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1 [The R.M.C. 803 session was called to order at 0906, 25 October  
2 2023.]

3 MJ [Lt Col BRAUN]: This commission is called to order.

4 Trial Counsel, please identify who is here on behalf of the  
5 United States. If any counsel are making their first appearance,  
6 please indicate such so that we can get their detailing information,  
7 qualifications, status as to oath on the record.

8 TC [COL KRAEHE]: Yes, Your Honor. Good morning.

9 Representing the government today are Colonel George Kraehe,  
10 United States Army; Lieutenant Colonel Christopher Goewert, United  
11 States Air Force; and Lieutenant Commander Jeffrey Larson, United  
12 States Navy.

13 Also present at counsel table today are LN1 Torii Alaniz,  
14 United States Navy paralegal; Mr. Shane Rooney and Mr. Joshua Bowman,  
15 trial team analysts; and [REDACTED], linguist.

16 All trial counsel present today have been detailed to this  
17 military commission by the chief prosecutor in accordance with Rule  
18 for Military Commissions 503. All members of the government are  
19 qualified under Rule for Military Commissions 502(d) and have been  
20 previously sworn in accordance with Rule for Military Commissions  
21 807.

22 No member of the government has acted in any manner which  
23 might tend to disqualify us in this proceeding.

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1           The detailing document has been marked as Appellate Exhibit  
2 0003.007 (Gov).

3           These proceedings are being transmitted stateside via  
4 closed-circuit television transmission -- CCTV -- to remote viewing  
5 sites located at Fort Meade, Maryland, and the Pentagon, pursuant to  
6 the commission's order, Appellate Exhibit 0007.006 (TJ).

7           MJ [Lt Col BRAUN]: Trial Counsel, before you sit down, I  
8 believe in AE 0003.007 (Gov), there was a detailing of a Major James  
9 Jordan, IV. Is that recollection correct?

10          TC [COL KRAEHE]: That is correct, Your Honor. And I believe  
11 we've asked that he be excused.

12          MJ [Lt Col BRAUN]: Understood. And that excusal is approved.  
13 I just wanted to get that onto the record given that that is a  
14 detailed counsel to this proceeding.

15          Additionally, there was an absence approved in  
16 00 -- 0066.012 (TJ) for a Major Antonio to be absent from this  
17 specific proceeding as well.

18          TC [COL KRAEHE]: Correct, Your Honor.

19          MJ [Lt Col BRAUN]: Trial Counsel, on that note, is this  
20 proceeding being transmitted by closed-circuit TV to the Remote  
21 Hearing Room this morning?

22          TC [COL KRAEHE]: Yes, Your Honor, it is.

23          MJ [Lt Col BRAUN]: Are there any counsel appearing remotely

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1 via that Remote Hearing Room?

2 TC [COL KRAEHE]: There are, Your Honor, but I believe they  
3 are on behalf of the defense.

4 MJ [Lt Col BRAUN]: Very well. I'll let defense counsel  
5 address that when they announce the counsel that are present for the  
6 proceeding.

7 I just want to state on the record that the RHR is an  
8 extension of the well of this courtroom. And consistent with  
9 previous order of the commission, any party that departs or enters  
10 the RHR needs to announce such so that we can maintain a complete  
11 record of this proceeding.

12 TC [COL KRAEHE]: Yes, Your Honor.

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

14 TC [COL KRAEHE]: Thank you, Your Honor.

15 MJ [Lt Col BRAUN]: Mr. Hodes, please indicate for the record  
16 who is here on behalf of Mr. Nurjaman. Also please indicate if any  
17 of the attorneys are making their first appearance so that we can get  
18 their detailing information, status as to oath, and whether they've  
19 acted in any disqualifying manner on the record.

20 LDC [MR. HODES]: Yes, Your Honor. My name is Jim Hodes on  
21 behalf of Mr. Nurjaman. And the full name is Encep Nurjaman bin  
22 Isomudin.

23 With me at counsel table directly to my left is Commander

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1 Eric Nelson, Sergeant Tenesia Parks, and Major Lindsey Parsons.

2 Second row, we have Mr. David Akerson and we have Lieutenant  
3 Ryan Hirschler.

4 In the Remote Hearing Room we have Major Cristina Curl,  
5 Mr. Frank Masella, and I believe Mona Martinez-Hensley who is our  
6 security officer.

7 All defense counsel were detailed to this military  
8 commission -- at this point I'm going script only.

9 MJ [Lt Col BRAUN]: Guide, counsel.

10 LDC [MR. HODES]: ---- by the Chief Defense Counsel in  
11 accordance with Rule for Military Commissions 503. All defense  
12 counsel are qualified under Rule for Military Commissions 502, and  
13 all have been previously sworn in accordance with Rule for Military  
14 Commissions 807, except for Major Parsons.

15 No member of the defense has acted in any manner which might  
16 tend to disqualify us in this proceeding.

17 Major Parsons' detailing document has been marked as  
18 Appellate Exhibit 0004 -- that may have been one too many  
19 zeros -- 031. That's all.

20 MJ [Lt Col BRAUN]: Thank you. Major Parsons, if you could  
21 please rise and raise your right-hand. Do you prefer to swear or  
22 affirm?

23 **[Counsel was sworn.]**

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1 MJ [Lt Col BRAUN]: Thank you. You may be seated.

2 Mr. Hodes, I believe this has been covered somewhat in  
3 previous sessions, but I just want to ensure that we have a clear  
4 record this morning.

5 There have been some changes to the defense, the composition  
6 of the defense team over time. So could you please detail for the  
7 record any changes to the composition of your team since the last  
8 time this commission was in session since April of 2023?

9 LDC [MR. HODES]: I believe just one change. Colonel DeWeese  
10 has been released.

11 MJ [Lt Col BRAUN]: Thank you.

12 I note that the accused is present here this morning.  
13 Mr. Nurjaman, I want to go over your counsel rights with you at this  
14 time.

15 Pursuant to the Manual for Military Commissions you have the  
16 right to be represented by detailed military defense counsel.

17 Do you understand this?

18 ACC [MR. NURJAMAN]: Yes. I understand.

19 MJ [Lt Col BRAUN]: Additionally, this detailed military  
20 defense counsel will be provided to you free of charge.

21 Do you understand this?

22 ACC [MR. NURJAMAN]: Yes.

23 MJ [Lt Col BRAUN]: You also have the right to be represented

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1 by a military counsel of your own selection, provided that the  
2 counsel you request is reasonably available. If you were represented  
3 by military counsel of your own selection, then your detailed defense  
4 counsel would normally be excused. However, you could request that  
5 your detailed counsel continue to represent you, but your request  
6 would not have to be granted.

7 Do you understand that?

8 ACC [MR. NURJAMAN]: Yes.

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

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

20 Do you understand this?

21 ACC [MR. NURJAMAN]: Yes.

22 MJ [Lt Col BRAUN]: If a civilian lawyer represents you, your  
23 detailed military defense counsel will continue to represent you as

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1 well, unless you specifically waive the right to be represented by  
2 detailed military defense counsel.

3 Do you understand what I've just told you?

4 ACC [MR. NURJAMAN]: I understand.

5 MJ [Lt Col BRAUN]: Beyond the presence of detailed military  
6 defense counsel, there are also seated at your defense table detailed  
7 civilian defense counsel who are civilian attorneys who meet the  
8 requirements outlined above to practice before this commission.

9 It is my understanding the Chief Defense Counsel has  
10 detailed these counsel to your case to also represent -- be -- excuse  
11 me. It is my understanding the Chief Defense Counsel has detailed  
12 these counsel to your case to also be represent -- so that you can  
13 also be represented by these detailed civilian defense counsel who  
14 have been hired by the government at no expense to you.

15 Mr. Nurjaman, do you understand the rights to counsel as I  
16 have just explained them to you?

17 ACC [MR. NURJAMAN]: Yes.

18 MJ [Lt Col BRAUN]: Additionally, I believe, as Mr. Hodes had  
19 explained, Lieutenant Colonel Geoffrey DeWeese was at one point  
20 detailed as part of your defense team and has since been excused.

21 Mr. Nurjaman, did you discuss this fact with your defense  
22 team?

23 ACC [MR. NURJAMAN]: Yes, I already have.

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1 MJ [Lt Col BRAUN]: And do you concur with the permanent  
2 excusal of Lieutenant Colonel DeWeese from your defense team?

3 ACC [MR. NURJAMAN]: Yes.

4 MJ [Lt Col BRAUN]: Very well.

5 Mr. Hodes, a short time ago, outlined those that remain on  
6 your defense team to represent you in this proceeding.

7 Do you wish to be represented by those counsel?

8 ACC [MR. NURJAMAN]: Yes.

9 MJ [Lt Col BRAUN]: Additionally, we discussed that Captain  
10 Curl, a member of your defense team, is appearing remotely from the  
11 Remote Hearing Room.

12 Do you consent to proceeding today, understanding that she  
13 is in the Remote Hearing Room and not physically here in this  
14 courtroom this morning?

15 ACC [MR. NURJAMAN]: Yes.

16 LDC [MR. HODES]: Judge, I would just jump in and say it's  
17 Major Curl.

18 MJ [Lt Col BRAUN]: Excuse me, Major Curl. You are correct.  
19 Thank you, Counsel.

20 Mr. Nurjaman, I will now remind you of your right to be  
21 present and your right to waive said presence.

22 You have the right to be present during all sessions of the  
23 commission. If you request to absent yourself from any session, such



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1 absence must be voluntary and of your own free will. Your voluntary  
2 absence from any session of the commission is an unequivocal waiver  
3 of the right to be present during that session.

4 Your absence from any session may negatively affect the  
5 presentation of your defense in your case. Your failure to meet with  
6 and cooperate with your defense counsel may also negatively affect  
7 the presentation of your case.

8 Under certain circumstances, your attendance at a session  
9 can be compelled regardless of your personal desire not to be  
10 present.

11 Regardless of your voluntary waiver to attend a particular  
12 session of the commission, you have the right at any time to decide  
13 to attend any subsequent session. If you decide not to attend the  
14 morning session, but, for example, wish to attend the afternoon  
15 session, you must notify the guard force of your desires. Assuming  
16 there's enough time to arrange transportation, you will then be  
17 allowed to attend that afternoon session.

18 You will be informed of the time and date of each commission  
19 session prior to the session to afford you the opportunity to decide  
20 whether you wish to attend that session.

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

22 ACC [MR. NURJAMAN]: Yes.

23 MJ [Lt Col BRAUN]: Counsel, it's my understanding that two of

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1 the daily prayer times are scheduled during our normal court hours,  
2 with one taking place at approximately 1245 and the other taking  
3 place at approximately 1604.

4 It's also my understanding that the dining facility is open  
5 from 1100 to 1300 for lunch and 1630 to 1830 for evening meal. In  
6 order to accommodate the prayer time and mealtime, I intend to take a  
7 lunch recess from 1200 to 1330 and an evening recess from no  
8 later -- an evening recess no later than 1545.

9 Are there any objections to that projected way ahead for  
10 this week?

11 Defense Counsel, I'll start with you.

12 LDC [MR. HODES]: No objections, Your Honor.

13 MJ [Lt Col BRAUN]: Trial Counsel?

14 TC [COL KRAEHE]: No objection, Your Honor.

15 MJ [Lt Col BRAUN]: Thank you.

16 On the 22nd of October 2023, I conducted a conference with  
17 trial and defense counsel in accordance with Rule for Military  
18 Commissions 802. The accused was absent. At this conference we  
19 discussed the following:

20 The participants introduced themselves. Counsel were  
21 reminded of the purpose of an R.M.C., excuse me, 802 conference. The  
22 commission confirmed when prayer time was for the days the commission  
23 was in session and outlined for the parties how the commission

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1 intended to proceed forward based upon those prayer times.

2           The commission provided its proposed schedule for the  
3 sessions this week. The parties were provided an outline of how voir  
4 dire of the military judge would be accomplished this morning. The  
5 commission inquired as to whether either party intended to call  
6 witnesses in support of arguments of AE 0056 and AE 0057, which the  
7 commission plans to take up this week.

8           The government at that time requested a delay to argument on  
9 AE 0056, as the defense was going to file a supplement to their  
10 response during that week, and the government did not have an  
11 opportunity at that point to have reviewed that response.

12           The government did indicate, however, that it would be  
13 prepared to proceed based upon the pleadings that existed at that  
14 time of that R.M.C. 802 session, and made the commission aware that  
15 they may ask for additional argument and presentation of witnesses or  
16 evidence at a later session, if necessary, based upon the defense's  
17 supplement.

18           Both parties affirmed no witnesses were required for the  
19 presentations that the commission anticipated taking up this week,  
20 and both were otherwise prepared to proceed.

21           The commission confirmed the only reason to conduct a closed  
22 hearing was to allow the defense to provide a presentation on its  
23 theory of the case, and that presentation would be ex parte.

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1           The defense informed the commission of continuing  
2 difficulties with its assigned interpreter. The defense was unable  
3 to conduct a conflicts check, as it did not have a copy of the newly  
4 assigned interpreter's C.V.

5           The commission directed the parties to work together to see  
6 if they could resolve that and, if unable to do so, to file an  
7 appropriate pleading with the commission to request recourse from the  
8 commission.

9           The defense inquired as to the status of rulings on orders  
10 on previous-filed and fully briefed defense motions. The defense  
11 offered to provide an explanation in an ex parte session regarding a  
12 request of lead defense counsel to not be present in early  
13 January 2024.

14           The commission additionally inquired generally concerning  
15 the status -- or the commission informed the government that it would  
16 ask for an update as to discovery at this week's proceeding on the  
17 record. The commission also received a slight update on discovery  
18 during that session as well.

19           The government indicated it intended to file a request for  
20 additional time in response to defense motion AE 0069.

21           Based upon that summary, does counsel for either side have  
22 any objection to or wish to supplement my summary of our R.M.C. 802  
23 session?

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1 Trial Counsel?

2 TC [COL KRAEHE]: No objection, Your Honor.

3 MJ [Lt Col BRAUN]: Defense Counsel?

4 LDC [MR. HODES]: No objection, Your Honor.

5 MJ [Lt Col BRAUN]: Thank you.

6 I've been detailed to this commission by Colonel Lanny  
7 Acosta, the then-chief judge of the military commission's trial  
8 judiciary pursuant to Rule for Military Commissions 503. I am  
9 certified and qualified in accordance with Article 26(b) and (c) of  
10 the Uniform Code of Military Justice, as well as Rule for Military  
11 Commissions 502 and 503. I have previously been sworn under  
12 Article 42(a) of the Uniform Code of Military Justice and Rule for  
13 Military Commissions 807.

14 Prior to coming on the record this morning, I provided the  
15 parties a copy of my biography which has been marked as Appellate  
16 Exhibit 0001.007.

17 In accordance with the docketing order, AE 0066.001 (TJ),  
18 the government and Mr. Nurjaman have submitted voir dire questions of  
19 the military judge to answer, which have been marked as AE 0066.009  
20 (Gov) and AE 0066.010 (NUR) respectfully.

21 In response to those submissions, I will provide a  
22 consolidated response. To aid in this process, given that many of  
23 the questions submitted by the parties did overlap, I've organized my

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1 answers into general categories. I will outline those general  
2 categories for the parties as I provide the information.

3 While I appreciate that some of these categories will not be  
4 an exact fit, I'm hopeful that they are helpful in framing my  
5 responses to aid the parties in organizing any follow-on questions  
6 they may have.

7 For my response, I will also reference the number of each  
8 party's question that I am responding to, as outlined in the  
9 respective appellate exhibit. At the conclusion of my consolidated  
10 response I will allow each side to ask follow-up questions that  
11 pertain to my answers which are relevant to a causal challenge.

12 To begin, I note that none of the specific grounds for  
13 disqualifications in R.M.C. 902(b) exist in this case. Having  
14 carefully considered the matter upon being detailed to this  
15 commission, and following my review of the record in this case, I do  
16 not believe my impartiality might reasonably be questioned.

17 I provide that response generally as my obligation as a  
18 military judge detailed to this commission and in response to defense  
19 question 62.

20 The first category of questions I will address are those  
21 relating to my detailing to this commission in response to defense  
22 questions 1, 2, 3, 4, and 5.

23 I will start by saying that I, as a military judge, do not

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1 know the exact detailing process or the way in which military judges  
2 are nominated for the military commissions, aside from what is  
3 contained in the rules. My response, therefore, will capture the  
4 facts which I am aware.

5 First, I was approached by the chief trial judge for the Air  
6 Force in May of 2023, after I had already received notification of my  
7 next assignment as a military judge and impending PCS -- permanent  
8 change of station -- to San Antonio. I was asked at that time if I  
9 had an active Top Secret security clearance, which I did.

10 As I -- I was informed -- as I had an active Top Secret  
11 security clearance and the required time on the bench, as I had  
12 previously been a military judge, I was informed I would be a  
13 potential candidate for detailing to the commission.

14 In July 2023, after I had already departed my previous  
15 assignment and had arrived in San Antonio, I received a call from the  
16 chief trial judge of the military commissions informing me of his  
17 intent to detail me to a commission. I had no particular thoughts  
18 one way or another when I was notified of the likely detailing. I  
19 did acknowledge it was something that I had never done before and was  
20 intrigued at an opportunity to continue to grow as both an attorney  
21 and a judge.

22 Aside from that, after being notified of this detailing, I  
23 called Colonel Matt McCall, as I knew he was presiding over another

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1 commission. The discussions Colonel McCall and I had were about  
2 logistical and administrative matters only. They did not touch on  
3 any substance of this or any other commission.

4 I was detailed by Colonel Acosta a few weeks later. My oath  
5 was subsequently administered by Colonel Jack Pritchard, the current  
6 chief judge of the military commissions. I did not fill out any  
7 questionnaire or participate in any interviewing process as part of  
8 my detailing to this commission.

9 After being detailed to this commission, the only  
10 individuals I have spoken to regarding the assignment and my  
11 responsibilities in this commission are the chief trial judge for  
12 District 4 of the Air Force Trial Judiciary, and now Mr. Lanny  
13 Acosta, who is currently serving as the chief clerk for the Air  
14 Force.

15 The purpose of these conversations were to inform them of my  
16 responsibilities and really to ensure that my Air Force docket of  
17 courts-martial does not conflict with the schedule I have laid out  
18 for the military commissions.

19 In reference to -- moving on to my roles and  
20 responsibilities as a military judge -- and this is in reference to  
21 defense question 6.

22 As a military judge, I have attended periodic trainings that  
23 have discussed my role and responsibilities as a military judge.



1 They have included the Military Judges Course which I  
2 intended -- which I attended, excuse me, in both the spring of 2018  
3 and the spring of 2023. The Joint Military Judges Annual Training,  
4 which is an annual training for all DoD military judges that occurs  
5 annually. I attended every year I was assigned as a military judge.

6 And I attend internal trainings conducted among the Air  
7 Force judges, and those cover a range of topics to include judicial  
8 ethics.

9 I have also attended a training hosted by the National  
10 Judicial College in I believe it was 2020. At these trainings I have  
11 received briefings regarding my role and responsibility as a military  
12 judge as well as updates to the law. These briefings are presented  
13 by subject matter experts and -- subject matter experts from the  
14 services, as well as subject matter experts from the National  
15 Judicial College as well as fellow judges.

16 Specific to the commissions, as I previously mentioned, I  
17 have spoken to Judge McCall about the general requirements of being  
18 detailed to a military commission case. During these conversations  
19 we didn't talk again about the substance of any commission case.

20 I have spoken extensively with the trial judiciary staff  
21 about substantive matters, however. I have not talked to any other  
22 individuals listed in the defense question 6 about my roles and  
23 responsibilities as a military judge or the military commissions.

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1           In reference to defense question 7, my rater is the Chief  
2 District Military Judge for District 4, which is the district I'm  
3 assigned to, and my higher level reviewer is the Air Force Judge  
4 Advocate General.

5           Looking then to my knowledge of various parties -- and this  
6 is in reference to government questions 1 and 2, as well as defense  
7 questions 10, subsets a. through f.

8           I will note, for ease of the parties, defense question 10  
9 has a list of 17 subitems to it. The first eight are listed as  
10 subparagraphs a. through h. After item eight there's just a  
11 scrivener's error where the subparagraphs reset as a. with items 9  
12 through 17. For the sake of clarity, what I'm going to do  
13 is I'm -- when I'm discussing the items of 9 through 17, I'll refer  
14 to them as the second a., second b., second c. to try and keep us all  
15 together here.

16           So I know the following individuals associated with this  
17 military commission:

18           Major Christina Curl. She's a member of one of the defense  
19 teams -- she's a member of the defense team. She appeared before me  
20 in a court-martial I presided over in 2019. At that court-martial,  
21 she was acting as a victim's counsel for one of the named victims. I  
22 have not interacted with her in any significant way outside of that  
23 specific context.

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1 Major Lindsey Parsons. She appeared before me in a  
2 court-martial I presided over in 2020. In that court-martial, she  
3 was also acting as a victim's counsel. We have not acted in -- or  
4 interacted in any significant way again outside of that context.

5 Lieutenant Colonel Christopher Goewert, the Managing Deputy  
6 Trial Counsel. I know him from his time in the Air Force Judge  
7 Advocate General School. I believe he might have either taught a  
8 course or he gave a presentation that I attended or watched. We have  
9 not had an ongoing personal relationship and I do not have ongoing or  
10 significant contacts with him.

11 Major Imelda Antonio, a member of the prosecution team. I  
12 recognized her name but did not remember why I recognized the name.  
13 I have since learned that she and I may have attended training  
14 together at the Air Force Judge Advocate General School. I do not  
15 recall any specific interactions with her and we have not had regular  
16 or frequent communications now or at any time really during my time  
17 in the Air Force Judge Advocate General Corps.

