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1 [The R.M.C. 803 session was called to order at 1003,  
2 6 March 2019.]

3 MJ [LtCol LIBRETTO]: This commission is called to order.  
4 All parties present when the commission last recessed are  
5 again present including the accused. He is represented today  
6 by Ms. Hensler, Lieutenant Askar, and Lieutenant Ball, all of  
7 whom are present and were present at the last session.

8 I will also note that Captain Corey Squires, whose  
9 detailing is memorialized in Appellate Exhibit 003K, is also  
10 present and has joined the prosecution team. Captain Squires  
11 stated his legal qualification and status for the commission  
12 during the M.C.R.E. 505(h) session held yesterday, ahead of  
13 today's motions litigation. He was also sworn at that time.

14 Trial Counsel, would you please note for the record  
15 where the proceedings are being transmitted to by  
16 closed-circuit television.

17 TC [CDR SHORT]: Yes, sir, Your Honor. These proceedings  
18 are being transmitted stateside via CCTV to remote viewing  
19 sites at Fort Meade, Maryland and Fort Devens, Massachusetts,  
20 pursuant to the commission's order Appellate Exhibit 005I.

21 MJ [LtCol LIBRETTO]: Thank you very much.

22 Before moving on to the substantive matters that  
23 we're going to take up, I'll briefly describe the occurrences

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1 since last session.

2 A Rule for Military Commission 802 conference was  
3 held at 1300 on 14 January 2019. The military judge and both  
4 parties were present. The accused was not present.

5 Due to the health status of the accused at that time,  
6 the commission recessed prior to hearing oral argument on  
7 Appellate Exhibits 019, 024 and 085. The commission directed  
8 the parties to file supplemental briefs in lieu of oral  
9 arguments on these motions. Those supplemental briefs have  
10 been filed since the last session.

11 The commission also discussed scheduling -- the  
12 scheduling of future hearings with both parties in order to  
13 take into consideration Ms. Hensler's pregnancy. Ms. Hensler  
14 informed the commission that the first week of the scheduled  
15 March 2019 session was preferable, as opposed to the second  
16 week, which this commission took into consideration when it  
17 modified this week's session.

18 Commission also discussed other changes to the  
19 calendar year scheduling order. It has since cancelled the  
20 April and May 2019 session and has made modifications to the  
21 July session. It also extended the August 2019 session, all  
22 based on discussions during that R.M.C. 802 conference.

23 Ms. Hensler indicated the defense intended to submit

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1 a motion to continue hearings in the near future, outlining  
2 conflicts and justifying proposed adjustments to both the  
3 litigation schedule and the scheduling order. That motion has  
4 since been filed and will be taken up during the course of  
5 litigation today.

6 A second Rule for Military Commission 802 conference  
7 was held at 1700 on 4 March 2019. The military judge and both  
8 parties were again present. The accused was not present.

9 The government informed the commission that the  
10 accommodations for the accused described in AE 131V are in  
11 place; that the accused had declined to be moved that evening,  
12 but said he would be present for the session on 5 March. In  
13 fact, the commission did not come to order on 5 March, and we  
14 are here today.

15 The defense also wanted an opportunity to view those  
16 accommodations and may raise an issue on the record with  
17 respect to them. The commission directed the defense to work  
18 with the government counsel to coordinate the opportunity to  
19 view those accommodations.

20 The commission also directed both parties to submit  
21 supplemental M.C.R.E. 505 notices by 1000 yesterday in order  
22 to provide the commission a better understanding of the  
23 classified information sought to be disclosed during argument

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1 on the various motions, and to allow the government the  
2 opportunity to exercise its options under M.C.R.E. 505.

3           Following the submission of these supplemental  
4 filings, the commission conducted an M.C.R.E. 505 session on  
5 5 March, yesterday afternoon. We also discussed the remaining  
6 schedule for the week, to include this session today and the  
7 potential for a closed session tomorrow depending on the  
8 matters that we address today and any outstanding matters that  
9 involve classified information.

10           Finally, a third R.M.C. 802 conference was held this  
11 morning pursuant to the commission's order in Appellate  
12 Exhibit 143R. During this session the parties and the  
13 military judge briefly discussed the 505 measures that the  
14 government potentially would be requesting, as well as their  
15 position on the 505 process as it currently stands, in light  
16 of the commission's order in 143R.

17           The military judge also informed the parties of  
18 the -- of its intent in proceeding today, specifically that we  
19 will take the matters up in numerical order with few  
20 exceptions that I will explain on the record in a moment.  
21 That was based on a discussion and a request by the defense  
22 that they requested more time before litigating and moving on  
23 to Appellate Exhibits 135 and 141, which the commission notes

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1 and has informed the parties that it will be taking them up  
2 later today after an extended recess.

3 Finally, Ms. Hensler notified the military judge of a  
4 concern of hers with the accused's health status this morning,  
5 explaining that there was some delay in the accused's both  
6 arriving here at the Expeditionary Legal Center as well as a  
7 delay in their opportunity to meet with the accused this  
8 morning.

9 She also explained that he was on various medications  
10 that in some way cloud his ability to understand things that  
11 are being said to some level, although she did inform the  
12 military judge that she was able to hold a conversation with  
13 him such that he was able to understand and follow what she  
14 was saying and discuss the -- this morning's events with her.

15 She did inform the military judge upon inquiry that  
16 she had a concern with proceeding in light of his medications  
17 this morning, and requested that the military judge conduct a  
18 brief voir dire or discussion with Mr. Hadi in order to  
19 ascertain for the commission's own purposes whether or not we  
20 should proceed this morning or delay.

21 Counsel for either side have anything to add or  
22 correct based on the commission's R.M.C. 802 conferences since  
23 the last session?

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

2 DDC [MS. HENSLER]: Your Honor, I'd like to add two items.

3 With respect to the January 14th, 2019, 802 session, it's  
4 worth noting that the court was open to my request to shorten  
5 this hearing and to cancel the April/May hearing; however, the  
6 government proposed that the court compel Mr. Adam  
7 Thurschwell, former counsel on this case, to appear, since the  
8 court had not yet ruled on his excusal. And the court made  
9 adjustments to schedule anyway.

10 I'd also like to note that I -- this morning at our  
11 802 session -- specifically informed the court that  
12 Mr. al-Tamir this morning has taken -- has been administered  
13 Valium, Flexeril and Percocet, and he's in a great deal of  
14 pain after being restrained in the van outside of the  
15 courtroom for approximately 35 minutes.

16 MJ [LtCol LIBRETTO]: Thank you, Ms. Hensler. We might  
17 take up that matter this afternoon after we have an  
18 opportunity to potentially hear from various witnesses  
19 involved in that issue, but for the time being we will  
20 proceed.

21 Mr. Hadi, good morning. I have -- I understand that  
22 you had some time, albeit a bit more limited than I had hoped  
23 for, to meet with your counsel this morning to discuss the

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1 matters that we'll be taking up today.

2           However, before we get there, I want to advise you,  
3 as I have done in previous sessions, that you have the right  
4 to be present during all sessions of this commission. If you  
5 request to be absent from any session, your absence must be  
6 voluntary and of your own free will.

