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1 [The R.M.C. 803 session was called to order at 0918,
2 21 August 2019.]

3 MJ [LtCol LIBRETTO]: This commission is called to order.
4 Our last session was in March of 2019, and there have been
5 several changes in counsel since then. So we will begin by
6 having the parties announce who is present today, and if
7 counsel have not previously stated their detailing and
8 qualifications for the record, they will do so at the
9 appropriate time. I note as well that the accused is present.

10 Commander Short, please account for who is present
11 and representing the government.

12 TC [CDR SHORT]: Thank you, Your Honor. All members of
13 the government who were present when the commission recessed
14 are once again present. In addition, one new Assistant Trial
15 Counsel, Corey Squires. Now, he put his record -- he put his
16 qualifications on the record, Your Honor, in a closed session.
17 I don't know if you want to put his qualifications on in an
18 open session, but he's prepared to do so if you care to.

19 MJ [LtCol LIBRETTO]: Okay. Yes, please.

20 TC [CDR SHORT]: Okay. Do you want me to do that now or
21 do you want me to continue?

22 MJ [LtCol LIBRETTO]: You can continue and wrap that up
23 after you have concluded.

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1 TC [CDR SHORT]: Yes, sir. Representing the government
2 today are Commander Douglas Short, United States Navy;
3 Commander Kevin Flynn, United States Navy; Mr. Vaughn Spencer;
4 and as noted, Captain Corey Squires, United States Marine
5 Corps.

6 Major Rudy and Sergeant First Class Oe have moved on
7 to additional assignments. We thank them for their service
8 and their dedication to this mission, Your Honor.

9 Also representing at counsel table today are Sergeant
10 First Class Doug Underwood, United States Army, and Mr. Todd
11 Musher, who will be assisting the government. There is also
12 an interpreter present, Your Honor.

13 Finally, I'd like to state that these proceedings are
14 being transmitted stateside via CCTV to remote viewing sites
15 at Fort Meade, Maryland, and Fort Devens, Massachusetts, and
16 the Pentagon pursuant to commission's order, Appellate Exhibit
17 005K, Your Honor.

18 I do note that the Pentagon will not be viewing on
19 Saturday, Your Honor.

20 MJ [LtCol LIBRETTO]: Thank you very much, Commander
21 Short. Captain Squires, if you would, please, state by whom
22 you are detailed, your legal qualifications, status as to
23 oath, and whether or not you've acted in any disqualifying

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1 manner.

2 ATC [Capt SQUIRES]: Aye aye, sir. I have been detailed
3 to this Military Commission by the chief prosecutor in
4 accordance with Rule for Military Commissions 503. I'm
5 qualified under Rule for Military Commissions 502(d) and have
6 previously been sworn in accordance with Rule for Military
7 Commissions 807.

8 I have not acted in any manner which might tend to
9 disqualify me in this proceeding. The detailing document has
10 been appended to the record as Appellate Exhibit 003K.

11 MJ [LtCol LIBRETTO]: Thank you, Mr. Squires.

12 And, Ms. Hensler, please account for the defense team
13 who is here representing the accused today.

14 INT: Excuse me, Your Honor. This is the interpreter.
15 Would you please ask counsel and everyone to slow down?

16 MJ [LtCol LIBRETTO]: I will. Thank you.

17 INT: Thank you.

18 DDC [MS. HENSLER]: Good morning, Judge Libretto.

19 MJ [LtCol LIBRETTO]: Good morning.

20 DDC [MS. HENSLER]: This morning Mr. al-Tamir is
21 represented by myself, Susan Hensler, along with Lieutenant
22 Commander Jacob Meusch of the United States Navy, who will be
23 putting his credentials on the record today as counsel for

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1 Mr. al-Tamir. Also, Lieutenant Mishael Danielson, who also
2 will be putting his credentials on the record today, Your
3 Honor. And at that time we're prepared to address any
4 conflicts issues.

5 In addition, Lieutenant Charles Ball is also present
6 in the courtroom today; as is Chief Petty Officer Shenika
7 Mayes; Raul Ayala; and James Anderson, our defense information
8 security officer, as well as Abu Gadem, an intelligence
9 analyst on our team; and general -- Brigadier General John
10 Baker.

11 Your Honor, we are prepared to put the credentials of
12 Lieutenant Commander Meusch and Lieutenant Danielson on the
13 record at this time.

14 MJ [LtCol LIBRETTO]: Okay. Thank you very much,
15 Ms. Hensler.

16 And, Lieutenant Commander Meusch, beginning with you,
17 if you would please state by whom you are detailed, your legal
18 qualifications, status to oath, and whether or not you've
19 acted in any disqualifying manner.

20 DDC [LCDR MEUSCH]: Yes, Your Honor. Good morning.

21 MJ [LtCol LIBRETTO]: Good morning.

22 DDC [LCDR MEUSCH]: I've been detailed to this military
23 commission by the chief defense counsel in accordance with

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1 R.M.C. 503. I am qualified under R.M.C. 502; have previously
2 been sworn in accordance with R.M.C. 807. I've not acted in
3 any manner which might tend to disqualify me in any
4 proceedings, and the document detailing me as defense counsel
5 is marked as AE 007LL.

6 MJ [LtCol LIBRETTO]: Thank you, Lieutenant Commander
7 Meusch.

8 And Lieutenant Danielson, if you would, please, state
9 by whom you are detailed, your legal qualifications, status to
10 oath, and whether or not you've acted in any disqualifying
11 manner.

12 DDC [LT DANIELSON]: Good morning, Your Honor.

13 MJ [LtCol LIBRETTO]: Good morning.

14 DDC [LT DANIELSON]: I've been detailed to this case by
15 the chief defense counsel in accordance with Rule for Military
16 Commissions 503. I'm qualified under Rule for Military
17 Commissions 502, and I was previously sworn under Rule for
18 Military Commissions 807.

19 I have not acted in any manner that might tend to
20 disqualify me in any proceedings and the document detailing me
21 as defense counsel to this proceeding is appended as Appellate
22 Exhibit 007KK.

23 MJ [LtCol LIBRETTO]: Thank you very much, Lieutenant

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1 Danielson.

2 DDC [LT DANIELSON]: Yes, sir.

3 MJ [LtCol LIBRETTO]: To summarize what has occurred since
4 the last session of court in March, I will note that there
5 have been three R.M.C. 802 conferences since that time and
6 since we were last on the record. The first was on 6 March of
7 2019, shortly after recessing the commission for the last time
8 in March. The military judge and counsel representing the
9 prosecution and the defense were present. The accused was not
10 present.

11 At that time, Lieutenant Ball and Lieutenant Askar
12 informed the commission that the lead defense counsel is
13 experiencing some medical issues and was en route to the
14 hospital for further evaluation and treatment. The government
15 clarified some logistical issues with regard to the accused's
16 movement to the courtroom on 6 March 2019, and then we were
17 standing by in a holding pattern waiting on some updates as to
18 Ms. Hensler's health status.

19 In light of an updated status received the morning of
20 7 March of 2019 regarding Ms. Hensler's health, the commission
21 cancelled the remainder of this scheduled session.

22 In preparation for these hearings this week, another
23 R.M.C. 802 conference was held at 1700 on 19 August. The

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1 military judge and counsel representing the prosecution and
2 the defense were again present. The accused was again not
3 present.

4 After having the parties identify new members of
5 their teams, we discussed the general schedule of events, the
6 order of march, if you will, for the first half of this
7 session. I will go over this chronology in greater detail
8 momentarily for the benefit of those observing in the gallery
9 and those watching via closed-circuit television and for the
10 accused's benefit.

11 I also inquired with Ms. Hensler and Lieutenant
12 Danielson about any conflicts with Lieutenant Danielson's
13 representation of the accused in light of his former
14 representation of Mr. Binalshibh. Lieutenant Danielson and
15 Ms. Hensler indicated that there were no conflicts.
16 Nonetheless, I asked Ms. Hensler to discuss the matter with
17 Mr. Hadi so that we could have an informed discussion about it
18 on the record today, which we will do so shortly.

19 The government informed the commission that the new
20 accommodations for the accused described in AE 131 are in
21 place and ready and the defense objected to the government's
22 proposed use involving those new accommodations. Ms. Hensler
23 also requested an opportunity to view these accommodations,

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1 which the government agreed to coordinate.

2 I directed the defense to file an appropriate motion
3 if they intended to maintain their objection and also directed
4 that the senior medical officer be made available to testify
5 today, if necessary, in order to provide testimony regarding
6 the suitability of the accommodations. The defense requested
7 the commission not move forward with any docketed motions or
8 testimony outside of Appellate Exhibit 160, that which deals
9 with the recusal of the military judge, until the request for
10 the military judge recusal is resolved.

11 I informed the parties that I intended to proceed
12 taking up all matters on the docket notwithstanding the fact
13 that if I end up recusing myself, a lot of this session's
14 efforts may be for naught. However, I intended to not sit
15 idle for several days based on that possibility alone.

16 Additionally, the defense requested another military
17 judge be assigned to be the finder of fact with regard to the
18 anticipated testimony of Mr. Blackwood and Mr. Flinn and any
19 other evidence relevant that was -- would be presented on
20 AE 160. I noted this was the first time the defense brought
21 this matter to the commission's attention and that the
22 commission expected the issue to be appropriately raised and
23 briefed in a formal pleading.

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1 Notably, this session has been scheduled since 18
2 January 2019, and the docketing order for this session was
3 issued on 23 July 2019. The defense was instructed to file
4 motions on those two matters by the close of business
5 yesterday if they desired the commission to take them up
6 formally. The defense has done so, and I expect at least one
7 of them, AE 163, will be taken up later today.

8 Finally, the government informed the commission of a
9 second Department of Justice witness to speak to the pre-2017
10 hiring process of immigration law judges has not been located.
11 The commission had previously directed a witness from that
12 agency be prepared to testify as to the hiring practice
13 relevant to the motion to dismiss based on Captain Waits', the
14 former military judge's, applications to become an immigration
15 law judge. And finally, the government provided notice that
16 the Pentagon viewing site would not be available, as they just
17 did again, on Saturday.

18 A third R.M.C. 802 conference was held at 1130
19 yesterday. The military judge and both parties were present
20 and the accused again was not present. The government
21 informed the commission that the accommodations outlined in
22 AE 131 will be ready by 1700 yesterday; and that the senior
23 medical officer will inspect it by today's session; and that

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1 the accused will have the same accommodations, including the
2 medical -- medically appropriate arrangements he currently
3 uses in his cell at Camp VII.

4 The defense stated that despite the government and
5 the military judge having observed the cell, the defense had
6 not yet been afforded the same opportunity. The parties were
7 instructed to work together to do so so the defense could view
8 the holding cell both immediately and also upon completion, as
9 there was still some final work being done on the facility.

10 The defense represented that the successive days
11 planned for this session will be physically difficult for the
12 accused to attend and requested that the session begin on
13 Thursday, with the reopening of voir dire of the military
14 judge and then the taking of testimony of Lieutenant Colonel
15 Martin and Mr. Flinn. Notably, the commission had already
16 scheduled one day in between our arrival on island and the
17 start of the commission's session at the request of the
18 defense.

19 The commission informed the parties that we would
20 begin as scheduled at 0900 on Wednesday, 21 August, and that
21 the commission will take up any issues with the new
22 accommodations or requests to amend the current schedule at
23 the end of the day, if necessary.

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1 That summarizes the R.M.C. 802 conferences held since
2 the last session of the commission. Do either party have
3 anything to add or object to my summations?

4 TC [CDR SHORT]: Yes, sir, Your Honor. Just a couple of
5 quick points.

6 I believe the defense had indicated that Ramzi
7 Binalshibh had waived his presence, but that the accused here
8 had not -- I'm sorry, the conflict, but the accused had not.
9 So I -- I think that's just a finer detail on that.

10 Also, Your Honor, with regard to the accommodations
11 that were being made, I believe I had indicated to Your Honor
12 and the defense during the 802 that electrical work was being
13 done, and those were the final touches that were being put on,
14 and that there was some electrical work that was basically
15 being worked on at that time.

16 Defense had asked to -- I had indicated that we had
17 an 1800 appointment to go view the cell, and defense asked to
18 see it prior to that 1800 viewing time as well as 1800. I
19 also indicated to the defense and Your Honor that the
20 accommodations from -- that we brought with them from Camp VII
21 would include the bedding, the mattress -- an appropriate
22 mattress, and certain other cushions and things that were --
23 he's used to in Camp VII.

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1 Based upon that, the defense did ask to view it prior
2 to that, and we did tell Your Honor that we would make
3 arrangements to do so, and we did do so, Your Honor.

4 MJ [LtCol LIBRETTO]: Thank you.

5 Ms. Hensler.

6 DDC [MS. HENSLER]: Sir, the defense only has a few things
7 to put on the record with respect to these 802 conferences.

8 First, with respect to the 802 conference held on
9 August 19th, Commander Short used the phrasing that the jumbo
10 cell would be ready in time for court, so he used prospective
11 language with respect to the accommodations in the vicinity of
12 the courthouse.

13 In addition, the government at that time gave notice
14 that the Pentagon viewing area, which I believe the court had
15 ordered be open for the duration of these hearings, would be
16 closed on Saturday, the date that we have two witnesses
17 scheduled to testify.

18 In addition, on August 20th, the -- during the 802
19 conference we had yesterday, we -- the defense did demand an
20 immediate tour of the facilities in the vicinity of the
21 courtroom and asked that -- excuse me, Your Honor, I'm trying
22 to carefully parse my language -- and informed the court that
23 the defense had asked Commander Short to request an 802 to

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1 advise the court of the current status of those facilities --
2 not the prospective status of those facilities, but the
3 current status of those facilities, so that Your Honor could
4 make informed decisions about scheduling matters.

5 Thank you, Your Honor.

6 MJ [LtCol LIBRETTO]: Thank you.

7 Okay. Mr. Hadi, good morning. I understand that
8 you've had some time to meet with your counsel, at least
9 briefly, to discuss the matters that we will be taking up this
10 week and next. However, before we get started, I want to
11 remind you once again of your rights to be present at the
12 hearings both this week and next week.

13 You have the right to be present during all sessions
14 of this commission. If you request to be absent from any
15 session, your absence must be voluntary and of your own free
16 will. Your voluntary absence for any session of this
17 commission is an unequivocal waiver of your right to be
18 present during that session. Your absence from any session
19 may negatively affect the presentation of the defense in your
20 case. Your failure to meet with and cooperate with your
21 defense counsel may also negatively affect the presentation of
22 your case.

23 Under certain circumstances your attendance at a

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1 session can be compelled regardless of your personal desire
2 not to be present. Regardless of your voluntary waiver to
3 attend a particular session of the commission, you have the
4 right at any time to decide to attend any subsequent session
5 of the commission.

6 I want to emphasize again, as I have before, that
7 your medical providers have routinely advised that the most
8 effective way to minimize the risk of back spasms and
9 discomfort from occurring is to not remain in a static or
10 stationary position for an extended period of time. That
11 means adjusting your position, standing up, stretching, or
12 perhaps lying down.

13 In light of your condition and the recommendations of
14 the medical providers, it will not be considered
15 disrespectful, even in the middle of a session on the record,
16 for you to do or take any of those actions. In fact, I'm
17 encouraging you to do so.

18 If you fail to do so and you experience back spasms
19 or cannot proceed as a result, that prevent your attendance at
20 a session of this court this week or next week, it will be
21 considered in any determination I make in whether your absence
22 is voluntary.

23 It is my sincere goal, as it always is, for you to be

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1 present at every session of the commission, and certain
2 accommodations have been afforded to you to that end.

3 Additionally, there are other accommodations that are
4 currently available to you that were not available at any
5 previous session of the commission. These accommodations
6 would permit you to have even greater freedom of movement;
7 access to all medical devices and items available to you
8 during the course of any other day; and permit you to
9 participate in these proceedings remotely, both verbally and
10 through video feed, while maintaining continuous access to
11 your defense counsel and interpreter.

12 If at any time you would like to utilize these
13 additional accommodations, just let your counsel know, and I
14 will order the necessary arrangements to be made.

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

16 ACC [MR. HADI]: Yes, I did understand, but just one
17 remark.

18 The accommodations that the government had indicated
19 are available are not complete.

20 MJ [LtCol LIBRETTO]: Okay, Mr. Hadi. I understand your
21 position in that regard, and your attorney, Ms. Hensler, has
22 expressed that concern to me previously. At the end of the
23 day, I intend to take up that matter more formally and more

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1 thoroughly in order to address any concerns that you,
2 Ms. Hensler, or the government have with respect to those
3 accommodations.

4 Do you understand?

5 ACC [MR. HADI]: Yes, I understand.

6 MJ [LtCol LIBRETTO]: Very well.

7 And finally, before we move on to taking up some of
8 the issues for this session, I want to address and revisit one
9 of the subjects initially addressed during Monday's R.M.C. 802
10 conference, and that is, again, as mentioned, the potential
11 conflict that may exist with Lieutenant Danielson's
12 representation of the accused in light of his previous
13 representation of Mr. Binalshibh, one of the five co-accused
14 in the case of United States v. Khalid Shaikh Mohammad, et al.

15 I categorize it as a potential conflict for two
16 reasons. First, within the four corners of the charge sheet
17 in this commission, there is no direct conflict between the
18 accused's potential interests and those of Mr. Binalshibh.
19 And second, because both Lieutenant Danielson and Ms. Hensler
20 have represented to this commission that there is no conflict
21 with Lieutenant Danielson's representation of the accused in
22 this case and his former representation of Mr. Binalshibh.

23 With that said, beginning with Lieutenant Danielson.

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1 Lieutenant Danielson, do you believe your previous
2 representation of Mr. Binalshibh creates any actual or
3 potential conflict for your current and future representation
4 of Mr. Hadi?

5 DDC [LT DANIELSON]: No, I do not, Your Honor.

6 MJ [LtCol LIBRETTO]: Next, Ms. Hensler, based on your
7 discussions with Lieutenant Danielson and your knowledge of
8 this case, do you believe there is any actual or potential
9 conflict with Lieutenant Danielson's representation of the
10 accused in light of his previous representation of
11 Mr. Binalshibh?

12 DDC [MS. HENSLER]: No, Your Honor.

13 MJ [LtCol LIBRETTO]: You have, however, discussed the
14 commission's concern, at least on an uninformed concern, with
15 Mr. Hadi?

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

17 MJ [LtCol LIBRETTO]: Okay.

18 Mr. Hadi, Lieutenant Danielson has been detailed to
19 represent you. He announced his qualifications and detailing
20 earlier and stated on the record that he is not disqualified
21 from representing you and has disclaimed any actual or
22 potential conflict arising -- arising from his previous
23 representation of Mr. Binalshibh, who is, again, one of the

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1 five co-accused in the case of United States v. Khalid Shaikh
2 Mohammad, et al., and was recently released from his
3 representation of Mr. Binalshibh.

4 Nonetheless, I asked Ms. Hensler to explain to you
5 the potential concern this commission had to ensure that you
6 understand that you have the absolute right to be represented
7 by defense counsel who are without any conflicts with other
8 accused detainees whose interests may not align with yours.

9 Did Ms. Hensler discuss that matter with you?

10 ACC [MR. HADI]: Yes.

11 MJ [LtCol LIBRETTO]: And do you understand that you have
12 the right to conflict-free counsel?

13 ACC [MR. HADI]: Yes, I understand that.

14 MJ [LtCol LIBRETTO]: And do you believe there is any
15 actual or potential conflict between your interests and those
16 of Mr. Binalshibh?

17 [Pause.]

18 ACC [MR. HADI]: [Speaking in English] No, sir, there is
19 not any conflict.

20 MJ [LtCol LIBRETTO]: Very well. Thank you, Mr. Hadi.

21 Moving forward then, by whom do you wish to be
22 represented?

23 ACC [MR. HADI]: Those sitting on the table next to me:

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1 Ms. Susie, Mr. Meusch, Mr. Danielson, and Mr. Ball.

2 MJ [LtCol LIBRETTO]: Sir, you wish to be represented by
3 Ms. Hensler, Lieutenant Commander Meusch, Lieutenant
4 Danielson, and Lieutenant Ball?

5 ACC [MR. HADI]: Yes, and Ms. Susie.

6 MJ [LtCol LIBRETTO]: Who is --

7 DDC [MS. HENSLER]: Your Honor, I believe he's referring
8 to me.

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

10 The final counsel issue that we will address before
11 moving on to some substantive matters is that which pertains
12 to Lieutenant Askar and his request to be permanently excused
13 from representing Mr. Hadi. That request was filed last week
14 and has been attached to the record of trial as Appellate
15 Exhibit 007MM.