18 Lieutenant Colonel Geoffrey DeWeese, a prior member of one  
19 of the defense teams. I believe I met Lieutenant Colonel DeWeese  
20 during my deployment in Qatar. During that time he was the Home  
21 Installation Judge Advocate for the commander of the task force that  
22 I deployed to, to provide legal services to. He in essence came  
23 forward to Qatar to discuss military justice matters and to offer

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1 other insights into some of the Army specific issues that may have  
2 come forward with that commander so that I would have some visibility  
3 during the deployment. Aside from that, he and I have had no -- no  
4 contacts.

5 Nothing about these interactions with any individual would  
6 cause me any difficulty in finding facts concerning the law and  
7 applying the law to the facts as required in my role as a military  
8 judge in this commission or in any other proceeding before me.

9 Turning then to my knowledge of the accused in this case.  
10 In response to government questions 13, 14, 15, 16, and 17, I did not  
11 have any prior knowledge of the accused before I was detailed to this  
12 military commission. I was not involved in any operations involving  
13 the accused and do not know of any colleague, family, or friend who  
14 has any connection or knowledge of the accused.

15 Regarding any knowledge of the accused, there is nothing  
16 that would cause me any difficulty in finding facts, discerning the  
17 law, and applying the law as required in my role as a military judge  
18 in this commission or in any other proceeding before me.

19 Looking then to other -- my knowledge of other individuals,  
20 aside from the parties, as it pertains defense -- to defense  
21 question 10 g. I note that I currently work with the Office of  
22 Military Commissions trial judiciary staff.

23 In addition, I note the following military commission trial

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1 judges: Colonel (Retired), excuse me, Lanny Acosta. We briefly  
2 interacted at the military judges course in the spring of 2023, and  
3 during that time discussed Colonel Acosta's pending retirement.

4 At that time I was not aware of Colonel Acosta's role in the  
5 Military Commissions Trial Judiciary, nor was I told that I would be  
6 detailed to this military commission or any military commission.

7 That's incorrect. I had a conversation with Judge Wiedie at  
8 that same judge's course about potentially being a candidate to be  
9 detailed, as I previously discussed. I was not aware though that I  
10 would be detailed to this commission.

11 The next time I spoke with Colonel Acosta was in July 2023  
12 when he informed me that I would be detailed to this commission  
13 specifically.

14 As I previously stated, I had current interaction with him  
15 as he is currently the -- I currently have interactions with him, as  
16 he's the Clerk of Court for the Air Force Trial Judiciary. In that  
17 role, he is the focal point of maintaining what I would call our  
18 master calendar for docketing purposes. So he is aware of periods of  
19 time when I have found that I will be unavailable for Air Force  
20 courts-martial.

21 Colonel Acosta and I have never discussed any specifics of  
22 this commission, and I was unaware he had previously been detailed to  
23 this commission.

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1           Colonel Matt McCall. Colonel McCall and I were both judges  
2 in the same circuit from July 2019 until July 2021, so we have known  
3 each other for some time. We would have regular contact and would  
4 see each other regularly during that time as we worked in the same  
5 building.

6           Once I left the bench in July of 2021, we had very  
7 infrequent contact. I have since had more contact with him since I  
8 returned to the bench in July of 2023, largely because we attended  
9 same trainings and will see each other at other Air Force events that  
10 involve the trial judiciary.

11           Colonel (Retired) Vance Spath. Colonel Spath was the Chief  
12 Trial Judge for the Air Force Trial Judiciary when I was selected to  
13 become a military judge in 2019. So I've known him since then in  
14 that context. We have not been in regular contact since he retired  
15 from the Air Force some time ago.

16           Lieutenant Colonel (Retired) Mark Rosenow. I know  
17 Lieutenant Colonel Rosenow from the time we overlapped as military  
18 judges from 2018 to 2019, and generally from my time in the Air Force  
19 Judge Advocate General Corps. Given our similar positions and time  
20 in the JAG Corps, we have encountered each other at various  
21 trainings. We also were assigned as defense counsel at bases near  
22 each other in New Mexico. I would not describe our relationship as  
23 incredibly close and we have not talked in some years. I have never

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1 discussed with Lieutenant Colonel Rosenow his work on the commissions  
2 or any commissions case.

3 Colonel (Retired) Shane Cohen. I know Colonel Cohen, as he  
4 was the first Deputy Chief Circuit Military Judge and then the Chief  
5 Circuit Military Judge when I was previously on the bench. In that  
6 capacity, he served as my supervisor for some of that time while he  
7 was the Chief Circuit Military Judge.

8 We have texted some since he's retired from the Air Force,  
9 though we have never discussed any ongoing cases either from the  
10 commissions or from my courts-martial docket. Our few conversations  
11 are in essence brief hellos just to check in with each other.

12 In response to defense questions -- defense question 10  
13 subparts g. through h. and the second a. through g. I'm unaware of  
14 any financial, personal, or professional relationship with  
15 individuals who previously or currently work for the following:

16 The Office of Military Commissions, the Office of the  
17 Convening Authority, the Office of the Chief Prosecutor, the Office  
18 of the Chief Defense Counsel, the Department of Justice, the Central  
19 Intelligence Agency, the Federal Bureau of Investigation, or the  
20 National Security Agency.

21 In response to defense question 10, second h., my spouse was  
22 assigned to Joint Task Force GTMO from October 2010 to April 2011 and  
23 he was responsible for FOIA actions during that time.

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1           At the time of the assignment I did not know my spouse. And  
2 other than asking for dates of the assignment for this matter, we  
3 have not spoken in any great detail about that assignment. I'm not  
4 aware of any other financial, personal, or professional relationship  
5 with anyone who was involved in Joint Task Force GTMO.

6           In response to defense question 11, my spouse is retired  
7 from the Air Force and is currently seeking employment with federal  
8 agencies. However, at this time none of those agencies are part of  
9 the Department of Justice or within the intelligence community.

10           Should my spouse accept a position with an entity who is a  
11 recognized party to this commission, I will notify the parties of  
12 that fact.

13           I also have a close friend who works as an ethics attorney  
14 in the Department of the Interior and have many close friends and  
15 colleagues who work in the Department of Defense, though, again, none  
16 of them, to my knowledge, work in the Office of Military Commissions  
17 or with the commissions process.

18           Nothing in this category of knowledge would cause me any  
19 difficulty in finding facts, discerning law, or applying law as  
20 required in my role as a military judge in this commission or any  
21 proceeding before me.

22           Turning then to any communications about this case as it  
23 relates to defense questions 24, subparts a. through g. and q.



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1           Members of my staff have routine and ongoing administrative  
2 contact with members of the defense and prosecution teams. Members  
3 of my staff have routine and ongoing administrative contact with  
4 members of the defense team in U.S. v. bin Amin, et al.

5           The trial judiciary staff director has contact with the  
6 following: The Office of Military Commissions, the Office of  
7 Convening Authority, the Office of Chief Prosecutor, the Office of  
8 Chief Defense Counsel, Joint Task Force GTMO. These contacts are  
9 administrative in nature and deal with the administrative and  
10 logistic requirements for this and other military commission  
11 proceedings.

12           In response to defense questions 24, subpart k., I'm aware  
13 the staff director has conversations with the individual military  
14 services to request forces to ensure he can accomplish the trial  
15 judiciary's mission. I'm not party to any of those conversations as  
16 they deal with the overall administration of the trial judiciary,  
17 something that falls outside the scope of my role as a military  
18 judge.

19           In response to defense questions 24 l. through p. and r., no  
20 member of the trial judiciary staff has had conversations about this  
21 commission with the Department of Justice, the Central Intelligence  
22 Agency, the Federal Bureau of Investigations, the National Security  
23 Agency, the Biden Administration, nor any member of Congress.

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1 I do not personally know any of the individuals that are  
2 listed in defense question 25.

3 Nothing of my knowledge in this category would cause me any  
4 difficulty in finding facts, discerning the law, and applying the law  
5 as required in my role as a military judge in this commission or in  
6 any other proceeding that would be before me.

7 As it pertains to defense questions 12 and 13, I will  
8 unequivocally state that I have always held and continue to hold  
9 deeply that my personal, religious and political beliefs have no  
10 place in my judicial duties.

11 While I'm performing judicial duties, I do not think about  
12 religion or politics, unless it's been properly placed in front of me  
13 as evidence. Nothing about my personal or religious beliefs will  
14 influence or affect my ability to be fair and impartial.

15 Turning then to any upcoming change of assignment,  
16 retirement, or post-government employment in reference to government  
17 questions 3, 4, and 5, I do not anticipate a future PCS -- or  
18 permanent change of station -- until at least the summer of 2025,  
19 possibly 2026.

20 If I'm asked my desires to change stations in the summer of  
21 2025, I currently anticipate I will request to remain a military  
22 judge until the summer of 2026, which would give me a three-year tour  
23 on the bench.

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1           Nothing in my current position as an Air Force military  
2 judge will interfere with my duties and responsibilities as a  
3 military judge detailed to this commission.

4           In reference to government questions 6 and 7 and defense  
5 questions 28 and 29, I am not currently retirement-eligible, and my  
6 earliest date for retirement would be on or about 1 November 2026.

7           I've not decided on whether I will retire in 2026 or  
8 continue with my Air Force career. I have not begun the retirement  
9 process, though I anticipate I will attend the mandatory Transition  
10 Assistance Program -- commonly referred to as TAP -- at some point  
11 over the next couple of years as approach that retirement eligibility  
12 date, to ensure that I'm satisfying the congressional and DoD  
13 requirement to attend that briefing.

14           I'm not seeking post-government employment. I have not  
15 applied for civilian employment with the Department of Defense, the  
16 Department of Justice, or any other Executive Branch agency. I've  
17 not discussed prospective employment with any individual, aside from  
18 talking generally about the different jobs I see other individuals  
19 taking post-government when they separate.

20           Such discussions are informal and really are geared towards  
21 an understanding of the unique nature of an individual's job and the  
22 path they took to get there. This is not my attempts to seek  
23 employment from those individuals or the agencies that employed them,

1 but merely an attempt to inform myself based upon general curiosity.

2           If this case is still active in 2026 and I decide to retire,  
3 I'll notify the parties. Likewise, should I begin negotiations for  
4 employment with any federal/executive branch agency generally  
5 recognized as a party to the litigation of military commission cases,  
6 I will notify the parties.

7           Turning to my past formal education, in reference to defense  
8 questions 31, 32, 33, and 34, I do not have a declared minor or -- I  
9 did not have a declared minor or concentration during my  
10 undergraduate studies or during law school.

11           I did take one elective in international law during law  
12 school and it discussed the general structure of international law  
13 and discussed the -- during that time, the various -- discussed  
14 various criminal tribunals in an international law context.

15           To my recollection, I did write a paper in this course,  
16 though I cannot, for the life of me, remember exactly what the title  
17 was of that paper, and it was not a published work. I wrote no other  
18 papers related to international law while in law school.

19           During my LLM, my area of concentration was criminal law.  
20 As part of the graduation requirements, I did write a research paper  
21 that discussed the current limitations on immunity under Rules for  
22 Courts-Martial, and suggested a change in the authority under the MCM  
23 to allow delegation of immunity to a special court-martial convening

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1 authority in cases involving collateral misconduct. This paper was  
2 also not published.

3 I did not write a paper as part of a graduation requirement  
4 for Air Command and Staff College.

5 Turning to my current and prior professional experience, as  
6 it pertains to defense question 26, my reasons for joining the  
7 military back in 2006 have no relevance to this case. My reasons for  
8 joining the military have no basis for my role as a military judge.  
9 It has no place in my courtroom. It will have no impact upon my  
10 rulings or analysis of facts and evidence in reaching such rulings.

11 Accordingly, my reasons for joining the military over 17  
12 years ago will have absolutely zero bearing on my duties as a  
13 military judge, be it this commission or any other proceeding in  
14 which I am involved.

15 In response to defense question 27, my next promotion board  
16 will meet in the summer of 2024.

17 In reference to defense question 30, I have not previously  
18 disqualified myself from presiding over a United States Air Force  
19 courts-martial.

20 In reference to defense question 35, I have not been  
21 involved in a court-martial in any capacity that involved classified  
22 material.

23 In reference to defense question 36, as a Captain I have

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1 provided pre-deployment briefings on the law of armed conflict for  
2 deploying airmen. These were standard presentations that were  
3 required by the Air Force.

4 Other than those items previously disclosed, I have not  
5 published any work, written work, or spoken publicly about the topics  
6 covered in defense question 36.

7 In reference to defense question 37 and its subparts, while  
8 I was assigned to Ramstein Air Base Germany from November of 2006 to  
9 November of 2009, I was a court observer.

10 In that role, I would observe any German trial involving a  
11 U.S. citizen. At the conclusion of that trial, I would write a  
12 report outlining the proceeding, with an eye toward ensuring U.S.  
13 citizens were afforded adequate due process rights. I believe I only  
14 observed one criminal trial during my time as a court observer.

15 While deployed to Qatar in May of 2009 to November of 2009,  
16 I received and provided briefings on basic LOAC and humanitarian law.  
17 I also reviewed operational plans for information operations  
18 conducted by the Joint Psychological Operations Task Force to ensure  
19 compliance with international and domestic law.

20 As an LLM student, I took the required core international  
21 law courses to -- that included human rights law and the Law of War  
22 and national security.

23 As a Staff Judge Advocate at Barksdale Air Force Base, I

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1 provided oversight to personnel conducting required LOAC briefings.  
2 I have not been responsible for international law training in any  
3 other position.

4 In reference to defense question 38, while I was the Staff  
5 Judge Advocate to the Air Force Office of Special Investigations  
6 Academy and legal instructor at the Federal Law Enforcement Training  
7 Center, I taught courses on the Fifth and Sixth Amendments to basic  
8 core students who would -- that which -- excuse me. I taught courses  
9 on the Fifth and Sixth Amendments to basic core students, and that  
10 included all Air Force Office of Special Investigations students.

11 I also co-taught interviewing techniques insomuch as it  
12 involved discussions of the law, be it Fifth or Sixth Amendment or  
13 the Federal or Military Rules of Evidence to OSI students.

14 Finally, as an instructor I monitored courses on cognitive  
15 interviewing techniques.

16 In reference to defense question 39, I am unaware of having  
17 any interaction with any member of the CIA, and I don't have an  
18 opinion of the CIA.

19 In reference to defense questions 40, as an instructor at  
20 the Federal Law Enforcement Training Center, I instructed some FBI  
21 students. Additionally, while stationed at Kirkland Air Force Base,  
22 I was part of a joint planning team that involved the FBI. The  
23 planning involved discussions regarding contingency operations,

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1 planning that would involve the Air Force and the FBI interacting  
2 with each other.

3 I don't recall any FBI students by name, nor do I recall any  
4 of the FBI agents I interacted with during that training. And as far  
5 as the students, or the individuals in that training, I did not -- or  
6 that planning, I did not interact with any of them outside of those  
7 specific environments. I do not have any particular opinion of the  
8 FBI.

9 In reference to defense question 41, when I was the Chief  
10 Joint Service Policy -- the Chief of Joint Service Policy and  
11 Legislation, I was part of a coordination process for the services in  
12 DoD regarding potential changes to the Rules for Military  
13 Commissions.

14 I did not provide any input or substantive information as  
15 that fell outside of my portfolio. However, that specific job put me  
16 at a -- put me within a DoD level joint committee that worked  
17 military justice issues. So I was a conduit that took that  
18 information and staffed it to the stakeholders within the Air Force  
19 Judge Advocate General Corps.

20 In reference to defense question 43, I have played no role  
21 in any capacity in developing any aspect of the RDI programs.

22 In reference to defense -- excuse me. In reference to  
23 government questions 9, 10, and 11, as well as defense questions 42,



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1 44, and 45, I was the deployed Staff Judge Advocate for the Joint  
2 Psychological Operations Task Force from May to November 2009.

3 In that role I served as the principal legal advisor to the  
4 Joint Task Force commander who at the time was an Army O6. My duties  
5 varied from assisting in discipline matters, reviewing contracting  
6 and fiscal law issues, and assuring appropriate authorities existed  
7 to conduct various military information operations.

8 I also provided legal support to approximately ten different  
9 teams that were embedded in various countries throughout the CENTCOM  
10 AOR. These teams were responsible for the planning and execution of  
11 local operations in coordination with the Joint Psychological  
12 Operations Task Force, and the local embassy or the chief of mission  
13 where they were located. This would have involved actions which  
14 supported the various CENTCOM and NATO named operations during my  
15 time in deployment.

16 I also forward deployed to serve as a legal advisor to an  
17 Army task force that was being established in Kabul, Afghanistan, to  
18 conduct military information operations in that country. I received  
19 the Afghanistan Campaign Medal and the ISAF NATO Medal for that  
20 deployment.

21 I did not interact with any Southeast Asian government or  
22 law enforcement during my time as a deployed staff judge advocate or  
23 during my deployment to Kabul.

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1           Nothing from my experience deploying to the Joint  
2 Psychological Operations Task Force will affect my ability to fulfill  
3 my duties fairly and impartially as a military judge in this  
4 commission.

5           Turning then to any prior experiences I have had with  
6 terrorism, the following response to government questions 8 and 12  
7 and defense questions 8 and 9.

8           I informed the parties that during my deployment to  
9 Afghanistan from May 2009 to November of 2009, I was in a convoy  
10 which was near a vehicle-borne improvised explosive device that  
11 destroyed the front gate of the headquarters ISAF. I was not injured  
12 and no one in my convoy was injured.

13           There were, to my understanding, significant injuries for  
14 personnel that were near that gate. I did not personally know any of  
15 the injured. Nothing about this incident would impact my ability to  
16 fulfill my duties on this commission.

17           I have not witnessed any other attacks, been victim of, nor  
18 investigated any terrorist attack. I do not have any extended family  
19 or close personal friends or professional colleagues who witnessed,  
20 were the victim of or investigated any terrorist attack. I'm not a  
21 victim, nor have I been personally affected by any al Qaeda attacks.  
22 I have no extended family or any close personal friends or  
23 professional colleagues who were the victim of or personally affected

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1 by any al Qaeda attacks.

2 I did not lose anyone or suffer an injury due to the war in  
3 Afghanistan. I have no extended family or any close personal friends  
4 or professional colleagues who lost anyone or suffered any injury due  
5 to the war in Afghanistan.

6 Nor -- neither I nor any extended family member, close  
7 friend, or professional colleague was affected in any significant way  
8 by the bombings alleged in the present case.

9 I have not and am not aware of any family member or close  
10 friend that suffered any specific financial loss due to any terrorist  
11 attack that would not have been experienced by any member of the  
12 general public due to financial market fluctuations.

13 In response to defense questions 17 and 18, I have read  
14 basic material about al Qaeda in the media and at various  
15 professional military education courses. I do not recall any one  
16 particular specific source of that information. I do not recall ever  
17 specifically reading about Jemaah Islamiyah.

18 Given all my responses regarding any exposure I may have  
19 had, or a close family member or friend that may have had, to what  
20 one might classify as an act of terrorism, my limited knowledge of  
21 those facts would not impact my ability to fulfill my duties as a  
22 military judge in this commission.

23 Turning to my knowledge of the commissions, in reference to

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1 defense questions 46 and 47. I know I have in the past reviewed  
2 media coverage about the commissions and the RDI program in general.  
3 Again, I don't recall any specific source or underlying facts of any  
4 one particular article.

5 In reference to government questions 18, 19, 20, and 21, the  
6 defense -- and defense question 48, prior to being detailed to this  
7 case, I do not recall seeing, hearing, or reading anything of  
8 substance about this specific commission.

9 I likely heard of the incidents as they happened, or at the  
10 time they would have occurred through normal media reporting. But I,  
11 again, don't recall any specifics, or any specific source.

12 Outside of the trial judiciary staff supporting me, I have  
13 not spoken to anyone about the substance of this case. No one has  
14 provided me their opinion of the case. And any exposure I may have  
15 had, be it directly or indirectly to this commission, will not impair  
16 my ability to fairly fulfill my duties as a military judge presiding  
17 over this commission, or my ability to determine facts based upon  
18 evidence presented to me and apply the law to those facts.

19 In reference to defense questions 49 and 50, I have not read  
20 anything regarding the Combatant Status Review Tribunal for  
21 Mr. Nurjaman or his treatment while in U.S. custody.

22 In reference to defense question 51, I have watched *Zero*  
23 *Dark Thirty*. I don't remember when I watched it anymore. It was

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1 several years ago, I do know that. The film had no particular impact  
2 upon me or my opinion about the respective topics, the military  
3 commissions in general, or this commission in particular.

4 In reference to defense question 52, I have not formed or  
5 expressed an opinion regarding the list of people and topics in  
6 defense question 52.

7 In reference to defense question 53, I have no expectation  
8 or goals for when this case will be completed. What I do expect is  
9 that this commission will progress in an orderly, efficient, and fair  
10 manner in accordance with the Military Commissions Act and other  
11 controlling law.

12 In reference to defense questions 55 and 56, I'm generally  
13 aware of the rulings from other military commissions related to the  
14 admissibility of evidence or statements procured through torture. I  
15 do not have enough information to form an opinion regarding the  
16 correctness of any of those decisions.

17 In reference to defense questions 54, 57, 58, 59, 60, and  
18 61, I'm unwilling to assume the facts requested in those questions to  
19 provide a response on how I might rule under certain situations, nor  
20 do I think an advisory ruling is appropriate.

21 However, I will say that I'm fully prepared to determine  
22 facts based upon evidence presented properly before me and apply  
23 applicable law to reach a decision when required to do so as part of

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1 this commission, regardless of the subject matter involved.

2           Turning to any prior experience or knowledge I have of Islam  
3 or Indonesia, relating to defense questions 14, 15, and 16, I do not  
4 have any close personal or close social contacts with any Muslims, to  
5 my knowledge. I have no specific opinion of Muslims. I have a  
6 minimal knowledge of the practice of Islam, and this knowledge comes  
7 from my time in college where I was required to take core education  
8 courses in religion, one of which was a comparative religion class.