7           Your voluntary absence from any session of the  
8 commission is an unequivocal waiver of your right to be  
9 present during that session. Your absence from any session  
10 may negatively affect the presentation of the defense in your  
11 case, and your failure to meet with and cooperate with your  
12 defense counsel may also negatively affect the presentation of  
13 your case.

14           Under certain circumstances your attendance at a  
15 session can be compelled, regardless of your personal desire  
16 not to be present. Regardless of your voluntary waiver to  
17 attend a particular session of the commission, you have the  
18 right at any time to decide to attend any subsequent session.

19           Finally, I will note, as I have in the past, your  
20 medical providers have routinely advised that the most  
21 effective way to minimize the risk of back spasms and pain  
22 from occurring is to not remain in a static position for an  
23 extended period of time. That means adjusting your position,

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1 standing up, stretching or lying down. In light of your  
2 condition and the recommendations of your medical providers,  
3 it will not be considered disrespectful in any way, even if  
4 you do so in the middle of the sessions on the record. I am  
5 encouraging you to do so.

6 In fact, if you fail to do so and you experience back  
7 spasms as a result that prevent your attendance at a session  
8 of court today or perhaps even tomorrow, it may be considered  
9 in any determination that I have to make in whether your  
10 absence is voluntary.

11 It is my sincere goal for you to be present at every  
12 session of this commission, and certain accommodations have  
13 been afforded to you to that end. But ultimately it is up to  
14 you to take advantage of those accommodations and I sincerely  
15 encourage you to do so.

16 Do you understand what I have just explained to you?

17 ACC [MR. HADI]: Yes. I understood, Your Honor.

18 MJ [LtCol LIBRETTO]: Now, Mr. Hadi, Ms. Hensler has  
19 explained to me that you have taken some medications this  
20 morning, specifically Percocet and Valium, I believe, that  
21 have in the past been explained to me to make you drowsy.

22 Are you feeling drowsy this morning?

23 ACC [MR. HADI]: Yes.

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1 MJ [LtCol LIBRETTO]: Notwithstanding your feeling of  
2 drowsy, you did understand the extended advisement that I just  
3 provided to you, correct?

4 ACC [MR. HADI]: Yes, I understood the advisement, because  
5 it is repeated every session.

6 MJ [LtCol LIBRETTO]: And you understand the conversation  
7 that we're having now?

8 ACC [MR. HADI]: Simple matters I would understand, but if  
9 things become complicated, I will not be able to understand  
10 it.

11 MJ [LtCol LIBRETTO]: Okay. Thank you for that, Mr. Hadi.  
12 And if during the course of the litigation today, if at any  
13 time you needed a moment to speak with your counsel for them  
14 to further explain any matters that we're addressing, just let  
15 them know, and we can -- I will afford them the opportunity to  
16 discuss those matters with you. Do you understand?

17 ACC [MR. HADI]: Yes.

18 MJ [LtCol LIBRETTO]: Given the nature of the motions that  
19 we will be taking up today, as well as the commission's  
20 understanding of the effects that the medications he is  
21 currently on have on him, based on medical testimony that the  
22 commission has received in the past, the military commission  
23 is confident that we can proceed today with the understanding

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1 that if at any time Mr. Hadi would like to discuss the matters  
2 in further detail or go over them with counsel at any time  
3 during today's session, I will afford him the opportunity to  
4 do so.

5 DDC [MS. HENSLER]: Your Honor, the defense notes an  
6 objection to moving forward this morning.

7 MJ [LtCol LIBRETTO]: I'm sorry?

8 DDC [MS. HENSLER]: The defense notes an objection to  
9 moving forward this morning.

10 MJ [LtCol LIBRETTO]: Okay. It's noted for the record.

11 AE 143 and AE 143N, the original and admitted  
12 docketing orders for this hearing list 13 motions and  
13 appellate exhibits we will be addressing this week.

14 In AE 143B, filed 22 February 2019, the defense  
15 submitted a motion requesting a Military Commission Rule of  
16 Evidence hearing 505(h) with respect to several motions. In  
17 AE 143N, the defense filed additional notices for the AE 135,  
18 136, 137, 138, 139, 140, and 141 series.

19 In AE 143A, filed 27 February, the government  
20 submitted its own motion requesting a Military Commission Rule  
21 of Evidence 505(h) hearing be held prior to taking  
22 unclassified oral argument on the docketed motions, as nearly  
23 all of the docketed motions involve either directly or

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1 tangentially classified information. The commission granted  
2 each party's request for a 505(h) hearing in the amended  
3 docketing order AE 143N.

4 Per the M.C.R.E. 802 session held on 4 March, and as  
5 explained during the 802 summary a moment ago, both parties  
6 filed supplemental notices, after which the commission held  
7 that 505 hearing yesterday to determine the use, relevance,  
8 and admissibility. The commission's findings in that regard  
9 are outlined in AE 143R.

10 As discussed during this morning's R.M.C. 802  
11 conference, the commission plans to take up the outstanding  
12 motions in numerical order with a few exceptions, including  
13 110, 135, and 141, that would be reserved for litigating later  
14 on today.

15 Before moving on to taking up these motions, and  
16 notwithstanding the commission's findings in AE 143R  
17 pertaining to the classified evidence, the defense sought to  
18 rely upon for its motions, the commission notes, as the  
19 government has, that certain motions may nonetheless implicate  
20 classified information during argument separate and apart from  
21 the evidence presented to the commission in AE 137.  
22 Accordingly, we will take up each of the requested motions,  
23 most of which can be taken up in their totality during this

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1 open session.

2 If either party believes that further argument, which  
3 includes classified information, is necessary for the  
4 commission to fully understand the respective parties'  
5 position, they're directed to inform the commission at the  
6 close of your arguments on each motion before taking a seat.

7 Finally, I advised the parties that it is unnecessary  
8 to cover the same arguments provided in their pleadings.

9 With that, moving on to the first motion to take up  
10 this morning, AE 079. AE 079 is a defense request for the  
11 commission to compel production of Defense Sixteenth  
12 Supplemental Discovery Request, dated 25 January 2017.

13 In AE 079A, the government requested the commission  
14 deny the defense motion as it believes, in pertinent part,  
15 that it has already produced all discoverable information  
16 either directly to the defense or to the military judge, and  
17 subsequently disclosed via the M.C.R.E. 505 process.

18 The defense replied in AE 079B.

19 Of note, the commission originally heard oral  
20 argument on 25 April 2017 and subsequently issued AE 079D,  
21 which deferred a final ruling because there was still ongoing  
22 discovery pending, the M.C.R.E. 505 review process.

23 Nothing had been addressed with 079 until recently

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1 when the commission sought clarity by issuing 079E, ordering  
2 the parties to articulate their views as to the status of the  
3 discovery requested in the original AE 079.

4 In AE 079F, the defense stated the government has not  
5 provided a written response to the Sixteenth Supplemental  
6 Request for Discovery, dated January 17.

7 In AE 079G, the government stated it had reviewed its  
8 records and provided all information determined to be  
9 discoverable either via the M.C.R.E. 505 summary and  
10 substitution process or otherwise.