16 The request indicates that Lieutenant Askar has
17 recently applied and accepted employment with the Department
18 of Justice, and as such, plans to resign his active duty
19 commission in December of this year. The notice filed by lead
20 defense counsel indicates that she has discussed Lieutenant
21 Askar's request for withdrawal with the accused and that he
22 consents to Lieutenant Askar's withdrawal.

23 Absent from the filing, however, was anything

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1 directly from Mr. Hadi indicating as much and as has been
2 typically filed by the defense in previous withdrawal
3 requests. Before addressing that matter with Mr. Hadi
4 directly, I want to take up one matter with Ms. Hensler.

5 Ms. Hensler, in the filing you assert that you also
6 consent to Lieutenant Askar's withdrawal and that his
7 withdrawal will not unreasonably delay these proceedings.
8 That same assertion has been made before in the course of
9 prior counsel withdrawal requests, but yet on at least one
10 occasion motions that have been filed by the defense have
11 cited to turnover of counsel as the justification, at least in
12 part, of the relief requested by the defense.

13 Understanding that the commission moving forward,
14 if -- assuming, again, Mr. Hadi consents to Lieutenant Askar's
15 withdrawal, do you believe in any way that Lieutenant Askar's
16 withdrawal from this proceeding will impact the defense's
17 ability to abide by and conform with the deadlines imposed by
18 this court -- commission at this time?

19 DDC [MS. HENSLER]: No, sir, I do not.

20 INT: I apologize, Your Honor. I pushed the button by
21 mistake. This is the interpreter.

22 MJ [LtCol LIBRETTO]: Okay.

23 DDC [MS. HENSLER]: No, sir, I do not. As a functional

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1 matter, Lieutenant Askar has not worked on this case and has
2 been walled off from all matters relating to this case for
3 several months, since the point at which he informed myself
4 and Mr. al-Tamir that he planned to apply with a -- for a
5 position with the Department of Justice, so it will not have
6 any impact on our ability to move forward.

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

8 Mr. Hadi, Ms. Hensler has indicated to the commission
9 that you consent to Lieutenant Askar's voluntary request to
10 withdraw from your case. Have you discussed that matter with
11 Ms. Hensler?

12 ACC [MR. HADI]: Yes.

13 MJ [LtCol LIBRETTO]: Do you understand that you have the
14 right to not consent to his withdrawal from representing you?

15 ACC [MR. HADI]: Yes.

16 MJ [LtCol LIBRETTO]: Do you also understand that this
17 commission will not delay or otherwise modify any existing
18 trial deadlines or trial dates based on his withdrawal if you
19 voluntarily consent to release him?

20 ACC [MR. HADI]: Yes, I understand.

21 MJ [LtCol LIBRETTO]: Do you need any more time to discuss
22 this matter with any of your counsel?

23 ACC [MR. HADI]: No, we do not need that.

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1 MJ [LtCol LIBRETTO]: Understanding what I have told you
2 and what Ms. Hensler has told you, do you voluntarily release
3 Lieutenant Askar from further representation?

4 ACC [MR. HADI]: Yes.

5 MJ [LtCol LIBRETTO]: Very well. The commission will
6 issue a written order pertaining to the withdrawal request of
7 Lieutenant Askar based on Mr. Hadi's voluntary release from
8 further representation.

9 Turning then to an outline of what issues the
10 commission plans to take up over the next week and the order
11 in which we will address them. Appellate Exhibit 161 is the
12 docketing order for this hearing. It lists eight motions
13 which we will address during this session this week and next.

14 We will begin this morning by taking up Appellate
15 Exhibit 160, the defense motion for Judge Libretto to
16 disqualify himself under R.M.C. 902. To the extent -- I will
17 provide the parties the opportunity to ask additional voir
18 dire of me as it pertains to that motion. The motion will
19 then be held open for the receipt of additional evidence and
20 argument later in the week.

21 We will then take up two outstanding motions held
22 over from the previous session. Those are Appellate Exhibit
23 137, the defense motion to compel discovery of information

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1 related to and access to buildings in which the accused or any
2 other potential witness have been confined; and AE --
3 Appellate Exhibit 139, the defense motion to compel defense
4 examination of the accused's conditions of confinement on
5 board Naval Station Guantanamo Bay.

6 I will note that the parties provided notice ahead of
7 the March 2019 session of their intent to disclose or use
8 classified information in connection with Appellate Exhibit
9 137. At the close of their respective arguments later today,
10 if either party believes that further argument, which includes
11 classified information, is necessary, they are directed to
12 inform the commission. If the commission determines a closed
13 session to be necessary, it will be conducted on Friday.

14 Circling back to today's session, we will conclude,
15 to the extent there are still matters in dispute, with taking
16 up Appellate Exhibit 155, the defense motion to compel
17 discovery regarding judicial bias and violations of
18 R.M.C. 902(a).

19 Tomorrow, we will begin at 0-9 with the taking of
20 testimony from Lieutenant Colonel Edwin -- Edward Martin, the
21 director of the Center for Law and Military Operations, which
22 is relevant to Appellate Exhibit 156, the defense motion to
23 compel production of discovery relating to the rules of

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1 engagement requested in defense -- defense's 51st Supplemental
2 Request for Discovery. His testimony will be followed by
3 testimony from Mr. Shawn Flinn, a Department of Justice agency
4 official, who can speak generally to the process involved with
5 hiring assistant United States attorneys.

6 His testimony is relevant to both Appellate Exhibit
7 158, the defense motion to dismiss because a military judge
8 and law clerk sought employment with the Department of Justice
9 and the Department of Defense, as well as Appellate
10 Exhibit 160. Both of those motions, again, will be held open
11 for further evidence later in the week and subsequent
12 argument.

13 We will then conclude tomorrow's session by taking up
14 argument on Appellate Exhibit 156 and, to a very limited
15 degree, Appellate Exhibit 79, which was not previously
16 docketed but, in light of recent filings, the commission deems
17 appropriate to address.

18 Friday will be reserved for possible closed session
19 of the commission on Appellate Exhibit 137 and for any matters
20 taken up on Wednesday or Thursday that we need to close the
21 loop on.

22 On Saturday we will take the testimony beginning at
23 0-9 from retired Navy Captain Kirk Waits, a former military

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1 judge on this commission, and Mr. Matthew Blackwood, a former
2 attorney advisor to Captain Waits, Colonel Rubin, and myself.
3 Their testimony is relevant to both Appellate Exhibits 158 and
4 160.

5 The commission will stand in recess for the remainder
6 of the weekend and be called to order at 0-9 on Monday 26
7 August to take the testimony of the convening authority Rear
8 Admiral Retired Christian Reismeier as it relates to Appellate
9 Exhibit 157, the defense motion to dismiss on the basis that
10 the convening authority has a personal interest in the outcome
11 of the military commission. The commission will then hear
12 argument on Appellate Exhibits 157, 158, and 160.

13 And finally, next Tuesday, the commission will hear
14 argument on Appellate Exhibit 150, the defense motion to
15 compel the appointment and funding of defense mitigation
16 specialist, and Appellate Exhibit 159, the defense motion to
17 compel discovery of information related to public statements
18 made by Rear Admiral Ring concerning conditions of confinement
19 on board Naval Station Guantanamo Bay. That captures what
20 we'll be taking up during this session.

21 Moving on to the first motion that we'll be taking up
22 today, in Appellate Exhibit 160 the defense moved for the
23 military judge to disqualify himself under R.M.C. 902,

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1 alleging that the military judge's impartiality could
2 reasonably be questioned in light of the fact that one of my
3 confidential attorney advisors, Mr. Blackwood, had applied for
4 jobs with the Department of Justice and Department of Defense
5 while I presided over this case, subsequently accepting a
6 position as a United States -- assistant United States
7 attorney in Missouri. Additionally, the defense requested
8 that I permit additional voir dire on the topic.

9 The government responded in Appellate Exhibit 160A,
10 arguing the defense had not met its burden to establish
11 disqualification, but deferred to the military judge whether
12 to reopen voir dire. In their pleading the government
13 requested the military judge provide the parties answers to
14 several questions, which I will do in a moment.

15 However, as an initial matter, the commission notes
16 that in Appellate Exhibit 160F, which was filed this morning,
17 the defense moved the commission to transfer the motion to
18 recuse raised under AE 160 to a different judge to conduct the
19 fact-finding session.

20 Taking succinct language articulated recently by a
21 federal district court judge in the Northern District of Ohio
22 in the case Chinnock v. Navient Corp., cite 2019 U.S. District
23 Lexus 4710, the recusal's decision is vested with the federal

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1 judge whose recusal is sought. In this commission, that
2 position is specifically supported by the plain reading of
3 R.M.C. 902(d), which outlines the procedure for resolving
4 challenges and states unequivocally that the military judge
5 shall, upon motion by any party or sua sponte, decide whether
6 the military judge is disqualified.

7 Accordingly, the defense motion to assign a different
8 judge to preside over the fact-finding session or any part of
9 Appellate Exhibit 160 is hereby denied.

10 Moving then to the questions posed by the government
11 in Appellate Exhibit 160A, first, whether Major Blackwood
12 participated -- and Major Blackwood being interchangeable with
13 Mr. Blackwood -- whether he participated in substantive
14 matters for this case after he accepted employment with the
15 United States Attorney's Office for the Western District of
16 Missouri.

17 Having just recently learned the timeline associated
18 with Mr. Blackwood's application to the United States
19 Attorney's Office for the Western District of Missouri, I can
20 state that, yes, Mr. Blackwood participated in certain matters
21 on this case along with Mr. Taylor, Mr. Blackwood's supervisor
22 within the trial judiciary office; and Captain Tessler,
23 United States Marine Corps, a second attorney advisor to me on

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1 this case.

2 The extent to which Mr. Blackwood participated in
3 matters or what matters he participated in, to the extent that
4 it is not covered by judicial privilege, I can say that he did
5 participate since July 31st, 2018, when he applied, leading up
6 to his -- ending his work with the trial judiciary staff
7 sometime in the November, early December time frame.

8 A second question posed by the government is when did
9 Mr. Blackwood cease working on matters related to this case.
10 I cannot definitively state for a number of reasons the answer
11 to that question. First, I am not co-located with the
12 judiciary staff. Second, Mr. Taylor had been, until very
13 recently, my primary point of communication when dealing with
14 issues with this case, both administrative and substantive.
15 And, third, from my perspective, there was no one individual
16 that provided advice to me on any given issue; rather,
17 Mr. Taylor, Mr. Blackwood, Captain Tessler would work together
18 in providing any support I directed, and normally Mr. Taylor
19 would function as the final sounding board on issues presented
20 to me.

21 All that said, it is my understanding that
22 Mr. Blackwood significantly reduced his participation in this
23 case immediately or shortly after the November session of this

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1 commission, which is when I first learned of Mr. Blackwood's
2 pending employment.

3 And finally, the government asks when, if known, the
4 date of the R.M.C. 802 conference when Mr. Taylor disclosed
5 Mr. Blackwood's status as an Assistant United States Attorney.
6 Whether -- when or whether that conversation ever took place,
7 I can say that I have no recollection of that conversation
8 whatsoever, so I do not know when or if it occurred.

9 Having provided the answers to those questions
10 outlined in the motion, I now offer the opportunity for voir
11 dire by the defense.

12 Ms. Hensler?

13 DDC [MS. HENSLER]: Yes, sir. Before we move into voir
14 dire, there are two matters that I would ask the court to
15 allow me to put on the record.

16 MJ [LtCol LIBRETTO]: Do they pertain to this issue?

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

18 MJ [LtCol LIBRETTO]: Okay.

19 DDC [MS. HENSLER]: Your Honor referred to the first issue
20 and reprising our second 802 conference, the one which took
21 place on August 19th, the defense has requested that this
22 court not move forward with any other matters before this
23 commission until the question of Your Honor's recusal is fully

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1 decided. Understanding the parameters of Rule -- R.M.C. 902
2 as they are, we argue that to move forward with Your
3 Honor's -- a question of Your Honor's conflict of interest in
4 play is a violation of Mr. al-Tamir's due process rights. And
5 for that reason we ask that everything else on the docket that
6 is not related to 160 be postponed until after this issue is
7 fully litigated.

8 MJ [LtCol LIBRETTO]: Okay, Ms. Hensler. As I indicated,
9 I understand your position in that regard and, again, the
10 commission reiterates that in the event that recusal -- the
11 relief requested by the defense is granted, then perhaps a
12 future military judge will be presiding over the very same
13 issues and taking the very same testimony that we do here this
14 week before this issue is finally decided.

15 However, in light of the nature of these proceedings,
16 the commission finds it appropriate to continue based on that
17 possibility alone, because in the event that the relief is not
18 granted, there's no purpose in sitting idle for several days.

19 So that request is denied.

20 DDC [MS. HENSLER]: Understood, Your Honor.

21 In addition, based on the information just provided
22 by Your Honor related to AE 160, we would move to compel the
23 production of Your Honor's attorney advisor, Mr. Fred Taylor,

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1 as a witness in this proceeding. And we would ask that he be
2 sequestered from the voir dire and any testimony that's taken
3 in relationship to 160.

4 MJ [LtCol LIBRETTO]: For purposes of your request to
5 sequester Mr. Taylor -- I mean, he's not present -- however,
6 that request is denied. Whether I will grant the relief as it
7 pertains to the defense's request to call him as a witness, I
8 will take that matter up at a later time.

9 DDC [MS. HENSLER]: Understood, Your Honor.

10 Finally, we advised the court's assistant this
11 morning that at some point we do need to put an urgent matter
12 relating to defense's oral request to disqualify Commander
13 Short as counsel for the government on the record. Lieutenant
14 Commander Jacob Meusch is prepared to address that at a time
15 in which Your Honor finds appropriate.

16 MJ [LtCol LIBRETTO]: Okay. As has been historically my
17 practice, any matters that the defense or the government, for
18 that matter, would like to take up formally on the record will
19 be briefed to the commission formally so I can have an
20 understanding of the issues at play. And we can have a more
21 informed discussion about it when we do take it up formally.

22 DDC [MS. HENSLER]: Understood, Your Honor.

23 Your Honor, may I begin my voir dire?

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1 MJ [LtCol LIBRETTO]: You may.

2 DDC [MS. HENSLER]: Sir, you were commissioned in May 2000
3 with -- you received your commission with the U.S. Marine
4 Corps, correct?

5 MJ [LtCol LIBRETTO]: I did.

6 DDC [MS. HENSLER]: But initially you were not -- you were
7 not a JAG.

8 MJ [LtCol LIBRETTO]: Ms. Hensler, in order to perhaps
9 make it more efficient, the issues presented in AE 160 pertain
10 to Mr. Blackwood serving as my attorney advisor during an
11 approximate five- or six-month period of time. What do these
12 questions have to do with that?

13 DDC [MS. HENSLER]: Sir, these questions relate to whether
14 or not Your Honor is either retirement eligible or nearing
15 retirement eligibility. The question of -- excuse me, of a
16 military judge's future employment prospects are squarely in
17 play here, as are the future employment prospects of Your
18 Honor's staff.

19 And so for that reason, it's appropriate to ask Your
20 Honor if you are at or nearing retirement eligibility.

21 MJ [LtCol LIBRETTO]: That is a perfectly acceptable
22 question, I suppose, depending where it goes. And I will say
23 I am nearing retirement eligibility within the next nine

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1 months, I believe.

2 DDC [MS. HENSLER]: And, Your Honor, have you begun the
3 retirement process in any way?

4 MJ [LtCol LIBRETTO]: I attended last year the retirement
5 seminar. They recommend doing so twice, roughly two years
6 before you plan to retire and then again shortly before
7 retirement.

8 DDC [MS. HENSLER]: And when was that class?

9 MJ [LtCol LIBRETTO]: October.

10 DDC [MS. HENSLER]: October. October of 2018.

11 Sir, in those classes, did they -- did the topic of
12 future employment prospects arise and potential conflicts
13 related to that -- those -- those prospects?

14 MJ [LtCol LIBRETTO]: Employment, of course. Conflicts in
15 the legal sense, as it pertains to attorneys, no.

16 DDC [MS. HENSLER]: Okay. So what sort of conflicts were
17 addressed, if any?

18 MJ [LtCol LIBRETTO]: I believe there was some discussion
19 about cooling-off periods with DoD employees.

20 Ms. Hensler, again, please get to the points that are
21 salient to the issue to be decided. If there are questions
22 that you'd like to ask me about applications or such that may
23 be disqualifying and whether or not I've submitted any

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1 applications, please do.

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

3 Have you submitted any applications for employment
4 with the DoJ or DoD?

5 MJ [LtCol LIBRETTO]: I have not.

6 DDC [MS. HENSLER]: Do you plan to submit applications for
7 employment with DoJ or DoD?

8 MJ [LtCol LIBRETTO]: Not at this time.

9 DDC [MS. HENSLER]: Have you had any discussions with
10 anyone related to the prospect of, in the future, obtaining
11 employment with the DoJ or DoD?

12 MJ [LtCol LIBRETTO]: I have for the last 12 years.

13 DDC [MS. HENSLER]: And have you had any -- have any of
14 those discussions -- can you describe those discussions to us?

15 MJ [LtCol LIBRETTO]: Sure. Running into people that I've
16 met along the way who are now serving as, for example,
17 immigration law judges, getting an explanation of what their
18 jobs are like. The same thing with assistant U.S. attorneys'
19 positions. The same thing with -- I know a -- a Navy captain
20 who -- reservist who is -- has something to do with ethics on
21 Capitol Hill. I've had conversations with her about her job.
22 Just to get an understanding of what they're doing and what
23 might interest me in the future.

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1 DDC [MS. HENSLER]: And, Your Honor, were these informal
2 conversations or was there -- were they informal conversations
3 that -- in one instance or was there follow-up after the
4 initial conversation?

5 MJ [LtCol LIBRETTO]: No follow-up.

6 DDC [MS. HENSLER]: And, sir, did any of these
7 conversations take place after Your Honor attended the
8 retirement class in October of 2018?

9 MJ [LtCol LIBRETTO]: Probably.

10 DDC [MS. HENSLER]: And do you recall who -- who those
11 conversations were with or what agencies they were affiliated
12 with?

13 MJ [LtCol LIBRETTO]: I've had conversations with, as I
14 said, assistant U.S. attorneys and immigration law judges,
15 defense counsel who either both work for federal public
16 defenders' offices or worked in a civilian capacity
17 representing accused servicemembers.

18 DDC [MS. HENSLER]: And, sir, just to be clear, those
19 conversations have taken place since October 2018?

20 MJ [LtCol LIBRETTO]: Yes, as informal as they may be.

21 DDC [MS. HENSLER]: Okay.

22 Again, for the record, outside of these conversations
23 in person or on the phone, was there ever any follow-up

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1 correspondence between you and anyone about the prospect of
2 future employment with DoJ or DoD?

3 MJ [LtCol LIBRETTO]: No. And to be clear, those
4 conversations did not involve the prospect of my future
5 employment. It was more to acquaintances -- or friends, for
6 that matter -- discussing what life is like as a -- you name
7 the position.

8 DDC [MS. HENSLER]: Sir, you oversee several attorneys in
9 the trial judiciary in connection with this case, correct?

10 MJ [LtCol LIBRETTO]: I do ----

11 DDC [MS. HENSLER]: On the --

12 MJ [LtCol LIBRETTO]: ---- along with Mr. Taylor, who is
13 the trial judiciary staff attorney -- or director.

14 DDC [MS. HENSLER]: Aside from Captain Tessler,
15 Mr. Taylor, and Mr. Blackwood, have any other attorneys
16 assisted you on this matter?

17 MJ [LtCol LIBRETTO]: Mr. Powell, who came aboard in March
18 of this year.

19 DDC [MS. HENSLER]: Sir, I'd like to go through each of
20 those attorneys.

21 With respect to Mr. Fred Taylor, has Mr. Taylor
22 informed you that he -- ever informed you that he has applied
23 or plans to apply for outside employment with the DoJ or DoD?

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1 MJ [LtCol LIBRETTO]: No.

2 DDC [MS. HENSLER]: With respect to Captain Tessler, has
3 he informed you that he plans to apply or has applied for
4 outside employment with the DoJ or DoD?

5 MJ [LtCol LIBRETTO]: No.

6 DDC [MS. HENSLER]: With respect to Mr. Powell, has he
7 informed you that he plans to apply or has applied for outside
8 employment with the DoD or DoJ?

9 MJ [LtCol LIBRETTO]: No.

10 DDC [MS. HENSLER]: With respect to other individuals on
11 your staff, Your Honor, what other individuals on your staff
12 and the trial judiciary have a connection -- excuse me, work
13 regularly on -- on this commission with respect to Mr. Hadi?