9           I also received basic briefings during my deployment to aid  
10 in better understanding and respecting the cultures of those who  
11 lived in the nations that we were deployed to at the time. Nothing  
12 about my prior knowledge of the practice of Islam will impact me as a  
13 military judge.

14           As it relates to defense questions 19, 20, 21, 22, and 23, I  
15 do not have any close social or personal contact with anyone from  
16 Indonesia, Malaysia, Singapore, or Australia. I have not traveled to  
17 Indonesia and have no family members who have traveled to Indonesia.

18           I do not speak Dahasa -- I'm sorry, Bahasa, Indonesia, or  
19 any other Indonesian dialect, nor do I speak Arabic. I do not have a  
20 particular opinion as to Indonesians.

21           Turning then to any expressed public opinions or comments in  
22 reference to government questions 22, 23, 24, 25, and 26, I have not  
23 publicly commented or expressed an opinion concerning this

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1 commission, the accused's guilt or innocence, al Qaeda, and Jemaah  
2 Islamiyah.

3 I do not believe I have publicly commented or expressed an  
4 opinion on terrorism. Any opinion I may have expressed would have  
5 been limited to the particular circumstances or fact pattern and  
6 would not have involved this commission.

7 Regardless, I find that I would have no difficulty setting  
8 aside any previous opinion I may have had in judging this case,  
9 again, based upon the evidence presented to me properly in this  
10 commission and applying the controlling law involved to provide  
11 appropriate ruling as required by the law and my role as a military  
12 judge.

13 Those conclude the consolidated responses I have to the  
14 parties' submissions for voir dire of the military judge. It's my  
15 intent at this time to take a 15-minute recess to allow the parties  
16 to talk amongst themselves, collect their notes, determine what  
17 individual questions, if any, they may have for me, as well as to  
18 attend to any other needs they may need during the process.

19 Is 15 minutes going to be sufficient, Trial Counsel?

20 TC [COL KRAEHE]: Yes, Your Honor.

21 MJ [Lt Col BRAUN]: And Defense Counsel?

22 LDC [MR. HODES]: Yes, Your Honor.

23 MJ [Lt Col BRAUN]: Very well, then.

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1           This commission is in recess for 15 minutes.

2   **[The R.M.C. 803 session recessed at 1003, 25 October 2023.]**

3   **[The R.M.C. 803 session was called to order at 1020, 25 October**  
4   **2023.]**

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

6           The parties that were present when the commission recessed  
7   are again present.

8           Prior to moving into any individual questions the parties  
9   may have, I want to correct a response -- or supplement a response to  
10  defense question 24.

11           I will advise the parties that the Court Information  
12  Security Officers do have communications with members of the  
13  intelligence community to address security issues.

14           Other than being notified of security concerns which may  
15  impact the proceeding, specifically my need to move into potentially  
16  a closed session or other security concerns, I am not involved in  
17  these conversations. I do not know how these conversations occur.  
18  But I do know that my staff do have those conversations. And  
19  defense, I think that is directly responsive to your question 24. So  
20  I wanted to make sure that all the parties had the benefit of that  
21  information, should that impact any follow-on questioning they may  
22  have.

23           So with that, Trial Counsel, do you desire to ask follow-up



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1 questions of me?

2 TC [COL KRAEHE]: No, Your Honor. We have no follow-up  
3 questions.

4 MJ [Lt Col BRAUN]: Defense Counsel, do you desire to ask  
5 follow-up questions of the military judge?

6 LDC [MR. HODES]: We do, Your Honor. It will be Major Parsons  
7 handling that.

8 MJ [Lt Col BRAUN]: Okay. Please proceed.

9 DDC [Maj PARSONS]: Good morning.

10 MJ [Lt Col BRAUN]: Good morning.

11 DDC [Maj PARSONS]: In response to some of the questions, you  
12 described your current rating chain. And I believe you stated that  
13 one of your raters is either the chief trial judge for District 4 or  
14 the chief district judge for District 4. Your Honor, would you be  
15 able to provide the name of that individual? Or does that  
16 individual, to your knowledge, have any prior or present relationship  
17 to the military commissions in any form?

18 MJ [Lt Col BRAUN]: So to my knowledge, that person does not  
19 have any relationship with the military commissions. But what I will  
20 do is I will make sure to double-check that answer for the parties.  
21 But to my knowledge, no, that individual has no involvement with the  
22 commissions.

23 DDC [Maj PARSONS]: Thank you, Your Honor.

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1           And because of the timing of you first being assigned and  
2 arriving at Joint Base San Antonio as a military judge for the Air  
3 Force and then being assigned here, I just want to ask some  
4 clarifying questions about maybe any crossover. Is there any -- do  
5 you have any holdover cases with the Air Force trial judiciary at the  
6 moment? Any duties to the Air Force trial judiciary?

7           MJ [Lt Col BRAUN]: Sure. Yeah. So I maintain an Air Force  
8 court-martial docket simultaneously to my service as the military  
9 judge to this commission. So I do have -- I guess the best way to  
10 say it is I have active cases currently ongoing, and those schedules  
11 are just deconflicted, and that's part of the conversations I have  
12 with my chief district trial judge and then the chief clerk of the  
13 Air Force trial judiciary, to make sure that my time is allocated  
14 appropriately, both for conducting the proceedings and then any prep  
15 work that I may need to accomplish.

16          DDC [Maj PARSONS]: And, Your Honor, does one of those forums  
17 hold precedent over the other or come first, to your knowledge, in  
18 those scheduling duties and ----

19          MJ [Lt Col BRAUN]: Yeah. So I think there is -- with proper  
20 planning, there's sufficient time to do all of them if one actively  
21 maintains their docket.

22          However, it is my understanding that the commissions do take  
23 priority over any Air Force courts-martial that I am docketed to.

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1 DDC [Maj PARSONS]: And does Your Honor have a separate  
2 administrative staff or any resources like that available on the Air  
3 Force side?

4 MJ [Lt Col BRAUN]: So as an Air Force trial judge, I do not  
5 have an administrative staff. I do have individuals that help me  
6 with things like travel authorizations and vouchers when I have  
7 difficulties with that process.

8 But, generally speaking, under the Manual for  
9 Courts-Martial, trial counsel assumes a lot of the responsibility for  
10 logistics involved in holding a courts-martial, from availability of  
11 courtrooms to availability of witnesses, lodge -- assisting in the  
12 lodging of the military judge, those types of matters.

13 DDC [Maj PARSONS]: Yes, Your Honor.

14 And do any of those travel or administrative assistants on  
15 the Air Force side, to your knowledge, do any of them have any prior  
16 or current relationship to the military commissions?

17 MJ [Lt Col BRAUN]: To my knowledge, based on the current  
18 cases that I am detailed to, no. I wouldn't expect that that would  
19 be the case, though I don't know what future cases I would be  
20 detailed to. But the current cases I'm detailed to, no.

21 DDC [Maj PARSONS]: Thank you, Your Honor.

22 And, Your Honor, based on your biography you joined the Air  
23 Force in 2003. So that was after 9/11. Did 9/11 have any affect on

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1 your reason to join the Air Force?

2 MJ [Lt Col BRAUN]: I joined in 2006.

3 DDC [Maj PARSONS]: I'm sorry, Your Honor.

4 MJ [Lt Col BRAUN]: Did 9/11 have any impact upon my decision  
5 to join the military?

6 DDC [Maj PARSONS]: Yes, Your Honor.

7 MJ [Lt Col BRAUN]: It did not.

8 DDC [Maj PARSONS]: And, Your Honor, in your current position  
9 you've had to take a number of oaths, first as an officer for the Air  
10 Force, then, I presume, as a military judge for the Air Force, and  
11 then now as a military judge for the commissions. In your mind, is  
12 there a difference between any of those oaths?

13 MJ [Lt Col BRAUN]: They are all different oaths. Right? You  
14 look at the language side by side, they all contain different  
15 languages. I think there are common threads that you can draw  
16 through all of them. Things like integrity, honesty, excellence, I  
17 think can be drawn through all of those oaths. So while they are  
18 distinct in many ways, I think there are some fundamental  
19 similarities that one could draw.

20 DDC [Maj PARSONS]: And, Your Honor, you mentioned being  
21 familiar with Colonel Spath, (Retired) Colonel Spath. Were you  
22 aware -- are you aware of the incidents that resulted in his several  
23 rulings in the commissions being vacated?

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1 MJ [Lt Col BRAUN]: Am I aware of -- I'm sorry -- the facts?

2 DDC [Maj PARSONS]: Aware of, I guess, that happening, aware  
3 of any of the underlying facts? Was that ever a topic of  
4 conversation between the two of you?

5 MJ [Lt Col BRAUN]: With Colonel Spath, no. I never discussed  
6 those specifically with Colonel Spath.

7 I believe when those rulings came out, there was -- I think  
8 there was some media attention to it at the time, and that may be  
9 military-specific. Something like what was -- yeah, I don't recall  
10 anything specific.

11 I do know that in some way I know Colonel Spath had left the  
12 commissions. I never talked specifically with him about any of his  
13 commissions work, though.

14 DDC [Maj PARSONS]: When you were deployed to Qatar, Your  
15 Honor, you said that you dealt with some contracting issues. Can you  
16 describe some of the issues that you dealt with?

17 MJ [Lt Col BRAUN]: From the contracting fiscal perspective, a  
18 lot of it was requests to improve facilities, kind of generic home  
19 station contracting, new carpet, we painted some walls. It wasn't  
20 anything much more exciting than that. I think there were some  
21 contractor issues -- there were some contractor issues I worked that  
22 might have had a little more of -- that were less facilities, but it  
23 was pretty run-of-the-mill contract and fiscal issues that I was

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1 reviewing.

2 DDC [Maj PARSONS]: And while you were deployed or in any  
3 other prior military experience, did you ever work or support or  
4 visit or inspect any type of detainee facility or operations for  
5 detainees?

6 MJ [Lt Col BRAUN]: No. No, I did not.

7 DDC [Maj PARSONS]: You described either giving some briefings  
8 or overseeing those who gave briefings on the law of armed conflict.  
9 If you recall, what were the specific topics within those briefings?

10 MJ [Lt Col BRAUN]: Yeah. So they were standardized briefings  
11 that talked about proportionality, talked about protected status of  
12 individuals, whether they be a -- some may be recognized as a  
13 prisoner of war versus a retained person. It was pretty generic, if  
14 one can.

15 There was not -- I did not provide during those briefings  
16 AOR-specific or country-specific regulations or considerations. It  
17 was a very generalized brief.

18 DDC [Maj PARSONS]: And, Your Honor, do you recall where this  
19 substance -- for the ones that either you gave or you oversaw them  
20 being given, do you recall the source of the content, where those  
21 might have come from?

22 MJ [Lt Col BRAUN]: I don't. I believe they were a larger Air  
23 Force product that was either pushed down -- and I don't know if

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1 that's from the department or from a major command level. I just  
2 know that they were not created at the local level.

3 DDC [Maj PARSONS]: Your Honor, I believe that in response to  
4 questions about having seen any media coverage of this commission, I  
5 believe that your response was that you do not recall seeing any  
6 before being detailed to the bench, to the extent that that's an  
7 accurate recollection of your answer.

8 Do you -- have you seen any media coverage since being  
9 detailed to this commission?

10 MJ [Lt Col BRAUN]: I have not. Yeah, I have not regarding  
11 this commission. And understanding I would have a role in this  
12 commission, I have intentionally tried to avoid sources of  
13 information that do not come properly before me by the parties  
14 through this process.

15 DDC [Maj PARSONS]: And, Your Honor, I believe you said that  
16 during your time as an instructor at the United States Air Force  
17 Special Investigations Academy, you taught interviewing techniques  
18 and cognitive interview techniques.

19 To the extent that my recollection of that answer is  
20 correct, would you be able to provide some more details about  
21 specific techniques?

22 MJ [Lt Col BRAUN]: I can't provide a whole lot of details on  
23 the specific techniques because I didn't teach the techniques

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1 themselves.

2           My role as a legal instructor was to talk about the  
3 considerations one has to take as it relates to the Fifth Amendment,  
4 the Sixth Amendment, and those were specific to the Military Rules of  
5 Evidence as well. So talking about voluntariness under military law  
6 and applying military case law to those scopes of constitutional  
7 issues. That was the role that I served in that process. I am not a  
8 person who is a subject matter expert on interviewing techniques or  
9 processes.

10           DDC [Maj PARSONS]: May I have a moment, Your Honor?

11           MJ [Lt Col BRAUN]: You may.

12 **[Counsel conferred.]**

13           DDC [Maj PARSONS]: Thank you, Your Honor.

14           When you were deployed and dealing with contracting issues,  
15 do you recall ever dealing with issues related to whether a contract  
16 is for personal services?

17           MJ [Lt Col BRAUN]: I am familiar with the concept just as a  
18 judge advocate who's been in for 17 years, but I don't -- I don't  
19 recall ever particularly coming across that issue in the deployed  
20 environment. I may have, it's just not jumping out at me.

21           DDC [Maj PARSONS]: Thank you, Your Honor.

22           And regarding the various oaths that you have had to take up  
23 until this point, in response to your response to my last question



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1 about this, you stated that there are some -- some common themes,  
2 while there are differences. And one of the differences is that the  
3 officer oath specifically cites the Constitution, whereas the oaths  
4 for judge does not -- do not cite the Constitution.

5 In your mind, is that -- in your mind, does that present a  
6 difference in the oaths and in your role under all three of those of  
7 oaths?

8 **[Pause.]**

9 MJ [Lt Col BRAUN]: So I don't think there's a difference, and  
10 the reason for that being is the Constitution is kind of the  
11 fundamental law. And insomuch as a judge's oath requires a judge to  
12 follow applicable law, a military judge, if the Constitution applies  
13 in a certain circumstance, say, for example, the Fifth  
14 Amendment -- we were talking about interviews earlier.

15 If there is a Fifth Amendment protection, that applies to an  
16 interview; or a Fourth Amendment protection, that applies to a  
17 search. A military judge's obligation to apply that law to the  
18 evidence presented by the parties to the military judge and come to  
19 the legally correct and fair conclusion at the end of the day.

20 So while it may not be explicitly stated, I think it  
21 is -- it is incorporated when you talk about a judge's obligation to  
22 apply the law fairly and impartially to questions as required.

23 DDC [Maj PARSONS]: Thank you, Your Honor.

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1           No further questions from defense, Your Honor. Thank you.

2           MJ [Lt Col BRAUN]: Trial Counsel, any follow-up based upon  
3 defense's?

4           TC [COL KRAEHE]: No, Your Honor.

5           MJ [Lt Col BRAUN]: Counsel, I do appreciate that I owe a  
6 response to the one follow-up that I have regarding the Chief  
7 District Judge for District 4 and whether that judge had any  
8 involvement with the commissions. Understanding I owe a follow-up on  
9 that, are the parties prepared to proceed? And then I can come back  
10 on the record after the next opportunity to recess to answer that.  
11 Or would the parties like an opportunity to answer that prior to  
12 challenging?

13          LDC [MR. HODES]: We're fine with Your Honor.

14          TC [COL KRAEHE]: Your Honor, the United States is fine with  
15 proceeding now.

16          MJ [Lt Col BRAUN]: Very well, then. With that, given the  
17 information exchanged between the parties, the voir dire, the  
18 individual voir dire, I find that no challenge for cause exists.  
19 However, does either party wish to articulate a challenge?

20                 Trial Counsel?

21          TC [COL KRAEHE]: Not from the United States, Your Honor.

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

23          LDC [MR. HODES]: No, Your Honor.

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1 MJ [Lt Col BRAUN]: Very well. So we will move on.

2 I would like to move on to consideration of Appellate  
3 Exhibit 0057. I'm sorry. That's AE 0057, the series.

4 Before we move directly -- well, before we move into  
5 consideration of any additional matters outside of the parties'  
6 briefing, I do have a fundamental question. And I'll start with you,  
7 Defense Counsel, as you filed the initial pleading.

8 Who bears the burden on this matter?

9 LDC [MR. HODES]: We're talking 0057, right?

10 MJ [Lt Col BRAUN]: We're talking 0057.

11 LDC [MR. HODES]: We -- **[microphone button not pushed; no**  
12 **audio.]**

13 I didn't hit the button properly.

14 We say that the prosecution bears the burden of  
15 demonstrating that the charges and specifications allege an offense  
16 by the preponderance of the evidence.

17 MJ [Lt Col BRAUN]: Trial Counsel, now I'm going to look at  
18 you. Do you concur with that assessment?

19 MDTC [Lt Col GOEWERT]: No, Your Honor, we do not.

20 MJ [Lt Col BRAUN]: And what is your position as to who bears  
21 burden on Appellate Exhibit 0057?

22 MDTC [Lt Col GOEWERT]: Your Honor, the defense bears the  
23 burden as the moving party under R.C.M. 905 and 906 for striking

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1 language within the charging document. There's no -- there's no  
2 indication that this is a jurisdictional issue, as was mentioned in  
3 their motion, and the cases that they cite in their motion are not on  
4 point to this particular issue.

5 LDC [MR. HODES]: Judge, may be heard for a second?

6 MJ [Lt Col BRAUN]: You may.

7 LDC [MR. HODES]: I apologize to the court. Mr. Akerson is  
8 going to be handling AE 0057, and so it would be better if he handles  
9 the argument with regards to who bears the burden at this point. So  
10 I apologize for jumping in like I did.

11 MJ [Lt Col BRAUN]: Very well. I will give your counsel an  
12 opportunity -- your co-counsel an opportunity to respond to my  
13 question then.

14 DDC [MR. AKERSON]: Your Honor, I don't have much to add.

15 MJ [Lt Col BRAUN]: I think you -- and if you want to come to  
16 the podium, I think that might be easier. For the parties, if I'm  
17 asking for a simple yes or no, feel free to give your response from  
18 table. But if you're going to provide a bunch of information, it's  
19 just going to be a lot easier logistically if you'd come to the  
20 podium.

21 DDC [MR. AKERSON]: David Akerson on behalf of Mr. Nurjaman.

22 Yeah, I think that the pleadings are pretty clear. We had  
23 argued that this is a jurisdictional issue. We don't believe that

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1 the prosecution or the government has the jurisdiction to charge  
2 Mr. Nurjaman with common plan liability. And so the burden is on the  
3 government.

4 MJ [Lt Col BRAUN]: To prove that jurisdiction exists?

5 DDC [MR. AKERSON]: Exactly.

6 MJ [Lt Col BRAUN]: So understanding that that is a  
7 fundamental point at contention here, what I'm going to do is first  
8 ask defense counsel, as you have moved -- at least initiated this  
9 AE -- do you have any additional evidence you want to present, in  
10 addition to the written filings that the commission already has on  
11 this matter, or are you simply seeking to provide argument?

12 DDC [MR. AKERSON]: On the matter being the jurisdictional  
13 matter or the whole ----

14 MJ [Lt Col BRAUN]: The entirety ----

15 DDC [MR. AKERSON]: ---- series?

16 MJ [Lt Col BRAUN]: The entirety of the series.

17 DDC [MR. AKERSON]: We don't have additional evidence.

18 MJ [Lt Col BRAUN]: Okay.

19 DDC [MR. AKERSON]: We do have exhibits that we have  
20 previously submitted and cleared, but it's just to assist in the  
21 arguments. It's the Principals paragraph and exhibits that present  
22 the statutes and the cases that we've cited. But no new evidence.

23 MJ [Lt Col BRAUN]: So those exhibits were filed with your

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1 initial pleadings?

2 DDC [MR. AKERSON]: These exhibits were submitted to -- I  
3 believe. I'm unfamiliar with the process because there's a lot of  
4 people involved. But we were -- a security officer, a court officer  
5 was provided a copy of these. No?

6 **[Counsel conferred.]**

7 DDC [MR. AKERSON]: Apparently we have not provided these to  
8 the court. They were provided and cleared by a security officer, I  
9 think. It is just what's in the briefs.

10 MJ [Lt Col BRAUN]: Yeah. If it's simply cases or language  
11 from the Military Commissions Act that you cite in the brief, I  
12 don't -- I don't specifically need to see those. I absolutely can.

13 While I appreciate counsel providing, while we're in this  
14 type of a format, authority for ease of the commission, in this case  
15 I think we can proceed without that.

16 DDC [MR. AKERSON]: Okay.

17 MJ [Lt Col BRAUN]: If that's purely all it is, if it's just  
18 legal authority that is already cited in the brief.

19 DDC [MR. AKERSON]: That's all it is.

20 MJ [Lt Col BRAUN]: Okay. Very well, then.

21 Before we move into argument, I'm going to ask the same  
22 question of trial counsel, see if there's any additional evidence  
23 that you want to present at this time. So thank you, Defense

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1 Counsel.

2 MDTC [Lt Col GOEWERT]: No, Your Honor. Just argument.

3 MJ [Lt Col BRAUN]: Very well. Defense, I'm going to allow  
4 you to argue first.

5 DDC [MR. AKERSON]: May it please the court, counsel, honored  
6 guests who are in the courtroom and colleagues who are appearing at  
7 the Remote Hearing Room, it's our pleasure today to -- I think it is  
8 the first substantive legal issue that we're addressing and we're  
9 honored to go down that road for the first time, Your Honor.

10 I want to make sure that the fact that we are making the  
11 first argument, we're also putting on the record that we're not  
12 waiving the issue of who's got the burden of proof.

13 MJ [Lt Col BRAUN]: And the commission understands that,  
14 Counsel.

15 DDC [MR. AKERSON]: Okay. Your Honor, the appropriate  
16 starting point for our argument today is that Mr. Nurjaman is charged  
17 with a federal criminal statute, the Military Commission Act. And  
18 the plain language of any federal criminal statute dictates what can  
19 be charged under that statute.