11 Does the defense wish to be heard further on the 079  
12 series?

13 DC [LT ASKAR]: Yes, Your Honor.

14 MJ [LtCol LIBRETTO]: You may proceed.

15 DC [LT ASKAR]: Lieutenant Askar on behalf of  
16 Mr. al-Tamir, Your Honor.

17 In AE 079D, this commission's ruling, the commission  
18 acknowledged that the al Qaeda command structure, the  
19 terrorist training camps, the guesthouse, and the structure of  
20 the al Qaeda Senior Advisory Council, to include policies and  
21 objectives, were discoverable material. The commission agreed  
22 that to the extent that information exists, it would be  
23 discoverable.

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1           I think one of the things that is going to focus our  
2 inquiry today, Your Honor, is something that you acknowledged  
3 in your introduction of this motion, and that's that to date,  
4 the government still has not provided a response to the  
5 Sixteenth Supplemental Discovery Request.

6           Now, the reason that's important, Your Honor, is  
7 in -- I believe it's AE 079G, the government's most recent  
8 response, they claimed that they've reviewed, they searched,  
9 and they believe that some of the information that we  
10 requested is discoverable and some of it is not discoverable.  
11 Well, Your Honor, that lack of specificity, that lack of  
12 particularity, is what's going to make this inquiry today more  
13 difficult.

14           The issue that we run into in AE 079 -- and you're  
15 going to see this issue, Your Honor, in AE 080, you're going  
16 to see this issue in AE 140, you're going to see this issue in  
17 a number of motions to compel discovery -- is that the  
18 government refuses to make an explicit decision with respect  
19 to discovery and disclosure. They refuse to make an explicit  
20 decision as to what they are not turning over. They refuse to  
21 acknowledge to this commission and to the defense what  
22 information may be in their possession that they do not  
23 believe is discoverable.

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1           And where we run into an issue here, Your Honor, is  
2 in terms of pure practicality. The mechanics of this process  
3 are such that they demand more of a showing from the  
4 government. The government makes a number of claims,  
5 essentially accusing the defense of requesting that they  
6 provide us with the information to a point of particularity  
7 such that they -- we want them to in some way do our jobs.  
8 And that's simply not the case, Your Honor.

9           The defense has conducted a thorough review of the  
10 discovery presented. And it is our position in front of this  
11 commission that the items specifically requested in the  
12 Sixteenth Supplemental Discovery Requests and in a number of  
13 the motions to compel discovery that you're going to hear  
14 today, that the government has not complied ----

15       MJ [LtCol LIBRETTO]: With all of them?

16       DC [LT ASKAR]: Your Honor, we can go into the specifics  
17 of each one, if you would like.

18       MJ [LtCol LIBRETTO]: What I would like you to do, because  
19 it was not included in the motion, is specifically identify  
20 what it is that you believe the government has not provided  
21 you discovery of.

22       DC [LT ASKAR]: Yes, Your Honor. I'm happy to go point by  
23 point through the discovery request if Your Honor would find

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1 that to be helpful.

2 MJ [LtCol LIBRETTO]: Well, I need to know what it is that  
3 you're specifically requesting this commission order  
4 production of and the articulable basis to believe that it  
5 exists.

6 DC [LT ASKAR]: Yes, Your Honor.

7 So I can go -- and I will pull the -- I have the  
8 Sixteenth Supplemental Discovery Request, which is included as  
9 an attachment to the original AE 079 series. I believe it is  
10 Attachment B. Within that, Your Honor -- Your Honor, may I  
11 have one moment?

12 MJ [LtCol LIBRETTO]: You may.

13 DC [LT ASKAR]: I appreciate it.

14 [Pause.]

15 DC [LT ASKAR]: Your Honor, so to take the first example  
16 presented, all memoranda, correspondence, cables, e-mails,  
17 notes or other documents, to include photographs, charts,  
18 sketches or drawings in the possession of the Office of the  
19 Chief Prosecutor, the Office of the Convening Authority, the  
20 Central Intelligence Agency, and the Federal Bureau of  
21 Investigation, the Department of Justice, and the Department  
22 of Defense or any other government agency that depict the  
23 al Qaeda command structure, to include, but not limited to,

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1 how to join al Qaeda, the advancement within al Qaeda, taking  
2 command within al Qaeda, or being chosen -- as is referred to  
3 in some of the charging documentation -- an Emir within  
4 al Qaeda.

5           Your Honor, I think the government's response is  
6 actually extremely revealing on this point. Now, it is our  
7 position that we have not been provided information that may  
8 be within the possession of any of these agencies with respect  
9 to the command structure, how to join al Qaeda, the  
10 advancement -- how someone is chosen for advancement.

11           The reason these things are material, Your Honor, was  
12 discussed in AE 079 in the initial, and I can certainly go  
13 into greater detail today. But as we look at the government's  
14 response, Your Honor, what we see is -- you know, they refer  
15 to documents, they go, well, you have statements that were  
16 provided during the course of the 505 process, so summaries of  
17 statements, and that those should be sufficient.

18           Those responses, Your Honor, are directly -- those  
19 responses very clearly do not satisfy the contemplated  
20 material. They very clearly do not satisfy the requested  
21 material.

22           And if the government's position is going to be  
23 consistently, Your Honor, that they have provided over 100,000

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1 pages of discovery and it's in there somewhere, well, then,  
2 Your Honor, if they had an AE 080, I think the thing that  
3 needs to happen is a formal response that lays out what they  
4 believe is discoverable and is not discoverable. And then we  
5 can talk with particularity, Your Honor, about, hey, here's  
6 what hasn't been provided.

7 And if the government disagrees with us, then they  
8 can say for themselves, well, these are the documents -- as  
9 they did with respect to K in the discovery request -- these  
10 are the documents we believe satisfy that request, and we can  
11 point out, Your Honor, how they haven't.

12 MJ [LtCol LIBRETTO]: Okay. That point is well taken.

13 Are you aware of anything contained within your 079  
14 discovery request where you have received some form of  
15 evidence that suggests other evidence exists that you have not  
16 received?

17 DC [LT ASKAR]: Your Honor, so I can point to some things.  
18 I'm a little concerned about doing so in an open session.

19 MJ [LtCol LIBRETTO]: Okay.

20 DC [LT ASKAR]: I can point to -- I can direct the court  
21 to certain numbers ----

22 MJ [LtCol LIBRETTO]: You have not -- you have not alerted  
23 this commission to those items?

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1 DC [LT ASKAR]: I have not, Your Honor, and I -- I believe  
2 I can refer to some things. But pursuant to the court's  
3 question as to whether or not I believe some of those things  
4 exist, I do. Pursuant to whether or not I can discuss them in  
5 this session, I am not certain, Your Honor. And I just want  
6 to make sure, in an abundance of caution, that I am not  
7 causing any sort of information spill.

8 MJ [LtCol LIBRETTO]: Okay. I understand your concern and  
9 the issues. I want to hear from the government briefly before  
10 we even entertain the idea of doing that.