14 MJ [LtCol LIBRETTO]: A paralegal and the court
15 information security officer.

16 DDC [MS. HENSLER]: Your Honor, has Your Honor's paralegal
17 advised you that they have applied or will apply for
18 employment with the DoD or DoJ?

19 MJ [LtCol LIBRETTO]: No.

20 DDC [MS. HENSLER]: With respect to the court security
21 officer, has he ever informed you that he plans to apply or
22 has applied for employment with the DoD or DoJ?

23 MJ [LtCol LIBRETTO]: No.

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1 DDC [MS. HENSLER]: Sir, with respect to the trial
2 judiciary's policies, are you aware of whether the trial
3 judiciary has any policies in place to screen for conflicts
4 before an individual is assigned to a commissions case?

5 MJ [LtCol LIBRETTO]: Are we talking about future
6 employment conflicts, Ms. Hensler?

7 DDC [MS. HENSLER]: No, Your Honor, before an individual
8 is detailed to work on a case. So, for instance, when Your
9 Honor was detailed to this commission, was there a process in
10 place to screen for any conflicts?

11 MJ [LtCol LIBRETTO]: For me?

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

13 MJ [LtCol LIBRETTO]: Well, I, as an attorney and military
14 judge, would be necessarily required to disclose any conflicts
15 that I might have.

16 DDC [MS. HENSLER]: So you understood that you had a
17 professional obligation to disclose those conflicts, if you
18 were aware of any, but you were not aware of a formal policy
19 which required that you be screened in any way before being
20 detailed?

21 MJ [LtCol LIBRETTO]: Other than that goes along with --
22 perhaps I don't understand necessarily the call of the
23 question.

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1 As attorneys we have a professional responsibility to
2 identify any conflicts that may exist. There's a process in
3 place, particularly for military judges, which is what we're
4 undertaking right now, in order to ferret out and identify any
5 potential conflicts. So I believe that in terms of the
6 military judge and myself sitting on the case, that is what I
7 consider to be the policy.

8 DDC [MS. HENSLER]: So just to reiterate, Your Honor
9 mentioned the voir dire process and also Your Honor's
10 professional obligation as a member of the judiciary to
11 disclose those conflicts, but you are not aware of any policy
12 specific to the military commissions with respect to advanced
13 screening on conflicts?

14 MJ [LtCol LIBRETTO]: I'm sure there are.

15 Ms. Hensler, as it pertains to the military judge,
16 which is why we're here, I've answered the question.

17 DDC [MS. HENSLER]: Sir -- Honor -- with respect to your
18 staff, is Your Honor aware of any policies in place to screen
19 for either the attorneys or the paralegals and court security
20 officers in advance to determine whether or not they have a
21 conflict before being detailed to work on this commission?

22 MJ [LtCol LIBRETTO]: Are we -- are we talking about as it
23 relates to the Appellate Exhibit 160 insofar as if somebody

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1 applies for a position while serving in the capacity in
2 working on this commission?

3 DDC [MS. HENSLER]: So, sir, an example would be if Your
4 Honor employed an attorney advisor in the trial judiciary who,
5 for instance, was a -- a victim or a relative of a victim of
6 one of the individuals identified as being associated with one
7 of the attacks on this charge sheet. Would there be any
8 policy in place to preclude them from working on this
9 commission?

10 MJ [LtCol LIBRETTO]: I'm not certain of whether or not
11 there is a policy. I'm certain that those conflicts would be
12 identified in the normal hiring process, which I am not overly
13 familiar with and that I don't control.

14 DDC [MS. HENSLER]: Okay. Who does control that process?

15 MJ [LtCol LIBRETTO]: I don't know, nor is it relevant to
16 this commission or -- or to this issue.

17 So, Ms. Hensler, please address your questions to the
18 issues that are relevant to the issue presented, and that is
19 whether or not Mr. Blackwood's application to the DoJ and DoD
20 create an apparent conflict that requires my disqualification.

21 DDC [MS. HENSLER]: Sir, with respect to the issue with
22 respect to Mr. Matthew Blackwood, the trial judiciary -- does
23 the trial judiciary have a policy in place about its staff

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1 applying for outside employment? Is there a policy in place
2 to identify conflicts of interest in an individual's pursuit
3 of outside employment that you are aware of?

4 MJ [LtCol LIBRETTO]: I don't know if there's a written
5 policy, Ms. Hensler.

6 DDC [MS. HENSLER]: Okay. And you said you don't know if
7 there's a written policy. Do you know if there's an informal
8 policy or if there ----

9 MJ [LtCol LIBRETTO]: The policy is, as it relates to
10 Mr. Blackwood or an attorney advisor, their professional
11 obligations as a licensed attorney to disclose potential
12 conflicts.

13 DDC [MS. HENSLER]: And are you aware of any training on
14 conflicts of interest disclosure?

15 MJ [LtCol LIBRETTO]: Ms. Hensler, we're moving on.

16 ATC [Capt SQUIRES]: Your Honor, I'd like to place an
17 objection.

18 MJ [LtCol LIBRETTO]: Your objection?

19 ATC [Capt SQUIRES]: The challenge is to the specific
20 military judge, not the military commission's trial judiciary.

21 MJ [LtCol LIBRETTO]: Got it.

22 ATC [Capt SQUIRES]: So if these questions could pertain
23 to your knowledge, not greater policies.

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1 MJ [LtCol LIBRETTO]: That's what I was getting at. Thank
2 you.

3 DDC [MS. HENSLER]: Your Honor, I am asking about Your
4 Honor's awareness. I understand that you're not co-located
5 with the trial judiciary staff.

6 Sir, in your current position, I understand that you
7 are based in Parris Island, South Carolina. You mentioned
8 you're not co-located ----

9 MJ [LtCol LIBRETTO]: That's correct.

10 DDC [MS. HENSLER]: ---- with the trial judiciary staff.

11 And do you maintain an active docket there?

12 MJ [LtCol LIBRETTO]: I do.

13 DDC [MS. HENSLER]: Okay. Approximately how many cases?

14 MJ [LtCol LIBRETTO]: It fluctuates.

15 DDC [MS. HENSLER]: How many days of the month do you
16 spend in the trial judiciary offices versus your offices in
17 Parris Island?

18 MJ [LtCol LIBRETTO]: It fluctuates.

19 DDC [MS. HENSLER]: Can Your Honor -- more or less than --
20 well, what does it mean, that it fluctuates? Can you give me
21 a description of ----

22 MJ [LtCol LIBRETTO]: It means I'm some months never
23 there; other months, I'm there for a week at a time; other

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1 times, I'm there for a day or two at a time.

2 DDC [MS. HENSLER]: Sir, you were detailed to this
3 commission on June 13th of 2018. Can you give an approximate
4 estimate of the number of days you've spent in your trial
5 judiciary office?

6 MJ [LtCol LIBRETTO]: Why is that relevant?

7 DDC [MS. HENSLER]: Sir, because it goes to the remedy
8 that we've requested in 160 and what remedy is required,
9 because it will go to show the extent to which you relied on
10 your attorney advisors in making your decisions.

11 MJ [LtCol LIBRETTO]: Okay.

12 I don't recall how many days. I would put it in a
13 number of 20 or so.

14 DDC [MS. HENSLER]: Do you have a dedicated office space
15 in the Washington region?

16 MJ [LtCol LIBRETTO]: I do not.

17 DDC [MS. HENSLER]: Do you have an attorney advisor on
18 your staff in Parris Island?

19 MJ [LtCol LIBRETTO]: The relevance of that question,
20 Ms. Hensler?

21 DDC [MS. HENSLER]: I'm trying to understand Your Honor's
22 relationship with the attorney advisors, and it's my
23 understanding that, unlike an Article III court, the military

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1 judges do not have dedicated law clerks.

2 MJ [LtCol LIBRETTO]: Okay. I do in this case.

3 DDC [MS. HENSLER]: Okay. And when did he or she begin
4 working with you?

5 MJ [LtCol LIBRETTO]: Mr. Blackwood came on board before I
6 was assigned -- detailed to this case.

7 DDC [MS. HENSLER]: Oh, sir, excuse me because I did not
8 understand your answer. With respect to the law clerk
9 question, do you have a dedicated law clerk in Parris Island
10 for your military -- for your courts-martial docket?

11 MJ [LtCol LIBRETTO]: I do not.

12 The response was instructive to you to move on to
13 what's relevant to the case or the issue, and that is my
14 attorney advisor relative to this commission. Mr. Blackwood
15 began before I came on deck.

16 DDC [MS. HENSLER]: Okay. So, Your Honor, I understand
17 that -- Your Honor, may I make a record on the issue of
18 whether or not you had interacted with law clerks before
19 coming onto this commission's case?

20 MJ [LtCol LIBRETTO]: No.

21 DDC [MS. HENSLER]: Sir, you're based in Parris Island,
22 South Carolina, and your trial judiciary staff is based in
23 Washington. So how does that work? How do you coordinate

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1 with your staff in this case if you mentioned you'd only spent
2 about 20 days in Washington in their offices?

3 MJ [LtCol LIBRETTO]: All different forms of communication
4 technology.

5 DDC [MS. HENSLER]: So, sir, does that include telephone?

6 MJ [LtCol LIBRETTO]: It certainly does.

7 DDC [MS. HENSLER]: E-mail?

8 MJ [LtCol LIBRETTO]: Certainly does.

9 DDC [MS. HENSLER]: I assume share drives.

10 MJ [LtCol LIBRETTO]: No.

11 DDC [MS. HENSLER]: And does Your Honor -- does Your Honor
12 have a SIPR terminal in Parris Island?

13 ATC [Capt SQUIRES]: Your Honor, the government objects.

14 We're way outside the bounds of relevant information, so ----

15 MJ [LtCol LIBRETTO]: We're getting there again.

16 No.

17 DDC [MS. HENSLER]: Sir, do you have access to a point to
18 point terminal in Parris Island?

19 MJ [LtCol LIBRETTO]: What do you mean by "point to point
20 terminal"?

21 DDC [MS. HENSLER]: P to P. It's the -- where ----

22 MJ [LtCol LIBRETTO]: Exposing my naivety with regard to
23 communications technologies.

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1 DDC [MS. HENSLER]: Sir, where top secret documents are
2 housed, the computer system.

3 MJ [LtCol LIBRETTO]: No, I do all of that when I make my
4 visits up to Crystal City.

5 DDC [MS. HENSLER]: Okay.

6 Sir, when you were detailed to this case on June 13th
7 of last year, there had been almost four years of proceedings.
8 So how did you familiarize yourself with those proceedings,
9 for instance, prior rulings and the transcripts?

10 MJ [LtCol LIBRETTO]: Primarily through reading, but, of
11 course, certain discussions that were had with members of the
12 trial judiciary staff.

13 DDC [MS. HENSLER]: And those discussions included
14 conversations with Mr. Blackwood, Mr. Fred Taylor, Captain
15 Tessler, and more recently, Mr. Powell; correct?

16 MJ [LtCol LIBRETTO]: They do and have, yes.

17 DDC [MS. HENSLER]: And approximately how many pages of
18 rulings do you think you reviewed?

19 MJ [LtCol LIBRETTO]: There's no way I could possibly even
20 estimate that.

21 DDC [MS. HENSLER]: Because it's quite a large number?

22 MJ [LtCol LIBRETTO]: A very large number.

23 DDC [MS. HENSLER]: Okay. And there's a large scope of

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1 proceedings to review because there had been four years of
2 proceedings when you were detailed, correct?

3 MJ [LtCol LIBRETTO]: There were.

4 DDC [MS. HENSLER]: Sir, at the time you took the bench,
5 there were 2,130 pages of transcripts available in connection
6 with this case. Did you review those transcripts?

7 MJ [LtCol LIBRETTO]: Not in their entirety. I reviewed
8 in their entirety issues that I believed were most pertinent
9 to the issues presented to me at any given time throughout the
10 last year or so, but I certainly did review the vast, vast
11 majority of them, perhaps not to the detail of others.

12 DDC [MS. HENSLER]: And, Your Honor, did you -- are you
13 able to provide a ballpark estimate for the number of pages --
14 transcript pages you reviewed out of that ----

15 MJ [LtCol LIBRETTO]: No.

16 DDC [MS. HENSLER]: ---- 2100?

17 MJ [LtCol LIBRETTO]: I would say, again, the vast
18 majority of them.

19 DDC [MS. HENSLER]: And did that transcript review occur
20 largely before you took the bench for the first time?

21 MJ [LtCol LIBRETTO]: I'm sure it did because we didn't
22 take -- I didn't take the bench, I don't think, for the first
23 time until November -- or September, I suppose.

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1 DDC [MS. HENSLER]: Do you recall whether transcript
2 review took place in your first month after being detailed?

3 MJ [LtCol LIBRETTO]: Certain -- yes.

4 DDC [MS. HENSLER]: Sir, have you reviewed or did you
5 review the transcripts of the closed sessions in this case?

6 MJ [LtCol LIBRETTO]: Some of them.

7 DDC [MS. HENSLER]: Approximately what proportion of them?

8 MJ [LtCol LIBRETTO]: I have no idea.

9 DDC [MS. HENSLER]: So, sir, less than a month after you
10 took the bench, you issued a docketing order for the
11 August 2018 scheduled hearing, which ultimately was continued
12 due to my client's health issues. That docketing order listed
13 ten substantive motions for hearings and included
14 approximately -- involving approximately -- not
15 approximately -- 2,097 pages of briefings. How did you ----

16 MJ [LtCol LIBRETTO]: Can you say that again?

17 DDC [MS. HENSLER]: The docketing order, AE 119, which
18 was -- Your Honor, may I have a moment to consult with my
19 client?

20 MJ [LtCol LIBRETTO]: Go ahead.

21 [Pause.]

22 DDC [MS. HENSLER]: Your Honor, I would ask to take a
23 short break at some point in the near future so that my client

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1 has the ability to get up and move around and use the
2 restroom.

3 MJ [LtCol LIBRETTO]: Okay. Would you like to do that now
4 or after this line of questioning concludes?

5 DDC [MS. HENSLER]: Sir, I'd like to do that now.

6 MJ [LtCol LIBRETTO]: Okay. We have been going for a
7 while, so we'll take a 15-minute recess. The court's in
8 recess.

9 [The R.M.C. 803 session recessed at 1024, 21 August 2019.]

10 [The R.M.C. 803 session was called to order at 1037,
11 21 August 2019.]

12 MJ [LtCol LIBRETTO]: The commission will come back to
13 order. All parties present when the commission last recessed
14 are again present.

15 Ms. Hensler, you may continue.

16 DDC [MS. HENSLER]: Sir, AE 119, which is a docketing
17 order issued several weeks after you were detailed to this
18 commission, lists ten substantive motions for the docket of
19 the next hearing, which at the time was an August 2018
20 hearing.

21 How did -- how did Your Honor formulate that list of
22 motions to be docketed for the hearing session?

23 MJ [LtCol LIBRETTO]: Well, perhaps a more efficient way

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1 to answer that question is to provide an understanding of the
2 process with any product that gets generated and issued,
3 published by me. And that is to say, I review pertinent
4 documents associated with any ruling or order that I might
5 decide to issue, review any applicable or relevant information
6 within the pleadings or the record, direct the attorney
7 advisors where I want to go with the ruling or order.

8 They draft a first draft, if you will, create a first
9 draft, and then it is a -- very much a process from there in
10 terms of editing by me, by them, and then I initially or
11 conclusory issue the final ruling.

12 DDC [MS. HENSLER]: Sir ----

13 MJ [LtCol LIBRETTO]: So rather than go through each of
14 the orders or rulings, that is generally how the process
15 works.

16 DDC [MS. HENSLER]: Sir, I understand that is the process
17 for the issuance of a ruling, but with respect to this
18 docketing order, which was issued just a few weeks after Your
19 Honor was detailed where there was no specific motion in play,
20 how did you formulate the list of what you would hear?

21 MJ [LtCol LIBRETTO]: Again, I reviewed all of the
22 relevant documents to include the transcripts from previous
23 sessions, had conversations with the attorney advisors, and

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1 formulated a ruling based on that information.

2 DDC [MS. HENSLER]: And at the time that you reviewed the
3 pertinent documents, you mentioned that Your Honor does not
4 have a SIPR terminal or a P to P terminal in South Carolina,
5 so who presented the pertinent documents to you? Who advised
6 you of what the pertinent documents were to review?

7 MJ [LtCol LIBRETTO]: I'm certain the attorney advisors
8 did.

9 DDC [MS. HENSLER]: Okay. And as I mentioned, the ten
10 substantive motions on that -- listed on AE 119 comprised
11 2,097 pages of briefings. Did you review all of those
12 briefing materials?

13 MJ [LtCol LIBRETTO]: Let me -- I'm just going to pull up
14 119 if I -- just so I am looking at the same thing that you
15 are.

16 [Pause.]

17 MJ [LtCol LIBRETTO]: You're referring to the docketing
18 order that lists the motions that were outstanding when I was
19 detailed to the case, correct?

20 DDC [MS. HENSLER]: Yes, that's correct, Your Honor.

21 MJ [LtCol LIBRETTO]: Okay. So with respect to this
22 docketing order, likely, although I don't have any specific
23 recollection of it, it was a review of pertinent records

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1 associated with what was outstanding at the time and a
2 discussion with attorney advisors as to what motions had been
3 previously filed that were still outstanding and what do we
4 need to address come August.

5 DDC [MS. HENSLER]: And did you have those consultations
6 in person with your attorney advisors?

7 MJ [LtCol LIBRETTO]: I don't recall if I had those -- I
8 don't recall if I was up there at any point between -- before
9 that docketing order was issued.

10 DDC [MS. HENSLER]: In your first few weeks after being
11 detailed, do you recall if you spent any time in the
12 Washington, D.C., area at the trial judiciary offices?

13 MJ [LtCol LIBRETTO]: I did.

14 DDC [MS. HENSLER]: And approximately how long, sir?

15 MJ [LtCol LIBRETTO]: Probably collective four or five
16 days.

17 DDC [MS. HENSLER]: Sir, you mentioned with respect to
18 rulings that the first step is that you reviewed the pertinent
19 documents. So walking through the process you described with
20 a typical motion, who presents -- who collects the pertinent
21 documents for you?

22 MJ [LtCol LIBRETTO]: Who collects them or who forwards
23 them from when they're filed?

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1 DDC [MS. HENSLER]: Well ----

2 MJ [LtCol LIBRETTO]: I mean, you -- the question says
3 "collects the documents."

4 DDC [MS. HENSLER]: Yes, sir. Who gathers the documents
5 for you to review, or do you gather them all yourself?

6 MJ [LtCol LIBRETTO]: I get them forwarded to me when
7 they're filed. So when a motion is filed, it gets forwarded
8 to me.

9 DDC [MS. HENSLER]: And that is the -- you review the
10 motion and any pleadings and that is the first step in your --
11 in the issuance of a ruling?

12 MJ [LtCol LIBRETTO]: By and large, yes. And that is the
13 extent to which I'm going to get into of the process. The
14 overview that I previously provided, which I believe that
15 question reiterated, yes.

16 DDC [MS. HENSLER]: Sir, I understand -- I understand that
17 you are frustrated by these questions, but ----

18 MJ [LtCol LIBRETTO]: I'm not frustrated by the questions,
19 just understand I'm not going to get into the deliberative
20 process that I undertake in issuing or ruling on any matter.

21 DDC [MS. HENSLER]: Sir, may I make a record on -- to the
22 extent to which you rely on your attorney advisors in issuing
23 a ruling?

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1 MJ [LtCol LIBRETTO]: Sure.

2 I mean, to the extent that in issuing rulings, I rely
3 on my attorney advisors, to the extent that they assist in
4 drafting written products, and to the extent that I have
5 conversations either with one or all of them collectively in
6 coming to a conclusion that I make independently.

7 DDC [MS. HENSLER]: And those conversations happen, sir,
8 throughout the process of issuing -- of considering a pending
9 motion and the issuance of the order that follows?

10 MJ [LtCol LIBRETTO]: To varying degrees, yes.

11 DDC [MS. HENSLER]: Okay.

12 Sir, who generally prepares the first drafts of your
13 rulings?

14 MJ [LtCol LIBRETTO]: It depends on what the ruling is,
15 what the nature of it is.

16 DDC [MS. HENSLER]: Okay. Well, in the time that you've
17 been detailed to this case, has Mr. Taylor prepared first
18 drafts of rulings?

19 MJ [LtCol LIBRETTO]: I'm -- probably. I don't know. I
20 don't dictate who prepares what.

21 DDC [MS. HENSLER]: Okay.

22 MJ [LtCol LIBRETTO]: My primary -- as I indicated
23 earlier, my primary -- until Mr. Powell recently came on board

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1 in March, my primary point of contact and conversations were
2 with Mr. Taylor.

