.

22 The criminal defense attorney, whether historically
23 or under the modern view espoused by the defense which we

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1 dispute, is not in any way a modern or accurate reflection of
2 the understanding of the law. The criminal defense attorney
3 is the most capable and effective mitigation expert that is
4 available today. And the accused currently is represented by
5 six that we know of in addition to analysts, paralegals,
6 investigators, and experts that have already been appointed to
7 the defense in the field of Islamic studies.

8 Sitting across the bar from us is what I would call
9 the most capable and formidable defense team ever provided a
10 noncapital indigent defendant. They are certainly capable of
11 performing the duties that are listed in their motion, which
12 are Basic Defense 101. To assess the strength of the
13 government's case, to develop cross-examination and sentencing
14 strategies, is the job of a defense attorney. And the defense
15 has failed to show why this requested expert is required to do
16 something that the defense can do themselves; indeed, that at
17 this stage of the case, that the defense should already have
18 done themselves.

19 I would remind the commission that just days ago, the
20 defense represented to the commission that another counsel
21 could depart the case without delaying the ability of the
22 defense to comply with deadlines, and yet immediately they
23 invoke timelines and ability to prepare within those timelines

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1 as justification for their relief here. They cannot speak
2 outside of both sides of their mouths this way.

3 If this expert assistance was necessary, the defense
4 could not have represented to the commission that
5 Lieutenant Askar could leave the case without prejudice. It's
6 as simple as that.

7 I would also add that the expert and resources issues
8 have been raised historically throughout these proceedings.
9 In April 2018, during oral argument on Appellate Exhibit 111
10 when seeking abatement, then-lead defense counsel made the
11 claim that is present in Appellate Exhibit 150 and 150B, the
12 defense reply, that every prior iteration of counsel had been
13 ineffective. But if you need the transcript at 1981, that
14 counsel assured the commission that the current defense team
15 was working diligently to prepare for trial.

16 He also claimed that Ms. Hensler, who is a highly
17 qualified and highly experienced defense counsel, had been on
18 the team since approximately 2017. He stated that -- in the
19 transcript at 1989 that the litigation order forces us to
20 raise this, but the constitutionally adequate defense of
21 Mr. al-Tamir began in November 2016. He conceded at page 1991
22 and 1992 of the transcript ----

23 MJ [LtCol LIBRETTO]: Slow down.

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1 ATC [Capt SQUIRES]: Aye-aye, sir.

2 MJ [LtCol LIBRETTO]: Thank you.

3 ATC [Capt SQUIRES]: That the defense did have an expert,
4 something that I believe they claim they lack in Appellate
5 Exhibit 150. And he conceded in the transcript at page 2015
6 to 2016 that Professor Brian Glyn Williams had been appointed
7 as an expert in Islamic studies, and it's our belief, based on
8 a later defense discovery request, defense request 40, that
9 Professor Williams had been replaced by Mr. Felix Kuehn, who
10 is an expert allegedly in the cultural and Islamic studies
11 that they invoke as justification for this expert.

12 The bottom line is that the defense has a burden of
13 proof, not a burden to come up with hypothetical to-do lists
14 for the commission. They have to show that the expert would
15 actually do something, that there is a bona fide, as opposed
16 to theoretical, need for the expert, and the laundry list of
17 tasks that they present this commission and proclaim that
18 they're unable to do and that only a forensic psychologist is
19 able to do are simply not compelling.

20 The defense team is very capable and by now should
21 have already done this. The three-prong test that is the law
22 of the case and the law of the commission has not been met.
23 There is no bona fide need. There is no showing of what this

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1 expert would actually accomplish and there is no showing that
2 the defense cannot do this themselves. And to simply throw up
3 their hands and say we are unable, without any explanation or
4 details as to why, is a failure to meet the burden of proof.

5 The defense motion should be denied.

6 MJ [LtCol LIBRETTO]: Thank you, Captain Squires.

7 ATC [Capt SQUIRES]: Thank you, sir.

8 MJ [LtCol LIBRETTO]: Lieutenant Danielson?

9 DDC [LT DANIELSON]: Briefly, Your Honor.

10 Again ----

11 MJ [LtCol LIBRETTO]: Before ----

12 DDC [LT DANIELSON]: ---- we rely on our pleadings ----

13 MJ [LtCol LIBRETTO]: Lieutenant Danielson, just let me
14 ask a couple of questions of you before you make your closing
15 comments.

16 Captain Squires represented that there's been an --
17 one expert appointed in Islamic studies. The commission has
18 appointed a medical doctor to the defense team for purposes of
19 establishing -- or for mitigation purposes.

20 Are there any other experts that have been appointed
21 to the defense that the commission might not be aware of that
22 were done outside of the scope of a motion to compel?

23 DDC [LT DANIELSON]: One second, please, Your Honor.

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1 We believe so, Your Honor, but none of those experts
2 have mitigation skills. The court -- or the commission
3 has ----

4 MJ [LtCol LIBRETTO]: What experts have been provided to
5 the defense team?

6 DDC [MS. HENSLER]: Sir, I don't have a list in front of
7 me, but we have been afforded funding by the new convening
8 authority for certain technical experts, for instance, so that
9 we could litigate potential Daubert motions, and another
10 expert to rebut the government's expert on al Qaeda. And,
11 sir, that's all the experts I remember off the top of my head.