11 DC [LT ASKAR]: Thank you, Your Honor.

12 MJ [LtCol LIBRETTO]: Trial Counsel, who will be taking up  
13 this matter?

14 DTC [CDR FLYNN]: I will, Your Honor.

15 MJ [LtCol LIBRETTO]: Okay. Bear with me just a moment.  
16 I'd like you to first comment on the defense's point  
17 that the lack of a formal government response complicates the  
18 commission's inquiry as to whether or not the government has  
19 satisfied its discovery obligations.

20 DTC [CDR FLYNN]: Your Honor, good morning. Commander  
21 Kevin Flynn for the government.

22 The government probably should have, back when this  
23 was first received, answered these requests. However, we've

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1 discussed this -- even before you were here, we talked about  
2 this. This motion was argued, you know, at a previous  
3 hearing.

4 We can go through every single one of these, if  
5 that's what you want to do, and I'm prepared to do that. The  
6 issue the ----

7 MJ [LtCol LIBRETTO]: Let me ask you this: If we were to  
8 do that sitting here today, you would be able to articulate  
9 what evidence that you've produced, either by way of direct  
10 evidence or a 505 summary, since this was initiated before  
11 that process had been complete, what information you've  
12 disclosed for each of those information, or an assertion that  
13 it doesn't exist, or an assertion that it is not discoverable?

14 DTC [CDR FLYNN]: I'll answer your question this way:  
15 First of all, Your Honor, there's absolutely no requirement  
16 for the government to pinpoint favorable information in  
17 discovery that has been turned over to the defense.

18 It's the defense's obligation to go through the  
19 discovery that's been provided and determine what specifically  
20 they think they are missing, number one. Number two, I --  
21 well, as a member of the court go -- be able to state that  
22 we -- we have gone through every single one of those requests.  
23 Some of that information has been deemed discoverable. That

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1 information has been turned over, Your Honor. I can say on  
2 the record as an officer of the court that that has occurred.

3 There is absolutely no obligation, and there's case  
4 law that we've cited in our response, for us to show the  
5 defense, to basically do their job, Your Honor. Go through  
6 the discovery. Don't send us a supplemental discovery  
7 request, and don't state in that that we still have not turned  
8 over any of that information.

9 Now, in the response we -- and we didn't have to do  
10 this, Your Honor -- but we pinpointed for the defense -- I  
11 just gave you just an example of they're saying that we didn't  
12 turn over this information and we absolutely did. The  
13 specific request I believe was 10.k., 10.Kilo., they wanted  
14 information on the accused's membership on certain councils.

15 We -- just reading what's been turned over with  
16 respect to the accused's own statements, if they just would  
17 have read those, that's evidence he himself tells us that he  
18 was on these various councils.

19 Other statements that have been turned over to the  
20 defense, other statements by other individuals, have said that  
21 the accused was a member of this -- these various councils.  
22 The accused's own drawings maps out that he was a member of  
23 these various councils.

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1           So to say in a pleading that the government has not  
2 turned -- has still not turned over any of this information is  
3 just not -- that's not an accurate statement.

4           MJ [LtCol LIBRETT0]: To your point, Commander Flynn,  
5 regarding the government's lack of responsibility to identify  
6 favorable information -- and that point is not lost on me;  
7 however, I will point to 080 where the government has not  
8 pointed out favorable information, but articulated what  
9 evidence has been produced with respect to each of the various  
10 requests contained therein.

11           Some of it is a bit contradictory internally to  
12 itself where, for instance, 4.a., the first request, says,  
13 "This request is denied, is not relevant, material, and  
14 helpful to the preparation of the defense," but then  
15 immediately lists evidence that was responsive to the request  
16 that has been disclosed.

17           So there's sort of two built-in questions there. The  
18 first is understanding the government has no duty and  
19 obligation to sort of categorize and/or identify with any  
20 specificity what the evidence that they're turning over is,  
21 but isn't there a responsibility, if for no other reason than  
22 to facilitate the discovery process and avoid any unnecessary  
23 ambiguity in litigation, for the government to identify what

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1 evidence it is that is responsive to each of the requests?

2 Major Rudy, when I'm talking to the person, do not  
3 stand up and have a conversation with him.

4 ATC [Maj RUDY]: Yes, sir.

5 MJ [LtCol LIBRETTO]: If he needs a moment to discuss  
6 matters with you, then it can wait until after I'm done with  
7 my point.

8 ATC [Maj RUDY]: Understood, Your Honor.

9 MJ [LtCol LIBRETTO]: Commander Flynn.

10 DTC [CDR FLYNN]: It's a fair question, Your Honor. And I  
11 just want to make sure you understand the government's  
12 position.

13 Obviously, it's our position that we have no  
14 obligation to point out information or try to organize things  
15 for the defense, but we've done that anyways, just -- I mean,  
16 we've included, and I think my -- one of my attachments is an  
17 example for you, Your Honor, where we -- when we turn over a  
18 production -- and we've turned over 182 productions to the  
19 defense -- we attach in most, if not all of those, a  
20 spreadsheet which points -- tells them what we're turning over  
21 generally. I mean, it doesn't go into specifics, but it  
22 should give them an idea of what is being turned over. So I  
23 think that answers your first question.

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1           And I believe the reason Major Rudy got up, Your  
2 Honor, was because he's actually the one handling AE 080.

3           In 079 I could have gone through every single one of  
4 the 70 or so, whatever -- 50 requests and pinpointed exactly  
5 what's been turned over that answers that request. The  
6 government doesn't have to do that.

7           What I wanted to do is to show you, Your Honor, that  
8 we've complied with our discovery obligations. And I just  
9 pick that one out because it was easy. There has been so much  
10 evidence that has been turned over that answers that question.

11           So again, the government's position with respect to  
12 DR-16 is that the great -- some of that information is not  
13 discoverable. And I'm saying that as an officer of the court.

14           We have gone through 16 on more than one occasion,  
15 and made that determination. There's obviously information in  
16 DR-16 that is discoverable. That information has been turned  
17 over.

18           The reason this was put on hold before you were here,  
19 Your Honor, was because there was a lot of information in the  
20 pipeline, so to speak, with respect to 505 that the defense  
21 had not received. Most, if not all, of our 505 information --  
22 let me say it this way: The great majority of that  
23 information was turned over by the end of December 2017.

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1           The issue here is the defense can't come in here and  
2 just generally say there's things that we haven't turned over.  
3 What? What is that? I mean, we've turned over everything  
4 that we've determined is discoverable in DR-16. And that's --  
5 that's the government's position.

6           MJ [LtCol LIBRETTO]: Okay. And there's a distinction  
7 that you're making there; that distinction being we've turned  
8 over everything that we believe is discoverable. And with  
9 that -- whether or not I agree with that government position,  
10 whether or not it's, as you argue in the motions, an  
11 unreviewable decision by the government, unreviewable by this  
12 commission as to what is or what is not discoverable, putting  
13 that matter aside.

14           In light of the fact that the government hasn't  
15 provided any level of detail with respect to a response and  
16 what it is that -- so, in other words, there's however many  
17 requests contained within the Sixteenth Discovery Request, and  
18 if the government's position is that their obligation to  
19 respond to that is a dump of 128 various different discovery  
20 dumps, however many thousands of pages, and then says there  
21 are stuff that we reviewed that is nondiscoverable, how in the  
22 world can we ever meaningfully litigate that issue if that is  
23 the status of the discovery process?