3 DDC [MS. HENSLER]: And Mr. Taylor provides documents
4 prepared by either him or his staff, first drafts of rulings
5 to Your Honor for your initial review?

6 MJ [LtCol LIBRETTO]: Yes. And on occasion, the other
7 attorneys will provide them independently of Mr. Taylor.

8 DDC [MS. HENSLER]: Okay. So there are also direct
9 communications between you and the four attorney advisors on
10 your staff?

11 MJ [LtCol LIBRETTO]: There are.

12 DDC [MS. HENSLER]: Okay. Sir, do you make revisions to
13 the drafts provided to you by your attorney advisors?

14 MJ [LtCol LIBRETTO]: Almost always.

15 DDC [MS. HENSLER]: And how extensive are your revisions?

16 MJ [LtCol LIBRETTO]: It depends.

17 DDC [MS. HENSLER]: Okay. And has -- so sometimes the
18 revisions you make are light edits and sometimes they're
19 extensive?

20 MJ [LtCol LIBRETTO]: That is a fair statement.

21 DDC [MS. HENSLER]: Okay.

22 MJ [LtCol LIBRETTO]: And part of that is based on how
23 either sufficient or inadequate my initial advice -- or

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1 guidance to them was.

2 DDC [MS. HENSLER]: And have there been instances where
3 your attorney advisors gave you their opinions on how you
4 should rule on a pending -- on pending motions?

5 MJ [LtCol LIBRETTO]: Have there been occasions where my
6 attorney advisors have given me their opinions as to ----

7 DDC [MS. HENSLER]: How you should -- Your Honor should
8 rule.

9 MJ [LtCol LIBRETTO]: Oh, certainly.

10 DDC [MS. HENSLER]: And, Your Honor, I'd like to go back
11 to AE 119. As you pointed out, that docketing order bundled
12 all of the motions which were pending at the time Your Honor
13 was detailed. Many of those motions were filed during the
14 terms of previous judges, either Captain Waits or Colonel
15 Rubin.

16 When you were detailed to the case, were any of those
17 motions in the pipeline for a ruling? Some of them had been,
18 I believe, actually argued.

19 MJ [LtCol LIBRETTO]: I don't recall specifically -- well,
20 they were in the pipeline to the extent that they were filed.

21 DDC [MS. HENSLER]: So did -- did Your Honor require that
22 your -- or order your staff to start from scratch on those
23 motions in terms of the issuance of rulings?

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1 MJ [LtCol LIBRETTO]: "Start from scratch"?

2 DDC [MS. HENSLER]: Yes, sir. So several of these motions
3 had been pending for quite a long time, which I suspect is why
4 Your Honor put them on the docket. Since they had been
5 pending for quite some time, I assume the attorney advisors
6 had done advanced work on them and possibly had even been
7 working on drafts of those rulings.

8 So I'm asking if Your Honor instructed your attorney
9 advisors to start from scratch when you were detailed or
10 whether they were permitted to rely on previous drafts.

11 MJ [LtCol LIBRETTO]: I didn't affirmatively provide them
12 that guidance. But if my recollection serves me looking at
13 the docketing order now, those had been pending, the majority
14 of them, for an extensive period of time and were waiting to
15 be argued initially. So I suspect, as the case may be, there
16 was no work on them previously.

17 DDC [MS. HENSLER]: So it was your understanding that
18 there had been no work because many of them had been pending
19 for a long time. But with respect to the motions that had
20 been more recently filed -- so, for instance, the motion in
21 the AE 110 series to adjust the litigation schedule -- did you
22 instruct your staff to start from scratch when you were
23 detailed or were they permitted to rely on ----

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1 MJ [LtCol LIBRETTO]: They weren't permitted nor were
2 instructed either way.

3 DDC [MS. HENSLER]: Okay.

4 ATC [Capt SQUIRES]: Your Honor, I'm going to object to
5 anything further on this line of questioning. First, this
6 docketing order was continued. Second, it was issued before
7 Mr. Blackwood even applied, so I don't see the relevance of
8 this line of questioning whatsoever to Appellate Exhibit 160.
9 It's ----

10 MJ [LtCol LIBRETTO]: I understand the objection, Captain
11 Squires.

12 ATC [Capt SQUIRES]: Thank you.

13 MJ [LtCol LIBRETTO]: I will permit Ms. Hensler a little
14 bit of latitude.

15 DDC [MS. HENSLER]: Your Honor, were you -- strike that.

16 Sir, I'd like to move on from your rulings to the 505
17 substitution process. You are stationed in Parris Island, and
18 you earlier advised me that you did not have access to a point
19 to point terminal or did not have a SIPR terminal in your
20 offices at Parris Island.

21 So how does the 505 process work? How do you work
22 with your attorney advisors if you don't have access to a
23 point to point terminal or a SIPR terminal?

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1 MJ [LtCol LIBRETTO]: The 505 process, as it relates to my
2 review of summaries and ----

3 DDC [MS. HENSLER]: Yes, sir. Mechanically, how does it
4 work?

5 MJ [LtCol LIBRETTO]: I go up to Crystal City and I review
6 them.

7 DDC [MS. HENSLER]: Okay. And are you always physical
8 present -- physically present for any meetings with
9 prosecutors?

10 MJ [LtCol LIBRETTO]: I have never been ----

11 DDC [MS. HENSLER]: You've never ----

12 MJ [LtCol LIBRETTO]: ---- physically present with members
13 of the prosecution team.

14 DDC [MS. HENSLER]: Okay. And in connection with the 505
15 process, are you aware ----

16 MJ [LtCol LIBRETTO]: Well, I think there was one. It
17 dealt with the binder related to one of the defense filings at
18 one of the sessions here. The government made an ex parte
19 showing to me. You might recall that. I think it was
20 probably the January session where we met to review that
21 binder of evidence that was submitted.

22 But beyond that, I've not done any 505 summaries or
23 substitutions.

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1 DDC [MS. HENSLER]: And, sir, are you aware of whether
2 your staff has participated in meetings with the prosecutions
3 while you've been detailed to the case in connection to 505
4 summaries or substitutions?

5 MJ [LtCol LIBRETTO]: Not that I'm aware of.

6 DDC [MS. HENSLER]: And with respect to 505 substitutions,
7 do you always personally review each original document and
8 then review the substitution, or do you rely on your staff in
9 doing so?

10 MJ [LtCol LIBRETTO]: Ms. Hensler, I've not done any 505
11 summaries or substitutions.

12 DDC [MS. HENSLER]: Oh, okay. Sir ----

13 MJ [LtCol LIBRETTO]: Well, with the exception of -- I
14 take that back -- the most recent, dealing with the
15 memorandum.

16 DDC [MS. HENSLER]: Sir, are you referring to the document
17 in the AE 079 series?

18 One moment, Your Honor.

19 MJ [LtCol LIBRETTO]: AE 140.

20 DDC [MS. HENSLER]: Understood.

21 And in connection with that substitution, did you
22 review the actual document?

23 MJ [LtCol LIBRETTO]: The source document, I did.

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1 DDC [MS. HENSLER]: And were your attorney advisors
2 involved in or consulted with on that substitution process?

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

4 DDC [MS. HENSLER]: Were your attorney advisors involved
5 with or consulted with on that substitution process?

6 MJ [LtCol LIBRETTO]: We are talking about many, many
7 months after Mr. Blackwood left the trial judiciary, so let's
8 move on.

9 DDC [MS. HENSLER]: Sir, I'd like to ask you a few
10 questions about Matthew Blackwood.

11 When did you first become acquainted with Matthew
12 Blackwood?

13 MJ [LtCol LIBRETTO]: Late -- mid to late June of 2018.

14 DDC [MS. HENSLER]: And Mr. Blackwood was at one time an
15 active duty Marine Corps JAG officer. He's now, I understand,
16 in the Reserve Corps. You -- my understanding is that you did
17 not have any overlap with him during your ----

18 MJ [LtCol LIBRETTO]: I did not know him or even know of
19 him, for that matter, until shortly before being detailed to
20 this case.

21 DDC [MS. HENSLER]: So -- and does that -- did you ever
22 have any conversations with any of his superior officers about
23 his work or anyone who had written a fitness report for him,

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1 say?

2 MJ [LtCol LIBRETTO]: In the context of ----

3 DDC [MS. HENSLER]: His performance.

4 MJ [LtCol LIBRETTO]: No. I was -- I will disclose that
5 Colonel Rubin, the former military judge, informed me of who
6 his attorney advisors were, expressed no negative thoughts
7 about them. But that's the extent of any discussions I had
8 regarding Mr. Blackwood.

9 DDC [MS. HENSLER]: And you mentioned that he -- Judge
10 Rubin discussed no -- disclosed no negative thoughts. But did
11 he disclose positive ones? Did he advise you that you could
12 rely on the work and advice that they gave you?

13 MJ [LtCol LIBRETTO]: No, not specifically. I mean, he
14 said he was a good Marine.

15 DDC [MS. HENSLER]: He was a good Marine? Which you took
16 to mean ----

17 MJ [LtCol LIBRETTO]: That he was a good Marine.

18 DDC [MS. HENSLER]: Sir, you advised that you became
19 acquainted with Mr. Blackwood shortly before being detailed to
20 this commission. Can you tell us about the detailing process
21 that took place when you were detailed to this commission?

22 MJ [LtCol LIBRETTO]: Why is that relevant?

23 DDC [MS. HENSLER]: Because, sir, you testified -- or you

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1 stated that you met Mr. Blackwood shortly before you were
2 detailed to the commission.

3 MJ [LtCol LIBRETTO]: No, I met him after I was detailed
4 to the commission. I became acquainted with his name before I
5 was -- well, shortly after I became detailed to the case.

6 DDC [MS. HENSLER]: And how did you become acquainted with
7 his name?

8 MJ [LtCol LIBRETTO]: Colonel Rubin advised me of who his
9 attorney advisors were.

10 DDC [MS. HENSLER]: Okay. Sir, during your time in the
11 trial judiciary, you mentioned you don't have an office.
12 Where do you sit when you are in ----

13 MJ [LtCol LIBRETTO]: It's a temporary office that the
14 visiting judges, if you will -- because none of the
15 commissions judges are co-located there at the trial judiciary
16 office spaces, so we all rotate through one or two offices
17 that might be available at any given time.

18 DDC [MS. HENSLER]: And where do your attorney advisors
19 for this commission -- where do they sit in relationship to
20 you?

21 MJ [LtCol LIBRETTO]: Almost across the building, in terms
22 of the floor.

23 DDC [MS. HENSLER]: And Mr. Blackwood was also located

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1 with -- in that area across the building?

2 MJ [LtCol LIBRETTO]: Correct.

3 DDC [MS. HENSLER]: While you were in Guantanamo,
4 Mr. Blackwood attended hearings with you, correct?

5 MJ [LtCol LIBRETTO]: Yes.

6 DDC [MS. HENSLER]: And he did research for you while you
7 were here in military commission hearing sessions.

8 MJ [LtCol LIBRETTO]: Yes.

9 DDC [MS. HENSLER]: And he consulted with you on issues
10 that were the subject of litigation?

11 MJ [LtCol LIBRETTO]: Yes.

12 DDC [MS. HENSLER]: For instance -- and that's in issues
13 that were the subject of litigation in opened and closed
14 settings?

15 MJ [LtCol LIBRETTO]: Yes. I mean, if the issues were --
16 like I said earlier, he was an attorney advisor of mine. We
17 would discuss the issues being litigated at any given point,
18 so whether that -- they took place in an open or closed
19 session, that was generally the case.

20 DDC [MS. HENSLER]: And you -- when did you learn that
21 Mr. Blackwood was applying or had applied for outside
22 employment?

23 MJ [LtCol LIBRETTO]: I recall -- if I recall correctly,

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1 it was the November session.

2 DDC [MS. HENSLER]: And can you tell us about the
3 circumstances of that disclosure?

4 MJ [LtCol LIBRETTO]: It was an informal conversation that
5 I had with him where I asked him what his long-term plans
6 were, and that's when he informed me that he was going to be
7 transitioning in the near future to the Department of Justice
8 as an assistant U.S. attorney.

9 DDC [MS. HENSLER]: And this conversation, was it a social
10 conversation, during a meal, or was it a conversation -- a
11 sit-down in Your Honor's office?

12 MJ [LtCol LIBRETTO]: It was more of an informal
13 conversation.

14 DDC [MS. HENSLER]: And at that point, did you ask him
15 what, if any, measures he'd taken to -- excuse me.

16 He informed you that he had already taken a position
17 with the Department of Justice in that conversation, sir, in
18 November -- in the November hearing session?

19 MJ [LtCol LIBRETTO]: That's my recollection, yes.

20 DDC [MS. HENSLER]: Okay. And what, if any, actions did
21 you take after that conversation as a result of his disclosure
22 of his intent to move on very shortly to the Department of
23 Justice?

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1 MJ [LtCol LIBRETTO]: Little to none. To the extent that
2 he was already transitioning off the case at that point, or he
3 was about to be, I didn't take any action.

4 DDC [MS. HENSLER]: Did you instruct anyone on your staff
5 to take any actions to screen him off the -- off this
6 commission?

7 MJ [LtCol LIBRETTO]: I did not.

8 DDC [MS. HENSLER]: Sir, when conflicts arise in your
9 position as a military judge, either detailed to a military
10 commission or in your practice -- excuse me, in proceedings in
11 South Carolina, who do you consult with when issues regarding
12 conflicts or ethics arise?

13 MJ [LtCol LIBRETTO]: Primarily other judges.

14 DDC [MS. HENSLER]: And are those -- are those in-person
15 conversations or are they sometimes by e-mail?

16 MJ [LtCol LIBRETTO]: It depends -- oh, by e-mail?

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

18 MJ [LtCol LIBRETTO]: Oh. I don't know. I don't
19 remember. It depends.

20 DDC [MS. HENSLER]: And do you ever reach out to anyone by
21 an ethics hotline or someone in the larger JAG organization
22 for ethics advice or conflicts advice?

23 MJ [LtCol LIBRETTO]: Have I ever?

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

2 MJ [LtCol LIBRETTO]: Probably when I was -- I think I did
3 when I was a practicing attorney.

4 DDC [MS. HENSLER]: But not since you've been serving as a
5 military judge?

6 MJ [LtCol LIBRETTO]: Not -- not in relation to
7 Mr. Blackwood's issue, I did not.

8 DDC [MS. HENSLER]: Okay. But outside of the -- the issue
9 of Mr. Blackwood, have you consulted with ethics counsel in
10 the larger Navy JAG organization for advice on any military
11 justice issues while you've been serving as a military judge?

12 MJ [LtCol LIBRETTO]: Ethics issues?

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

14 MJ [LtCol LIBRETTO]: I think the only occurrence I did
15 was when I served as an adjunct faculty member with the
16 National Judicial College for purposes of understanding
17 whether or not I can serve in that capacity while on active
18 duty.

19 DDC [MS. HENSLER]: But other than that occasion, you
20 cannot ----

21 MJ [LtCol LIBRETTO]: I don't believe I have had an
22 occasion to discuss matters with an independent ethics
23 counselor that has not been satisfactorily vetted or discussed

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1 with an ethics counselor within the trial judiciary.

2 DDC [MS. HENSLER]: You mentioned that you often on these
3 matters would consult with other military judges. Which
4 judges do you consult with?

5 MJ [LtCol LIBRETTO]: Other judges.

6 DDC [MS. HENSLER]: Your Honor, may I make a record on
7 which individual judges you consult with?

8 MJ [LtCol LIBRETTO]: No.

9 DDC [MS. HENSLER]: Sir, have you consulted with any
10 judges detailed to military commissions cases on ethics or
11 conflicts matters related to the military commissions?

12 ATC [Capt SQUIRES]: Sir, the government objects. The
13 commission has already stated that it did not consult with any
14 other persons regarding Mr. Blackwood. This is not relevant.

15 MJ [LtCol LIBRETTO]: Ms. Hensler?

16 DDC [MS. HENSLER]: Sir, it is relevant because this
17 relates to the extent to which there was a practice in place
18 that Your Honor pursued with respect to vetting conflicts and
19 whether or not Your Honor pursued those practices.

20 MJ [LtCol LIBRETTO]: I've already said with respect to
21 Mr. Blackwood, I didn't pursue any.

22 DDC [MS. HENSLER]: Sir, were you -- before your
23 conversation with Mr. Blackwood in November of 2018, were you

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1 aware that he -- in any capacity -- that he was interested in
2 pursuing a job with DoD or DoJ after working at the
3 commissions?

4 MJ [LtCol LIBRETTO]: Not that I recall. I believe that
5 was the first occasion.

6 DDC [MS. HENSLER]: Were you aware in any sense that he
7 was looking for outside employment, that his time at the
8 commissions as a civilian would be short?

9 MJ [LtCol LIBRETTO]: I don't believe so.

10 DDC [MS. HENSLER]: Were you listed as a reference for
11 him?

12 MJ [LtCol LIBRETTO]: I don't know.

13 DDC [MS. HENSLER]: Were you ever contacted -- were you or
14 anyone -- were you ever contacted by any ----

15 MJ [LtCol LIBRETTO]: I was not. With relation to
16 Mr. Blackwood's employment applications, I was not.

17 DDC [MS. HENSLER]: Are you aware of whether anyone in
18 your staff in the trial judiciary served as a reference for
19 him?

20 MJ [LtCol LIBRETTO]: I do not.

21 DDC [MS. HENSLER]: Have you asked?

22 MJ [LtCol LIBRETTO]: No.

23 DDC [MS. HENSLER]: Sir, if I could have the court's

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1 indulgence.

2 [Pause.]

3 DDC [MS. HENSLER]: Sir, I'd like to go back to a comment
4 that you made about a conversation that you had with
5 Judge Rubin about Mr. Blackwood. You noted that Judge Rubin
6 referred to him as a good Marine.

7 MJ [LtCol LIBRETTO]: That reference is my words, not his.

8 I mean, when I became aware that I was being detailed
9 to this case, he provided me a very, very general overview in
10 terms of the process, the administrative and logistics
11 associated with the case -- nothing substantive -- to include
12 the names of the people who he worked with on a regular basis.
13 And in the course of that, he provided information that led me
14 to believe he thought he was a good Marine.

15 DDC [MS. HENSLER]: Okay. And what was -- can you
16 describe the information that he presented?

17 MJ [LtCol LIBRETTO]: I cannot, because it was very
18 perfunctory. And I take away more that he didn't say anything
19 negative about him as being a good Marine.

20 DDC [MS. HENSLER]: Sir, so I'm understanding that the
21 term "a good Marine," this is a -- this is a phrase that
22 you -- you used, that you drew from that conversation.

23 And did you take that to mean that he fulfilled the

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1 Marine Corps' duty of honor, courage, commitment?

2 MJ [LtCol LIBRETTO]: If he didn't, I would imagine that
3 Colonel Rubin might have said as much.

4 DDC [MS. HENSLER]: And that he would follow your lawful
5 orders obediently, swiftly?

6 MJ [LtCol LIBRETTO]: Those are generally the
7 characteristics of a good Marine.

8 DDC [MS. HENSLER]: That he does his duties faithfully, as
9 he's instructed?

10 MJ [LtCol LIBRETTO]: He does.

11 DDC [MS. HENSLER]: And that he could be relied upon?

12 MJ [LtCol LIBRETTO]: Sure.

13 DDC [MS. HENSLER]: No further questions at this time,
14 Your Honor.

15 MJ [LtCol LIBRETTO]: Okay. Thank you.
16 Captain Squires.

17 ATC [Capt SQUIRES]: Thank you, sir. Captain Squires for
18 the government.

19 Your Honor, at any point during the time in which you
20 presided over these proceedings, did you permit Mr. Blackwood
21 to make judicial decisions for the commission?

22 MJ [LtCol LIBRETTO]: No.

23 ATC [Capt SQUIRES]: Your Honor, are you aware of any

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1 reason that you cannot or in the past have not faithfully and
2 impartially, in accordance with your conscience and the laws
3 applicable to the military commissions, performed the duties
4 incumbent of a military judge?

5 MJ [LtCol LIBRETTO]: No.

6 ATC [Capt SQUIRES]: Thank you, sir. Nothing further.

7 MJ [LtCol LIBRETTO]: Very well. Bear with me a moment.

8 [Pause.]

9 MJ [LtCol LIBRETTO]: Okay. As I previously indicated,
10 the commission will defer any argument and rulings after the
11 commission receives additional evidence relative to that
12 motion. And we'll move on to the next substantive matter to
13 address, that is Appellate Exhibit -- Mr. Spencer?

14 ATC [MR. SPENCER]: Your Honor, I believe you're moving to
15 Appellate Exhibit 137, which would be the next as listed.