20 In this case the plain language of the MCA controls what the  
21 government can charge. The MCA has a distinct section, like all of  
22 the other war crimes tribunals, that lays out the modes of liability.  
23 And I should add here, Your Honor, that I'm using the term "modes of

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1 liability." That's another point of contention. It's what I'm used  
2 to. It's a term of art that has emerged in all of the war crimes  
3 tribunals. So that's what we will use to refer to the different  
4 forms of liability that are listed in the Principals paragraph.

5 I also should say, because ----

6 MJ [Lt Col BRAUN]: And Counsel, when you say the Principal  
7 paragraph, you are talking about Section 950q?

8 DDC [MR. AKERSON]: That's correct, Your Honor. I can put it  
9 up on the screen if you'd like, Your Honor.

10 MJ [Lt Col BRAUN]: Unnecessary, Counsel. But thank you.

11 DDC [MR. AKERSON]: This is a good -- an appropriate time for  
12 me to say, just out of force of habit, I might use the word common  
13 plan. I also might use JCE, or joint criminal enterprise. We  
14 consider them to be synonymous terms. And I might use any one of  
15 those to refer to the same thing.

16 The same goes for war crime and law of war offense. We  
17 consider those to be synonymous, and I might use those terms  
18 interchangeably.

19 And finally, I might refer to the International Criminal  
20 Court as the ICC just out of force of habit, and the Rome Statute,  
21 which is the statute for the International Criminal Court, I may just  
22 simply refer to it as the Rome Statute. I'll apologize in advance  
23 for that informality.



1           The core of our argument, Your Honor, is that the Principals  
2 paragraph does not include the common plan form of liability or mode  
3 of liability. It has eight modes of liability that are specifically  
4 listed. That paragraph is constructed as an exhaustive list, not an  
5 illustrative list.

6           And what the government has done in each of the first seven  
7 specifications is allege common plan, a mode of liability which is  
8 not specifically provided for in the Principals paragraph. And our  
9 argument is, therefore, they're not authorized to charge Mr. Nurjaman  
10 with that mode of liability.

11           The government agrees in their filings that the common plan  
12 mode of liability is not specifically listed in the Principals  
13 paragraph. They argue that they can charge common plan anyway for a  
14 number of reasons which I will touch on.

15           So the issue before this commission is whether a federal  
16 criminal statute and the plain language of that statute is  
17 controlling. Does the Principals paragraph have meaning? Does the  
18 language that specifically makes the eight modes of liability in the  
19 Principals paragraph as an exhaustive list of what is available to  
20 the prosecution to charge, is that language that was chosen by the  
21 drafters of the MCA, is that meaningful?

22           And I think it's important for the court to note that there  
23 have been three opportunities for the drafters of the MCA and its

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1 predecessors to change that language or to modify it.

2           There was an initial version of the Military Commission Act  
3 that was an Executive Order. There was the 2006 act of Congress, and  
4 then there was the 2009 act of Congress.

5           And although there's been three opportunities for there to  
6 have been common plan included, or the language of the Principals  
7 paragraph changed from very clearly exhaustive to illustrative, none  
8 of the drafters of the MCA in each of these three instances chose to  
9 change the language.

10           MJ [Lt Col BRAUN]: Counsel, in each of those three instances,  
11 did the language of that paragraph change at all?

12           DDC [MR. AKERSON]: Yeah. It changed in substantial ways.  
13 The drafters responded to a number of different aspects. And so,  
14 yeah, the drafters were contemplating significant changes, the  
15 Principals paragraph.

16           I don't know specifically if the Principals paragraph  
17 changed, but what I do know is they didn't change the language that  
18 made the list exhaustive, or whether they included common plan or  
19 not.

20           MJ [Lt Col BRAUN]: And what language are you pointing to to  
21 indicate that this list is exhaustive?

22           DDC [MR. AKERSON]: We cited a case, Your Honor, that is  
23 called the Harrison case. I mean, this is kind of normal statutory

1 instruction. But the Harrison case, we provided it because they lay  
2 out the terms that you would look to for a statutory construction  
3 that was meant to create an illustrative list, and that would be  
4 terms like includes or such as, indicating that the list is open  
5 ended.

6 One of the things we would have shown you, Your Honor, is  
7 the Nuremberg war crimes statute. So this was drafted in 1943. It  
8 was drafted by Justice Jackson, who was a Supreme Court Justice, who  
9 took leave to become the Chief Prosecutor of the Nuremberg tribunal.

10 They spent two years drafting the London Charter, which  
11 became the statutes that Nuremberg operated under. And the War  
12 Crimes paragraph, which I believe is 10(b), says these are the war  
13 crimes which are not limited to but include -- and then they list I  
14 think eight war crimes. But it demonstrates, and he's a Supreme  
15 Court Justice, demonstrates what an illustrative list should look  
16 like.

17 I think we can all assume that Congress is well acquainted  
18 with basic techniques of statutory construction. They know what an  
19 illustrative list needs to look like. They know what an exhaustive  
20 list looks like. They had three opportunities in this case.

21 If they had any other intent -- but the -- and the  
22 prosecution has argued that the MCA has contemplated common plan,  
23 mode of liability. They don't provide any source for why they think

1 common plan was contemplated, but what's contemplated doesn't really  
2 matter in end of day.

3           What matters is what is put in the statute. And what the  
4 drafters put in the statute, after three attempts, is that there are  
5 eight modes of liability that the government is authorized to use,  
6 and none of them include common plan.

7           We also cited to two cases, Your Honor, where -- and there's  
8 a canon of case law on this point, which is the plain language of a  
9 federal statute has to be given its ordinary and plain meaning,  
10 unless there's an extraordinary reason to conclude otherwise. And we  
11 would argue that there's nothing in the MCA that should give this  
12 court any reason to deviate from the very simple precept that the  
13 plain language of a statute must control. And the plain language of  
14 the MCA gives the government eight modes of liability in the  
15 Principals paragraph to choose from.

16           Another point that I wanted to draw to the court's  
17 attention, Your Honor, is that it's well established in the law of  
18 war that to secure a conviction of a war crime, the government is  
19 required to prove the elements of the charged offense, and they're  
20 also required to prove the elements of the alleged modes of  
21 liability.

22           You might think of the modes of liability being similar to  
23 jurisdictional elements. In order to secure a conviction of a crime

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1 you have to prove the elements of the jurisdiction. That's also been  
2 true in the extensive jurisprudence of law of war tribunals.

3 You cannot secure a conviction of a crime if you don't also  
4 secure a conviction -- if you don't also prove the elements of the  
5 mode of liability that's alleged. And the reason that has emerged as  
6 such a clear principle is that in almost every war crimes case, the  
7 mode of liability is the most important aspect of the case.

8 You can think about if Vladimir Putin ever ends up in a  
9 court charged with war crimes, he's not a direct committer of the war  
10 crimes. He's not even -- there would be no evidence that he ever  
11 went into Ukraine.

12 His liability would be an indirect form of liability. So  
13 they would have to allege that he's responsible, either as an aider  
14 or abetter, or he counselled, he commanded one of the modes of  
15 liability that would establish his liability for the crimes committed  
16 by his subordinates.

17 And so it's -- the reason I say this is that the mode of  
18 liability is not a trivial or peripheral issue. I think the  
19 government has intimated that it's not very important, that they  
20 don't have to allege it. It's a matter of their strategy or tactics.

21 And that is very much in contravention to a canon of case  
22 law from all of the war crimes tribunals that have prosecuted war  
23 crimes cases, that not only is it required, but the mode of liability

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1 is what's going to be most important in this case. And that's why we  
2 have taken it so serious.

3 MJ [Lt Col BRAUN]: So, okay, Counsel. With that, then, do  
4 you have a copy of the charge sheet? If not, please take a moment to  
5 get one.

6 DDC [MR. AKERSON]: Okay. Let's see here. Do I? I don't  
7 know if I ----

8 **[Pause.]**

9 DDC [MR. AKERSON]: Your Honor, that may take a moment for us  
10 to get because I don't have it in my binder, the charge sheet, I'm  
11 sorry to say. However, I might be able to entertain the question  
12 because I have spent a lot of time with it.

13 MJ [Lt Col BRAUN]: Yeah. So -- okay. Then -- so as I look  
14 at -- and I'm with Charge I, Specification 1. So I'll give you a  
15 minute to flip to that.

16 DDC [MR. AKERSON]: I'm with you.

17 MJ [Lt Col BRAUN]: Okay. So when you look at the end of  
18 Specification 1 -- and I'm just going to use Specification 1 as an  
19 example because this language seems to carry throughout the various  
20 specifications -- it talks about liability. And it specifically says  
21 they are liable for the above-alleged offense as principals,  
22 co-conspirators, and participants, as alleged in the common  
23 allegations. Are you tracking where I'm at right now?

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1 DDC [MR. AKERSON]: Yes.

2 MJ [Lt Col BRAUN]: So now I want to flip back to the common  
3 allegations.

4 DDC [MR. AKERSON]: I'm with you.

5 MJ [Lt Col BRAUN]: I'm finding the exact language that I want  
6 you to look at. Give me one moment here.

7 So if you look at the very beginning of the common  
8 allegations language, on the fourth line after the closed  
9 parentheses, we have language that says: and aided, abetted,  
10 counselled, commanded, and procured the commission of each offense.

11 Shouldn't that language be read all together? And doesn't  
12 that sound like principal liability?

13 DDC [MR. AKERSON]: Could you repeat that last phrase you  
14 just ----

15 MJ [Lt Col BRAUN]: I sure can. And I'll start with the last  
16 part of my question first.

17 That seems to mirror the language contained in Section 950q  
18 describing principal liability, does it not?

19 DDC [MR. AKERSON]: There's a couple of deviations from 950q.  
20 There's two -- three modes of liability that are not listed there,  
21 and I think in the bill of particulars motion, we had gone back and  
22 forth about that.

23 There's eight mode of liability in 950q. There's five here

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1 that are listed. Aiding ----

2 MJ [Lt Col BRAUN]: Is the government required to list every  
3 mode of liability, or only those that they're bringing into issue?

4 DDC [MR. AKERSON]: I'm sorry. We argue they are required to  
5 specifically allege the modes of liability. It's a basic principle  
6 of fairness and due process that we are clearly alleged.

7 MJ [Lt Col BRAUN]: And let me clarify my question.

8 Are they required to list only those modes of liability that  
9 they are alleging? So when we talk about listing every mode of  
10 liability and all of those that are available in  
11 Section 950q -- right? -- that is a list -- I would -- is it  
12 defense's position that the government would be required to provide  
13 notice through the pleading of all modes of liability of which they,  
14 the government, plans to prove at trial?

15 DDC [MR. AKERSON]: Yes. And that is supported by -- I think  
16 in a number of our motions we've filed numerous citations from law of  
17 war cases where, in the early practice of the Yugoslavia and the  
18 Rwanda tribunals, they also had a paragraph that was like the  
19 Principals paragraph. It's labeled Individual Criminal  
20 Responsibility.

21 It has a list of -- tracks almost the same as the eight  
22 modes that are in the Principals paragraph. The prosecution filed  
23 its indictment and just said the person is liable as a principal,



1 basically the same as what the government alleges it should be able  
2 to do.

3           And that was litigated and the courts ruled that it's not  
4 fair to an accused if they don't know which of the modes the  
5 government is actually intending because it has been the accused  
6 going -- spending precious resources investigating theories of  
7 liability that aren't actually applicable.

8           Of course, the government can charge an accused with all of  
9 these modes of liability if it wants, if it can substantiate it. And  
10 it should provide some sort of substantiation in the charge sheet for  
11 which modes that it intends.

12           But what is clear from that series of case law is that if  
13 they're not intending on charging all of them, then they have to make  
14 that evident to the accused through clear and particular charges.

15           And in the bill of particulars motion we said -- we made  
16 this argument, this is what the government has to do. And they said,  
17 well, you should know that we are proceeding on these five. So  
18 what's excluded in this list, Your Honor, is: Commission, it's not  
19 listed there; causing an act, which is paragraph b. of the Principals  
20 paragraph; and the third, superior responsibility. Those are all  
21 excluded.

22           We said, okay. And this is our reply to the response in the  
23 bill of particulars motion. We said, okay. We can accept that that

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1 gives us notice of the five that you're proceeding to charge  
2 Mr. Nurjaman with from the Principals paragraph. That leaves the  
3 question of common plan, which is not in the Principals paragraph,  
4 which is just kind of added on here.

5 In this case, in the first phrase that you mention,  
6 Mr. Nurjaman and his co-conspirators participated in a common plan  
7 and agreement. That conflates really conspiracy and common plan  
8 liabilities. But ----

9 MJ [Lt Col BRAUN]: Do you stop the reading there? Or do you  
10 continue on? So you're getting to that common plan language and then  
11 you're stopping. Shouldn't you read the rest of the language there  
12 with the common plan language?

13 DDC [MR. AKERSON]: No. We argue that these are individual  
14 modes of liability, and there's also extensive case law on this.  
15 They all have different elements.

16 The best expression of this is in the Rome Statute of the  
17 International Criminal Court which not only has a statute which has  
18 all of these modes of liability, either under their current name or  
19 under a similar name, but they're all there. They also have several  
20 others that are included.

21 They have also -- they have a companion document to the  
22 statute that lists the elements of the modes of liability, because  
23 it's so clearly established in the law of war now that the modes of

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1 liability are like jurisdictional elements. They have to be  
2 specifically alleged. You've got to tell an accused which ones  
3 you're proceeding under to have a fair trial. That's just  
4 fundamental due process.

5 And I'll give you an example of this.

6 The last mode of liability, which is called superior  
7 responsibility, which everybody who's in the military is very  
8 familiar with, it starts with evidence that there is a military-style  
9 superior/subordinate relationship.

10 That's a whole set of evidence that, you know, if we're to  
11 assume that they can just categorically charge all modes of liability  
12 and we have to then prepare to defend ourselves against superior  
13 responsibility, it's a whole different investigative strategy that we  
14 would have to spend time defending against.

15 It's also directly contradictory to the commission, because  
16 superior responsibility is based on an omission, that a superior  
17 failed to stop his subordinates or failed to punish subordinates once  
18 he learns crimes have been committed.

19 I'm sorry. Your Honor, I don't know if you have any other  
20 questions in that line of ----

21 MJ [Lt Col BRAUN]: I think that might simplify a little bit  
22 of superior/subordinate, but I don't -- I don't -- that's not front  
23 of mind for me right now.

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1           So continue with your argument, Counsel.

2           DDC [MR. AKERSON]: Yeah. I mean, the core argument, Your  
3 Honor, is that due process and fundamental fairness require that we  
4 are advised of the charges against our client with sufficient clarity  
5 and particularity and categorical charging, not only should ----

6           MJ [Lt Col BRAUN]: That, Counsel, fair to say that is  
7 caveated by the fact that this is a notice pleading forum that we're  
8 in?

9           DDC [MR. AKERSON]: I think that doesn't change the argument.  
10 All of the tribunals are notice pleading ----

11          MJ [Lt Col BRAUN]: We can agree on that fact, correct?

12          DDC [MR. AKERSON]: Yeah, we can agree on that fact, yeah. I  
13 think in a notice pleading jurisdiction, the charges, what the  
14 allegations are against the accused, need to be sufficiently clear  
15 that he can adequately defend himself, and that requires that the  
16 modes of liability that are being charged have to be clearly alleged  
17 and they have to be alleged with particularity, with enough factual  
18 detail that we can ascertain what the factual support is for those  
19 charges.

20          And then, of course, as it pertains to this motion, they  
21 have to be proper legal charges. And the argument here is that  
22 they're charging something that's not authorized by the statute, of  
23 course. So that's a slightly different issue.

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1 MJ [Lt Col BRAUN]: Okay. I want to direct your attention to  
2 one additional provision here and get your thoughts. So I'm going to  
3 move you forward to Rule 307. And if you need to grab a manual,  
4 please do so.

5 307, and I'm specifically looking at subsection (c)(3). Or  
6 I'm sorry, (c)(2). Once you get that up, I'll ask specifically my  
7 question.

8 DDC [MR. AKERSON]: Your Honor, pardon me. Did you say (c)(2)  
9 or (c)(3)?

10 MJ [Lt Col BRAUN]: I initially said (c)(3), but I'm looking  
11 at (c)(2).

12 DDC [MR. AKERSON]: Okay. Yes. I have it in front of me.

13 MJ [Lt Col BRAUN]: It starts off with "charge."

14 So how -- understanding your position that the government is  
15 bound explicitly by the -- as you argue, the exhaustive list  
16 contained in Section 950q Principals, this provision, specifically  
17 Rule 307(c)(2) states that charge -- offenses are defined by the  
18 manual or under the law of war.

19 How do you reconcile that language with the argument that  
20 you just gave me, that the list contained in the Section 950q  
21 Principals is exhaustive?

22 DDC [MR. AKERSON]: Yeah. And of course (c)(2) tracks the  
23 jurisdictional paragraph of the MCA as well, which also has this

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1 provision of the law of war, and that's, of course, the subject of a  
2 motion that we just filed and we consider that to be void for  
3 vagueness, unconstitutionally vague.

4           However, assuming arguendo that that's not true, the first  
5 thing we would say is that this pertains to offenses, right, so the  
6 MCA has enumerated offenses. And I think similar to the Nuremberg  
7 tribunal statute, the law of war is a source for additional offenses  
8 that can be drawn. There is a reason that the Principal paragraph is  
9 a distinct section. They aren't offenses. You cannot be convicted  
10 of the offense of common plan. It's a mode of liability that  
11 connects an accused to an offense.

12           So it -- this jurisdictional statement, because it tracks  
13 directly with the MCA's jurisdictional paragraph, was the intent of  
14 the drafters to say that other offenses, other than the 30 that are  
15 list -- that are specifically enumerated, could be drawn upon. And  
16 that is very similar to what was in the Nuremberg statute.

17           We would say that that no longer is appropriate, this common  
18 law kind of provision, because this open-ended kind of language,  
19 which may have been appropriate in the Civil War, is no longer  
20 appropriate, in our view, in the modern time where due process and  
21 fundamental fairness requires accurate and detailed notice to an  
22 accused of what he's charged with.

23           But in any event ----

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1 MJ [Lt Col BRAUN]: Because one of the challenges, and I think  
2 it's fair, one of the challenges is statutes -- when we talk about  
3 statutory construction interpretation, statutes are read, one, by  
4 their plain meaning; two, to be harmonious with themselves. Right?  
5 Statutes aren't read to cause conflict internally with themselves.

6 So I think that's a question that needs to be resolved on  
7 some level ----

8 [MR. AKERSON]: Yeah.

9 MJ [Lt Col BRAUN]: ---- to resolve this motion. Is that  
10 fair?

11 DDC [MR. AKERSON]: Yeah, that's fair.

12 And the government quite rightly cited a Supreme Court case  
13 that said charging -- the government can look to the law of war in  
14 charging. And I think what that refers to -- and I think this is  
15 intuitive, is that the law of war has been extensively litigated in  
16 war crimes tribunals in which the U.S. has been involved and has been  
17 a primary supporter of, frankly. I'm talking about the Yugoslavia  
18 tribunal, the Nuremberg tribunal, even the International Criminal  
19 Court, where the U.S. was a very prominent delegation and negotiated  
20 the terms of that treaty. It is necessary for this court to look to  
21 that jurisprudence to help define or understand the elements of the  
22 charges.

23 So, for example, at some point we're going to have to

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1 confront the definition of what armed conflict is. Right? That's  
2 going to be a key aspect of this case. That has been extensively  
3 litigated at the tribunals, and it would be incumbent on us to look  
4 to those statutes for guidance. It does not mean that a mode of  
5 liability can be drawn out of the ether and -- when it's not included  
6 in the statute, when there is an exhaustive list.

7           So the Principals paragraph stands on its own. And I think  
8 the important point here is, Your Honor, that the Principal  
9 paragraph, the Principals paragraph has several sources -- you know,  
10 the government also correctly points out that, you know, one of the  
11 primary sources of the Principals paragraph is Article 77 of the  
12 UCMJ. But if you compare Article 77 of the UCMJ to the Principals  
13 paragraph, there's a substantial addition. It's doubled in size and  
14 it's doubled in size because, you know, paragraph three comes from  
15 tribunal statutes.

16           So the drafters of the MCA conformed the Principals  
17 paragraph. They conform the modes of liability paragraph to meet the  
18 needs of war crimes tribunals, war crimes litigation. It stands on  
19 its own, and they had the chance to draft it in a number of ways.

20           So they could have done what Justice Jackson did at  
21 Nuremberg and said the Principals paragraph includes these modes of  
22 liability but it's not limited to these modes of liability. That has  
23 been around for 75 years. And there are countless examples in



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1 congressional acts. They did not do that. They didn't do it when  
2 the MCA was first an Executive Order. They didn't do it in 2006.  
3 They didn't do it in 2009.

4           The government quite rightly also points out common plan/JCE  
5 is very well known, it's very well established in law of war  
6 jurisprudence, and they argue that that gives them the right to  
7 charge it in this case.

8           We also agree with that. It is one of the most important  
9 modes of liability in war crimes jurisprudence. It was specifically  
10 included in the Nuremberg statute. It's specifically included in the  
11 ICC, where the U.S. was extensively involved, as were a hundred other  
12 countries in negotiating the terms of that treaty over months and  
13 months of work.

14           It's well known and that -- that undermines their argument  
15 that MCA drafters contemplated it but chose not to include it. It  
16 would have been the first mode of liability if they -- you know, the  
17 first mode of liability that would come to mind.

18           If you look at any of the judgments at the Yugoslavia  
19 tribunal, which were mostly war crimes cases, large war crimes cases,  
20 joint criminal enterprise, common plan is included in every single  
21 one of them. And it's hard to believe that they chose that knowing  
22 common plan liability is so important, in three different  
23 cracks -- three different bites at the apple, that they didn't see

1 fit to include it.