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1 DTC [CDR FLYNN]: Well, a couple of responses. I don't  
2 believe it's our position, Your Honor, that you can't  
3 review -- you can't -- I mean, you're the ultimate -- the  
4 decision-maker.

5 I mean, the prosecution, it's our duty to go through  
6 all of these hundreds of thousands of pages or documents and  
7 make a discovery call. I don't believe -- and I can consult  
8 with my counsel, but I do not believe that's the government's  
9 position, that you have no role in the discovery process. So  
10 that answers, I think, your first question.

11 I don't -- I think I already -- I thought I already  
12 answered the issue about this information. The government  
13 has to -- the government goes through discovery requests, and  
14 the government -- and we went through every single one of  
15 these. And most of these, Your Honor, for your information,  
16 basically just track the charge sheet, or a lot of them do.  
17 You know, they looked at the charge sheet and they wanted  
18 information with respect to the charge sheet. That's fine.  
19 That's something that a competent defense counsel would do.

20 That information was turned over probably in our  
21 initial -- you know -- let me put it this way, very early in  
22 the discovery process.

23 One of the issues that we have with this motion to

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1 compel or this -- I guess it's a continuation of the motion to  
2 compel, is the defense, again, in that motion is saying that  
3 we haven't turned over these things, and a simple review of  
4 the information would let them know that that's a false  
5 statement.

6           And again, our 10.k., the reason why we did it that  
7 way is because it was very -- it was just -- there was so much  
8 information that had been turned over to the defense with  
9 respect to that specific question, the accused's own  
10 statements. I mean, go through your discovery, determine what  
11 you think you need after you -- I mean, it's -- they're --  
12 we -- our obligation is to make discoverable calls.

13           We turn that information over to the defense. The  
14 defense goes through the discovery, the information that we've  
15 turned back over to them, and if they think there's something  
16 that we're not turning over or that we're missing, let us know  
17 that. Don't make a statement in a pleading that we have not  
18 turned over any of the information that the requests are  
19 asking for.

20           MJ [LtCol LIBRETTO]: Okay. Thank you, Commander Flynn.

21           DTC [CDR FLYNN]: Your Honor, I would like to make one  
22 more point.

23           MJ [LtCol LIBRETTO]: Go ahead.

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1 DTC [CDR FLYNN]: And this is basically -- since I'm going  
2 first, I get to make it for the rest of the motions, so I  
3 guess I'm the lucky guy.

4 The point is -- that I want to make is -- and this, I  
5 think, applies to all of our answers, all of our responses in  
6 the motions that you're going to hear.

7 The defense filed its initial request for discovery  
8 in June of 2013, almost six years ago. And as of today's date  
9 the government has turned over approximately 105 [sic] pages  
10 of discovery in 182 productions. And we've also turned over  
11 4.5 terabytes of information to the defense. The last major  
12 production to the defense, excluding Jencks materials, Jencks  
13 statements, was in approximately December of 2017.

14 And I'm bringing this up, Your Honor, because it's  
15 the government's position that it has completed all  
16 affirmative pretrial discovery, including the introduction --  
17 or the production of our case-in-chief evidence.

18 It's the government's position that it has fulfilled  
19 its responsibilities and obligations under the controlling  
20 statute, the MCA, under the rules, and under the case law with  
21 respect to the discovery process.

22 And I think, Your Honor, just to wrap this up, I  
23 think our position can probably be best described by an

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1 example. When I came to this team in the spring of 2014, I  
2 was a discovery attorney. That was the reason why I was  
3 brought on to this case. Almost all of the attorneys at that  
4 point were 100 percent involved in the discovery process.  
5 That was our mission.

6 I myself, as a discovery attorney, have reviewed  
7 hundreds of thousands of pages and made discovery calls. And  
8 at that -- at that point in time, that was our mission.  
9 That's -- discovery is what we were focusing on.

10 We're not in that posture now, Your Honor. We are in  
11 a trial posture. We are meeting your deadlines -- trying to  
12 meet your deadlines. We are preparing for pretrial motion  
13 practice, and we are preparing for trial on the merits. And  
14 that's what the government means when it says discovery has  
15 been complete.

16 Obviously, that doesn't mean we're not going to be  
17 turning over information in the future. We will continue to  
18 turn over discoverable information. We understand our  
19 obligations with respect to R.M.C. 701(b)(2), our Giglio  
20 obligations, our Jencks obligations. We understand all of  
21 that, Your Honor.

22 So I just wanted to lay that out there. And unless  
23 there's other questions you may have, that would conclude my

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1 presentation.

2 MJ [LtCol LIBRETTO]: There are not. Thank you. I  
3 understand both parties' positions on AE 079.

4 DC [LT ASKAR]: Your Honor?

5 MJ [LtCol LIBRETTO]: Yes.

6 DC [LT ASKAR]: May I briefly respond?

7 MJ [LtCol LIBRETTO]: To what extent?

8 DC [LT ASKAR]: Specifically ----

9 MJ [LtCol LIBRETTO]: I understand your position that the  
10 government, number one, hasn't articulated what responsive  
11 materials have been provided, and I understand that -- even  
12 notwithstanding their lack of response -- that you believe  
13 more is out there, generally speaking, without any specificity  
14 as to why you believe that. Is that a fair characterization  
15 of your position?

16 DC [LT ASKAR]: Yes, Your Honor. The only -- my response  
17 would be cabined specifically to the government's assertions  
18 with respect to 10.k. of the Discovery Request, and  
19 information they provided in their AE 79G response.

20 MJ [LtCol LIBRETTO]: Briefly.

21 DC [LT ASKAR]: I appreciate it. Thank you, Your Honor.

22 The government made a number of assertions with  
23 respect to 10.k. of the Discovery Request. 10.k. asks for all

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1 memoranda, correspondence, cables, e-mails, notes, or other  
2 documents designating or appointing Abd al Hadi al-Iraqi, to  
3 include any and all aliases that the government associates  
4 with Abd al Hadi al-Iraqi to al Qaeda's senior advisory  
5 council, to include dates appointed or designated in all time  
6 periods.

7           The only thing mentioned in the government's response  
8 before this commission and the only thing mentioned in AE 079G  
9 are statements taken by -- statements of Mr. al-Tamir, the  
10 subject of which will be certainly the subject of further  
11 litigation with respect to their veracity and the  
12 circumstances under which those statements were taken, and the  
13 statements of another -- of the -- of another potential person  
14 in the 505 process.

15           Your Honor, there's -- there's a reason that we  
16 requested this information. It was clearly discoverable. And  
17 information that is in the possession of the government --  
18 that we have reason to believe is in the possession of the  
19 government is far more expansive in 10.k. of the discovery  
20 request than in the government's response. It's not as though  
21 these statements cover what we're asking for. And I think  
22 that's part of the disconnect that we're going to have to deal  
23 with.

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1           That's all I have, Your Honor, pending your  
2 questions.

3           MJ [LtCol LIBRETTO]: You say you have reason to  
4 believe and that -- to the government's point in their  
5 response and their argument today -- you have reason to  
6 believe that other matters exist that you have not been  
7 provided. But neither in the original discovery request or a  
8 supplement or the motion to this commission did you identify  
9 with any level of specificity either the specific documents or  
10 the reason that you believe they exist.