16 MJ [LtCol LIBRETTO]: Correct.

17 ATC [MR. SPENCER]: The government just would like to
18 inquire, given the -- the commission's direction yesterday, to
19 have the SMO available for testimony today. And in light of
20 AE 163 filed by the defense last night, the SMO is standing
21 by. If the commission does not anticipate needing her
22 testimony, she does have patients to attend to, so if we could
23 release her. We'd just like instruction on that.

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1 MJ [LtCol LIBRETTO]: Sure. I appreciate you following up
2 on that.

3 I anticipate taking that up at the end of the day,
4 whenever that may be. I don't suppose that 137 and 139, which
5 is really the matters to be taken up today, and then 155 to
6 potentially a degree, will take all that long. So I suspect
7 that after the lunch hour, we will be taking that up. So if
8 we could have her available at, let's say, 1400.

9 ATC [MR. SPENCER]: Yes, sir. Thank you.

10 MJ [LtCol LIBRETTO]: Thank you.

11 DDC [MS. HENSLER]: Sir, excuse me. I would request
12 another five-minute break. My client needs ----

13 MJ [LtCol LIBRETTO]: Okay. Very well. The commission
14 will stand in recess until 11:30.

15 [The R.M.C. 803 session recessed at 1109, 21 August 2019.]

16 [The R.M.C. 803 session was called to order at 1142,
17 21 August 2019.]

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

21 Moving on to AE 137, defense requests that the
22 commission compel production of documents and information
23 relating to any buildings in which the accused or any

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1 potential witnesses have been confined. Additionally, defense
2 requests the commission to order the government to grant
3 counsel access to the sites to inspect the buildings in
4 person.

5 The government responded in Appellate Exhibit 137A
6 requesting the commission deny the motion and the defense
7 replied in the AE 137C. Does the defense desire to present
8 additional oral argument outside of that contained within the
9 written pleadings?

10 DDC [LT DANIELSON]: Your Honor, before we continue with
11 that, may we make a request about scheduling?

12 MJ [LtCol LIBRETTO]: In the near term or long term?

13 DDC [LT DANIELSON]: In the very near term, sir.

14 MJ [LtCol LIBRETTO]: Go ahead.

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

17 MJ [LtCol LIBRETTO]: Good morning.

18 DDC [LT DANIELSON]: During the break we've been able to
19 speak with Mr. al-Iraqi about his physical health, and it is
20 deteriorating rapidly at this time. He is in tremendous pain
21 and cannot focus on what is being said in court. He cannot
22 understand, whether Arabic or English. He feels his presence
23 is useless right now.

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1 We'll note for the record, Your Honor, that before
2 this proceeding this morning, Mr. al-Iraqi has taken Valium
3 and Percocet in order to control the pain he's suffering.
4 Those both have worn off and Mr. al-Iraqi now requires
5 additional -- an additional dose of Valium and up to three
6 hours of sleep to allow the pain to dissipate.

7 Right now, Your Honor, we're asking that the court
8 would allow Mr. al-Iraqi to return to Camp VII to rest for the
9 remainder of the day. Right now, and assuming he takes
10 medication going forward, his state of mind is completely
11 altered based on the medication he's been taking. Between
12 that and the pain that he's going through, he's unable to
13 participate in his defense sitting here today.

14 Rather than keep him in the vicinity, we'd ask that
15 the court send him back so that he can get full rest and be
16 prepared for future proceedings.

17 MJ [LtCol LIBRETTO]: So is the defense requesting that
18 the military judge dictate the JTF commander's detention
19 operations?

20 DDC [LT DANIELSON]: We're asking that the court allow
21 Mr. al-Iraqi to return back to Camp VII to rest.

22 MJ [LtCol LIBRETTO]: And what authority does the military
23 judge have to do that?

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1 DDC [LT DANIELSON]: One second, Your Honor, if I may.

2 [Pause.]

3 MJ [LtCol LIBRETTO]: Before we go down that road, is
4 Mr. Hadi requesting to be voluntarily absent for the remainder
5 of the two motions that we are taking up today?

6 DDC [LT DANIELSON]: That is correct, sir. Withdrawn.
7 Let me please consult.

8 [Pause.]

9 DDC [LT DANIELSON]: I apologize, Your Honor. I'll state
10 that he is unable to proceed. Again, this is a health matter.
11 He wants to participate very desperately but, because of his
12 physical health, he's unable to do so at this time.

13 Regarding the court's -- or the commission's previous
14 question, the only reason, Your Honor, that JTF would keep
15 Mr. al-Iraqi present for the rest of this proceeding is if
16 there would be a reason that the court would find for him to
17 continue to participate in the proceeding.

18 If he's unable based on the court's determination, we
19 know that JTF will return Mr. al-Iraqi back to Camp VII to
20 rest.

21 MJ [LtCol LIBRETTO]: Okay. As the military judge, I'm
22 not going to get into the dictating where or how the JTF
23 commander detains Mr. Hadi with respect to where he's held,

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1 either near term or long term.

2 Having said that, Trial Counsel, are the 131
3 accommodations set up for use to the extent that Mr. Hadi
4 could observe and participate in a perhaps more open and
5 relaxed environment?

6 ATC [MR. SPENCER]: Yes, Your Honor, that's correct. In
7 fact, there was another comms check, I believe, this morning
8 to verify that he has both video and audio in English as well
9 as two Arabic feeds so that he can listen in Arabic. He can
10 watch and observe and listen in English. And there is the
11 ability, as indicated in 131, for him to have an attorney with
12 him and communicate into the courtroom.

13 And, you know, if -- the government would suggest
14 respectfully that if the military judge has questions as to
15 the current state given the filing last night in AE 163 that
16 the military judge reinspect following -- I understood that
17 the military judge had an opportunity to inspect yesterday
18 afternoon prior to the electrical and some odds and ends being
19 completed, but it is available for your inspection if you'd
20 like to look at that today, sir.

21 MJ [LtCol LIBRETTO]: Okay, thank you.

22 Lieutenant Danielson, has that -- I explained to
23 Mr. Hadi earlier about -- when explaining his rights to be

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1 present about those new accommodations and the options that
2 they afford him and the defense team to participate while
3 perhaps minimizing or mitigating some of the discomfort that
4 Mr. Hadi might be feeling.

5 Have you discussed those matters with Mr. Hadi?

6 DDC [LT DANIELSON]: We have, Your Honor. But there's a
7 larger issue with regard to the accommodations at issue before
8 the court today. And this goes into Appellate Exhibit 16 ----

9 MJ [LtCol LIBRETTO]: I'm not getting into 163. I'm
10 talking about for participation during what will amount to
11 probably another hour at most of argument -- legal argument on
12 these motions, if Mr. Hadi would like to observe and
13 participate remotely in perhaps more comfortable
14 accommodations that have been provided.

15 DDC [LT DANIELSON]: Mr. al-Iraqi has told us more than a
16 half hour ago that he had only about 30 minutes left within
17 him before he felt he would lose all ability to focus. We're
18 now past that point, Your Honor.

19 So we don't believe those accommodations will provide
20 any use to him because he won't be able to focus, whether or
21 not those accommodations are sufficient, which we argue
22 they're not. And again, this leads us into Appellate Exhibit
23 163, which we'd like to make a record on, if only briefly.

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1 MJ [LtCol LIBRETTO]: We're not doing that now.

2 DDC [LT DANIELSON]: Correct, Your Honor.

3 That said, it's still important to point out
4 Mr. al-Iraqi's current state -- his current physical state.
5 Again, he's well beyond his limit for the day. We understand
6 he wants to be here. If he could be here to participate in a
7 meaningful way he would, but he's unable.

8 We'll also note for the record, Your Honor, again
9 going back to the accommodations, if we may say, we understand
10 that there is no bed in the area of accommodations, so it
11 wouldn't allow Mr. al-Iraqi to rest for the three hours that
12 he needs to rest while he's taking Valium.

13 MJ [LtCol LIBRETTO]: Okay.

14 Mr. Spencer?

15 ATC [MR. SPENCER]: Yes, Your Honor. As indicated
16 yesterday in the 802 multiple times to defense, his bedding is
17 here. It's not currently in the -- in the cell. The reason
18 for that I can put on the record now, but it relates to the
19 accused's refusal to come this morning if the bedding was
20 brought, which we can go into more detail within the 163
21 context. But it is here; it's available.

22 And the government would propose an alternative. In
23 the past, the accused has taken a Valium and needed

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1 approximately 60 to 90 minutes of rest. Given the somewhat
2 proximity to the lunch hour, the government doesn't object to
3 having, you know, him taking whatever pain medication he needs
4 and then having some period of time to rest. But he's never
5 needed three hours of rest prior to -- and certainly based on
6 discussions with the SMO and presuming she'll be available or
7 her testimony will be taken later today, that's not indicated
8 medically typically with him.

9 So the government would propose, as an alternative,
10 breaking for lunch for approximately 90 minutes, allowing him
11 to take medication and rest, either in place in the courtroom,
12 as he's done with the past with the hospital bed and the
13 privacy screens, or in the jumbo facility, as the defense
14 called it, which is available for him. And the bedding is
15 available that we can move in there very quickly.

16 MJ [LtCol LIBRETTO]: Okay.

17 DDC [LT DANIELSON]: Your Honor, I'm unable to speak
18 toward the previous occurrence. Obviously I was not part of
19 the case at that time, and I'll defer to lead counsel if Your
20 Honor wishes to inquire further.

21 But again, speaking to Mr. al-Iraqi today, he's
22 requested up to three hours of rest. He's explained to us his
23 physical symptoms. He has tremendous tension and strain in

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1 his back. There's a tremendous amount of pressure in his
2 head. And because of this pain, he's unable to even hear and
3 process what's going on in court.

4 So even if he goes into the alternative
5 accommodations, he'll still be in that state of mind, and even
6 more so with a new application of Valium or Percocet or
7 whatever he may take.

8 MJ [LtCol LIBRETTO]: The commission is going to stand in
9 recess until 1400 to give Mr. Hadi an opportunity to take
10 medications and perhaps relieve some of the stress that he is
11 currently undergoing.

12 At -- it is 1153 right now. We will come back as
13 previously indicated at 1400. Please have the senior medical
14 officer standing by at that time to provide testimony on 163
15 as well as some issues now pertinent to perhaps commission's
16 decisions moving forward for today and the rest of the --
17 well, at least for today and tomorrow.

18 During this period of time, I'm not going to get into
19 the business of directing where Mr. Hadi goes, but we will
20 come back on the record at 1400 to continue this session.

21 The court -- the commission is in recess.

22 [The R.M.C. 803 session recessed at 1154, 21 August 2019.]

23 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1206,
2 21 August 2019 and recessed at 1217, 21 August 2019. There is
3 no public transcript available for this portion due to
4 exceptional circumstances.]

5 [The R.M.C. 803 session was called to order at 1542,
6 21 August 2019.]

7 MJ [LtCol LIBRETTO]: This commission will come back to
8 order. All parties present when the commission last recessed
9 are again present, with a few exceptions to include the
10 accused.

11 Ms. Hensler, in addition to placing on the record who
12 else is not present that was present earlier this morning, if
13 you would, please, provide the commission an explanation as to
14 why Mr. Hadi is not present.

15 DDC [MS. HENSLER]: Your Honor, everyone who was present
16 before is now present except for Chief Petty Officer Shenika
17 Mayes, Raul Ayala, and Abu Gadem, as well as my client.

18 My client is not here because he is in excruciating
19 pain. As Your Honor knows, he took a Valium after this court
20 recessed at around 12:30 and then went to sleep. He was woken
21 up forcibly at around ----

22 MJ [LtCol LIBRETTO]: I'm sorry. Did you say "forcibly"?

23 DDC [MS. HENSLER]: Forcibly. He was -- he was told by

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1 the guard force to wake up.

2 MJ [LtCol LIBRETTO]: Oh, okay. The connotation of
3 "forcibly" confused me a bit. So he was woken up; he didn't
4 wake up by himself.

5 DDC [MS. HENSLER]: Yes.

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

7 DDC [MS. HENSLER]: And he was very confused and not
8 happy.

9 My understanding is that he was taken back to his --
10 the accommodations to pray. At that time, he noticed that
11 items from Camp VII were present in the accommodations, which
12 he took to mean he would stay -- be forced to stay there for
13 an extended period of time, which is something that he
14 explicitly objected to before being brought over to court this
15 morning.

16 He was very upset and he began to have a muscle spasm
17 in his wheelchair. That continued for a period of time.
18 Apparently he asked for myself, he asked for his attorneys,
19 and the guard force deemed it too volatile a situation to
20 allow us to go back and meet with him. When they did and we
21 showed up, he was in his chair gripping the chair, clearly in
22 in the middle of a muscle spasm. His face was winced with
23 pain and he could not speak.

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1 My colleagues assisted him into getting into the
2 medical chair, which seemed to at least help the muscle spasm
3 abate somewhat. And he indicated that he was tired, he was
4 upset, he was in -- he was in too much pain.

5 Your Honor, he had signed a waiver with modifications
6 before taking the second Valium, which I provided to the court
7 during the recess. He asked me to rip that up, and he has
8 asked to return to Camp VII.

9 It's worth noting that at this point he has taken two
10 Valium, a Percocet, and a Flexeril today. And I was having
11 difficulty maintaining an easy conversation with him. He's --
12 he's clearly in a lot of pain.

13 [Pause.]

14 MJ [LtCol LIBRETTO]: Ms. Hensler, has the medical staff,
15 to your knowledge, met with Mr. Hadi or has he requested
16 assistance from medical personnel in the last, let's say, 30
17 to 45 minutes?

18 DDC [MS. HENSLER]: We were told that he met with the SMO
19 briefly; that he represented to me at this point he just -- he
20 needs to rest. He's taken the maximum amount of pain relief
21 that he's allowed to take and he needs more time to rest.

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

23 Before the commission makes a determination as to

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1 whether or not it needs to hear from a witness to describe
2 those events in any more detail or clarity for the commission,
3 I will allow the government to briefly put their understanding
4 of the situation that develop -- as it developed over the last
5 hour or so on the record.

6 ATC [MR. SPENCER]: Thank you, Your Honor.

7 In addition to what was relayed by defense counsel,
8 for at least a period of 10 to 15 minutes prior to that --
9 prior to them meeting him or seeing him, he was gripping the
10 interior cage or mesh of the inner cell of the jumbo facility,
11 refusing to be moved into the inner cell.

12 According to guard force personnel that I spoke with,
13 he saw the mattress when they -- when they wheeled him in,
14 became very upset because he had specifically ordered that the
15 mattress not be brought over. He was very upset and asked to
16 speak with the staff judge advocate.

17 The staff judge advocate came and he -- it was the --
18 a different staff judge advocate than he was expecting. He
19 asked that the female staff judge advocate, who is available
20 for testimony as well, be brought so that he could scold her
21 for going against his wishes this morning, which was
22 specifically not to bring the mattress.

23 Again, he maintained grip on the -- the mesh for

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1 approximately 10 to 15 minutes, refused to be moved. The
2 situation was such that he was not able to be restrained and,
3 therefore, the guard force did not feel that security would
4 allow the counsel to meet with him at that point. Once he
5 agreed to be restrained, then he was allowed to meet with his
6 counsel, it was my understanding.

7 Additionally, Your Honor, the modified waiver that
8 the defense referred to earlier, the government is not in
9 possession of that. I guess it's somewhat moot now that it's
10 been withdrawn, but the government would at least request to
11 have a copy of that.

12 The SMO is -- did meet with him ----

13 MJ [LtCol LIBRETTO]: Stand by, Mr. Spencer.

14 [The military judge conferred with courtroom personnel.]

15 MJ [LtCol LIBRETTO]: The document that Ms. Hensler first
16 referenced with regard to the statement of understanding of
17 right to be present at the commission proceedings is marked as
18 Appellate Exhibit 143FF. And the government will be provided
19 an opportunity to review it at an appropriate time.

20 ATC [MR. SPENCER]: Thank you, sir.

21 The SMO, at my request, did go back with the SJA --
22 with the female SJA when I was informed of the accused's
23 request specifically for the female SJA. The SMO did go back

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1 and talk with him for some period of time. It was relayed to
2 me that there was no medical emergency. I have no doubt that
3 he is in pain, but this is consistent with what he has done
4 before in terms of in pain, taking medication.

5 At this point, it's clear from his actions that this
6 is not about his pain; this is about his control and his
7 frustration at having his wishes countermanded by the SJA. Do
8 I doubt that he's in pain? No. But he's clearly exploiting
9 that pain to continue to delay these proceedings.

10 And both -- both the SJA and the -- and the SMO are
11 available for testimony. Additionally, Your Honor, as was
12 directed prior to the lunch break, the acting JDG commander is
13 also available for your questions, which I believe were
14 unrelated to 163, but he is here as well.

15 DDC [MS. HENSLER]: Sir, may I make a record on the
16 agitation point?

17 MJ [LtCol LIBRETTO]: Not right now.

18 [Pause.]

19 ATC [MR. SPENCER]: Your Honor, I would add that given his
20 current location, as we were prepared to do, we can broadcast
21 these proceedings to him both in English and in Arabic. And
22 it's my understanding that the telephone is in place for him
23 to have a counsel inside -- to be able to communicate with

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1 counsel in the courtroom.

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

3 DDC [MS. HENSLER]: Sir, that is incorrect.

4 MJ [LtCol LIBRETTO]: Ms. Hensler, stand by, please.

5 [Pause.]

6 MJ [LtCol LIBRETTO]: So apparently there were some
7 administrative issues with Appellate Exhibit 163, so it has
8 not formally been filed. It will take that numbering once it
9 is refiled in accordance with the guidance given by the
10 clerks.

11 [Phone rang in courtroom.]

12 DDC [MS. HENSLER]: Sir, I assume my client is trying to
13 communicate with us here in the courtroom.

14 MJ [LtCol LIBRETTO]: Okay. The phone did ring into the
15 defense counsel's desk, probably in response to the
16 representations made by Mr. Spencer.

17 Is it up and working?

18 DC [LT BALL]: That is correct. It is up and working. We
19 had a miscommunication about the correct number. That said,
20 there is an issue with the audio with regards to the
21 translation channels that are going back. He is not receiving
22 a translation back to the jumbo cell.

23 MJ [LtCol LIBRETTO]: So the interpreter is not receiving

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1 the feed; is that right?

2 DC [LT BALL]: It was just that the -- he -- they are not
3 receiving a translation back there. So even though the --
4 they're putting the -- the wires, the headsets on, the
5 translation channel is not coming through. The translation is
6 not coming through.

7 MJ [LtCol LIBRETTO]: Okay.

8 Is that a capability that should be functioning?

9 ATC [MR. SPENCER]: Yes, Your Honor. It was -- we've
10 tested it a couple of times. It's previously been working.
11 I'm sure it's something that is an easy fix.

12 MJ [LtCol LIBRETTO]: Okay. What we're going to do, we're
13 going to take a five-minute recess to allow the technicians to
14 resolve that apparent issue. We will come back in and we will
15 begin with taking the testimony of the senior medical officer.

16 Commission is in recess.

17 [The R.M.C. 803 session recessed at 1553, 21 August 2019.]

18 [The R.M.C. 803 session was called to order at 1607, 21 August
19 2019.]

20 MJ [LtCol LIBRETTO]: This commission will come to order.
21 All parties present when the commission recessed are again
22 present.

23 Mr. Spencer, has there been a function check and is

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1 all of the systems that should be working working?

2 ATC [MR. SPENCER]: Yes, sir. The issue with the
3 translator feed was the volume button on the headphone itself
4 in the cell, so that has been corrected and the volume button
5 is now turned up. The person -- whoever is wearing the
6 headphones has the option of turning the volume down, so --
7 and then the phone comms have been connected, so there is
8 two-way communication.

9 MJ [LtCol LIBRETTO]: Okay. And is there a video feed as
10 well? Correct?

11 ATC [MR. SPENCER]: Yes, sir. That's correct.

12 DDC [MS. HENSLER]: Sir, the court should understand that
13 the telephone is running on about a 30-second delay -- 15- to
14 30-second delay. The video feed is also running on a delay,
15 so should the phone ring, we would ask that the court wait for
16 a period of time in order for us to communicate with our
17 client ----

18 MJ [LtCol LIBRETTO]: Okay.

19 DDC [MS. HENSLER]: ---- because it's not contemporaneous.

20 MJ [LtCol LIBRETTO]: And, Ms. Hensler, I inquired through
21 my clerk a moment ago as to whether or not Mr. Hadi knew that
22 he had the right to have an attorney present with him in the
23 131 accommodations. Have you discussed that issue with him?