2           And so, you know, our argument comes back to what we started  
3 with, Your Honor, which is the plain language of the statute, for  
4 better, for worse, has to control. And the plain language of the  
5 statute, given Congress and the President had three different  
6 attempts at it, they created the Principal liability paragraph. They  
7 took one mode of liability straight from the Geneva Conventions and  
8 the tribunal statutes to conform it with the law of war. They chose  
9 not to include common plan, for whatever reason.

10           But that is the statute, and we argue that the government  
11 has no right to charge a mode of liability that is not contained in  
12 the plain language of the statute, given all the indications that the  
13 statute very clearly excludes all the other modes of liability.

14           I don't want to go into -- this is probably a distraction,  
15 but the ICC has indirect perpetration, co-perpetration,  
16 indirect -- they have a lot of modes of liability that was drafted in  
17 1998. The U.S. State Department was actively involved. David  
18 Scheffer, who was the ambassador for war crimes, led the U.S.  
19 delegation to draft that statute. All of these would have been well  
20 known to the congressional drafting team that came up with the MCA.

21           So, you know, in conclusion, Your Honor, we would ask the  
22 commission to decline to accept the government's strained arguments  
23 that the plain language of a federal criminal statute, the MCA, does

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1 not control what be charged under this statute.

2 Thank you.

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

4 Trial Counsel?

5 MDTC [Lt Col GOEWERT]: Your Honor, the government is prepared  
6 for argument, but if we could just have a quick health and comfort  
7 respite.

8 MJ [Lt Col BRAUN]: You can. Is ten minutes sufficient or  
9 would 15 minutes be desired? Trial Counsel?

10 MDTC [Lt Col GOEWERT]: Yes, Your Honor. Ten minutes is fine.

11 MJ [Lt Col BRAUN]: Defense Counsel?

12 LDC [MR. HODES]: That's fine, Your Honor.

13 MJ [Lt Col BRAUN]: Very well. This commission is in recess  
14 for ten minutes.

15 **[The R.M.C. 803 session recessed at 1122 25 October 2023.]**

16 **[The R.M.C. 803 session was called to order at 1132, 25 October**  
17 **2023.]**

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

19 The parties that were present when the commission recessed  
20 are again present. I do note that defense counsel is short one  
21 paralegal, I believe.

22 LDC [MR. HODES]: Yes, Your Honor. We're taking care of some  
23 things that we didn't have previously.

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1 MJ [Lt Col BRAUN]: Understood. Thank you.

2 Before we take up government argument, I note it's a little  
3 after 1130 right now. I did notify the parties that I would recess  
4 the court at 1200 to accommodate both meal and the prayer schedule  
5 for today. I'm subsequently informed that maybe we could press a  
6 little later than that.

7 Defense Counsel, do you have an opinion as to when -- when  
8 we would need to break for lunch today?

9 LDC [MR. HODES]: I believe our client indicated that if he  
10 could break around 1215, 1220.

11 MJ [Lt Col BRAUN]: Trial Counsel, any objection to a break  
12 around 1215, 1220 to give us a little bit more time?

13 MDTC [Lt Col GOEWERT]: No, Your Honor. No objection.

14 MJ [Lt Col BRAUN]: Very well then. What we will plan to do  
15 is press ahead to 1215 and then we will break, a hard break at that  
16 point.

17 LDC [MR. HODES]: And Judge, the one thing, we'd just ask the  
18 court to clarify with the guard force. Our client doesn't have  
19 enough room because we do not have the large cell because another  
20 team evidently has rights to it even though we're in the hearing.

21 He does not have enough room to pray in the smaller cell,  
22 and we would ask for his permission to stay here and do his prayers  
23 after we break.

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1 MJ [Lt Col BRAUN]: Government, any objection?

2 MDTC [Lt Col GOEWERT]: No, Your Honor. In fact, they have  
3 done that in the past.

4 MJ [Lt Col BRAUN]: Okay. Yeah, I don't have an objection to  
5 that. Defense Counsel, I think that is fine. Thank you for bringing  
6 that to my attention.

7 Okay. Trial Counsel, argument, please.

8 ATC [LCDR LARSON]: Yes, Your Honor. May I approach the well?

9 MJ [Lt Col BRAUN]: Please do. Please proceed.

10 ATC [LCDR LARSON]: Thank you, Your Honor. Good afternoon.  
11 For the record, my name is Lieutenant Commander Jeffrey Larson. I  
12 will be presenting on behalf of the United States Government in the  
13 matter concerning AE 0057, which is known as the defense motion to  
14 strike the common plan language. And I do have a prepared argument  
15 here, but I wanted to address just a few things sort of an argument  
16 before an argument.

17 The defense actually brought up a couple very good points  
18 and I wanted to address two of them first.

19 One is that this forum does not have the same rigid  
20 procedural requirements as the international courts. And I think  
21 that it is important that the commission realize it is not really a  
22 viable argument to ask for the importation of process from the ICC as  
23 in the requirement to allege in minute detail, even though the MCA

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1 requires only notice pleadings, then ignore the law of war reference  
2 that incorporates the charging requirements. And potentially what  
3 we've done here is bring in law of war liability requirements.

4           So in one sense the defense does have a point. We can't  
5 charge things that we're not allowed to that's beyond the scope of  
6 the enabling statute, but the enabling statute in this case is the  
7 MCA and it does allow us to.

8           There is no requirement that we adopt any other measures  
9 from the ICC, and this is a sort of long-standing historical  
10 precedent that we draw from many military tribunals before us.

11           Another thing I wanted to mention was this jurisdictional  
12 issue. We had mentioned it before, before we started, the  
13 government's position is that this is not a jurisdictional issue.  
14 This is a straight stick, striking language from the motion issue,  
15 and there is rules on point to that which I would -- I cited in the  
16 written filing, and I will make mention of again in my argument.

17           So with that being said, Your Honor, I would like to begin  
18 the prepared statement, unless you have any particular questions on  
19 that point.

20           MJ [Lt Col BRAUN]: Please proceed, Counsel. I may interject  
21 as you progress through your argument.

22           ATC [LCDR LARSON]: Yes, Your Honor. Thank you.

23           So the motion, as I said before, is about the words common

1 plan. The charging scheme and the words employed in that charging  
2 scheme were taken from the case al Bahlul from 2016 that states the  
3 words common plan mean joint criminal enterprise.

4 And yes, as defense did state, it is a common form of  
5 liability that is found throughout the international community,  
6 throughout the international courts, and indeed all the way back to  
7 1946 where we first used it in our own courts. It is a recognized  
8 theory of vicarious liability with an international sort of flavor to  
9 it. It's been called joint criminal enterprise, common purpose,  
10 common plan liability. And as the defense mentioned, they all mean  
11 the same thing.

12 In the government's written filing it referenced that  
13 307(c)(2) allows for the incorporation of charges that rise from and  
14 reside in the law of war. And further the government holds because  
15 the motion to strike -- sorry. The government holds that the motion  
16 to strike should fail because the language in the charging document  
17 alleges all the elements and does so in a way that's not inartful or  
18 misleading.

19 For that reason alone, the defense's motion should fail.  
20 But as is pretty clear from the defense's argument, this issue of  
21 joint criminal enterprise is of central importance. And so I'm going  
22 to take a moment to talk about it.

23 The issue before you is not a novel one. The charging

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1 scheme is informed by its historical precedent. Excuse me. The  
2 words common plan put the accused on notice. And this is, as you  
3 already pointed out, a notice pleading jurisdiction.

4           The common allegations are found earlier in the charging  
5 document and those common allegations put the accused on notice  
6 further that the government intends on eliciting evidence of a joint  
7 criminal enterprise. That's the point of the language. Common plan  
8 is JC and the government intends on using JCE.

9           It's not the only theory the government intends on relying  
10 on. In fact, there are other theories that are clearly within the  
11 charging document, but this one is the one that's important today.

12           Because the defense has implied that the language must fail  
13 based on some perceived illegality, it's important to go through the  
14 history as it applies to this commission. And I believe the  
15 commission will notice that JC stems from the American courts. It's  
16 universally recognized in the international courts. And through that  
17 recognition is deposited back into the American domestic wartime  
18 precedent.

19           I'm going to roadmap this comment here. I must first  
20 describe the JCE sort of generally. A lot of it was already taken on  
21 by the defense. And to the extent that I move quicker because of  
22 that, I will do so. I can move quicker because of that, I will do  
23 so.



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1           Next I'm going to describe Tadic which -- and other ICC  
2 cases, other international court cases and how those trials used this  
3 concept. And, again, I'm going to point back to the fact the defense  
4 has acknowledged the fact that JCE is prevalent in the international  
5 courts. It's prevalent in the domestic courts. It is used  
6 everywhere.

7           But I believe that the commission should notice that the  
8 modern language -- I'm sorry. The commission will be able to trace  
9 its development from the beginning through these ICC courts and then  
10 back into our own current jurisdiction.

11           Next I'm going to, you know, provide some modern context on  
12 how it's been used in other areas of American jurisprudence, not  
13 because those are binding on us, but because they show the sort of  
14 conditions in which the law of war can be imported into other areas  
15 despite the fact that it's not -- the JCE is not explicitly mentioned  
16 in other statutes. The U.S. Government and the courts specifically  
17 have imported them anywhere that they find JCE -- I'm sorry, the law  
18 of war.

19           So finally I will end on the fact that these words are  
20 appropriate in this particular forum, this particular case, based on  
21 recognized law.

22           So in its current form, it can be traced from the Rome  
23 Statutes of the International Criminal Court, which makes a person

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1 criminally responsible and liable for the punishment for a crime if  
2 that person contributes to the commission or attempted commission of  
3 the crime by a group or persons acting with common purpose.

4           The contribution must be intentional. It must be made with  
5 the aim of furthering the criminal activity or the criminal purpose  
6 of that group.

7           If not that, it must be made in the knowledge of the  
8 intention of that group to commit that crime. And these words come  
9 to us from al Bahlul. I believe will, you know, that may be the most  
10 instructive addition into the domestic wartime precedent on this  
11 particular subject, but recognizing of course that it exists in many  
12 other channels.

13           While the Rome Statutes are not binding per se, I bring them  
14 up to demonstrate the fact that we have imported from the  
15 international community into this -- into our own wartime domestic  
16 precedent.

17           Yes, sir.

18           MJ [Lt Col BRAUN]: Counsel, let me ask you, how -- from your  
19 perspective, how is common plan different from the language that's  
20 already included in 950q?

21           ATC [LCDR LARSON]: So 950q is not necessarily an exhaustive  
22 list. The government's position sort of rejects that idea. Because  
23 the law of war is allowed in 307, charges can reference forms of

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1 liability that would be found in the law of war but not necessarily  
2 in 948q.

3 MJ [Lt Col BRAUN]: But how is common plan liability then  
4 different? Is it just completely different from everything that's  
5 included? Is it somehow -- does it relate to anything that's already  
6 there?

7 ATC [LCDR LARSON]: No, Your Honor, it's not different. I  
8 mean it's sort of like a continuum of vicarious liability on which  
9 948r mentions, you know, a variety of forms of vicarious liability.  
10 And, you know, stemming all the way to the -- sort of the theory  
11 of -- you know, the conspiracy theory found in Pinkerton, they exist,  
12 as they always have existed, in military tribunals and in  
13 courts-martial.

14 And, in fact, the language of 948r hasn't changed since the  
15 '50s. But courts have continuously read into this body of law  
16 anywhere there's a law of war reference, the vicarious liability that  
17 is common to other international courts such as, you know, Tadic,  
18 which I'll talk about here in a moment. It's not necessarily  
19 different. I think that's the root of the answer that you're looking  
20 for, Your Honor.

21 MJ [Lt Col BRAUN]: Okay. Continue.

22 ATC [LCDR LARSON]: Thank you, Your Honor.

23 So in its modern form, it's far from the first time

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1 vicarious liability of this nature has been relied upon. Pinkerton  
2 v. The United States is cited numerous times throughout wartime  
3 domestic precedent, and just about anywhere conspiracy or vicarious  
4 liabilities of this nature have been relied on.

5 In fact, the Rome statutes are based largely on the language  
6 from Pinkerton. This case goes all the way back to 1946 and it is  
7 well established.

8 This form of liability was also found in what's known as the  
9 subsequent Nuremberg trials or the -- you know, the major war crime  
10 cases following World War II. Perhaps no more succinctly than stated  
11 in U.S. v. Ohlendorf where it was held that not only are principals  
12 guilty, but also accessories; also those who take consenting part in  
13 the commission of the crime; those who are connected to the plans or  
14 enterprises involved in its commission; also those who aid or abet a  
15 crime; and this is probably the more important one since it's the one  
16 on topic: those who belong to an organization or group engaged in the  
17 commission of a crime.

18 So that trial was known as what's, like I said, the  
19 subsequent Nuremberg trials. They were not an international court;  
20 they were a military tribunal. They involved the 24 former SS  
21 leaders who, as commanders of the Einsatzgruppen, murdered millions  
22 of people in occupied Soviet territory.

23 As I said, it is a military tribunal, so the commission

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1 might find it instructive to show that this forum embraces the  
2 charging scheme that is now in front of it today. Given it ----

3 MJ [Lt Col BRAUN]: Counsel ----

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

5 MJ [Lt Col BRAUN]: And I apologize.

6 ATC [LCDR LARSON]: That's perfectly okay.

7 MJ [Lt Col BRAUN]: I think that squarely addresses part of  
8 defense's argument that, as you're saying, this is a storied and  
9 known concept within international law, yet 950q fails to include it.

10 ATC [LCDR LARSON]: Yes, Your Honor. 950q has not been  
11 changed since 1950, but it has been -- it has been interpreted  
12 throughout the course of that time to include various forms of  
13 vicarious liability. And I'll ----

14 MJ [Lt Col BRAUN]: Should this commission read into the fact  
15 that there was an opportunity to add that form of liability in 950q  
16 and it -- that opportunity was -- was not taken?

17 ATC [LCDR LARSON]: No, Your Honor. You shouldn't read  
18 anything into that specifically because it is not necessary to add to  
19 it something that is so commonly accepted into the body of law.

20 In fact, that exact thing I just said was found in U.S. v.  
21 Jefferson, which I will get the notation for you by the end of  
22 this -- yeah, by the end of this argument. We'll look for it and  
23 I'll get you the notation for it.

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1           But it specifically says that it is so much a part of  
2 general court-martial schemes of liability that it must be read into  
3 what's there.

4           Additionally, I will point out, 948q is not the only thing  
5 that highlights what we can do in the indictment -- or I'm sorry,  
6 into the charging document.

7           I will again point to 307, which highlights the law of war  
8 as being something that we can rely upon to make charging decisions.

9           As that is the case, it doesn't seem that big a deal that  
10 Congress didn't address it, considering it already incorporated the  
11 law of war under, obviously not 307 since that's the rule, but the  
12 950 article which it passed, highlighting the fact that prosecutions  
13 can be done under the laws of war.

14           So this particular forum, a unique sort of forum, borrows  
15 from the general court-martial sort of body of rules. It is not the  
16 general court-martial forum, though. It has taken much of what it is  
17 from general courts-martial, but it has made the caveat that this is  
18 its own species of forum, and courts, you know, commissions should  
19 recognize that fact.

20           In the case of the charging scheme, we are incorporating far  
21 more than we normally would under the court-martial charging scheme.  
22 We just are. We have created an entirely exhaustive list of common  
23 allegations in order to put the accused on notice that they are going

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1 to have to defend themselves against vicarious liability, in this  
2 case JCE.

3 With -- you know, with that I could continue with my  
4 argument or I can answer any other questions.

5 MJ [Lt Col BRAUN]: You can continue with your argument,  
6 Counsel.

7 ATC [LCDR LARSON]: Thank you, Your Honor.

8 Well, I may have said this already, but the case of the 24  
9 former SS leaders should be instructive because it is a forum that is  
10 the same as our forum. It's a military tribunal following the same  
11 sort of mandates to prosecute law of war violations.

12 Given its settled roots in international law as well as this  
13 forum, there should be no viable argument that Congress did not  
14 authorize military commissions to prosecute under the theory of joint  
15 criminal enterprise. As it has always been there, Congress meant it  
16 to remain.

17 Tadic is an important case in the development of this theory  
18 and probably should be examined closely. In that vain, Prosecutor v.  
19 Tadic is a case where the accused was tried in the international  
20 court systems for committing crimes in Serb-run concentration camps  
21 in Bosnia and Herzegovina. The court there found that it was  
22 appropriate to apply this notion of common purpose, and that common  
23 purpose liability held, first, that the intention to take part in the

1 joint criminal enterprise and to further criminal purposes of that  
2 enterprise were required. And second, that the foreseeability of the  
3 possible commission of other members of that group to other offenses.  
4 So essentially, the group and the foreseeability that that group  
5 would lead to a crime. The commission may notice at this point that  
6 it's similar to the Rome statutes, and that's because the Rome  
7 statutes were created only a few years prior to that case.

8 In Tadic the court describes three versions of joint  
9 criminal enterprise. Of note, the third variant, the extended JCE,  
10 occurs when there is a common purpose to commit a crime where one of  
11 the perpetrators commits an act which, while outside the common  
12 purpose, is nevertheless a natural and foreseeable consequence of  
13 that common purpose.

14 This is notable because it matches the Pinkerton language,  
15 which holds an act in furtherance of a conspiracy is attributable as  
16 a substantive offense, if it is reasonably foreseen as a necessary or  
17 natural consequence of an unlawful agreement.

18 In the later tribunal Prosecutor v. -- and I know, Your  
19 Honor, I'm going to mess this up because I've practiced it many  
20 times -- Krnojelac, JCE makes an appearance once more. In that  
21 judgment, the observation that all the accused employed at the staff  
22 of Auschwitz knew that that system and that course of conduct was in  
23 force, and that in one way or another, in furtherance of that common



1 agreement to run the camp in such a brutal way, all the people were  
2 taking part in that course of conduct.

3 By invoking the language of common agreement in the course  
4 of conduct the international court is again giving merit to the form  
5 of liability found in Pinkerton. And then subsequently in the  
6 Nuremberg -- I'm sorry, yes, in the subsequent Nuremberg war crime  
7 trials.

8 Now we need to return to the formulation of our own idea on  
9 this, which comes to us again from Bahlul, which informs the charging  
10 document that is in front of you, taking its cue from Hamdan where  
11 the plurality found that continued planning with aggressive war as  
12 the objective may be punished under the law of war.

13 It is notable that Hamdan in that case cites back to the  
14 Nuremberg war crimes trials and Pinkerton. It is clear that the  
15 international court borrowed from Pinkerton in establishing its  
16 precedent. It should be equally clear that the form of liabilities  
17 applicable in this forum, where the principal aim is to try  
18 individuals for the violation of the law of war.

19 Now, it's made its way through American jurisprudence a few  
20 different ways. And while it's primarily instructive to talk about  
21 it in the form of how we apply it here in the commission, the concept  
22 is present, JCE is present anywhere there is a law of war  
23 distinction.

1           In Aziz v. Alcolac, which is a Fourth Circuit case  
2     considering the law of war, as it applies to tort cases, stated that  
3     virtually every court to address the issue has recognized secondary  
4     liability since the founding of the republic.

5           Perhaps unsurprisingly the same acknowledgement is found in  
6     Yousuf v. Samantar [sic]. In that case, Yousuf is a detained and  
7     tortured Somali at the hands of Somali officials. When describing  
8     why the court should allow a complaint based on the theory of joint  
9     criminal enterprise, the court there finds that the theory of  
10    liability proves a specific crime and considers each member of that  
11    organization, each member of that organized criminal group to be  
12    responsible specifically and principally for the crimes committed by  
13    that group in the course of their common plan. It requires an overt  
14    act to support the offense.

15           In doing so, this court has explicitly cited Tadic and  
16    Hamdan. And as I said, I'm delving into cases that don't necessarily  
17    fit exactly into this forum. And I don't intend for this commission  
18    to take them as binding. However, they are instructive on how  
19    vicarious liability, specifically joint criminal enterprise, plays  
20    through American jurisprudence.

21           Each instance where there is the law of war there is JCE,  
22    and they lead back to Tadic, the Rome Statutes, Nuremberg trials, and  
23    Pinkerton.

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1           Such is the case with every instance that invokes joint  
2 criminal enterprise under its law of war context. The concept  
3 originates in American jurisprudence, has it been adopted widely by  
4 the international community, only to find its way back to American  
5 courts, into the body of wartime domestic law precedent that we now  
6 find ourselves practicing under.

7           It is only appropriate that we use it again in this case for  
8 the exact reason that it was intended for in the first place.

9           And I will end on this last point, as I said in the  
10 beginning of my prepared statements, the words common plan are  
11 appropriate in this case based on recognized law.

12           You heard that JCE traces its origins through the Nuremberg  
13 trials. Fittingly, the world was shocked at what the Nazis were  
14 allowed to do during that period of time. And it is unsurprising  
15 that 24 SS agents who signed on to carry out a horrific slaughter of  
16 a million people or more would have been criminally liable for the  
17 acts that led to that end.

18           That case highlights how the international community found  
19 it wholly inappropriate to adopt a rule that would allow escape from  
20 justice anyone who acted in accordance with such a horrific common  
21 plan.

22           The modern Serbian-run concentration camps of Bosnia claimed  
23 the lives of hundreds of thousands. Those who participated in that

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1 enterprise were also found personally liable, criminally personally  
2 liable. And rightly so, considering the truly despicable acts  
3 carried out as part of a joint criminal enterprise.

4 This case now before you involves a plan to aggressively  
5 seek out and kill thousands of people. It was done with a common  
6 plan shared by hundreds within an organization, several  
7 organizations, each acting in accordance with their part of the plan.  
8 And JCE has been used in this way, in this exact forum, using these  
9 rules for a very long time.