11          DC [LT ASKAR]: Your Honor, part of that issue is going to  
12 be in some way the government identified Mr. al-Tamir,  
13 rightfully or wrongfully, as someone who they believed in  
14 their charging documents deserved all of the allegations that  
15 they've made against him.

16           If the only thing the government has with respect to  
17 that belief, the only thing that informed the government's  
18 decision, is the statements which are going to certainly be  
19 the subject of further litigation, then we need the government  
20 to affirmatively say that. Otherwise, Your Honor, there's  
21 reason to believe that additional information exists and that  
22 we have a reason -- that information is clearly discoverable,  
23 and we have a need for it.

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1 Pending your questions, Your Honor, that's all I  
2 have.

3 MJ [LtCol LIBRETTO]: So your reason is to believe that  
4 the government couldn't possibly only be relying upon the  
5 limited information that was disclosed to you?

6 DC [LT ASKAR]: Or if they are, Your Honor, we need to  
7 know that.

8 MJ [LtCol LIBRETTO]: Are they required to identify that,  
9 even if it is?

10 DC [LT ASKAR]: Your Honor, while they are not required to  
11 identify it, while they are not -- Commander Flynn made the  
12 point a number of times that it's not their job to pinpoint  
13 discovery. I think Your Honor articulated exactly what the  
14 defense's position on this is going to be, which is  
15 ultimately, Your Honor, all we can do -- the only way this  
16 process can work practically is we do our discovery review,  
17 which we have done and will continue to do. And when we do  
18 not believe that things exist that we need, we request them as  
19 we have in the past.

20 The government's response cannot be, well, we've  
21 provided you everything we think is discoverable. Because  
22 ultimately, Your Honor, we are left at an impasse where then  
23 we can provide the court with the 105,000 pages of discovery

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1 and say we didn't -- we've looked at it, we don't think it's  
2 here. It's not here. We need the additional discovery. Or  
3 the government can point to what they think is responsive and  
4 we can argue about the sufficiency of it, Your Honor.

5 MJ [LtCol LIBRETTO]: Okay. I understand your position.  
6 Thank you.

7 DC [LT ASKAR]: Thank you, Your Honor.

8 MJ [LtCol LIBRETTO]: Moving on to -- Ms. Hensler?

9 DDC [MS. HENSLER]: Your Honor, may we take a 10- or  
10 15-minute comfort break?

11 MJ [LtCol LIBRETTO]: We will take 10 minutes. This  
12 commission is in recess.

13 [The R.M.C. 803 session recessed at 1052, 6 March 2019.]

14 [The R.M.C. 803 session was called to order at 1126,  
15 6 March 2019.]

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

19 Moving on to AE 080, the defense requests the  
20 commission to compel production of Defense Seventeenth  
21 Supplemental Discovery Request, dated 30 January 2017. Much  
22 like AE 079, the commission ordered clarity as to the parties'  
23 position as to the status of that motion in light of the

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1 commission originally deferring until after the 505 process  
2 was complete.

3           Having not received any updates since that time, the  
4 commission ordered the parties to brief the issue, which we  
5 will take up at this time.

6           Defense?

7           DC [LT BALL]: Good morning, Your Honor.

8           MJ [LtCol LIBRETTO]: Good morning.

9           DC [LT BALL]: I think the best way for me to approach  
10 this is -- following on Lieutenant Askar's heels -- is to  
11 direct your attention or invite your attention to AE 080F, the  
12 Attachment B, which is the government's response to our  
13 request, our initial request. Now, this response came in  
14 May of 2017. This way, I can just simply address any issues  
15 and focus your attention and let you know what we're asking  
16 for in this motion to compel.

17          MJ [LtCol LIBRETTO]: Go ahead.

18          DC [LT BALL]: Okay.

19                So in the first request, we had requested all  
20 memoranda, correspondence, cables, e-mails, et cetera, and  
21 this all comes down to something referred to as the Shkin  
22 Meeting Letter. Now, the Shkin Meeting Letter comes out in  
23 Appellate Exhibit 043, Attachment B. It also comes out in the

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1 government's list of exhibits, AE 110G, specifically number  
2 248.

3 That Shkin Meeting Letter has our client's name on  
4 it, but we have no context as to where it came from. We don't  
5 understand why his name is on the letter. So the purpose of  
6 this discovery request was to ask for more information  
7 surrounding this letter.

8 If I just go through each of the requests, the -- and  
9 how I -- actually, if I could just digress for a moment here,  
10 how I responded in your request to us was I broke it down into  
11 four parts. I responded to the sections that the government  
12 denied as not relevant, that they objected to as overbroad,  
13 denied outright without giving a reason, and then the fourth  
14 way was where they said they will provide information going  
15 forward, but we haven't seen anything since then.

16 So if I could go through each of these line by line,  
17 I'd be happy to kind of expand and let you know what we're  
18 looking for.

19 MJ [LtCol LIBRETTO]: Well, what I would like you to do is  
20 identify for the commission what, with specificity, it is that  
21 you're looking for, why you believe it exists, and why you  
22 believe that the government's response, both in the discovery  
23 that they have provided you to date, as well as their response

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1 to the original motion, does not satisfy the defense's  
2 request.

3 DC [LT BALL]: Yes, sir.

4 If I could show, for example, invite your attention  
5 to the first request. The government does deny it as not  
6 being relevant; however, they do then specify a number of  
7 documents by Bates numbers.

8 So, for example, in that first request, when we ask  
9 for all -- we ask for the universe, essentially. They reply  
10 with reports by -- a C-T-I-F [sic] report, a Criminal  
11 Investigation Task Force report, a report by a chief warrant  
12 officer.

13 They reply with photographs of the evidence tags and  
14 the custody -- the chain-of-custody documents, but we don't  
15 have any of the memoranda, the correspondence. We don't have  
16 any maps, anything like that, photographs, charts.

17 So we don't have any detailed information as to what  
18 we're asking for, which is where did this Shkin Meeting Letter  
19 come from.

20 MJ [LtCol LIBRETTO]: Well, isn't that answered in 4.b.?

21 DC [LT BALL]: Well, in 4.b., sir, they simply refer back  
22 to the same -- to the same group of documents that they  
23 provided, which is the C-T-I-F reports, the tags, the evidence

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1 custody and the chief warrant officer report.

2 MJ [LtCol LIBRETTO]: Okay. And are you aware of any  
3 additional evidence outside of that to which they have pointed  
4 to in -- notwithstanding, again, as I previously sort of  
5 pointed out, the contradictory nature of their response,  
6 putting that aside for a moment.

7 DC [LT BALL]: Sure.

8 MJ [LtCol LIBRETTO]: Do you have any basis to believe,  
9 and basis -- I mean, evidence that you're relying upon, and  
10 can point the commission to, to believe that additional  
11 evidence outside of those matters exist for this? I mean,  
12 you're requesting the commission compel production of  
13 something.