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1 DDC [MS. HENSLER]: I have not, but Mr. Ayala is informing
2 him of that now, that it presents another logistical issue.
3 Should he like us to come back and meet with him or should an
4 attorney wish to go speak with Mr. al-Tamir, we assume that
5 we'll have to run through the exact same rigmarole that we
6 have to run through when we want to go meet with him during a
7 recess. And the guard force will need to communicate that we
8 wish to go back there, and we will need to go through all of
9 the security measures we do. So it's a bit more complicated
10 and time consuming than we understood before.

11 MJ [LtCol LIBRETTO]: Okay. And with the understanding
12 that there will be likely a primary counsel associated with
13 this issue, among others, if we take them up, is there a
14 reason why we're not having a -- one of the four defense
15 attorneys present with Mr. Hadi?

16 DDC [LCDR MEUSCH]: Your Honor, what we're discussing now
17 seems to be getting into the 163 material, the adequacy of the
18 accommodations. The defense position is there is a threshold
19 issue that must be discussed first. There's evidence of
20 unlawful influence that has been presented to this commission
21 in the 164 series. That evidence relates to Appellate Exhibit
22 163, and I believe I have a duty to inform this commission if
23 it orders us to move forward on the 163 matters, it is our

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1 position that will prejudice the defense, based on the matters
2 in Appellate Exhibit 164. And so we ----

3 MJ [LtCol LIBRETTO]: Can you articulate that a little bit
4 further?

5 DDC [LCDR MEUSCH]: Yes, Your Honor, if I can make a
6 record as to ----

7 MJ [LtCol LIBRETTO]: You can make a very brief record to
8 explain why it is that if we take up the testimony related to
9 163, how -- and now, particularly -- the senior medical
10 officer's testimony, why you will be prejudiced?

11 DDC [LCDR MEUSCH]: Yes, Your Honor.

12 May I stand at the podium so I don't have to lean
13 over?

14 MJ [LtCol LIBRETTO]: You may.

15 DDC [LCDR MEUSCH]: Your Honor, based on the events of
16 last night, it is the position of the defense that unlawful
17 influence has occurred, that there is a showing of it, that
18 there is some evidence of it, and that it relates to Appellate
19 Exhibit 163.

20 The unlawful influence ----

21 MJ [LtCol LIBRETTO]: All right. Lieutenant Commander
22 Meusch, we're not going into an argument as to unlawful
23 command influence or unlawful influence. What I've requested

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1 from you is an explanation of how one relates to the other in
2 terms of taking testimony on a very narrow issue.

3 DDC [LCDR MEUSCH]: Yes, Your Honor.

4 So this morning, there were arrangements made for
5 Dr. Crosby to meet with Mr. al-Tamir. Those arrangements were
6 cancelled due to what would -- was perceived as intimidation
7 by Commander Short. She was meeting with Mr. al-Tamir and the
8 defense in preparation of the Appellate Exhibit 163 arguments,
9 a continuation of the pleading that was filed last night.

10 And as a result of that intimidation, she has
11 cancelled that meeting and has not been able to provide the
12 assistance that we had planned on using with her. And so
13 right now, she is not going to assist the defense due to a
14 perception of intimidation. And until that is reconciled, we
15 are in a position where we are not able to access her and
16 prepare 163 as we had planned to do and had -- she is -- she
17 has submitted an affidavit in connection with Appellate
18 Exhibit 163. And so that's how they're connected.

19 If we proceed now without resolving this issue, the
20 source of the intimidation, you are forcing the defense to
21 proceed without her assistance.

22 MJ [LtCol LIBRETTO]: You would agree she provided the
23 defense assistance by inspecting the 131 accommodations and

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1 providing an opinion on that matter?

2 DDC [LCDR MEUSCH]: Yes, Your Honor.

3 MJ [LtCol LIBRETTO]: Okay. And similarly, the commission
4 intends to take testimony from another witness, the senior
5 medical officer, who has a lot of familiarity perhaps with the
6 accused and the accommodations as well. The commission does
7 not find that doing so will in any way impact the defense's
8 ability to completely litigate that issue. They are -- at
9 this matter we are taking the opportunity to present evidence
10 or to gather evidence, and the commission cannot see a
11 disadvantage to the defense at this juncture as it relates to
12 the taking of the testimony. So we are not going to delay
13 that issue any further.

14 DDC [LCDR MEUSCH]: Your Honor, if I may, just -- your
15 ruling is understood. It is the position of the defense,
16 though, that we are moving to remove Commander Short as trial
17 counsel.

18 MJ [LtCol LIBRETTO]: And you have not done so yet. As I
19 indicated earlier, we will not be taking that matter up until
20 a formal filing has been presented to the commission.

21 DDC [LCDR MEUSCH]: Okay. And I would -- Your Honor,
22 understood. I would advise the commission, though, that we
23 have presented some evidence of unlawful influence in

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1 United States v. Boyce, footnote 9. If the commission reviews
2 that, it is -- the language used in that case is a must. When
3 there is some evidence of unlawful influence, the military
4 judge must inquire about it. And so we have presented that
5 evidence. It happened last night. We are in the process of
6 filing a pleading. It will be in writing later this evening,
7 but we are moving.

8 MJ [LtCol LIBRETTO]: And once it is formally filed and
9 the commission understands the position of the defense as to
10 how that information amounts to unlawful influence, we will
11 take the matter up as appropriate.

12 DDC [LCDR MEUSCH]: Okay. So just so I'm clear, Your
13 Honor, it is the commission's -- the commission's position
14 that we're not allowed to move at this time to make an
15 unlawful influence motion?

16 MJ [LtCol LIBRETTO]: You are free to move the commission
17 by formal written filing, as indicated this morning.

18 DDC [LCDR MEUSCH]: Yes, Your Honor.

19 MJ [LtCol LIBRETTO]: So with that said, is there a reason
20 why one of the four defense attorneys currently at counsel
21 table are not with Mr. Hadi?

22 DDC [MS. HENSLER]: Sir, it really relates to scheduling.
23 Your Honor, we weren't sure what Your Honor would do when

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1 coming back from recess.

2 Lieutenant Ball plans to present argument on AE 137
3 and 139, Lieutenant Danielson is managing health issues, and
4 Lieutenant Commander Meusch is arguing the motion to
5 disqualify, so -- and I'm lead counsel, so we all determined
6 that we needed to be present here in order to field whatever
7 issues Your Honor would like to raise.

8 However, if Your Honor is intent on moving forward
9 with testimony on AE 163, I will ask co-counsel to step back
10 and meet with Mr. al-Iraqi.

11 MJ [LtCol LIBRETTO]: So my plan for the way ahead this
12 afternoon is to take testimony from the senior medical officer
13 pertaining to both the incidents occurring this afternoon as
14 well as testimony regarding the suitability of the AE 131
15 accommodations.

16 We will then move on to taking additional testimony
17 as the commission deems necessary after hearing from the
18 senior medical officer, potentially by the staff judge
19 advocate, and potentially the joint detention group commander,
20 both related to actions that occurred this afternoon as well
21 as presenting evidence on the suitability of the
22 accommodations in AE 131.

23 At that time, we will take a recess to determine the

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1 way ahead for the remainder of the day; and at that time, the
2 defense will be given an opportunity to switch out counsel if
3 we take up AE 137 and 139 this afternoon.

4 DDC [MS. HENSLER]: Sir, now that I understand your
5 position on scheduling, I must -- I must put on the record
6 that we object to participating in this manner. This is a
7 violation of my client's constitutional right to participate
8 in his defense.

9 AE 163 is a substantive motion. Right now Your Honor
10 has not made a finding that he is voluntarily absent, and for
11 that reason we request that the court permit him to return to
12 Camp VII right now and terminate the proceedings.

13 MJ [LtCol LIBRETTO]: Your objection is noted for the
14 record, Ms. Hensler.

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

16 MJ [LtCol LIBRETTO]: Mr. Spencer.

17 ATC [MR. SPENCER]: ---- very briefly.

18 One thing to clarify with respect to the delay as
19 referenced by defense counsel, the 30 seconds to which she
20 referred is the outside time for initial connection. Once the
21 connection is made, there is no delay. Generally it's between
22 10 and 15 seconds to make the connection on the secure phone.
23 The 6-second delay on the feed is previously before the

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1 commission in AE 131.

2 Your Honor, in light of the defense's argument just
3 now, the government would request that Mr. -- that the accused
4 be invited to rejoin us in the courtroom. And should he
5 decline that invitation, then the government would request the
6 commission rule that he has voluntarily absented himself from
7 this proceeding.

8 MJ [LtCol LIBRETTO]: Ms. Hensler, you represented to the
9 commission earlier that Mr. Hadi made a decision to not come
10 back into the courtroom this afternoon. Is that correct?

11 DDC [MS. HENSLER]: Your Honor, I do not know the exact
12 wording I used, but my client is not in the courtroom today
13 because he is in excruciating pain, he is on mind-altering
14 medications, and he has informed me that he cannot
15 participate, though he would like to.

16 MJ [LtCol LIBRETTO]: Okay. So he told the defense that
17 he was not coming back into the courtroom?

18 DDC [MS. HENSLER]: He asked to be returned to Camp VII.
19 He asked to be returned to Camp VII and did not accompany me.

20 MJ [LtCol LIBRETTO]: Okay. The permissible inference
21 that the commission takes from that conversation and those
22 assertions by the defense is that Mr. Hadi decided -- putting
23 aside what that decision was based on -- to not be present

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1 here in the commission today. Whether or not that amounts to
2 a voluntary absence will in large part be determined by
3 testimony received from the senior medical officer, the staff
4 judge advocate, the -- potentially the JDG commander, if he is
5 an appropriate witness, or perhaps another witness who was
6 present during the -- and observed the actions of the accused
7 this afternoon once he left the courtroom.

8 So while the government understands -- I'm sorry,
9 while the commission understands the government's concern
10 about a finding of voluntary absence, in order to make that
11 determination, the commission must necessarily make a factual
12 record and receive evidence on that point.

13 That is what the commission intends to do. At that
14 time, before taking up any additional substantive matters, the
15 commission will make that determination as to whether or not
16 it's voluntary or not. At any point, certainly Mr. Hadi is
17 free and encouraged to return to the courtroom and participate
18 in these proceedings.

19 But as an initial matter, in order to make that
20 determination, the commission must receive evidence and not
21 simply proffers by defense or government other than to get an
22 understanding of the general nature of what transpired.

23 So with that, government, if you would, please, call

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1 the senior medical officer.

2 ATC [MR. SPENCER]: Yes, sir, Your Honor. Understood.

3 Just to clarify for the record, the -- as previously
4 stated, the accused is able to hear and see the video feed,
5 both in English and in Arabic directly in the headphones.

6 MJ [LtCol LIBRETTO]: Thank you.

7 ATC [MR. SPENCER]: Your Honor, the government calls the
8 senior medical officer to the stand.

9 MJ [LtCol LIBRETTO]: Please proceed.

10 DC [LT BALL]: Your Honor, excuse me. Your Honor, with
11 your permission, I'd like to go back to the jumbo cell.

12 MJ [LtCol LIBRETTO]: Please. Let's stand by for just a
13 few moments. We'll take an in-place -- we won't go off the
14 record, but let's let Lieutenant Ball make his way back.

15 You can have a seat for a few moments. We're going
16 to be a couple of minutes.

17 [Pause.]

18 DC [LT BALL]: Sir, he's using the restroom, I have just
19 been informed, so I'll wait a few minutes. And when he's
20 finished, they'll let me know.

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

22 [Pause.]

23 DDC [MS. HENSLER]: Sir, we understand that our client is

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1 now praying.

2 MJ [LtCol LIBRETTO]: Ms. Hensler, the commission afforded
3 him that opportunity during the lengthy recess; in fact,
4 extended it by 45 minutes. It's time to go.

5 Lieutenant Ball.

6 [Pause.]

7 MJ [LtCol LIBRETTO]: Just to clarify the commission's
8 comments in that regard, I will note that the commission was
9 scheduled to return at 1415. Based on some delays unrelated
10 to the accused, we pushed that back initially to 1430 or
11 thereabouts.

12 At the defense -- at the request of the defense,
13 specifically Mr. Hadi, the court extended that recess an
14 additional 40 minutes because Mr. Hadi indicated that he, one,
15 needed to use the restroom; and, two, wanted time to pray in
16 light of him missing prayer time as a result of him resting
17 during the previously scheduled time. The court accommodated
18 that request and, in fact, extended it even further in light
19 of the occurrences after he left the courtroom.

20 [Pause.]

21 MJ [LtCol LIBRETTO]: All right. Let's try to get some
22 confirmation that Lieutenant Ball is set up and ready to go.

23 Lieutenant Ball, if you can hear us, please give a

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1 call to the defense counsel's table.

2 [Pause.]

3 MJ [LtCol LIBRETTO]: You're able to call back into the
4 cell as well?

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

6 MJ [LtCol LIBRETTO]: Okay. If you would, please give
7 them a ring and see what's the status.

8 [Pause.]

9 DDC [LT DANIELSON]: Your Honor, at this time, there's no
10 answer at the number we've given to contact the temporary
11 accommodations.

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

13 DDC [LT DANIELSON]: There's no answer, sir.

14 MJ [LtCol LIBRETTO]: Assuming somebody in the 131
15 accommodations can hear -- I'm hoping that's the case -- if
16 you would, please call defense table.

17 [Pause.]

18 ATC [MR. SPENCER]: Sir, for the record, the guard stepped
19 out to verify that he had, in fact, made it into the jumbo
20 cell.

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

22 And if I understand correctly, there is no delay once
23 the initial connection is made?

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1 ATC [MR. SPENCER]: That's correct, sir. There's about a
2 six-second delay between what happens here and what they see
3 and hear there. Once the connection is made with the -- with
4 the phone, which takes between 10 and 15 seconds, no more than
5 30 seconds, then from that point there's no delay in the
6 communication.

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

8 DDC [MS. HENSLER]: Sir, I'd like to note for the record
9 that we've seen several instances of this -- of these
10 communication systems not working as intended, so it's worth
11 noting that for the record.

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

13 [Pause.]

14 MJ [LtCol LIBRETTO]: Is there somebody we can send out to
15 determine what the status is?

16 ATC [MR. SPENCER]: Sir, I've just asked the guard force
17 that was in the courtroom to verify that.

18 MJ [LtCol LIBRETTO]: Thank you.

19 [Pause.]

20 ATC [MR. SPENCER]: Sir, I was just informed by the guard
21 force that Lieutenant Ball did not go in. They -- he is still
22 praying, and they were waiting for him to finish praying. I
23 informed the guard force that we're not waiting for him to

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1 finish praying.

2 MJ [LtCol LIBRETTO]: Okay. Lieutenant Ball will join
3 Mr. Hadi when Mr. Hadi deems it appropriate. From our
4 perspective, we will continue with the testimony of the senior
5 medical officer.

6 ATC [MR. SPENCER]: Doctor, would you please stand --
7 excuse me. Stand by.

8 DDC [LT DANIELSON]: Your Honor, Lieutenant Ball has just
9 called us from the temporary accommodations.

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

11 ATC [MR. SPENCER]: Doctor, would you please stand and
12 raise your right hand?

13 SENIOR MEDICAL OFFICER, U.S. Navy, was called as a witness for
14 the prosecution, was sworn, and testified as follows:

15 **DIRECT EXAMINATION**

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

17 ATC [MR. SPENCER]: Your Honor, the government will note
18 for the record pursuant to the protective order in this case
19 that the senior medical officer is testifying under pseudonym.

20 Q. Doctor, would you please state your billet and your
21 unit?

22 A. My billet?

23 Q. Yes.

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1 A. I'm currently an active duty medical officer.

2 Q. And what's your current duty station?

3 A. Walter Reed.

4 Q. What is your current duty station that you're
5 presumably TDY or TAD to?

6 A. At Guantanamo Bay.

7 Q. And what is your current role here in Guantanamo?

8 A. I'm currently the senior medical officer.

9 Q. How long you been the senior medical officer?

10 A. I assumed this duty May 20, 2019.

11 Q. Were you previously stationed in Guantanamo?

12 A. I was.

13 Q. In what capacity?

14 A. I was previously a senior medical officer for
15 low-value detainees.

16 Q. And so since May of 2019, that's when you took over
17 as the high-value detainee senior medical officer; is that
18 correct?

19 A. Yes.

20 Q. How long have you been a medical doctor?

21 A. I graduated medical school in 2013. I've been
22 practicing since then.

23 Q. And what is your primary specialty, if you have one?

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1 A. Internal medicine.

2 Q. Are you board certified in internal medicine?

3 A. Yes.

4 Q. For how long have you been board certified in
5 internal medicine?

6 A. Three and a half years, going on four.

7 Q. Have you been treating the accused in this case,
8 Mr. Hadi al-Iraqi, since May of 2019?

9 A. Yes.

10 Q. When is the last time that you examined the accused?

11 A. August 5th, 2019.

12 Q. Can you tell me about that examination?

13 A. It was a medical appointment to review the CT scan
14 results we had discussed, and it was a full neurological
15 examination.

16 Q. Approximately how long did that examination last?

17 A. The full appointment lasted about 60 minutes, to
18 include questions, history taking, and a physical exam, and an
19 opportunity for the patient to ask me any questions.

20 Q. Have you interacted with the accused since 5 August?

21 A. I have not, but our corpsmen and our nursing staff
22 have.

23 Q. So is it correct that you did not see him today in

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1 his current facility?

2 A. I did see him right before this testimony.

3 Q. Okay. Can you tell me about that, please?

4 A. I was called by my corpsman to observe the patient.

5 Q. When you entered the facility, what did you observe?

6 A. I observed the patient shaking back and forth.

7 Q. Where was he located?

8 A. He was located in the wheelchair outside the initial
9 cell.

10 Q. Was he doing anything with his hands?

11 A. His right hand was holding onto the cell door and his
12 left hand was grabbing the pillow.

13 Q. The pillow? Which pillow are you referring to?

14 A. The pillow that was on his knees.

15 Q. Did you speak with the accused at that point?

16 A. I did. I went to assess him. I asked him questions
17 to assess what was going on with him.

18 Q. Did he respond to you?

19 A. He stated that I was a criminal and he wanted me to
20 leave the building.

21 Q. I'm sorry. He stated that you were a criminal?

22 A. Yes.

23 Q. Has he ever interacted with you in that way before?

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1 A. No.

2 Q. Did he clarify why he thought you were a criminal?

3 A. No.

4 Q. Did you have further discussion with him?

5 A. I went on to assess him medically to try and do my
6 examination, my assessment. He refused to answer any of those
7 questions. I asked the interpreter to translate my questions
8 to him. He continued to state ----

9 Q. I'm sorry, Doctor. Why did you ask the interpreter
10 to translate the questions?

11 A. The interpreter was present, so I just wanted to
12 ensure that he was understanding those questions, even though
13 that hasn't been an issue in the past before. I just wanted
14 to make sure that I was fully giving him the opportunity to
15 respond to my questions.

16 Q. What was his general demeanor?

17 A. He appeared very anxious.

18 Q. Did he appear to understand the questions that you
19 were asking him?

20 A. Yes.

21 Q. Did he answer any of your questions?

22 A. He did not answer any of my medical questions.

23 Q. What medical questions did you ask him?

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1 A. I attempted to ask his name, his identifying factors,
2 what pain he was in, to tell me where the pain was located, if
3 there was anything that I could do at the present moment to
4 help him with anything.

5 Q. And he refused to answer all of those questions?

6 A. Yes.

7 Q. Please continue. What happened next?

8 A. I stand -- I stood there with my corpsman to continue
9 to assess him. Ultimately the guard force had a conversation
10 with him to try and calm down the fact that he was very
11 anxious. I observed him able to be calm and respond to their
12 questioning via gestures or head nodding or grabbing the
13 pillow.

14 Q. So was he verbally responsive to them at all?

15 A. His hand was stating that he was either comprehending
16 the question or not.

17 Q. So he was signaling to the guard force that he
18 understood or didn't understand the questions?

19 A. Yes.

20 Q. Did he appear to be having any kind of seizure?

21 A. No.

22 Q. Did he appear to be in any pain?

23 A. I wasn't able to assess that, but I did ask him and

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1 he did not verbally tell me. I also asked the corpsman; he
2 also did not verbally say that to her.

3 Q. Were there any visible signs of pain?

4 A. He was -- he was moving back and forth. When we did
5 ask if he had pain, knowing that he had been able to be
6 responsive to the guards, he did not respond to that question.

7 Q. When you say "moving back and forth," what do you
8 mean?

9 A. So it was a rocking motion in his wheelchair.

10 Q. And what did that rocking motion indicate to you?

11 A. Initially it indicated anxiousness.

12 Q. So that he was upset? Is that a fair
13 characterization?

14 A. He was anxious or upset or angry about something.

15 Q. But other than the rocking, did you see any visible
16 indication of pain?

17 A. No.

18 Q. And just to clarify, the rocking, to you, did not
19 signify that he was experiencing a spasm or any acute medical
20 condition at that point?