12 But again, these are experts that go to the case --
13 government's case in chief and to rebutting that and to -- not
14 to mitigation. The only mitigation expert we have right now
15 is funding for the neurosurgeon as Your Honor ordered.

16 MJ [LtCol LIBRETTO]: Okay. Go ahead.

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

18 Again, we've listed in our pleadings some of the
19 myriad ways in which the defense counsel is unable due to a
20 lack of skill and knowledge, a lack of experience as to why we
21 need mitigation support. None of us have dealt with -- in any
22 great length the understanding of torture most of all and how
23 it affects an individual such as Mr. al-Tamir. This is

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1 something that we have virtually no experience between the six
2 attorneys detailed to the case.

3 Furthermore, there are issues involving a war zone or
4 obviously Iraq and Afghanistan, areas that military counsel
5 have essentially never been detailed to, have had no
6 involvement in in any manner. And how those -- those areas
7 may come into play in presenting a mitigation case.

8 We could go on and on. And again, we have presented
9 a presentation in the appellate exhibits. We ask that the
10 court review those in addition to our pleadings for further
11 exposition into those questions.

12 MJ [LtCol LIBRETTO]: Lieutenant Danielson, I would like
13 to address one matter contained within your pleading because
14 the commission has been provided differing accounts on the
15 status of any investigative assistance that might be available
16 to the defense.

17 DDC [LT DANIELSON]: My understanding is that we have
18 recently brought on board an investigator. He is brand new to
19 the team, brand new to the case. I don't believe he has all
20 clearances yet and so can't participate fully in the
21 preparation of the case. That usually takes anywhere from 12
22 to 24 months often.

23 He has some clearances but not all clearances

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1 required; and unfortunately, there have been delays in
2 receiving those clearances.

3 MJ [LtCol LIBRETTO]: That's not the only expert
4 assistance that this defense -- I mean, whether or not the
5 defense organization internally has detailed a specific
6 investigator to a defense team, putting that issue aside,
7 there are a number of investigators that are generally
8 available to assist the defense in its investigative efforts;
9 is that correct?

10 DDC [LT DANIELSON]: No, sir, that isn't. Each team must
11 be detailed their own individual investigator. There are
12 conflict issues, as the commission could imagine. So we each
13 have our own staff generally to work with.

14 MJ [LtCol LIBRETTO]: And just recently is the first time
15 that this defense team has been provided an investigative
16 assistance?

17 DDC [LT DANIELSON]: I believe he was hired ----

18 DDC [MS. HENSLER]: Sir, Lieutenant Danielson only
19 recently joined our team ----

20 MJ [LtCol LIBRETTO]: Sure.

21 DDC [MS. HENSLER]: ---- so he's not familiar with
22 the ----

23 MJ [LtCol LIBRETTO]: Yeah, if you can please provide me

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1 some background.

2 DDC [MS. HENSLER]: So we did have a contractor on staff
3 for a period of time, but he had no defense background at all
4 and performed basically none of the tasks that would be
5 necessary to fulfill the duties of a defense investigator.
6 That is why the convening authority -- it's my understanding
7 that's why the convening authority afforded the MCDO money to
8 hire our own GS investigators.

9 We have done that. We have hired an investigator.
10 He started a few weeks ago. He has a TS//SCI clearance. He
11 is a veteran. And the only impediment to him beginning his
12 work is an SAP read-on, which has been delayed. But he too
13 does not have -- well, he has some experience relevant to
14 the -- litigating the case in -- government's case in chief.
15 He does not have any experience working with torture victims,
16 he does not have any -- and he does not have any experience
17 with litigating sort of fleshing out issues related to
18 religion and the things that we would need to present to a
19 panel. So that's why we've requested outside assistance.

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

21 DDC [LT DANIELSON]: Anything else, Your Honor?

22 MJ [LtCol LIBRETTO]: No. That's it.

23 DDC [LT DANIELSON]: Thank you, sir.

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1 MJ [LtCol LIBRETTO]: Thank you. I believe that that
2 concludes all of the matters that we were -- had on the docket
3 for this session's agenda. Does either side have anything to
4 take up before this commission stands in recess until October?

5 Oh, I'm sorry. Ms. Hensler, you did.

6 DDC [MS. HENSLER]: Yes, sir. One point of clarification,
7 and this relates to AE 160, which I inartfully merged with the
8 argument on AE 158 yesterday.

9 Sir, our position is that R.M.C. -- the record
10 establishes that disqualification and recusal are necessary
11 under R.M.C. 902(1)(a). 902(1)(a) states explicitly that a
12 military judge shall disqualify himself in any proceeding in
13 which the military judge's impartiality might reasonably be
14 questioned. Therefore, it's our position that under
15 902(1)(a), Your Honor must disqualify and recuse yourself.

16 The rule establishes that disqualification and
17 recusal are not discretionary but mandatory and that
18 particular remedy is independent of dismissal or a vacatur of
19 the orders in this case. We continue to assert that dismissal
20 is also required.

21 MJ [LtCol LIBRETTO]: Okay. I understand your argument
22 and clarification. Thank you.

23 And with that, is there anything to bring up by

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1 either side before the commission stands in recess?

2 TC [CDR SHORT]: Nothing from the government, Your Honor.

3 DDC [MS. HENSLER]: No, Your Honor. Thank you.

4 MJ [LtCol LIBRETTO]: Very well. The commission is in
5 recess.

6 [The R.M.C. 803 session recessed at 1051, 28 August 2019.]

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