14 DC [LT BALL]: Sure.

15 MJ [LtCol LIBRETTO]: What is the something that you're  
16 asking the commission to compel that you know exists based on  
17 other discovery that has been provided? Or is this simply a  
18 matter of the defense requesting the commission have the  
19 government stand up and say, "Have you completed your  
20 discovery obligations with respect to the letter A?" Them  
21 standing up and saying, "Yes, Your Honor, we have."

22 Is that the -- is that the outcome that the defense  
23 is requesting today?

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1 DC [LT BALL]: No, sir. So if I could direct your  
2 attention to c., for example. We know that this is a report  
3 by a chief warrant officer. Within that report, he refers to  
4 certain lists, black, white, and gray lists. We don't have  
5 any information as to what that is about. So certainly ----

6 MJ [LtCol LIBRETTO]: When did you -- when did you request  
7 that?

8 DC [LT BALL]: We have not, Your Honor, no, sir. That, we  
9 believe, would be part of the underlying request in c., which  
10 is the unredacted list, spreadsheets, et cetera.

11 MJ [LtCol LIBRETTO]: Okay. And you see the difficulty  
12 with which we place ourselves in now ----

13 DC [LT BALL]: Yes, sir.

14 MJ [LtCol LIBRETTO]: ---- when based on the blanket --  
15 and I believe you used the phrase "asking for the world."

16 DC [LT BALL]: Sure.

17 MJ [LtCol LIBRETTO]: When we ask for the world and don't  
18 perhaps file a supplemental request identifying with  
19 specificity the materials that we believe exist that we have  
20 not received, we're in a position now where you're basically  
21 requesting the commission to facilitate discovery that should  
22 be directed towards the government. You would agree?

23 DC [LT BALL]: I do. I would agree with that, Your Honor.

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1 Now, if I could -- we know, for example -- if we just take  
2 this slightly off, there are 72 requests within this discovery  
3 request.

4           There's a lot of things that we're asking for. A  
5 number of those are simply we will respond at a later date, so  
6 we would still like to see that information come. And I've  
7 outlined which one those are within our response.

8           Broadly speaking, his name is on the list. We know  
9 that the government has identified him as a member of al Qaeda  
10 through this Shkin Meeting Letter, through other documents.

11           What we're asking for, Your Honor, is the reports.  
12 We know that task forces were stood up by the CIA to  
13 investigate Usama bin Laden, for example, after the 9/11  
14 events. We know this because intelligence analysts on our  
15 team, investigators on our team have been involved or know  
16 about these.

17           Those -- those task forces, those teams, would have  
18 produced some type of work product. They would have produced  
19 a broader picture as to where we're going, the command  
20 structure, for example -- and we're getting into other  
21 arguments, which I'll get into hopefully later today. But the  
22 command structure, where he fits in, what -- why is his name  
23 on this list?

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1           We have no information, other than -- from what was  
2 responded here, we know that it was -- that a list exists and  
3 they picked it up somewhere in -- and that, I don't think, is  
4 even clear, I can't remember, but ----

5           MJ [LtCol LIBRETTO]: So just to set expectations and  
6 perhaps to inform the commission's understanding of what the  
7 defense believes is required of the government, if there's a  
8 piece of evidence that is seized, is it the government's  
9 obligation in the discovery process to explain the meaning of  
10 that evidence, whatever the evidence may be?

11          DC [LT BALL]: It is not. No, sir.

12          MJ [LtCol LIBRETTO]: Okay.

13          DC [LT BALL]: But what we're asking for in this is the  
14 context as to where it came from, and that's the purpose of  
15 this discovery request.

16          MJ [LtCol LIBRETTO]: The context.

17          DC [LT BALL]: Correct.

18          MJ [LtCol LIBRETTO]: An explanation.

19          DC [LT BALL]: Yes, sir. So they produced the evidence to  
20 us. They discovered this to us, this letter to us. We are  
21 now in a position where we're asking for more information, the  
22 charts, the maps, the structure, all this other information  
23 that surrounds this.

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1           So we know the discovery exists. Within that  
2 discovery, we recognize and realize that there's more out  
3 there that we need to ask for, and that's the purpose of this  
4 Discovery Request Number 17.

5           MJ [LtCol LIBRETTO]: Okay.

6           So if I understand correctly, there are certain --  
7 and I will refer to the original motion and your notice in  
8 080H, that you identify categories of information that you're  
9 requesting clarifying information about. Is that a fair  
10 characterization?

11          DC [LT BALL]: Yes, sir. I suppose what we were trying to  
12 do was preserve our position, our legal position, not letting  
13 the objections or the rejections stand, but to note that we  
14 are seeking further information clarity.

15          And if the information doesn't exist, simply -- for  
16 example, photographs that we're requesting, if they don't  
17 exist, then let us know, you know, that those photographs do  
18 not exist or have been destroyed.

19          MJ [LtCol LIBRETTO]: Okay. Thank you. Anything else?

20          DC [LT BALL]: I believe that's all. Thank you, sir.

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

22          Trial Counsel, who will be taking this matter up?

23 Major Rudy.

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1 ATC [Maj RUDY]: May I proceed, Your Honor?

2 MJ [LtCol LIBRETTO]: You may.

3 ATC [Maj RUDY]: Your Honor, simply put, stated in the  
4 government's response, AE 080I, there's nothing left to  
5 produce, Your Honor. The government has produced everything  
6 in its possession that's at all related to the discovery,  
7 capture, however we want to clarify it, to the Shkin Meeting  
8 Letter. The defense has it all, Your Honor. There's nothing  
9 that the government is aware of in its possession that the  
10 defense does not have.

11 We've complied with our discovery obligation. We've  
12 responded to their discovery requests. This has already been  
13 litigated previously before the commission. I believe that  
14 the military judge deferred ruling because of pending 505  
15 discovery production. However, again, after further review of  
16 the -- what was pending at the time, I don't believe that any  
17 of it actually addresses the Shkin Meeting Letter.

18 So at this point the defense has been in possession  
19 of, again, all of the information that the government has for  
20 years now.

21 MJ [LtCol LIBRETTO]: All right. Bear with me for just a  
22 moment.

23 ATC [Maj RUDY]: Yes, sir.

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1 [Pause.]

2 MJ [LtCol LIBRETTO]: Can you -- just so -- again, sort of  
3 the same question or type of question I asked the defense. To  
4 understand and inform the commissions as to the government's  
5 position as to the discovery process in general, can you just  
6 explain to me what I've characterized twice now as an internal  
7 inconsistency with the government's response, and by way of  
8 example, 4.a., where it says, "The request is denied as not  
9 relevant, material, and helpful to the preparation of the  
10 defense."

11 That would suggest that either, one, you've looked at  
12 material that would be responsive and have determined  
13 yourselves that it is not relevant, material, and helpful,  
14 because it doesn't say it doesn't exist. In fact, you  
15 reference several items of discovery that were turned over.

16 So what does this mean?

17 ATC [Maj RUDY]: Your Honor, those, say, preamble  
18 responses were in response to what the government considered  
19 the request generally, the defense's request generally, to not  
20 be a sufficient request for discovery.

21 However, read in context of what's already been  
22 produced, the government believed it appropriate, based on the  
23 limited scope of what the defense was looking at, i.e., one

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1 document, that we could simply provide them with a list of  
2 Bates numbers of what is responsive to the whole document.