21 A. No, because upon further observation, that stopped.

22 Q. So he stopped rocking. At what -- at what point did
23 he stop rocking?

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1 A. Within a few seconds.

2 Q. So after he stopped rocking, did he experience -- did
3 he exhibit any physical signs of pain or spasm?

4 A. He appeared to be very calm.

5 Q. And that's when he was speaking with the guard force
6 using gestures?

7 A. Yes.

8 Q. How long after that did you depart the space?

9 A. I was present for at least five minutes.

10 Q. Were you present during his conversation with the
11 staff judge advocate?

12 A. The initial conversation, I was present. He asked us
13 to leave the room. I then reentered the room, observed what I
14 just spoke about, and then left the room.

15 Q. Understood.

16 Okay, Doctor, I'd like to take you back to the
17 August 5th examination, the approximately 60 minutes that you
18 spent with him on that day.

19 Can you describe his demeanor during that meeting?

20 A. My initial encounter was about what his symptoms
21 were, were there any new symptoms since the last time that I
22 had evaluated him. He noted that he still had some abnormal
23 sensation in his left lower extremity greater than his right

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1 lower extremity, but that his symptoms had not changed.

2 I then reviewed the CT scan results with him,
3 including diaphragm -- diaphragm pictures of the anatomy and
4 the results of the CT scan.

5 Q. When was that CT scan taken?

6 A. A week prior.

7 Q. A week prior to the 5 August consultation or
8 examination?

9 A. I'd have to check the medical record, but -- I'd have
10 to check the medical record exact -- the exact date of the
11 exam, but it was a week prior to that.

12 Q. It was relatively recent in time to when you were
13 following up with him. Is that ----

14 A. Yes.

15 Q. ---- fair?

16 Did that CT scan present any cause for concern from
17 your standpoint?

18 A. The -- we examined his cervical and his lumbar
19 region, which are the two areas that he's had surgery, and he
20 was concerned that there was hardware malfunction. That study
21 showed that there was no hardware malfunction. In fact, the
22 cervical aspect of the exam showed that the spinal canal was
23 very open. The lumbar exam showed that there was a fusion

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1 mass that was forming, which in the neurological -- in the
2 neurosurgery world is a very -- is a very -- is a term that's
3 used to -- to show that the surgery has gone well.

4 Q. So am I hearing you correctly that nothing in the
5 CT scan showed any cause for immediate concern for the accused
6 self?

7 A. Not -- not according to his physical exam that was
8 present. It did show some narrowing of the -- the spinal
9 canal on the right side of the lumbar region, but that was not
10 present on his physical exam, and that was there -- that was
11 present due to his -- the fact that he has arthritis in that
12 region.

13 Q. Have you had the opportunity to consult with the
14 neurosurgeon?

15 A. Yes.

16 Q. And how frequently has that consultation been
17 available to you?

18 A. I -- I have a telephone consultation with him should
19 I have any questions.

20 Q. So you've spoken with him on a number of occasions;
21 is that ----

22 A. I spoke to him after the CT scan was performed. I
23 then spoke to him right before my examination with the patient

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1 and after the examination with the patient.

2 Q. And do you know when the last time that the accused
3 was examined in person by the neurologist or the neurosurgeon?

4 A. The neurosurgeon, he was examined June 10th, 2019.

5 Q. And were you present for that examination?

6 A. I was.

7 Q. Prior to your observation of the accused today, did
8 you have an opportunity to speak with the corpsman that was
9 present with him today?

10 A. Yes.

11 Q. Did that corpsman express any concerns about his
12 health that she thought you might need to be aware of?

13 A. This morning, no.

14 Q. Did she describe any medication that he had been
15 taking today?

16 A. Yes. He took a Percocet in the morning, prior to his
17 move, and then he requested for some Tylenol and Valium around
18 12:30.

19 Q. So it would be accurate to say that he took -- he has
20 taken two Percocet -- I'm sorry, one Percocet, two Valium, and
21 a Tylenol today? Does that sound ----

22 A. Yes.

23 Q. ---- correct?

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1 Is this unusual for him to take that amount of
2 medication?

3 A. He normally is administered medications twice a day.

4 Q. And what kind of medication?

5 A. He is administered Tylenol anywhere from one to two
6 times a day, depending on his pain level. He's administered
7 Valium twice a day and Flexeril once a day.

8 Q. So the only difference then -- almost his normal
9 routine would be the Percocet; is that fair?

10 A. Typically that's requested when he has any movements.

11 Q. So he does request Percocet from time to time?

12 A. Yes, for his -- for his movements outside of the --
13 the cell.

14 Q. And that's -- so with respect to the medications
15 that's been administered, as you said, is that administered as
16 a matter of routine or is that in response to him requesting
17 that be administered?

18 DDC [LT DANIELSON]: Objection, Your Honor. We are well
19 outside of the bounds of voluntariness for today's hearing.
20 I'm not sure where counsel is going with this line of
21 questioning.

22 MJ [LtCol LIBRETTO]: Overruled.

23 WIT: I'm sorry. Can you repeat the question?

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1 Q. Yes. You said that the medication was administered
2 to him. Is that administered as a matter of routine or is it
3 in response to his request that it be administered?

4 A. That -- that medication is prescribed as needed, and
5 so, therefore, he has to request that medication. And since
6 I've taken over, he's usually only requested that medication
7 when he has some sort of movements outside of the cell.

8 Q. That medication being Percocet?

9 A. Correct.

10 Q. But Valium he takes frequently regardless of
11 movement?

12 A. He's administered that on a routine basis.

13 Q. Right. Regardless of whether he's moved or not; is
14 that accurate?

15 A. Yes.

16 Q. Okay. What kind -- have you observed the accused
17 after he's taken Valium and Percocet?

18 A. No, I have not.

19 Q. Are you aware of how that has impacted him in the
20 past in terms of drowsiness or other possible side effects?

21 A. I just wanted to clarify. So he requests the
22 medication anywhere between 4:00 and 5:00 a.m. in the morning,
23 and then he requests it again anywhere between 7:00 and

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1 9:00 p.m. at night.

2 Q. Okay.

3 A. He's administered the medication. Whether he's taken
4 it right before an appointment, I don't have that information
5 available to me.

6 Q. So it's administered to him, but then he can choose
7 whether -- when and whether he wants to take it at all, even
8 after it's administered to him ----

9 A. Yes.

10 Q. ---- is that correct?

11 What are the effects of Percocet and Valium
12 generally?

13 A. Percocet is an opioid. It's typically for moderate
14 to severe pain or refractory to typical regiment. It can be
15 sedating. It can cause nausea, vomiting. That's typically in
16 patients that are opioid naive.

17 Q. Has the accused ever reported those symptoms or
18 reactions as a result of taking Percocet?

19 A. Not to me.

20 Q. Are you aware of whether he's reported those to
21 corpsmen?

22 A. I have checked the corpsman notes, and that has not
23 been reported this month.

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1 Q. What about for Valium?

2 A. The Valium can also cause sedation, drowsiness,
3 fatigue. Again, those are typically with patients that are
4 naive to Valium.

5 Q. Doctor, can you explain for the -- us nonmedical
6 types, what do you mean by "naive"?

7 A. Someone that has not taken that medication before or
8 takes it infrequently.

9 Q. So someone who is not naive to Valium, in other
10 words, they take it with some frequency, possibly twice a day
11 as a matter of routine, would they feel the same effects as
12 someone who was naive to the medication?

13 A. They would not. They -- the way the medication works
14 is you tend to build a tolerance, and so those side effects
15 are minimized or not as apparent as you continue to take it.

16 Q. And how long has the accused been taking two Valiums
17 a day?

18 A. I'd have to check the medical record as to the date
19 and time. I know that he's been taking Valium at least once a
20 day starting December 2018.

21 Q. But you're not sure when he started taking twice per
22 day?

23 A. No. But since I've taken over this responsibility,

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1 he's been taking it twice a day.

2 Q. So at least since May of 2019, he's been taking it
3 twice a day?

4 A. Yes.

5 Q. And is that typical -- let's say that's a three-month
6 period for the sake of argument. Is that enough to overcome
7 any naivety as it relates to medication?

8 A. Yes.

9 Q. Doctor, have you had the opportunity to examine what
10 we've been referring to as the jumbo holding cell, where you
11 observed the accused earlier today?

12 A. Yes.

13 Q. And when did you examine that?

14 A. I saw it this morning.

15 Q. Had you seen it prior to this morning?

16 DDC [LT DANIELSON]: Objection once again, Your Honor.
17 Outside of the scope.

18 MJ [LtCol LIBRETTO]: The commission indicated that we
19 would be taking up the matters that she observed this
20 afternoon as well as those presented by AE 163, which will be
21 marked as such. The objection is overruled.

22 DDC [LT DANIELSON]: Your Honor, just again for the
23 record, respectfully, we do object. The defense is at a

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1 disadvantage caused by ----

2 MJ [LtCol LIBRETTO]: Lieutenant Danielson, the objection
3 is already noted for the record and has been overruled. Thank
4 you.

5 Q. Doctor, so when did you first examine the jumbo cell?

6 A. My initial inspection?

7 Q. Yes.

8 A. My initial inspection was in June of 2019.

9 Q. And since then, when have you inspected the jumbo
10 cell?

11 A. This morning.

12 Q. Did you also inspect it yesterday?

13 A. I did.

14 Q. Did you inspect both the holding area as well as the
15 outer area?

16 A. I inspected the cell and where -- the conference
17 table.

18 Is that what you're asking me?

19 Q. So the living area, how would you describe that?

20 Without giving a number, how would you describe that relative
21 to the size of what he has in Camp VII?

22 A. The cell itself?

23 Q. The living portion within the jumbo cell.

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1 A. It is larger than his present cell.

2 Q. And does it have a sink?

3 A. Yes.

4 Q. And does it have a toilet?

5 A. Yes.

6 Q. Are you aware of the -- of a toilet add-on that he
7 uses in Camp VII to raise the level of the toilet?

8 A. Yes.

9 Q. And if that's brought over here and made available to
10 him here, would that then functionally make the toilet here
11 the same as the toilet in Camp VII?

12 A. Yes.

13 Q. What about the mattress? Are you aware of the
14 mattress that he uses in Camp VII?

15 A. Yes.

16 Q. And again, if that mattress is brought here, is then
17 that essentially the same sleeping arrangements in terms of
18 dimensions and height level that the accused is afforded in
19 Camp VII?

20 A. Yes.

21 Q. Are you aware of any other pillows that he uses in
22 his sleeping arrangements in Camp VII?

23 A. He has a cervical pillow, a doughnut pillow, and

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1 several extra pillows.

2 Q. Are those other pillows sometimes referred to as
3 "wedges"?

4 A. They can be.

5 Q. And are you aware that he has those available to him
6 here as well?

7 A. Yes.

8 Q. And so the pillows arrangement are then substantially
9 the same as what he has in Camp VII; is that fair to say?

10 A. Yes. The plan was to bring them over here.

11 DDC [LT DANIELSON]: Objection, Your Honor, once again.

12 MJ [LtCol LIBRETTO]: Is it the same objection that was
13 noted for the record twice now and that the commission
14 overruled twice now?

15 DDC [LT DANIELSON]: Your Honor, these questions are
16 leading. And again -- so we object to that.

17 MJ [LtCol LIBRETTO]: Overruled.

18 Q. Did you have the opportunity to inspect the shower
19 facility here?

20 A. Yes.

21 Q. The shower facility that we're talking about in the
22 area of his -- the jumbo cell?

23 A. Yes.

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1 Q. And do you have an opinion as to the adequacy of the
2 shower?

3 A. There are grab bars in place for him to use.

4 Q. Are those grab bars sufficient, from your estimation?

5 A. Yes.

6 Q. Does he also have a shower stool available to him
7 here?

8 A. Yes. It was brought over from his cell.

9 Q. The same shower stool that he has at Camp VII?

10 A. Yes.

11 Q. What about the fact that he -- that the defense has
12 raised with respect to the showerhead being just a regular
13 showerhead as opposed to a wand? Is that something that's
14 different from Camp VII?

15 A. I would have to check on that.

16 Q. With the absence of a wand, does that cause you any
17 concern from a medical standpoint?

18 A. I'd have to check on that.

19 Q. Doctor, do you know how he was transported -- how the
20 accused was transported to the commission today?

21 A. Yes.

22 Q. How was he transported?

23 A. He was transported in a van ----

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1 Q. I should ask you this: He has the option of either
2 being transported lying down or in a seated position. Are you
3 aware of that?

4 A. Yes.

5 Q. Do you know which option he chose for today?

6 A. He chose to be sitting.

7 Q. Why was the option of being transported lying down
8 made available to him, if you know?

9 A. I don't know.

10 Q. Doctor, you've signed a number of declarations
11 related to this case as ordered by the military judge, and
12 your declarations -- let me ask you this: Is it fair to say
13 that, as you've stated in the past, the continued movement to
14 and from the commissions are -- do not put the accused at any
15 greater risk of exacerbating his underlying medical condition?

16 A. Can you repeat the question?

17 Q. Yes.

18 Does moving him to and from the commission put him in
19 any greater risk of exacerbating his underlying medical
20 condition?

21 A. And his underlying medical condition, you're
22 referring to his back surgeries?

23 Q. Correct. Yes.

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1 A. From my examination with him on August 5th and after
2 reviewing his CT scan results, I anticipate that it should not
3 cause any further exacerbation. This is in line with what
4 neurosurgery has recommended, which is that activity as he
5 tolerates it.

6 Q. But it may cause him pain?

7 A. It can cause pain, and there are medications to
8 address that pain.

9 Q. So medications to address the pain. And what about
10 minimizing movements to and from the commission? Would that
11 also reduce pain -- potential for pain?

12 A. That's never been expressed to me by the patient.
13 I'd have to verify that with him.

14 Q. Okay. Doctor, I have no further questions for you.
15 The defense may have some questions for you as well as the
16 military judge. Thank you.

17 MJ [LtCol LIBRETTO]: Defense?

18 **CROSS-EXAMINATION**

19 **Questions by the Detailed Defense Counsel [LT DANIELSON]:**

20 Q. Good afternoon.

21 A. Good afternoon.

22 Q. So going back to the episode that you explained in
23 the temporary accommodations earlier this afternoon, you

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1 described Mr. al-Tamir as appearing anxious to you. Is that
2 right?

3 A. Yes.

4 Q. Let's now go back to the medicines that you
5 prescribed to Mr. al-Tamir. You went over them in some
6 detail, but let's go over some of the additional side effects
7 that we may not have discussed.

8 Now, looking at your 5 August -- or, excuse me,
9 7 August medical report which detailed your 5 August
10 examination of Mr. al-Tamir, you do mention that Mr. al-Tamir
11 is -- has been prescribed Flexeril; is that correct?

12 A. Yes.

13 Q. Valium as well, correct?

14 A. Yes.

15 Q. And Percocet ----

16 A. Yes.

17 Q. ---- correct?

18 A. And acetaminophen. Tylenol.

19 Q. Yes, indeed.

20 So in addition to the side effects you described
21 earlier in your testimony, it's fair to say that drowsiness is
22 a side effect of Valium?

23 A. It can be in someone that is naive to Valium.

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1 Q. Dizziness?

2 A. It can be.

3 Q. Tiredness?

4 A. It can be.

5 Q. Blurry vision?

6 A. I'd have to check on the specifics, but everybody
7 handles that medication differently.

8 Q. More severe side effects can include mood changes,
9 correct, Doctor?

10 A. When taking the medication?

11 Q. Yes.

12 A. Typically it's seen with withdrawal of the
13 medication.

14 Q. It can also cause hallucinations?

15 A. With severe intoxication and abuse of the medication,
16 yes.

17 Q. Agitation?

18 A. Yes.

19 Q. Confusion?

20 A. With severe intoxication of the medication.

21 Q. Trouble speaking?

22 A. Slurred speech? Is that what you're referring to?

23 Q. Correct.

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1 And restlessness?

2 A. Typically it's associated with withdrawal of the
3 medication.

4 Q. But these are all side effects from taking this
5 medication ----

6 A. Some of the ----

7 Q. ---- associated ----

8 A. Some of the side effects you've listed are typically
9 associated with overuse of the medication, but most of them,
10 yes.

11 Q. Moving on to Percocet. Some of the side effects
12 you've covered: nausea, vomiting, things of that sort.
13 Correct, Doctor?

14 A. With Percocet, initially on use, yes.

15 Q. There are additional side effects that include,
16 again, confusion and mental changes?

17 A. Typically when taken in large amounts.

18 Q. And Mr. al-Tamir has been taking this medication for
19 at least several months twice a day?

20 A. Which medication?

21 Q. Percocet and Valium.

22 A. Percocet he has usually only taken once a day and
23 only prior to movements, so not every day.

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1 Q. I'm sorry. And Valium up to twice a day since May?

2 A. He's administered it, yes.

3 Q. He's also on Flexeril?

4 A. He's administered that medication, yes.

5 Q. And Flexeril has similar side effects, such as
6 anxiety?

7 A. It can be associated with it. It's not a typical
8 side effect.

9 Q. But these are all potential side effects?

10 A. They are all potential side effects.

11 Q. Now, Doctor, you suggested that Mr. al-Tamir appeared
12 to be abnormal in your observation of him today as opposed to
13 previous examinations and interactions you've had with him.

14 A. What do you mean by "abnormal"?

15 Q. I believe you more or less said that he behaved
16 abnormally, that he called you a criminal. He hadn't done
17 that before, correct?

18 A. He had not called me a criminal before, no.

19 Q. All right. And he needed an interpreter today to
20 communicate with you, at least in part? And he doesn't need
21 that normally?

22 A. I wouldn't say that he needed one. I went out of my
23 way to ask the interpreter to see if there was another form of

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1 communication that he'd prefer that day.

2 Q. He appeared to be anxious to you physically,
3 expressing movements that made you believe he was anxious in
4 the moment?

5 A. At the present moment, yes.

6 Q. Now, you and I met earlier today prior to your
7 testimony, correct?

8 A. Yes.

9 Q. And that was the first time you and I had a chance to
10 meet?

11 A. Yes, at the request of you.

12 Q. We -- correct. And we met for about ten minutes or
13 so?

14 A. Yes.

15 Q. And you were there in the presence of the assistant
16 staff judge advocate here, one of them?

17 A. Yes.

18 Q. Okay. And you testified -- you told me then that you
19 generally have a very good relationship as a doctor and
20 patient with Mr. al-Tamir, correct?

21 A. The last appointment with -- that I had with him, at
22 the end of the appointment he did seem very appreciative.

23 Q. All right. He's never expressed this type of

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1 behavior such as you saw today in previous meetings with you?

2 A. When I initially met with him, he was frustrated by
3 me.

4 Q. Frustrated but not particularly anxious, not
5 particularly aggressive with you?

6 A. He did have one episode of anxiousness when he
7 refused to go to an ICRC visit.

8 Q. Now, you also testified, Doctor, that when he's at
9 the camp, at Camp VII in particular, he doesn't necessarily
10 require as much pain management medication as he does when
11 he's moved to court, correct?

12 A. The only difference is that if he does have a
13 movement outside the cell, and this could be for specialty
14 evaluations for medical appointments or for other appointments
15 that are nonmedical, then he will ask for a Percocet, and that
16 is administered to him.

17 Q. Right. So he does take additional medication when
18 moved?

19 A. When he's moved outside of his cell, yes.

20 Q. Correct.

21 A. Just the Percocet.

22 Q. And you're not here to testify, Doctor, that
23 Mr. al-Tamir doesn't feel any pain at all, correct? You ----

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1 A. I'm sorry. What was that?

2 Q. You're not here testifying that Mr. al-Tamir does not
3 feel any pain?

4 A. No.

5 Q. Right. He feels pain?

6 A. So pain is -- is a subjective complaint, and so it's
7 typically -- when I ask if a patient has pain, if -- if
8 they're feeling pain, it's on a pain scale.

9 Q. Right.

10 A. And that's relative to the activities -- activities
11 they've been doing, observation, history, physical
12 examination.

13 Q. But at no time have any of your corpsmen or you
14 yourself considered Mr. al-Tamir a malingerer?

15 A. What do you mean by that?

16 Q. He's never been accused of faking his injury or
17 faking pain?

18 A. I have not formally assessed him for that.

19 Q. Okay. But you have seen no indication in any records
20 saying such?

21 A. In the medical records that I've reviewed since I've
22 been here, I have not seen that.

23 Q. Okay.

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1 A. It's also not my specialty to diagnose that.