10 The words common plan may be small, but they do matter in  
11 this regard. What's on the charge sheet matters, because  
12 Mr. Nurjaman is on notice that because he led a part of the  
13 enterprise that formulated this plan to kill thousands of people, the  
14 government intends on holding him liable for the acts of his  
15 organization, the acts of the organization which he had a leadership  
16 role in.

17 With that, I'm standing by to entertain any questions Your  
18 Honor may have.

19 MJ [Lt Col BRAUN]: Counsel, do you have a copy of the charge  
20 sheet?

21 ATC [LCDR LARSON]: I do, Your Honor.

22 MJ [Lt Col BRAUN]: I want to look at the common allegation,  
23 or direct you to the common allegations. It's the same area that I

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1 talked with defense counsel about.

2 ATC [LCDR LARSON]: Yes, Your Honor. If you could remind me  
3 what the context of it was.

4 MJ [Lt Col BRAUN]: I can. So I want you to direct your  
5 attention to the fourth line where it states in a common plan and  
6 agreement.

7 After the language in a common plan and agreement, there's  
8 an "and."

9 ATC [LCDR LARSON]: Yes, Your Honor.

10 MJ [Lt Col BRAUN]: And there's a bunch of words there.  
11 Aided, abetted, counselled, commanded, and procured.

12 ATC [LCDR LARSON]: Yes, Your Honor.

13 MJ [Lt Col BRAUN]: That follow-on list seems to come directly  
14 from 950q. Is that fair?

15 ATC [LCDR LARSON]: Yes, Your Honor. That's true.

16 MJ [Lt Col BRAUN]: Can you tell me how, explain to me how, as  
17 alleged in the common allegations, the common plan and agreement  
18 interacts with that following list?

19 ATC [LCDR LARSON]: So, to the extent that they do interact,  
20 because ----

21 MJ [Lt Col BRAUN]: And that's the question. Perhaps they  
22 don't.

23 ATC [LCDR LARSON]: There's, you know, eight charges on here.

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1 I through VII are substantive offenses by themselves, not conspiracy,  
2 but we will choose -- we will use the liability mode of -- that's  
3 vicarious liability, in this case JCE, to prove some of those  
4 offenses, to the extent that they can be proved in that way.  
5 Conspiracy has its own -- that's Charge VIII -- has its own  
6 requirements that we will also have to fulfill, and we have laid that  
7 out separately in Charge VIII.

8 MJ [Lt Col BRAUN]: And I believe defense counsel has as well  
9 as it pertains particularly to that piece. I'm interested in the  
10 other charges.

11 ATC [LCDR LARSON]: Yes, Your Honor. JCE is a part of the  
12 fabric, you know, of this charge. It is the common allegations. It  
13 is essentially -- this is the common plan which proves his  
14 substantive crime. If we can, you know, do that.

15 Of course, the government -- and I'll put the caveat out  
16 there that the government is fully aware that it is required to prove  
17 everything on this charge sheet beyond a reasonable doubt. At this  
18 point ----

19 MJ [Lt Col BRAUN]: So that gets to the defense's notice  
20 concerns, fair?

21 ATC [LCDR LARSON]: Yes, Your Honor. You know, at that point  
22 though it can be corrected. The defense should be on notice now, at  
23 this point, that we intend on doing this, if they were not already.

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1           There is an issue as to perhaps the members. When the time  
2 comes, then the government would believe that if there is any  
3 confusion as to what the liability is, that the appropriate action  
4 would be an instruction at that point. Striking the language would  
5 not be appropriate at this point. That is the government's view of  
6 how this lays.

7           MJ [Lt Col BRAUN]: Anything further, Counsel?

8           ATC [LCDR LARSON]: No, Your Honor.

9           MJ [Lt Col BRAUN]: I have no additional questions for you.

10          ATC [LCDR LARSON]: Thank you, Your Honor.

11          MJ [Lt Col BRAUN]: Counsel, before we recess for the lunch  
12 hour, I -- during voir dire, I had a question that I was going to  
13 close the loop on with you, Defense Counsel. Whether or not the  
14 chief district military judge for the district that I'm assigned to  
15 had any interactions with the commissions. The answer to that is no.

16          DDC [MR. AKERSON]: Your Honor?

17          MJ [Lt Col BRAUN]: Defense counsel?

18          DDC [MR. AKERSON]: Would you be willing to entertain -- would  
19 you be willing to entertain a response to the prosecution's ----

20          MJ [Lt Col BRAUN]: If you have something you would like to  
21 respond directly to arising from trial counsel's argument, then yes,  
22 I'll permit you to respond.

23          DDC [MR. AKERSON]: Okay.

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1 MJ [Lt Col BRAUN]: Please proceed.

2 DDC [MR. AKERSON]: Thank you, Your Honor.

3 The main point I think we want to make is that statutes  
4 matter. Like, there's a reason they're drafted.

5 I think the kind of tenor of the government's argument is  
6 that if something exists in the law somewhere, whether domestic or  
7 international, that regardless of whether it was included in the  
8 statute, they're entitled to charge it.

9 It suggests they could charge RICO if they wanted, because  
10 that is well developed in domestic law. And if they feel like they  
11 can prove it and they have given us notice of it, they should be able  
12 to charge it.

13 There's a reason why the statute was drafted the way it was,  
14 and the statutes have meaning, and the law is clear that the plain  
15 language controls.

16 950q, the government has said, has not been changed since  
17 the '50s. That is not accurate.

18 Article 77 might not have changed since the '50s, and you  
19 would know more about that than I would. 950q is very different from  
20 Article 77. It's doubled in size. It has a mode of liability that  
21 is taken from the tribunal statutes. So the drafters of the MCA  
22 considered other modes of liability. They added the one they wanted;  
23 they didn't add common plan.



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1 Common plan is very different. JCE is very different from  
2 the modes of liability that are in the Principals paragraph. It's  
3 not embedded in the fabric. That's not the way statutes work. It  
4 has to be clearly articulated if -- you know, if you are going to  
5 give the government authority to find someone responsible under a  
6 mode of liability, that has to be articulated. It can't be something  
7 that's inherent in the statute or in the fabric.

8 And the government also insinuates, I think, that it's in  
9 the fabric of the charges. The charges don't change the statute. So  
10 if the statute doesn't authorize it, the fact that they have put it  
11 in the charging document or the common allegations does not mean that  
12 that somehow amends the statute. It is the statute that controls.

13 Notice is a bit of a red herring, I believe. They couldn't  
14 give us notice of RICO, for example, Racketeering Influence and  
15 Corrupt Organizations Act. If it's not in the statute that they're  
16 charging, they're not authorized to charge it. And so whatever  
17 notice they give us in the charging document does not change the  
18 statute.

19 And finally, you know, I think we both agree common plan is  
20 very prevalent in international criminal law. I think it's important  
21 for this court to review the Nuremberg statute and look and see that  
22 the common plan is specifically listed in there. Admittedly it's a  
23 rudimentary kind of precursor to the Principals paragraph. It's the

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1 first time that a statute was drafted for war crimes. But they  
2 specifically list common plan in there 75 years ago. They realized,  
3 you know, coming from the Supreme Court justice, statutes matter, the  
4 plain language of the statute is meaningful.

5 And so we would again argue, Your Honor, that based on the  
6 plain language of the MCA, they're not authorized to charge common  
7 plan.

8 And I do want to -- one last point, which is I think to try  
9 to address your question about the string of charges. If you choose  
10 to side with us and strike the common plan language, it does not  
11 affect the remaining charges. It's not -- it's not an integral  
12 sentence.

13 Aiding, abetting, counseling, commanding, procuring, those  
14 are all five charges that are listed in the common allegations. And  
15 if common plan is struck, as it should be because it's not authorized  
16 by the statute, they still have the five modes of liability that  
17 they've charged Mr. Nurjaman with, which you have to presume they  
18 believe they can prove. So the viability of their case does not  
19 change, it's just the mode of liability changes.

20 So all we're asking this court to do is to hue to the plain  
21 language of the statute. Let the case proceed on the viable charges  
22 that are expressed in that statute and expressed in the charge sheet.

23 Thank you.

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

2 ATC [LCDR LARSON]: Your Honor, if I may, I have two quick  
3 corrections I would like to address.

4 MJ [Lt Col BRAUN]: Directly relating to the response?

5 ATC [LCDR LARSON]: No, Your Honor. I made two misstatements  
6 I would like to correct.

7 MJ [Lt Col BRAUN]: Okay. I will permit you to correct  
8 misstatements, as I think that would be helpful to the commission if  
9 there was incorrect information provided. I'm going to ask you to  
10 keep it focused on that, Counsel.

11 ATC [LCDR LARSON]: Yes, Your Honor. And so the defense keyed  
12 on one of them which is -- it's Article 77. I intended to say  
13 Article 77 and I said 948q, or 950q, I believe. I wanted to correct  
14 that. Article 77 was what I was referencing.

15 The other piece is, I believe I said United States v.  
16 Jefferson, and then I left off a cite, and I'd like to give that to  
17 you if you would like it.

18 MJ [Lt Col BRAUN]: I'll take the cite, Counsel.

19 ATC [LCDR LARSON]: United States v. Jefferson is 22 M.J. 315.  
20 It's C.M.A. 1986.

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

22 ATC [LCDR LARSON]: Thank you, Your Honor.

23 MJ [Lt Col BRAUN]: Well, I think we've come to the point

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1 where I think we can recess for lunch. It's my plan to recess this  
2 commission until 1330. Will that be sufficient time for the parties?

3 Trial Counsel?

4 TC [COL KRAEHE]: Yes, Your Honor.

5 MJ [Lt Col BRAUN]: And Defense Counsel?

6 LDC [MR. HODES]: Yes, Your Honor, depending on what you have  
7 planned for this afternoon.

8 MJ [Lt Col BRAUN]: So -- and I was going to get to that.  
9 Thank you.

10 It is the intent that when we come back on the record we  
11 will move into consideration of AE 0056 at that time. So I want the  
12 parties to be prepared to discuss that matter.

13 At that point -- I know, Government, we'll discuss your  
14 request from -- that was summarized in the 802 earlier of delaying  
15 argument on that. But I do want to have a small discussion on the  
16 record, to the extent that the parties are able to do so.

17 So as it relates, for planning purposes, Defense Counsel,  
18 the ex parte presentation, insomuch as you may have been asking about  
19 that, it's the intent of the commission to do that tomorrow morning  
20 at 1000. That will give us time to set everything up for that.

21 LDC [MR. HODES]: That's fine, Your Honor.

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

23 Anything else we need to take up, then, before I recess this

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1 commission for lunch?

2 Trial Counsel?

3 TC [COL KRAEHE]: No, Your Honor.

4 MJ [Lt Col BRAUN]: Defense Counsel?

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

6 MJ [Lt Col BRAUN]: Very well, then.

7 This commission is in recess until 1330.

8 **[The R.M.C. 803 session recessed at 1212, 25 October 2023.]**

9 **[The R.M.C. 803 session was called to order at 1338, 25 October**  
10 **2023.]**

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

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

14 TC [COL KRAEHE]: Your Honor, may I just note for the record  
15 that our linguist, [REDACTED], is not present. She was not feeling  
16 well.

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

18 Are the parties prepared to take up consideration of AE 0056  
19 and the series of filings related to the defense motion to bar  
20 regulations burdening access to counsel?

21 Defense Counsel, are you ready to proceed?

22 LDC [MR. HODES]: We're ready, Your Honor.

23 MJ [Lt Col BRAUN]: Trial Counsel, are you ready to proceed?

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1 MDTC [Lt Col GOEWERT]: We are, sir.

2 MJ [Lt Col BRAUN]: Very well.

3 Defense Counsel, any evidence you wish to admit, aside from  
4 what has already been pre-submitted in your filings?

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

6 MJ [Lt Col BRAUN]: Okay.

7 Trial Counsel, do you have any additional evidence you wish  
8 to present, aside from what's already been presented in your filings?

9 MDTC [Lt Col GOEWERT]: That's correct at this point, sir.

10 MJ [Lt Col BRAUN]: Okay. There is additional or there is  
11 not?

12 MDTC [Lt Col GOEWERT]: There is not additional evidence other  
13 than we provided in our filings.

14 MJ [Lt Col BRAUN]: Okay. Do you still desire -- or do you  
15 still require the need to supplement your filings based upon the  
16 information contained in the additional defense filing that was  
17 received on, I believe, Tuesday, the supplement, AE 00 ----

18 MDTC [Lt Col GOEWERT]: No, we don't need to supplement it,  
19 sir. I still maintain an objection to hearing it at this point,  
20 based on the briefing cycle and the timing of the briefing cycle.  
21 But I don't -- have nothing to present at this point to the  
22 commission.

23 MJ [Lt Col BRAUN]: Okay.

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1           Then Defense Counsel, please present argument.

2           LDC [MR. HODES]: Judge, AE 0056 was designed to basically  
3 address an ongoing problem, and that is effective means of  
4 communications with our client. And we designated it as access to  
5 counsel.

6           And what's amazing to me is that despite all of these  
7 pleadings, despite years and years of litigation about this issue,  
8 I'm going to give you an example that's happening right now, today,  
9 of why this is so important.

10           We're having hearings today and tomorrow, two days out of  
11 months. We cannot meet with our client during breaks because another  
12 client, another defendant, I should say, is using the one room that  
13 we could meet with him in during breaks, over lunch, at any time that  
14 we would want to privately discuss this case and these ongoing  
15 matters with him, we cannot do so.

16           And that's just one of the many issues that are ongoing,  
17 constant, and truly create an ineffective assistance of counsel  
18 claim. We can't effectively represent our client if we can't  
19 communicate with him directly and easily.

20           And the government -- well, let me just point out what we've  
21 pointed out throughout the motion. And essentially, you know, we  
22 cite to the basic standard cases, the Turner v. Safley and Bell v.  
23 Wolfish. And the important thing that I think gets lost here is that

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1 he's a pretrial detainee; he's not a convict. He's a pretrial  
2 detainee who needs access to his lawyers on a regular basis.

3           Furthermore, he's a pretrial detainee who was arrested in  
4 2003 and didn't have legal counsel until 2019. This government kept  
5 him from speaking to lawyers for 16 years. And now we're expected to  
6 speak to him, develop a true attorney-client relationship in a matter  
7 of a couple of years, develop a relationship that is understanding  
8 and recognizes the cultural change -- the differences that are here,  
9 and the fact that this is a man facing legal proceedings that are  
10 unprecedented.

11           And the way we're supposed to communicate with him, the way  
12 the government believes is an effective and sufficient means of  
13 communications, right now include letters that are delivered 24 hours  
14 later and that have to be reviewed; SVTCs which are video  
15 conferences, which were only effectuated during the course of the  
16 pandemic, are only available on Wednesdays.

17           And if there is a commission hearing going on or if the 9/11  
18 teams are meeting here in the ELC -- and as Mr. Kraehe is aware,  
19 those meetings took place for months. They weren't hearings. They  
20 were just meetings.

21           MJ [Lt Col BRAUN]: When you say those meetings, just so I'm  
22 tracking, which meetings?

23           LDC [MR. HODES]: They would literally have meetings with the



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1 prosecution, with each other. There were conversations that would go  
2 on here in the ELC.

3 MJ [Lt Col BRAUN]: "They"? Who is "they"?

4 LDC [MR. HODES]: I'm sorry. The 9/11 ----

5 MJ [Lt Col BRAUN]: Okay.

6 LDC [MR. HODES]: ---- defendants, the 9/11 defense attorneys.  
7 I believe the prosecutors were present for many of those meetings.

8 And so we could not use this courtroom to communicate with  
9 our client. And it's -- we've included all of the times we've been  
10 denied in our pleadings in our reply.

11 And then lastly, we can have direct communication with him  
12 if we fly down here. As the commission is aware, we'd have to catch  
13 a flight from Andrews Air Force Base. We'd have to -- there are  
14 other logistical concerns. Even then, Your Honor, we have been on  
15 island and have been unable to see him because of some guard  
16 situation or some other situation that just prevents us from seeing  
17 our client. And if we're here on island and we can't see our client,  
18 Judge, we can't talk to him.

19 The only way to communicate with him while on island at that  
20 time was through a letter, a P2P letter. And one of the things that  
21 you'll also learn at some point -- well, you're going to learn it  
22 now, but you're also going to learn it in pleadings. But we're the  
23 only team going forward right now that does not have our own

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1 dedicated SCIF or our own dedicated P2P platform. We have to use  
2 other teams' equipment, and it's -- honestly, it's time consuming and  
3 it's just plain difficult.

4 I'll add this, too. With regards to -- with regards to the  
5 SVTCs, one of the things that we did was we looked forward too, not  
6 just backwards. According to the schedule that we've seen, there  
7 will be seven Wednesdays in 2024 where this will be available for  
8 SVTCs.

9 Now, the government points out that another courtroom might  
10 be available to us perhaps as early as the end of this year. We can  
11 only hope.

12 What I can point to the commission is that several years ago  
13 \$10 million worth of tiny houses were brought and we were all  
14 supposed to be living in those tiny houses. And that \$10 million  
15 purchase of tiny houses is still sitting somewhere in Guantanamo, and  
16 nobody's been able to live in those houses. And that's been years  
17 ongoing.

18 Again, just to get back on track, the government response  
19 and their general position seems to be that these modes of  
20 communication are good enough. And then there is the all-important  
21 national security concern, Your Honor.

22 And I was looking at the 792 series, which I guess Your  
23 Honor paid some attention to. And in that Judge Watkins seems to be

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1 satisfied by what was given to him with regards to the national  
2 security concerns. I ask Your Honor to do the same.

3 And Your Honor did indicate in the show cause order, tell  
4 me, government, what is it about national security? What is the  
5 national security concern that is still at issue here? They don't  
6 answer that question, Your Honor.

7 The LSS tells you, or tells them, who then tells you, that  
8 if somebody is labeled an HVD, that they are presumed that -- not  
9 they, but anything they say is presumed Top Secret SCI.

10 My client wrote a letter about his knee problem  
11 approximately two years ago. His knee problem, Judge. We have not  
12 been able to clear that. Nobody wants to allow him to talk about his  
13 knee problem. What is the national security concern of my client's  
14 knee problem? I find it mystifying. And I'd love it if this  
15 commission required this prosecution team to explain to you what the  
16 national security concerns are in that communication in particular.  
17 But in all of these communications in general, what it is that he  
18 could possibly say that could trouble our national security  
19 interests.

20 We're asking for phone privileges. We're basically asking  
21 the court to order them. And you did ask for an explanation. You  
22 did ask them to tell you what the technological capabilities are. We  
23 know what the technological capabilities are. We even have, what is

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1 it called a -- I had to write it down because I'm not good with  
2 military acronyms. VOSIP, V-O-S-I-P, phone.

3 So we have a voice over secret Internet protocol phone in  
4 our office. Guess what we do with it? Nothing. We don't have  
5 access to anything with it. There's -- we could. We could easily  
6 talk to our client.

7 And I think there's nothing stopping the government from  
8 making that happen. And I hope that this commission orders them to  
9 explain it to you.

10 The other thing that kind of stuns me about this national  
11 security issue is that the LSS -- again, this is in the attachment in  
12 their reply, or their response to your show cause order, but in that  
13 attachment the LSS basically explains that because our client was  
14 exposed to classified information. Please ask them to explain that.

15 Please ask them to further explain what that means. Because  
16 from my knowledge, the only exposure that my client had was forced  
17 upon him. It's not like he's Jack Teshera or Edward Snowden or  
18 Julian Assange out there looking for classified information. He's  
19 not, and he was not. He was exposed to classified information which  
20 is their way of saying he was tortured.

21 And as a result of that, he can't talk to his lawyers. He  
22 can't view classified information which is part of his discovery.  
23 There were probably a thousand people that went to that bathroom in

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1 Mar-a-Lago that were exposed to top-secret information. I'll bet  
2 none of them have had their phone lines cut off.

3 I think that you have asked the right questions, and I think  
4 we have not gotten the right responses. You wanted to know what has  
5 been done since AE 792I. The only thing they can point to is the  
6 Remote Hearing Room, which was in process at the time of the COVID  
7 pandemic.

8 Since then, Your Honor, zero has been done to facilitate  
9 communications. Since then, Your Honor, there have been canceled  
10 flights so we can't get down there. There have been COVID testing  
11 situations where Commander Nelson here was stuck on island for ten  
12 days and got to see our client once.

13 The national security concern is a situation that I think  
14 Your Honor rightly acknowledges, and I think deserves a better  
15 response than what we got from the government in their reply to your  
16 rule to show cause.

17 I don't know whether or not we would have to go into closed  
18 session for a further explanation of what national security issues  
19 are at stake, but I am hopeful that this commission asks for further  
20 information. Because without that, I don't know that this commission  
21 can make the proper decision.

22 But I do know that whatever it is that they bring up is 20  
23 years old, is highly relevant to the rest of this case and this

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1 trial, and is highly relevant to the defense of my client.

2 Costs. Whatever financial resources the government has, we  
3 know they can afford a phone line, and that's all I'm asking for.

4 I'd be happy to take any questions.

5 MJ [Lt Col BRAUN]: I do have some, Counsel.

6 First, I'm trying to understand -- and I just want to talk  
7 about the flights a little bit. Help me understand the -- you had  
8 mentioned that there's a lot of logistic challenges with the flights.  
9 Something I can understand; it's just travel. But help me understand  
10 a little better what those difficulties are.

11 LDC [MR. HODES]: You know, you mentioned it earlier actually  
12 when you were talking about the -- during voir dire. Like if you  
13 were having problems with flights, you'd have to go to somebody for  
14 travel. We have to do that all the time. And as a team, if we were  
15 to travel two, three, five of us at a time, it's that kind of  
16 complication.

17 And then once you're here, I don't know to what  
18 extent -- you mentioned also during voir dire that you discussed  
19 logistics and administrative things with Colonel McCall. But being  
20 here in Guantanamo is certainly not conducive to quality legal  
21 maneuverings or arguments. This is not a place that is conducive to  
22 that kind of work, but we're doing the best we can. In that ----

23 MJ [Lt Col BRAUN]: Is that -- and I apologize. Is that

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1 because of lack of ready access or something else?