3 MJ [LtCol LIBRETTO]: So these materials that are listed  
4 in paragraph 4.a. are responsive to the defense's request?

5 ATC [Maj RUDY]: They are what the government believed the  
6 defense was asking for. I'm not sure if they would be  
7 responsive to -- I think it would be a more limited set of  
8 what the defense thought exists or thinks exists. But that is  
9 what exists, what is listed in the government response.

10 MJ [LtCol LIBRETTO]: Okay. The only other question I  
11 have for you, Major Rudy, is on page 4 of your notice you  
12 reference to AE 029B on information related to witnesses.

13 How does the AE 029, the substance of it, relate to  
14 production of information pertaining to witnesses, as opposed  
15 to access to witnesses and the process by -- which must take  
16 place for that to happen?

17 ATC [Maj RUDY]: Your Honor, as we -- as we read, or as we  
18 read the defense's discovery request as it related to  
19 witnesses, it was -- it is the government's position that what  
20 they're truly asking for is just access to the witness, not  
21 necessarily merely information about the witness.

22 Again, Your Honor, the government has produced  
23 reports about -- summarizing statements of witnesses. Those

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1 are in the defense's possession. If they want to speak to the  
2 witness, they can just simply put in a witness request.

3 MJ [LtCol LIBRETTO]: So it says the government denied  
4 many of the defense requests because they were actually  
5 requests for witness information, not for discovery. And  
6 witness information is -- does not go through the discovery  
7 request process.

8 ATC [Maj RUDY]: Yes, sir. Again, if there -- if the  
9 defense is seeking something like witness discovery before  
10 they testify, the government will certainly produce any -- any  
11 information it that has an obligation to produce for a  
12 testifying witness at the appropriate time, if that is, in  
13 fact, what the defense was requesting in those paragraphs.

14 MJ [LtCol LIBRETTO]: You'll have to bear with me a little  
15 bit because you-all know the case and the evidence far better  
16 than I. But my understanding is that there are names listed  
17 on this evidence that the defense's request pertains to and  
18 information surrounding those witnesses or other people.

19 ATC [Maj RUDY]: Correct, Your Honor.

20 MJ [LtCol LIBRETTO]: So -- and my understanding is that  
21 this witness somehow links the accused to an organization and,  
22 thus, is responsible for the -- in part, the charged offenses.

23 ATC [Maj RUDY]: The document is -- will be used to link

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1 the accused to al Qaeda; however, the witnesses are merely  
2 foundation for how the government came -- came into possession  
3 of the document.

4 MJ [LtCol LIBRETTO]: Okay. I understand your position.  
5 Thank you, Major Rudy.

6 ATC [Maj RUDY]: Yes, sir.

7 MJ [LtCol LIBRETTO]: Lieutenant Ball, very briefly, I'd  
8 like to revisit a question with you.

9 The government laid out in their initial response,  
10 for instance, with paragraph 4.a. certain material that they  
11 believed in the general sense at least was responsive to your  
12 request.

13 DC [LT BALL]: Yes, sir.

14 MJ [LtCol LIBRETTO]: And I understand that the current  
15 defense team has diligently been reviewing the evidence. I'm  
16 curious to know whether or not there's some sort of mechanism  
17 that has been put in place such that you now can identify  
18 certain evidence in your possession with your own requests,  
19 and not your own requests individually, but collectively as  
20 the defense team.

21 In other words, when you filed your motion, your  
22 notice to the commission a few weeks ago and stated that  
23 certain things were denied and/or we don't have evidence of

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1 them, clearly, you were on notice that the government believed  
2 certain material that they had provided you was responsive to  
3 your request.

4 DC [LT BALL]: Yes, sir.

5 MJ [LtCol LIBRETTO]: Were you able to identify those and  
6 review them?

7 DC [LT BALL]: Yes, sir. We were. We were. Now, if I  
8 may, the specific document that I had referred that we don't  
9 have, it was -- the Bates stamp -- so within -- sorry.

10 So within our system, we do have a way to search each  
11 of the -- the files that we have that have been discovered.  
12 When the production came in -- I forget the number. Is it --  
13 when this -- when this discovery came in, the file names don't  
14 match up to the Bates stamps. So we have to go through and  
15 search what the Bates stamp number is.

16 When I search for the Bates stamps in 6502, for  
17 example, that was the one that was missing. So that's -- I  
18 just notified -- noticed that to the commission that that was  
19 missing. The government has replied to say that they had  
20 given that to us and they will give that to us again. So we  
21 are working our way through that. It was only the one  
22 document that I couldn't find, sir.

23 MJ [LtCol LIBRETTO]: Okay. And just to again inform the

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1 commission as to the parties' understandings as it relates to  
2 the discovery process, when you identified prior to filing  
3 this motion that you apparently were without 6502 ----

4 DC [LT BALL]: Yes, sir.

5 MJ [LtCol LIBRETTO]: ---- did you file a request either  
6 formally or informally with the government before it ended up  
7 in this motion?

8 DC [LT BALL]: Within the notice, Your Honor, the way we  
9 read it, it was we were giving you an update as to where we  
10 were. So through that notice, the government replied to our  
11 notice. That's how it came about, sir.

12 MJ [LtCol LIBRETTO]: Fair enough.

13 DC [LT BALL]: Yes, sir. But going forward ----

14 MJ [LtCol LIBRETTO]: Thank you. Go ahead.

15 DC [LT BALL]: I was just going to say going forward with  
16 the team on board, we're asking for supplemental discovery  
17 requests now, as we are ongoing in this process as you -- as  
18 is going to be later heard.

19 But if we were not to receive something, then of  
20 course we would reach out to them informally ----

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

22 DC [LT BALL]: ---- on our way through that, sir.

23 Yes, sir.

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1 MJ [LtCol LIBRETTO]: And just to be clear, Major Rudy, it  
2 is the government's position that the discovery logs  
3 identified in your original response completed discovery with  
4 respect to this 080 motion?

5 ATC [Maj RUDY]: Yes, sir.

6 MJ [LtCol LIBRETTO]: Thank you.

7 Moving on then to Appellate Exhibit 120, the  
8 government motion to compel production of discovery pursuant  
9 to R.M.C. 701(g).

10 DDC [MS. HENSLER]: Your Honor, the defense would ask  
11 before we move on to argument to that motion that Lieutenant  
12 Askar be able to briefly advise the court on Mr. al-Tamir's  
13 current medical condition.

14 MJ [LtCol LIBRETTO]: Is it a matter that we need to take  
15 a recess for?

16 DC [LT ASKAR]: It may be, Your Honor. Mr. al-Tamir at  
17 this point is having a great deal of trouble focusing. He's  
18 in a great deal of pain. His answers in both Arabic and in  
19 English are not really following some of the questions and are  
20 coming a great deal slower.

21 MJ [LtCol LIBRETTO]: Bear with me a moment. All right.

22 The commission is going to take a 10-minute recess,  
23 and in light of the hour may be taking an extended recess. I

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1 will let you know in about five minutes.

2 Commission is in recess.

3 [The R.M.C. 803 session recessed at 1150, 6 March 2019.]

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