2 LDC [MR. HODES]: Oh, the lack of ready access, I think,  
3 is -- is very important. This isn't a place where I can just fly  
4 into when I need to see my client.

5 If I'm a federal practitioner and I've got a case in New  
6 York City, I just fly to New York City and see my client. There are  
7 flights. There are flights that get canceled. There are flights  
8 that get delayed extensively. This isn't -- you know, this isn't  
9 American Airlines, this isn't Delta.

10 MJ [Lt Col BRAUN]: How often -- I know in your briefing you  
11 had mentioned one flight change specifically. How frequent has your  
12 team experienced that? Help me understand.

13 LDC [MR. HODES]: I can tell you that my first experience  
14 coming down here -- and again, I'm happy to supplement the record for  
15 Your Honor. But I can tell you from anecdotal experience, my first  
16 trip down here we sat at the terminal -- I won't say where because  
17 the buzzer might go off, but we sat at the terminal for hours. And  
18 we kept being told that the flight was coming, the flight was coming.  
19 And around 12:00, 1:00 we were told come back tomorrow.

20 So we came back tomorrow. And we were sitting and waiting  
21 and waiting. And again, the flight didn't come. And that was it,  
22 the flight was canceled.

23 And that happened the first time I was coming down here.

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1 I'm not going to tell you that it happens all the time.

2 MJ [Lt Col BRAUN]: And so help me -- yeah. Help me  
3 understand that. Out of about how many visits you've had down to  
4 Guantanamo Bay, help me appreciate the ratio of, you know, we've had  
5 20 visits; of those, five have been canceled or one has been  
6 canceled, five have been delayed. Help me.

7 LDC [MR. HODES]: I would guess it's somewhere in that  
8 neighborhood, Your Honor. But I don't know for sure and I don't want  
9 Your Honor to think that I'm suggesting, you know, a higher number  
10 than is correct.

11 But I can tell you that it feels pretty regular to me. And  
12 again, I'm not going to give you exact numbers or I'm not going to  
13 guesstimate in a way that, you know, is kind of crazy. But it seems  
14 to happen all the time. And it's just difficult. And in  
15 particular ----

16 MJ [Lt Col BRAUN]: All the time as in every flight?

17 LDC [MR. HODES]: Oh, no, no, no. Not all the time. Not  
18 every flight, no. But it happens enough that it's very frustrating  
19 for us as lawyers, when we've got a schedule and that schedule is  
20 just destroyed.

21 More importantly, it's very difficult for our client, who's  
22 expecting us and we're not there. And that's a hard thing. Again,  
23 the trust relationship between an attorney and the client is



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1 critical, particularly in this kind of matter. And what we have is a  
2 situation where, you know, we let him down. And that's a terrible  
3 thing to happen.

4 MJ [Lt Col BRAUN]: Okay. So thank you for that context.

5 Now I want to move on to the option -- the next option you  
6 discussed, the SVTC. You'd mentioned that that was happening, I  
7 think you said, during the pandemic. Those are still happening,  
8 correct? It's still an option, let me ask it that way.

9 LDC [MR. HODES]: It's still an option, correct.

10 MJ [Lt Col BRAUN]: How often have you been able to utilize  
11 that as a tool to meet with your client?

12 LDC [MR. HODES]: I know that in the recent past we have had  
13 at least eight scheduled, two of which either were canceled or  
14 denied.

15 MJ [Lt Col BRAUN]: And those cancellations ----

16 LDC [MR. HODES]: Judge, if I may, I'm sorry to interrupt,  
17 but -- and we're only requesting SVTCs on weeks we know the ELC is  
18 not being used. And so the ELC is more often than not being used,  
19 especially recently.

20 MJ [Lt Col BRAUN]: Okay. Is it eight scheduled, two which  
21 have been canceled or delayed ----

22 LDC [MR. HODES]: Either canceled or denied.

23 MJ [Lt Col BRAUN]: ---- or denied? Okay.

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1 Denied due to resource availability?

2 LDC [MR. HODES]: Probably.

3 MJ [Lt Col BRAUN]: Space not available type thing?

4 LDC [MR. HODES]: Correct.

5 So there's only four slots, is my understanding, over the  
6 course of a day for the SVTC, maybe five. I could be wrong. But  
7 obviously there's at least ten individuals that may want to meet with  
8 their teams or their teams with them.

9 MJ [Lt Col BRAUN]: Are you basing the -- you said you're  
10 basing those requests upon when you believe the facilities will be  
11 available. Are you basing that upon public hearing calendar?

12 LDC [MR. HODES]: Correct.

13 MJ [Lt Col BRAUN]: Okay. Is there a reason you're not  
14 asking, even though there may be a scheduled hearing, just  
15 understanding litigation changes pretty quickly and something could  
16 open that wasn't open before. Any reason you're not putting in those  
17 requests? That's not a trick question. I'm just trying to  
18 understand the process a little better.

19 LDC [MR. HODES]: So we can, and we can try to do more of that  
20 in the future. But what we have found is, for instance, we have  
21 asked -- there is in the standard operating procedure, we can ask for  
22 phone calls; we got denied. We can ask for SVTCs on days other than  
23 Wednesday; we got denied. It becomes, you know, more -- more of a

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1 problem than it needs to be.

2 MJ [Lt Col BRAUN]: So of those eight scheduled, those were  
3 all Wednesdays?

4 LDC [MR. HODES]: Correct.

5 MJ [Lt Col BRAUN]: Okay. You've asked for other days and  
6 those other days have been denied?

7 LDC [MR. HODES]: We have in the past and that was denied, I  
8 believe that's correct.

9 MJ [Lt Col BRAUN]: Okay. Then I want to talk about the third  
10 option you mentioned, and that is the -- the letters. You term it  
11 as -- basically I understand it's, based upon the pleadings of the  
12 parties, that you can send message, a letter.

13 How often have you been able to successfully use that?

14 LDC [MR. HODES]: Successfully? I'm not sure how you define  
15 successful.

16 We're able to do it, and the letters do get through.  
17 Sometimes there are redactions, but we do get through. And again,  
18 it's at least a 24- to 48-hour turnaround. And at the very least, it  
19 requires us to go to a different place to retrieve the letters.

20 So again, we are limited in that we do not have the same  
21 facilities that every other defense team representing a defendant in  
22 front of a commission, we don't have the same resources. And so  
23 we're the ones stuck with having to go to other places simply to

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1 retrieve a letter.

2 MJ [Lt Col BRAUN]: So when you -- and when you talk about the  
3 resources, that was part of the request that you -- you'd mentioned  
4 during your discussion earlier, correct? You don't have your own  
5 platform?

6 LDC [MR. HODES]: I'm not sure ----

7 MJ [Lt Col BRAUN]: How -- what do you need?

8 LDC [MR. HODES]: Well, that's something that's probably  
9 pending, but what we need is resources. And in this case what I'm  
10 specifically asking ----

11 MJ [Lt Col BRAUN]: I'm going to stop you.

12 Pending, like it's been requested and it's being worked  
13 or ----

14 LDC [MR. HODES]: We have requested it through the OMC and the  
15 convening authority and have been denied.

16 MJ [Lt Col BRAUN]: Okay. So the -- the commissions' defense  
17 organization?

18 LDC [MR. HODES]: Correct.

19 MJ [Lt Col BRAUN]: Okay.

20 LDC [MR. HODES]: So we have requested a SCIF, we have  
21 requested a P2P platform. It has been denied over and over.

22 And so the only other way for us to go forward with that is  
23 through this commission. And it's a difficult situation to say the

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1 least, and it seems like it's an unnecessarily difficult situation.

2 MJ [Lt Col BRAUN]: In your pleading there's -- and it's in  
3 Attachment C, I believe, there's a lot of discussion -- a lot of the  
4 meetings that were requested, the request for legal visits, a lot of  
5 those end in wait lists. But there's no -- there's no sub -- I don't  
6 have the subsequent decision that came out of that.

7 Do you remember what those subsequent decisions were? Did  
8 you receive a subsequent decision?

9 LDC [MR. HODES]: I can't -- I can't speak to each situation  
10 specifically, Your Honor.

11 I can tell you that in most cases when we are hit with a  
12 wait-list notice, we do not get the -- we do not get the meeting.

13 MJ [Lt Col BRAUN]: Okay. How many meetings have you been  
14 able to have? And I appreciate you probably don't have an exact  
15 number.

16 LDC [MR. HODES]: We've had honestly quite a few.

17 MJ [Lt Col BRAUN]: Okay.

18 LDC [MR. HODES]: Whenever we're on island, we try to make it  
19 so that we can see him as often as possible. But again, it doesn't  
20 always work out. And that's the -- that's the whole point, is  
21 the -- the different variables that are at work in this game is  
22 incredible.

23 And so, you know, we have to be able to have -- first we

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1 have to have the appointment. We can only see him in certain  
2 locations. If other -- if other defendants are seeking the same, we  
3 could be waitlisted, like you indicated, or we could just be denied  
4 visitation. It's a really difficult situation. And it's difficult  
5 from an effective assistance of counsel avenue.

6 And, you know, one of the things that we cite to in our  
7 reply and in our supplementals, is the special rapporteur from the  
8 United Nations who came and visited and basically documented this  
9 with regards to every one of the detainees. Because remember,  
10 they're all pretrial detainees.

11 And she points out in her report over and over how  
12 inadequate the systems are here and how inadequate the policies are  
13 here. And the simple fact is they are, and she's right, and this  
14 commission has the opportunity to do something about it.

15 What we're asking for is not that -- it's not that great.  
16 But the ability to communicate with our client on a daily basis by  
17 phone, that would help us move forward, help us move forward with the  
18 case, help us move forward with the relationship with our client.

19 And I think in the 792 series there's even communication  
20 about that, Your Honor, where there's, you know, lots of suggestions  
21 from the defense teams back then about how to avoid some of the  
22 security concerns. Nothing's been done about that. Nothing.

23 MJ [Lt Col BRAUN]: I think you've addressed the larger

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1 issues. There may be requests from the parties to supplement  
2 additional information at a later point. I have not made a  
3 determination of whether or not that will be necessary.

4 Anything additional from you before I turn to the  
5 government, Counsel?

6 LDC [MR. HODES]: I see a whole lot of notes on my desk there.  
7 But if you want to give me one second.

8 MJ [Lt Col BRAUN]: I will.

9 **[Counsel conferred.]**

10 LDC [MR. HODES]: Just a couple of very small points, and one  
11 of them is again from Judge Watkins in that 792 series. But it's  
12 about proactivity, and I think we talk about it as well. But the  
13 proactive nature that was required post COVID is highlighted by Judge  
14 Watkins, and I think it should be highlighted here. And I think Your  
15 Honor addressed that. What has the government done proactively? And  
16 the answer is nothing.

17 You know, one of the things that my team wanted me to point  
18 out to Your Honor is that it is next to impossible for us to -- you  
19 know, in terms of these modes of communication, it is next to  
20 impossible for us or for our client to confide in us in some written  
21 form that we all know is going to be read by somebody outside of this  
22 team.

23 And it's that confidentiality and that relationship building

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1 that is critical to the means of communication. And so again, the  
2 effective assistance of counsel ----

3 MJ [Lt Col BRAUN]: And that relates to -- that relates to the  
4 letters that we were talking about, correct?

5 LDC [MR. HODES]: Not just the letters. I mean, it really  
6 relates to everything. And ----

7 MJ [Lt Col BRAUN]: Well, to in-person meetings?

8 LDC [MR. HODES]: I'd be happy to take you to where we have  
9 the in-person meetings so you can see all of the little black things  
10 that I'm looking at on the roof of this building in our meeting room.  
11 And so you may or may not be familiar with the fact that one of the  
12 prior defense teams found a listening device in one of those  
13 interview rooms. And you may or may not be familiar with the fact  
14 that those rooms were also used as black sites at some point.

15 I have no confidence that we're not being listened to every  
16 time we're in a meeting. I certainly have no confidence in the  
17 letters that go back and forth through electronic means.

18 And I certainly have no confidence in the SVTCs. I can give  
19 you another little bit of anecdotal evidence. The first time we  
20 tried an SVTC, two people showed up on the screen. We still don't  
21 know who they were. There they were.

22 And so it's a hard situation, and I don't know that it can  
23 get much better. But at the very least, being able to communicate



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1 with him on a daily basis over a secured or unsecured phone line  
2 would be nice.

3 I'd prefer unsecured because I don't think this government  
4 can ever show you a legitimate national security concern that would  
5 be put at risk by our having the ability to talk to our client  
6 directly.

7 MJ [Lt Col BRAUN]: I have one additional question for you.

8 You had mentioned COVID protocols as it related to, I  
9 believe, a member of your defense team. I'm assuming some of that  
10 has diminished, just given currently where we are. And I'm not  
11 asking you to speculate forwards; nobody can do that. But to some  
12 extent, as it relates to you and your team, is that still a  
13 difficulty?

14 LDC [MR. HODES]: It could be. I'll tell you -- I don't know  
15 what ----

16 MJ [Lt Col BRAUN]: It could be. So it's not right now but it  
17 could be in the future, is what you're saying?

18 LDC [MR. HODES]: No. I'll explain it to you directly, Your  
19 Honor.

20 When we come down, because we meet with our client directly,  
21 we have to be COVID tested. I'm not sure if you and your team get  
22 COVID tested. I'm not sure if Colonel Kraehe and his team get COVID  
23 tested. We do.

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1           And if one of us tests positive, we get quarantined. If one  
2 of us had tested positive when we came down here on Saturday, this  
3 wouldn't be happening.

4           So that's -- that's what's happening COVID-wise.

5           MJ [Lt Col BRAUN]: Thank you.

6           MDTC [Lt Col GOEWERT]: May it please the court. Your Honor,  
7 as an initial matter, there's a lot going on with this motion  
8 and -- that I think needs a little bit of unpacking.

9           First of all, the standard that the defense is basically  
10 trying to impute in this case is one of perfection. There will never  
11 be perfection with any sort of infrastructure, any form of modes of  
12 communication. It is absolutely unrealistic to expect perfection.  
13 It is equally unrealistic to expect perfection here. That's not the  
14 standard we're talking about.

15           We have a couple -- we have many, many issues with the  
16 presentation that they made to you today in terms of its legal  
17 significance and how the court should view the law and apply the law  
18 in the case.

19           First of all, what is the allegation they're making?  
20 I -- there are lots and lots of proffers from counsel but very little  
21 proof of what's happened. There are some proof in e-mails and many  
22 things he said to you, but what is the actual proof and what are the  
23 issues before you today?

1 I am not going to ask Your Honor or tell Your Honor how to  
2 take his proffers before you, whether to accept them or not. That's  
3 obviously in your discretion. But let's talk about what is in the  
4 briefs and what's in the motions.

5 First of all, the way this court should look at, I would  
6 cite this court to Hatim v. Obama 760 F.3d 54. This was cited in our  
7 61 series motion related to F -- excuse me, related to the HVD  
8 process.

9 Very important in this case because it lays out an exact way  
10 this court should analyze the issues presented by the defense here.  
11 It lays out explicitly -- it's a D.C. Circuit Court of Appeals case  
12 which describes how -- the kind of deference the court needs to give.  
13 And there's lots of key language in there this court has to reconcile  
14 and think through and analyze when it's looking at the defense's  
15 allegations in this case.

16 One, first of all, what is the standard we're talking about  
17 here? We heard a lot about the 792 series. The 792 series occurred  
18 in the context of COVID, when teams couldn't get down here, when  
19 there was a national -- international pandemic.

20 Flights were being canceled. People couldn't travel. It  
21 made a lot of sense to try to have the commission develop a secondary  
22 mode of communication, a mode in which people could talk to their  
23 clients. We're not in that world anymore. That was a COVID-era

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1 protocol.

2           The court, when it looked at it, began in the very beginning  
3 by saying that the -- in its findings that the accused had clearly  
4 demonstrated their ability to physically meet with their counsel has  
5 been severely curtailed because of the effects of a pandemic-related  
6 restriction. And everything else followed that pandemic era.

7           The RHR is not the standard. The RHR is a good thing. It's  
8 great when it works.

9           MJ [Lt Col BRAUN]: Yeah, but Government, you rely on the RHR  
10 as one of the three mechanisms that defense counsel has to  
11 communicate with their client.

12           MDTC [Lt Col GOEWERT]: Yes, sir, we do. It is one of them.  
13 It's not perfect though, but it isn't the baseline standard.

14           The baseline standard is in-person visits. It's counsel  
15 coming here and meeting with their client in person. They can come  
16 down here. They are paid a per diem to come down here. They are  
17 provided lodging. They are provided MCDO sites. They are provided  
18 IT support. They have people to set this up for them.

19           So to say that they can't come down here, like every other  
20 counsel travels down here, is sort of -- is an interesting thought.  
21 Of course they can. They have six counsel on their team. They can  
22 come down here and spend time with their client like every other  
23 commissions case. And every other defense counsel on a commissions

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1 case, that this is the standard mode of dealing in a commissions  
2 case. The problem is they want to apply standards from other courts,  
3 other types of courts that don't apply here. We are in a military  
4 commissions case involving an HVD accused.

5 So the standards are going to be a little different. So the  
6 baseline standard is in-person visits, which are the best way to  
7 accommodate the need to meet with counsel and the need to have an  
8 effective relationship with counsel, and the need to balance the  
9 security interests in this case.

10 So we don't expect perfection that -- things may happen.  
11 Things may come up. He may get COVID. The counsel may get COVID  
12 when he travels down here. These are bumps in the road. They're  
13 imperfections. But that does not equate to what they are actually  
14 asking you to do. They are asking you to do something which is  
15 prohibited.

16 And if the court looks at Hatim v. Obama and looks at the  
17 language in there, there's great deference given to the decisions of  
18 prison administrators as to how they facilitate and run prisons, and  
19 that includes communications with counsel.

20 So this court has to say what is it they're asking me to do?  
21 They're asking you to put in an unsecured phone line -- or -- or -- I  
22 mean, I guess they give the court two things: One, gives us an  
23 unsecured phone line; or give us an SVTC phone in Camp Echo so that

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1 we can talk to them on demand, when we want to when -- at our  
2 client's behest or when we wish to. That is far over and above the  
3 standards that have been viewed as acceptable by the DC Court of  
4 Appeals.

5           So the court never said that a perfect standard was  
6 required. It simply said that a standard -- and I'll quote this to  
7 the court. It need not be ideal. It need only be available. And  
8 this is on page 7 of Hatim. There's a lot of great language in here  
9 that I think the court really has to look at. One it says -- and  
10 turning on to rather page 5. It says to prevent judicial  
11 overreaching in matters of prison administration courts are to uphold  
12 prison regulations that impinge on an inmate's constitutional rights  
13 as long as those regulations are reasonably related to legitimate  
14 penological interests.

15           So the court begins by saying, look, Mr. Hakim, [**sic**] you  
16 are unhappy with the searches that are being conducted, but you have  
17 a right to prison mail. And that's what that case was about. The  
18 court ultimately held that prison mail was a sufficient and adequate  
19 means of vindicating an effective attorney-client relationship. And  
20 we're in the same sort of place.

21           The defense continues to move the goalpost as to what they  
22 claim is adequate and effective. The court in Hakim [**sic**] has  
23 already set up a baseline, which is mail. They said that is adequate

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1 and effective. We're saying it's mail plus in-person visits. That  
2 gets you to adequate and effective representation of your client.

3 The RHR is a great thing to have when it works. And I  
4 understand that there's a lot of -- there is demand on it because of  
5 other cases, and we're hoping that the next courtroom will open up  
6 and we will get more RHR capability to the defense and that may help  
7 them.

8 MJ [Lt Col BRAUN]: And I actually want to stop you right  
9 there, Counsel.

10 So regarding that additional courtroom hopefully coming  
11 online, that's been talked about a bit here now, is that really going  
12 to increase the bandwidth or the ability? Because, right, with  
13 anything there's two ends, right? A phone has two ends. So  
14 you're -- as I see it, you're adding one end, but is there a  
15 corresponding second end that will actually create an increase in  
16 availability?

17 MDTC [Lt Col GOEWERT]: Sir, I don't know that. I can't  
18 project or anticipate what's going to happen with that. And I  
19 wouldn't because it is not the standard. It is something that was  
20 set up to address COVID protocol issues and issues with traveling  
21 down here. The standard is counsel traveling and meeting in person.

22 What they're asking for is more sort of -- more convenient  
23 travel possibly with -- they're really asking for on-demand travel,

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1 on-demand communications is what they are asking for, in lieu of  
2 traveling down here. They're saying we are inconvenienced by this  
3 traveling processes. Our flights may be bumped, our flights may be  
4 canceled. But the fact is across the whole spectrum of time you can  
5 travel down here, you can meet with your client over time. We don't  
6 look at this as a series of discrete events in which travel plans may  
7 have been interrupted. We look at it as a continuum. Can you build  
8 an effective relationship over time.

9           And that's why Hakim is so important, because it talks about  
10 who determines policies and why they determine policies. And what  
11 the appellate court tells the lower court is it's not your job to get  
12 into the weeds on matters of security or matters of policy or matters  
13 of administration as it relates to prison administration. That is  
14 not the lower court's job.

15           It says the task of determining whether a policy is  
16 reasonably related to legitimate security interests is peculiarly  
17 within the province and professional expertise of corrections  
18 officials. And that's what the defense wants you to jettison. They  
19 want you to set aside and usurp a role that does not belong to you.  
20 It is not the commission's lawful role to tell this facility,  
21 JTF-GTMO and OMC, how to arrange attorney-client communications with  
22 security protocols in mind.

23           Because what they're asking for, they're asking for you to



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1 order an SVTC -- I'm sorry, an SVTC built into a camp which doesn't  
2 have one, and built in such a way that the HVDs can use it, secure  
3 it, staff it, place lines into it. Essentially, they want you to  
4 become a camp administrator, a contracting officer, and demand that  
5 the federal government obligate funds and personnel to run something  
6 that they have no right to in the first place. And that's outside  
7 the bounds of your authority.

8 To even get to there, you would have to conclude that their  
9 fundamental access to counsel has been so incredibly impinged that I  
10 have to get past this case. And the problem is we can't get past  
11 there based on the information they've given you.

12 They have not met their burden of proof or burden of  
13 persuasion in adducing evidence to this court that the issues at  
14 stake are so, so affected by what's happened that you have to get  
15 involved in these matters. Right?

16 I can understand there may be situations where they bring a  
17 complaint to you. But the question is have -- is the amount of  
18 evidence so great that you're in a place where you should be even  
19 involving yourself in what they're talking about? And the answer is  
20 no. Because the court says these are matters left to prison  
21 administration; this is not a matter for you at this point.

22 It could get worse. It could change. But even  
23 after -- even after the COVID pandemic -- or during the COVID

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1 pandemic in 792, the court never -- never ordered more than the RHR.  
2 And that was at a time when people couldn't travel.

3           The defense can travel, albeit inconveniently. It might not  
4 be what they want. But they do not get to move the goalposts and  
5 tell this court what the standard is for attorney-client access. And  
6 that's what Hakim says and that what's they're trying to do in these  
7 motions.

8           So there's no amount of evidence that's been produced or  
9 that could be produced in this matter that's going to rise to the  
10 level they're talking about, based on the proffers that we've heard.

11           MJ [Lt Col BRAUN]: So it's the government's position that the  
12 standard really is being met by the exchange of messages, letters,  
13 mail -- call it what you want -- and in-person visits, correct?

14           MDTC [Lt Col GOEWERT]: Yes. That is -- that is -- that is  
15 our position with the court based on Hakim. We're going further than  
16 Hakim because in Hakim the standard was, and I think I have Hakim  
17 right -- I'm sorry. It's Hatim. Excuse me. In Hatim the standard  
18 was laid out. It was citing Supreme Court case law, Supreme Court  
19 precedent saying you don't need to have even in-person visits to meet  
20 the standard. Mail is sufficient. You may not like it, but it is  
21 sufficient.

22           And our position is, well, we'll go beyond that and say that  
23 meeting with them and mail together are probably sufficient to meet

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1 the minimum standard for effective attorney-client relationship.

2 I know that I'm not the defense counsel. I don't know the  
3 internal dynamics of that. And I wouldn't pretend to know that. But  
4 I do know what the law says. I do know what Hatim says and what it  
5 says about this commission's ability and responsibilities in  
6 relationship to this process and where it quickly oversteps the line.

7 When they invite you to order phones put in or to order  
8 SVTCs, put in to get into the internal security affairs and the  
9 internal logistics of the prison administration, we're at that point.  
10 We're at a problem point in an area that this court cannot address or  
11 effect in any meaningful way based on the law.

12 I also wanted to point out that the issue with pretrial  
13 detention and pretrial detainee status.

14 First of all, Mr. Nurjaman wasn't a pretrial detainee until  
15 referral of charges occurred. And second of all, the law doesn't  
16 actually treat pretrial detainees differently than posttrial  
17 detainees in terms of the analysis the court must conduct and its  
18 responsibilities and authority and abilities.

19 And I would cite to Pierce v. County of Orange, 526 F.3d,  
20 1190, and that was also cited in 61.02 brief in which that court,  
21 sitting en banc -- I'm sorry, excuse me. Also Bull v. City and  
22 County of San Francisco, 595 F.3d, 964.

23 MJ [Lt Col BRAUN]: Counsel, slow down.

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1 MDTC [Lt Col GOEWERT]: I'm sorry.

2 In which the court says we have never distinguished between  
3 pretrial detainees and prisoners in applying the Turner test, but  
4 have identified the interests of correction facility officials  
5 responsible for pretrial detainees as being penological in nature.

6 And those -- basically it says that the security and safety,  
7 those decisions, they are left for the people who are in charge of  
8 those things and responsible for those things, not courts to second  
9 guess. And that's the entire upshot of Hatim.

10 The D.C. Circuit court telling lower courts, that's not your  
11 business, given the state of evidence that -- it is, as a general  
12 matter, a very significant thing, and the defense bears a very high  
13 burden in proving that their client's relationships and their,  
14 whatever constitutional or statutory rights are impinged, those rules  
15 are allowing them to impinge on them. They'll never be perfect.

16 It's a very high bar before you can even begin to consider  
17 stepping out of your place as a judge and becoming essentially a camp  
18 administrator. And that's what they're inviting you to do.

19 So I'm -- I don't like to hear that the defense is unable  
20 to -- has had problems, but that is the nature of this commission and  
21 it will likely be so. There will always be problems with our travel  
22 here. We will suffer problems. They will suffer problems. But that  
23 does not mean that the effectiveness of their overall attorney-client

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1 relationship and communications has been so impacted that this court  
2 must step into this process. That is not the case at all.

3 Your Honor, barring this court's questions, I have no  
4 further argument.

5 MJ [Lt Col BRAUN]: Just one question.

6 Right before I asked you -- right after -- right before I  
7 asked you to slow down, you had given a cite to a case. Could you  
8 please repeat that?

9 MDTC [Lt Col GOEWERT]: Yes. I apologize, Your Honor.

10 We have two cases that we're discussing. This is in  
11 footnote 2 of AE 0061.002 (Gov). That would be Pierce v. County of  
12 Orange, 526 F.3d 1190 and Bull v. City and County of San Francisco,  
13 F95 -- F.3d -- 595 F.3d 964 standing for the proposition that  
14 pretrial detainees and prisoners, when we're applying the Turner  
15 test, which is ultimately what Hatim was talking about, the  
16 constitutional four-part test that the court laid out in which the  
17 court -- this court must answer whether there's a valid rational  
18 connection between the prison regulation and legitimate governmental  
19 interests put forward to justify it. There is, and the defense has  
20 not overcome that first piece; were there are alternative means of  
21 exercising the right that remain open to prison inmates. And those  
22 alternate means are what we're talking about. We're talking about  
23 in-person meetings and mail.

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1           They're saying the RHR is the standard.  Actually -- what  
2 they're actually saying is telephone communications is standard.  
3 SVTC lines into the prison that we can use on demand, that's a  
4 standard.

5           They have not explained -- and they can never explain why  
6 those are the standard because they're illusory.  They're a goalpost  
7 that can always be moved.  If there are problems with those they can  
8 demand something else.  Because the standard isn't based on a  
9 principle.  It's based on a factual situation which can move.

10           They haven't talked about the absence of ready alternatives  
11 to the regulation, and that's part four of the Turner test.  And  
12 that's important because in Hatim it tells this court something very  
13 simple:  Is what they're recommending more than a de minimus impact  
14 on the facility?

15           They're saying that I want you to give us a telephone, a  
16 direct communication between my client and us, and the -- this court  
17 can only -- can certainly imagine what that's going to take in terms  
18 of effort, time, money, security personnel, to -- if this court were  
19 even to entertain the idea of requiring JTF-GTMO to input an SVTC  
20 facility just for Mr. Nurjaman or a telephone to Mr. Nurjaman.

21           First of all, it's impossible, because of security  
22 regulations, to put in a telephone for him because he's a -- because  
23 of his status and his security classification.

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1           The question then becomes, could you put in an SVTC into  
2 Camp Echo II, and that is not a de minimus operation. You would  
3 basically be requiring them to construct a SCIF facility to put  
4 something in there, to hire personnel, to coordinate with DIA, DoD,  
5 SC/DRT, other logisticians to make a -- to make, set up, and run a  
6 system which would require a great deal of personal effort over time  
7 to run.

8           It's not a de minimus minor alteration. This is not  
9 something like saying please give him a crayon for his personal  
10 library or please allow him prayer time. That would be a de minimus  
11 kind of thing which this court -- commission might be able to order  
12 if those sorts of fundamental rights were being violated.

13           What we're talking about is a very serious operation and  
14 construction operation that would have to occur that -- and you would  
15 be behaving as a prison administrator, not as a military judge in a  
16 commission.

17           Thank you, sir.

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

19           LDC [MR. HODES]: Your Honor, can I have a minute to reply?

20           MJ [Lt Col BRAUN]: You may.

21           LDC [MR. HODES]: **[Counsel away from podium; no audio.]**

22           MJ [Lt Col BRAUN]: Counsel, if I could have you ----

23           LDC [MR. HODES]: I'm going to start by congratulating him on

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1 evidently establishing, with an abundance of proof, because I'm  
2 accused of just proffering information to the court.

3           The whole first part of his response was how I was  
4 proffering all the problems we had. We attached 50 pages of e-mails  
5 showing all of the cancellations. The government was tasked by Your  
6 Honor to tell Your Honor how much it might cost to do this.

7           And then he gets up here and what does he do? He proffers.  
8 Oh, it's going to be expensive. It's really expensive. Look at  
9 this. Look at the technology that's in this courtroom alone.

10           I suggest that the court take a tour of the different  
11 facilities that have been set up by this government for this  
12 commission. I suggest that the government produce to you how much it  
13 would cost to simply put in a phone line, either in the facility  
14 where the detainees are held or the facility where the detainees are  
15 brought for interviews.

16           I would suggest to this court -- I'm not going to proffer.  
17 I would suggest, though, that it wouldn't be as expensive as it is to  
18 fly us down here all the time. I have an idea as to how much it  
19 costs to charter these jets.

20           MJ [Lt Col BRAUN]: But is that a concern before the  
21 commission?

22           LDC [MR. HODES]: It's not. You know what? It's not even a  
23 standard, and he kept talking about standards, Your Honor.



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1           We're not asking for Your Honor to take a standard or create  
2 a standard. We're asking for Your Honor to make it available for us  
3 to communicate with our client on a regular basis in a way that isn't  
4 inconvenient to everybody.

5           You know, one of the things about the travel -- you were  
6 talking about that earlier -- it literally takes a day for us to get  
7 from wherever we are down here, and then we cannot meet with our  
8 client that day.

9           There are no -- well, I won't go into any details because  
10 I'm sure I'll set off the buzzer. But we can't meet him when we get  
11 here. It's impossible. And so we don't really start that part of  
12 our job until the next day.

13           So it's an all-day event for us to travel, and it's an  
14 all-day event for us to travel back as well. And so two days out of  
15 our work week are gone simply because the government chose to put our  
16 clients here instead of in the mainland United States. And our  
17 government chose to set up a trial here instead of in the mainland  
18 United States. This is all their doing.

19           And so the least they can do is make the effort to show Your  
20 Honor what the costs would be, what the national security concerns  
21 are. We're not asking you to create a standard. We're asking you to  
22 allow us to be effective in our assistance of counsel. We're asking  
23 you to let us, again, not be perfect, just effective. We're not

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1 seeking perfection; we're seeking effectiveness. And that's all  
2 we're asking for.

3 We're not asking for this commission to do anything that it  
4 doesn't have the power to do. And if that is a problem -- again, a  
5 legitimate penological interest is ultimately the legal standard.

6 And the only thing they can possibly point to to stop you  
7 from ordering the JTF or the OMC or the convening authority,  
8 whoever -- I'm still not sure who controls this place. But whoever  
9 it is, I'm still interested in their responses to your questions in  
10 your rule to show cause. What is the national security concern? And  
11 ultimately, how much would it cost to do what we're asking for? And  
12 they gave you no answers, zero, when it came to those questions.

13 Mail is sufficient according to Hatim v. Obama. I didn't  
14 see that in their original pleading. I look forward to reading it.

15 My guess is it's quite distinguishable. But I also know  
16 that this commission has been a lawyer long enough to know writing  
17 letters back and forth to a client is never sufficient, and it's  
18 clearly not efficient, especially in this case where those letters  
19 are being read by other people.

20 I have nothing further.

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

22 **[Pause.]**

23 MJ [Lt Col BRAUN]: There's just one matter that I wanted to

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1 discuss with the parties today, and that is just an update as it  
2 pertains to the progress on discovery in this case.

3 MDTC [Lt Col GOEWERT]: Your Honor, I apologize. Can you  
4 repeat that? I was talking to Attorney Kraehe. I apologize, sir.

5 MJ [Lt Col BRAUN]: Yeah. I just wanted to get from the  
6 government an update as it relates to the discovery in this case,  
7 where we are at and how we are progressing towards the deadlines  
8 previously set by the commission for the production of discovery to  
9 the defense in this commission.

10 TC [COL KRAEHE]: Yes, Your Honor.

11 By way of background, we represented at the April session,  
12 which was the last session in this commission, that we had produced  
13 approximately 90 percent of identified discovery. That included  
14 unclassified discovery, classified discovery not subject to Rule 505  
15 procedures, and also classified discovery subject to Rule 505  
16 procedures. That full body of identified discovery we represented  
17 that we had produced approximately 90 percent of that as of April.

18 Before -- at that time we had identify -- we had produced  
19 approximately 112,893 pages. That was produced to all three of the  
20 accused in the United States v. Nurjaman, bin Amin, and bin Lep. I  
21 know since then the cases have been severed and rejoined. And also I  
22 should note that the totals for each of the accused differ because  
23 they're not all entitled to the same discovery. But that was the

1 overall number for all three of them, the high water mark, so to  
2 speak.

3           Currently, the only remaining discovery not yet produced is  
4 classified discovery requiring Rule 505 procedures. That was the  
5 same in April 2000 -- earlier this year. It's the case now as well.

6           In April we projected and committed ourselves to substantial  
7 completion of all discovery by 15 January 2024. We are on track to  
8 do that. And by substantial, we mean submitting to the commission  
9 under Rule 505 all of the remaining discovery, recognizing, as we  
10 always do, that we have a continuing obligation to produce discovery  
11 as it becomes available to us.

12           And we should note that we continue to attempt to obtain, at  
13 the very least, additional discoverable materials. And we are  
14 committed to producing those materials, subject to any procedures  
15 that are required as we get those materials, if we get those  
16 materials.

17           So the estimates that I'm providing here, Your Honor, are  
18 based on currently identified discoverable materials, and they are  
19 also based, except as I might say otherwise, on original documents.

20           So as discovery goes through the 505 process, the number of  
21 pages may change. So, for example, the number of pages submitted to  
22 the commission under Rule 505 may vary from the number of original  
23 documents, depending on the type of substitution that Rule 505

1 requires.

2 Usually the number of pages coming out of the 505 process is  
3 less than the number of pages going into the 505 process, because  
4 summaries are generally smaller or involve fewer pages than the  
5 originals.

6 I also want to know what our discovery priorities are in  
7 this case as in the other -- in the related bin Lep and bin Amin  
8 case. Our priorities include the bin Amin RDI statements. And I  
9 have to say that most of those have already been submitted to the  
10 commission.

11 Also, the bin Lep RDI statements, some of those have been  
12 submitted to the commission and the remainder of those are programmed  
13 for submission to the commission relatively soon in the next two  
14 weeks, and definitely no later than 8 December.

15 And the next priority is just kind of general RDI  
16 information. And we're committed and programmed to submit those to  
17 the commission by December 8th.

18 And then there's a separate side issue that was addressed  
19 earlier involving a discrete number, a small number of drawings. And  
20 those don't require Rule 505 processing to our knowledge right now.  
21 If they do, it's a very small number. And that's not going to impact  
22 the deadlines in any significant way.

23 So by way of update, Your Honor -- and I am including in

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1 this update the discovery that covers both the cases, because this  
2 case, as you know, was originally joined and most of the discovery  
3 was produced when all three parties were joined to this case.

4 So as I said before, we previously submitted 112,893 pages  
5 to all three parties. Since April 2023 we have submitted to the  
6 commission 915 original pages of discovery under Rule 505.

7 By 8 December 2023, we anticipate submitting to the  
8 commission under Rule 505 on a rolling basis 1,430 original pages of  
9 discovery across both the cases. This will account for all of the  
10 identified discovery in United States v. bin Amin and bin Lep. And  
11 so once that discovery is produced, that will complete discovery for  
12 the bin Amin and bin Lep cases.

13 We estimate that upon completion of discovery in that case,  
14 approximately 115,238 pages will have been produced. And we have to  
15 note that so far approximately 113,808 pages of this total has  
16 already been produced or submitted to the commission under Rule 505.  
17 That is 98.8 percent of all identified discovery has already been  
18 produced in the bin Amin and bin Lep case. And as I've said, that  
19 discovery is also produced in this case.

20 In addition to that, we will continue to submit to the  
21 commission, on a rolling basis under Rule 505, what we estimate will  
22 be 1,725 pages of discovery. So that's above and beyond what we're  
23 submitting in the other case. That will involve submission to the

1 commission of approximately 11,505 pages under Rule 505, and we're  
2 expecting about 1,725 of those -- 1,725 pages of that will be  
3 produced in discovery.

4 That accounts for all the discovery in the United States v.  
5 Nurjaman. So we estimate that upon completion of discovery in the  
6 United States v. Nurjaman, approximately 116,963 pages will have been  
7 produced.

8 So far approximately 113,808 pages of this total has already  
9 been produced or submitted to the commission under Rule 505. So, in  
10 effect, 97.3 percent of the discovery in Nurjaman has already been  
11 produced. And by December 8th we're expecting that that  
12 number -- that that percentage is going to go up to about 98 percent.

13 So based on those figures and those expectations, we  
14 will -- we believe we will have substantially complied with our  
15 discovery obligations by December 8th. There will still be a  
16 percentage or two of discovery that requires processing through  
17 Rule 505.

18 And it may take -- I'm not going to promise that it's going  
19 to be very easy or quick to get that last one or two percent  
20 produced. It still involves a considerable effort. But we have  
21 produced almost everything, Your Honor, and are on track to get those  
22 last percentages before the commission for its review in the next  
23 weeks and following.

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1           And I think, based on that, I think we are in a position to  
2 move this case forward expeditiously, particularly with regard to the  
3 matters that we asked the court to schedule in January of 2024 and  
4 moving on forward from that to the series 18 matters that we asked to  
5 be scheduled. And even beyond that, on to trial, according to the  
6 trial setting that we requested for March 2025.

7           Discovery in this case is quickly coming to an end, and  
8 there's no telling whether additional materials will be filed. Like  
9 I said, we have a continuing discovery obligation and are making  
10 efforts to discover additional materials. But that's a bridge we'll  
11 have to cross when we get to it.

12           But based on what we have identified to date as discoverable  
13 materials, we have very little left to produce to the commission for  
14 its review.

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

16           Those were the matters that the commission desired to  
17 address, with the exception of the matter for tomorrow morning.  
18 Before I recess, however, I want to give the parties -- see if  
19 there's anything additional we can take up at this time.

20           Defense Counsel, I'll start with you.

21           LDC [MR. HODES]: At the very least, Your Honor, I'd love a  
22 little bit of time to respond to what you just heard.

23           MJ [Lt Col BRAUN]: Very well.



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1 LDC [MR. HODES]: Colonel Kraehe started telling you that as  
2 of April, 90 percent of identified discovery has been provided.  
3 Please keep in mind that operative word, "identified."

4 Your Honor, as of this date we have one report from a  
5 foreign entity that was the primary entity investigating the  
6 underlying crimes before this military commission. It wasn't the  
7 FBI. It wasn't the DEA. It was a foreign country's police  
8 organization. We have requested information about that. The United  
9 States Government has said we don't have it.

10 When we requested it from that foreign government, they said  
11 they had approximately 60 terabytes of information. Does our  
12 government have any obligation -- ethical, professional obligation to  
13 pursue that information? Evidently their position is they do not.  
14 There is additional information from so many sources at this point,  
15 Your Honor.

16 We just heard open testimony in the 9/11 case two to three  
17 weeks ago in which their lead agent testified under oath that he has  
18 testified in trials overseas involving these cases, individuals  
19 tried, convicted, and some executed for these crimes.

20 We haven't seen any of that testimony. We haven't even seen  
21 that agent's 302s from when he traveled abroad and testified.

22 MJ [Lt Col BRAUN]: Counsel, have motions to compel been filed  
23 on those particular matters?

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1 LDC [MR. HODES]: Production requests are coming. The motions  
2 are coming. But the idea, according to them that they're going to be  
3 complete, I just want the court to know.

4 MJ [Lt Col BRAUN]: Okay. And I do appreciate the  
5 perspective. And I'd remind if there are matters that are  
6 outstanding and they cannot be resolved between the parties,  
7 consistent with the rules, and we need to file a motion to compel to  
8 get that moving so that production can occur as is required under the  
9 law.

10 LDC [MR. HODES]: We're on it. Understood, Your Honor.

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

12 LDC [MR. HODES]: I just wanted to make you aware.

13 MJ [Lt Col BRAUN]: I appreciate the perspective.

14 Anything further, Defense Counsel, then, before we recess,  
15 understanding that this will end this portion of the proceeding; we  
16 would reconvene tomorrow morning for the ex parte only.

17 LDC [MR. HODES]: Judge, we would just put on the record that  
18 although we did not have an assigned linguist for this particular  
19 session, we would still want one. We still need one. And we will be  
20 filing -- the government was unable to join us in the motion that we  
21 had hoped they would join us in. We will be filing that motion  
22 independently, obviously.

23 MJ [Lt Col BRAUN]: Okay. Thank you for the notification of

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1 that, Defense Counsel.

2 Anything further?

3 LDC [MR. HODES]: Not at this time, Your Honor.

4 MJ [Lt Col BRAUN]: Thank you.

5 Trial Counsel?

6 TC [COL KRAEHE]: Nothing further, Your Honor.

7 MJ [Lt Col BRAUN]: Very well, then. This commission is  
8 recessed.

9 **[The R.M.C. 803 session recessed at 1456, 25 October 2023.]**

10 **[END OF PAGE]**