2 Q. Understood, Doctor.

3 Now, you also had a chance to, I guess, in the few
4 minutes you spent in the temporary accommodations earlier
5 today to review, at least superficially visually, the state of
6 that temporary accommodation, correct, Doctor?

7 A. What do you mean by "superficially"?

8 Q. You walked in and you took a look around.

9 A. Yes, I walked in and I took a look around.

10 Q. Now, you're clearly well educated, but I would
11 presume you're not an engineer, correct? A building engineer
12 of any type?

13 A. I'm a physician.

14 Q. Correct. You're not a fire marshal?

15 A. I'm a physician.

16 Q. You're not an electrician?

17 A. I'm a physician.

18 Q. Yes. Correct, Doctor. But none of those things.

19 So you wouldn't necessarily be qualified, with all
20 respect, to determine whether that area was, for example,
21 safe -- fire safe or safe for electrical use or things of that
22 sort, correct?

23 A. My responsibility there was to ensure that it was

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1 medically safe.

2 Q. Okay. Now we've discussed Mr. al-Tamir's extensive
3 medical history and you're well aware of his severe injuries
4 to his back, five surgeries over the course of several years.

5 There's no plan in place, no SOP that you're aware
6 of, Doctor, that indicates what would be done in a medical
7 emergency for Mr. al-Tamir being in this temporary
8 accommodation away from Camp VII, correct?

9 A. We would follow the same SOP as if it were to happen
10 at the cell.

11 Q. But there's no medical -- there aren't any medical
12 personnel permanently stationed in the vicinity of the
13 temporary accommodations, correct?

14 A. Yes, there is. There's a corpsman present.

15 Q. They're not present in the cell?

16 A. They're not present at his current cell.

17 Q. Right. So there's no particular SOP for this
18 particular area?

19 A. The SOP that would apply at the cell is the same SOP
20 that would apply here medically. And there is corpsman
21 coverage 24 hours a day, 7 days a week should he decide to
22 stay here.

23 Q. You talked a lot about the shower area, Doctor, with

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1 previous counsel. Do you remember that?

2 A. Do I remember the conversation that I had about the
3 shower?

4 Q. Yes.

5 A. Yes.

6 Q. Now, you -- you can confirm that this outdoor shower
7 area is, in fact, outdoors? It's not inside or enclosed in a
8 building of any sort?

9 A. The shower itself is enclosed, but it is outside his
10 cell.

11 Q. And leading up to the shower, there's a ramp and a
12 walkway that leads directly into the shower?

13 A. There's a ramp, yes.

14 Q. And Mr. al-Tamir uses a walker to get around, you're
15 aware?

16 A. A wheeled-rolled walker or a wheelchair.

17 Q. Right. And when the shower is in use, the floor of
18 the shower and the ramp leading to the shower gets wet, would
19 you say?

20 A. The shower gets wet? Yes, the shower can get wet.

21 Q. Is there any mat or any material that allows for
22 traction on that floor of the shower, on the ramp approaching
23 the shower?

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1 A. I don't know.

2 Q. And the ramp leads up to about a 4-inch -- or 4- to
3 5-inch step that leads into the floor of the shower. Are you
4 aware of that?

5 A. I have noticed that there's a step, but I have not
6 personally measured it.

7 Q. Okay. And that's not safe for a person using a
8 walker or who uses other mobility assistance?

9 A. He has a step in his current cell.

10 Q. Now, you mentioned about the grab bars in the -- in
11 the shower?

12 A. Yes.

13 Q. There are -- you may be aware that there is a -- one
14 grab bar in the shower, that there are four walls in the
15 shower. Would you still testify that that's enough for a man
16 to hold onto who uses mobility assistance?

17 A. It is what he has in his current cell.

18 Q. His current cell, you may be aware, Doctor, has been
19 assessed by a Camp VII occupational therapist. Are you aware
20 of that?

21 A. Yes.

22 Q. Okay. The last report that we're aware of happening
23 on the 7th of March this year, are you aware of that?

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1 A. I'd have to check the record to verify that.

2 Q. Okay. And in that report, the occupational therapist
3 says that there should be multiple grab bars for
4 Mr. al-Tamir's use, not just one or even two. Are you aware
5 of that?

6 A. I'd have to check the record.

7 Q. And does Mr. al-Tamir's shower in Camp VII have
8 sniper netting or a soft material for walls like his outdoor
9 shower here would?

10 A. That's not a med -- that's not my medical expertise.
11 I'd have to look into that.

12 Q. It's just a factual question. Does his shower at
13 Camp VII have solid walls or cloth sniper netting walls, to
14 your knowledge?

15 A. I'd have to verify what the material is.

16 Q. Okay. Are you also aware that the occupational
17 therapist at Camp VII said that there should be a shower wand
18 for Mr. al-Tamir's use so that he doesn't have to bend his
19 back and risk further injury?

20 A. I'd have to check the recommendation.

21 Q. And you're not aware that there has been any
22 occupational therapist to review the space that has been set
23 aside for Mr. al-Tamir's temporary use here, are you?

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1 A. Not to my knowledge.

2 Q. In fact, there's been no particular certification
3 from anyone truly qualified to assess a building of this sort
4 to confirm to the court that this is a suitable place,
5 correct, to your knowledge?

6 A. The measurements -- or the -- the certification that
7 was taken at his cell is what is at his current cell. So the
8 recommendations that were made by the occupational therapist
9 were then made for his current cell here.

10 Q. So in your opinion, Doctor, as a medical
11 professional, the setup here in the temporary facility for use
12 of Mr. al-Tamir should at least mirror, if not improve upon,
13 the spaces in Camp VII; wouldn't you agree? And this is based
14 on the recommendation of the occupational therapist. Would
15 you agree with that recommendation?

16 A. The occupational therapist made that recommendation
17 for his current cell.

18 Q. Right. So would you agree that this cell is -- now
19 at issue should at least mirror that, if not improve upon
20 that?

21 A. Under whose recommendation?

22 Q. The occupational therapist.

23 A. But he made that recommendation for the current cell.

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1 Q. For the current temporary cell?

2 A. No, for his ----

3 Q. For the Camp VII cell?

4 A. Yes.

5 Q. Yes, Doctor. So -- and I agree with that.

6 My question to you then is: In your professional
7 opinion, should the temporary cell for use here near this
8 complex at least meet that same standard?

9 A. It's a temporary cell.

10 Q. But for safety's sake, should it meet that standard?

11 A. From an ADA perspective, it meets the same bed
12 measurements and the grab bars and the toilets and the sinks
13 in his current cell.

14 Q. Let's talk about movement to Camp VII. You said that
15 you are not necessarily familiar with how Mr. al-Tamir is
16 moved, correct?

17 A. That's incorrect. I said I was familiar.

18 Q. Could you repeat your testimony on that?

19 A. Can you repeat the question?

20 Q. Would you restate what you said earlier, to clarify?

21 A. I am familiar with his movements; his transportation
22 vehicle.

23 Q. Right. You're familiar that he takes a vehicle here,

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1 but you weren't sure why he lays -- he may be given the
2 opportunity to lay down in that vehicle?

3 A. I know that we have a second vehicle for him. I can
4 extrapolate as to why he uses that vehicle.

5 Q. But you do acknowledge that the movement, again, to
6 and from the camp to any particular destination does cause
7 pain or discomfort?

8 A. By the indication that he requests to be administered
9 a Percocet is my only objective evaluation I have of that.
10 He's not ----

11 Q. And that would be the same with any patient. You
12 would assess their pain level by what they tell you.

13 A. He has not personally told me that. He requests it
14 from the corpsman.

15 Q. So he would tell the corpsman and the corpsman would
16 tell you his pain level?

17 A. He requests medication prior to his movements, yes.

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

19 [Pause.]

20 Q. So, Doctor, just a little back to the occupational
21 therapist's recommendation. Are you truly here testifying
22 that you do not agree that the occupational therapist's
23 recommendations for the Camp VII spaces should be mirrored

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1 here in the temporary spaces near the ELC?

2 A. I'm sorry. Can you repeat the question?

3 Q. Yes, Doctor.

4 Once again, an occupational therapist has given a
5 recommendation that certain standards should be met, that
6 certain facilities should be in place, certain apparatus
7 should be in the shower area, and things of that sort.

8 You are now -- are you now testifying that you do not
9 think the standards of the Camp VII spaces should be mirrored,
10 should be the same, here in the temporary space?

11 A. My understanding is that occupational therapy had
12 recommendations. I would have to verify and review those
13 records. That is at his permanent cell.

14 Q. So now taking you back to the medication and its
15 effects. It's clear that when a person is on such
16 medications, they're not allowed, for example, to operate
17 heavy machinery; is that correct?

18 A. Which medication are you talking about?

19 Q. Percocet, Valium, even Flexeril in certain doses.

20 A. It can be a recommendation to patients that have not
21 taken it or have no exposure to that medication.

22 Q. And you did also testify that taking medication for
23 long periods does, in fact, require an increase in the dosage

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1 to maintain its effects?

2 A. It can. Not always necessary.

3 DDC [LT DANIELSON]: Thank you. Nothing further.

4 MJ [LtCol LIBRETTO]: Mr. Spencer, any brief redirect?

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

6 **REDIRECT EXAMINATION**

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

8 Q. Doctor, with respect to the shower, you said that the
9 lip to get into the shower at the temporary facility, that
10 there is also a lip at the Camp VII shower; is that right?

11 A. Yes.

12 Q. And is that -- how do those lips compare to each
13 other?

14 A. I have not measured it.

15 Q. Do they visually look roughly the same?

16 A. I'd have to check.

17 Q. When you saw the lip to the shower here, did it cause
18 you any obvious concern?

19 A. There was -- I confirmed that there was a lip at his
20 original cell as well.

21 Q. And he does have a walker that he uses in his
22 Camp VII cell; is that accurate?

23 A. Yes.

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1 Q. The same walker that's available to him here?

2 A. Yes.

3 Q. Doctor, in your opinion, is the facilities, the jumbo
4 cell that we've been talking about, are those designed in such
5 a way as to mitigate any health concerns or safety concerns
6 for the accused on a short-term basis?

7 A. On a temporary basis. It's very similar to his cell.

8 Q. So it does -- it might not be exact, but it does
9 mirror or at least parallel what he has in Camp VII; is that
10 fair to say?

11 A. It is the same mattress. It is the -- there's grab
12 bars. And the toilets and the sinks that are present in his
13 cell are present here in the temporary cell.

14 Q. So it's -- it's substantially the same or extremely
15 similar; is that a fair characterization?

16 A. Yes.

17 Q. Okay. Thank you.

18 ATC [MR. SPENCER]: I have no further questions, sir.

19 MJ [LtCol LIBRETTO]: Mr. Danielson, any follow-up?

20 DDC [LT DANIELSON]: Nothing else. Thank you, sir.

21 **EXAMINATION BY THE MILITARY COMMISSION**

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

23 Q. Doctor, based on your walkthroughs of the -- I'll now

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1 refer to it as the jumbo cell, are there any issues that are
2 presented -- are there any issues presented within it that
3 causes any medical concern as to its suitability?

4 A. The cell, no.

5 Q. In your opinion, is it medically suitable to detain
6 the accused there?

7 A. In his cell, yes.

8 Q. With regard to your review of his previous medical
9 records, can you explain in general terms, understanding you
10 don't have the medical records in front of you, how often
11 Mr. Hadi experiences excruciating muscle spasms?

12 A. Since I have assumed these responsibilities on
13 May 20th, 2019, I understand that he has muscle spasms, but he
14 has not personally complained of muscle spasms to me.

15 Q. In your review of the records, you've identified
16 occasions where he has experienced muscle spasms, though?

17 A. Yes.

18 Q. Can you, from memory, identify the frequency of those
19 muscle spasms? Is it daily? Is it weekly? Is it monthly?

20 A. Valium is a medication to help with muscle spasms.
21 If he's administered the medication twice a day and he, in
22 fact, takes the medication twice a day, I can only conclude
23 that he at least has muscle spasms twice a day. And he has

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1 not required any additional doses.

2 Q. So to clarify your testimony, it's your opinion based
3 on him taking Valium twice a day that he is given those to
4 prevent or because of muscle spasms?

5 A. It can be taken when an initial muscle spasm occurs.
6 It has a 15- to 30-minute period where it takes into effect.
7 Because the medication is long-lasting, it can also prevent
8 muscle spasms.

9 Q. It's fair to say that you have no present knowledge
10 without review of the medical records as to how frequent those
11 occur?

12 A. How frequent the muscle ----

13 Q. The muscle spasms occur.

14 A. I'd have to review the record, yes.

15 [Pause.]

16 Q. From your perspective, is there any difference
17 between what Mr. Hadi's activities are on any daily basis when
18 he is not present here at these commissions and when he is
19 here at these commissions that would cause his pain,
20 discomfort, or potential for back spasms to increase?

21 A. Can you clarify what you'd like me to distinguish?

22 Q. Sure.

23 Between his daily activities back where he is

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1 normally detained and when he is present for these
2 commissions, his daily activities, the things that he is
3 required to do, for instance, sit in the chair; he's been
4 given the opportunity to lay down or adjust his positions, as
5 necessary.

6 But is there anything that these commissions require
7 him to do that increases the likelihood of severe pain or the
8 risk of back spasms from occurring?

9 A. I'm not entirely knowledgeable about what exactly
10 occurs here, but I can walk you through his day-to-day
11 activities at the camp.

12 He typically has physical therapy sessions on Monday
13 and Thursday. They last anywhere from 45 minutes to 60
14 minutes. They occur in the recreational yard. They're
15 passive stretches, activities to increase his
16 back-strengthening exercises. He has his activities of daily
17 living. So he's able to dress himself. He does engage with
18 the brothers. He does -- he has told me he's cooked before in
19 the kitchen, and he's able to stand with his roll walker
20 during that -- during that time period. And if he needs to
21 rest, he will then sit on his roll walker.

22 He also requests medications twice a day, and so he
23 uses his roll walker to come out of his room and ambulate with

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1 the roll walker to the sally port twice a day. That's also
2 where there have been medical appointments that are conducted
3 at the sally port, so he's had interviews with me there that
4 have lasted anywhere from 10 to 15 minutes. If they last
5 longer than 15 minutes, he uses his roll walker to sit down.

6 Q. Have there been any reports from your corpsmen or by
7 Mr. Hadi to you that he is unable to perform those daily tasks
8 of living on any given day because of the excruciating pain or
9 potential for back spasms?

10 A. I've reviewed the corpsmen and nursing notes from
11 August 1st to present, and there have been no notes of such.
12 The only request that he's made is for a TheraBand that was
13 made on August 14th.

14 Q. A TheraBand?

15 A. It's a rubber device -- a rubber physical therapy
16 device used for back strengthening. He already has one
17 present in his cell. We are working on the approval to get
18 another.

19 Q. Okay. Thank you.

20 Have you had the opportunity to interact with
21 Mr. Hadi at any point close in time to when he has taken any
22 of the medications that he's been prescribed?

23 A. I understand that he's administered the medications

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1 twice a day, but I cannot verify if -- I cannot verify the
2 time period before or after, if he took that medication during
3 my medical appointments.

4 Q. Are there any reports that you reviewed from corpsmen
5 that describe any adverse effects that either they have
6 witnessed or Mr. Hadi has described to them upon taking the
7 medications that he's been prescribed?

8 A. No. And to clarify, I've reviewed just from August
9 1st to now. There have been no such side effects that he's
10 complained about.

11 Q. Based on the dosages that Mr. Hadi is prescribed and
12 the length which with he's been taking them, based on if he
13 were to take the medications prescribed as he did today, this
14 afternoon, would you expect him to experience any
15 hallucinations, confusion, or have any of the other severe
16 side effects that the defense counsel inquired with you about?

17 A. No.

18 MJ [LtCol LIBRETTO]: Any final questions in light of
19 mine?

20 ATC [MR. SPENCER]: None from the government, sir.

21 **RE CROSS-EXAMINATION**

22 **Questions by the Detailed Defense Counsel [LT DANIELSON]:**

23 Q. Doctor, when the military judge asked you about the

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1 suitability of the temporary spaces in the vicinity of this
2 complex, you made a particular note to stress that in the
3 cell, in your opinion, there was no issue.

4 In your opinion, the shower is not suitable, correct?

5 A. I did not say that.

6 Q. I'm asking you now.

7 A. There -- the difference between his cell at the
8 temporary space and his cell at his permanent space is that
9 the shower is outside.

10 Q. Right. And in your opinion, it's not suitable?

11 A. The shower itself is suitable.

12 Q. You made a point to stress that the cell was, but
13 made no mention of the shower?

14 A. Somebody can refresh my testimony. I would have to
15 say that the question I thought that was asked was the
16 differences between his permanent cell and temporary cell.
17 And so that is a notable difference.

18 Q. Okay. Thank you.

19 DDC [LT DANIELSON]: Nothing else.

20 MJ [LtCol LIBRETTO]: Thank you, Doctor. That is all the
21 questions that we have for the time being. You may step down
22 and return to your normal duties.

23 WIT: Thank you.

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1 MJ [LtCol LIBRETTO]: Thank you.

2 [The witness was excused and withdrew from the courtroom.]

3 MJ [LtCol LIBRETTO]: Okay, counsel, we're going to take a
4 10- to 15-minute recess. During the recess, I'll provide
5 guidance as to which witness we will be calling next. The
6 commission is in recess.

7 [The R.M.C. 803 session recessed at 1733, 21 August 2019.]

8 [The R.M.C. 803 session was called to order at 1839,
9 21 August 2019.]

10 MJ [LtCol LIBRETTO]: The commission will come back to
11 order. All parties present when the commission last recessed
12 are again present.

13 Government, is the JDG commander present and
14 available to testify?

15 ATC [MR. SPENCER]: Your Honor, the JDG commander, Colonel
16 Yamashita, is off island TDY, but the acting JDG commander is
17 standing by for testimony.

18 MJ [LtCol LIBRETTO]: Okay. Please call the witness.

19 DDC [MS. HENSLER]: Sir, may I put an objection on the
20 record? My client has been absent now for over six-and-a-half
21 hours from these proceedings. And at this point, has the
22 court made a finding as to the voluntariness of that absence
23 or will the court decline to make a finding on that voluntary

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1 absence?

2 MJ [LtCol LIBRETTO]: I'm declining at this time because
3 the factual record hasn't been sufficiently developed and
4 that's what we're doing.

5 ATC [MR. SPENCER]: Your Honor, the government calls
6 Lieutenant Colonel Gray to the stand.

7 MJ [LtCol LIBRETTO]: Colonel, if you will please face me
8 and raise your right hand.

9 LIEUTENANT COLONEL JACK L. GRAY, U.S. Army, was called as a
10 witness for the commission, was sworn, and testified as
11 follows:

12 **DIRECT EXAMINATION**

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

14 Q. Would you please state your full name for the record,
15 spelling your last name?

16 A. Jack Lee Gray, G-R-A-Y.

17 Q. And are you a lieutenant colonel?

18 A. I am.

19 Q. What branch?

20 A. MP. Military Police.

21 Q. United States Army?

22 A. United States Army.

23 Q. What's your current billet, sir?

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1 A. The deputy commander, Joint Detention Group, acting
2 commander at this time.

3 Q. Located where?

4 A. Guantanamo Bay.

5 Q. Thank you. I believe the military judge has some
6 questions for you.

7 A. Yes, sir.

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

9 Q. Sir, with respect to -- and I'm going to refer to the
10 accommodations outlined in Appellate Exhibit 131. I don't
11 know if you're familiar with that numerical designation, but
12 in terms of what I will refer to it as the "jumbo cell," are
13 you aware of what I'm referring to?

14 A. It's been relayed to me, the name for it.

15 Q. Okay. So with respect to the jumbo cell, is there
16 processes and procedures in place that will ensure the accused
17 has sufficient subsistence during his time in detention there?

18 A. Yes, sir.

19 Q. Is there a means by which any acute emergency that
20 he -- may come about can be identified and responded to?

21 A. Yes, sir.

22 Q. From your per -- yeah, before I proceed further,
23 thank you. If any of the questions I or counsel ask will call

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1 for a response that may go into classified information, please
2 alert me to that before you answer the question.

3 DDC [LT DANIELSON]: Your Honor, I apologize for
4 interrupting. We received a call from Lieutenant Ball asking
5 that the witness would enunciate. They're having trouble
6 hearing him in the temporary accommodations.

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

8 Q. Sir, if you would please speak into the microphone,
9 it might help or might not. I don't frankly know. But bear
10 with me a moment.

11 From your perspective as the acting JDG commander,
12 are there any safety concerns with the jumbo cell?

13 A. Not at this time, sir.

14 Q. Have comparable accommodations to those that the
15 accused is accustomed to having in his cell at Camp VII been
16 afforded to him in the jumbo cell?

17 A. As best as we can afford.

18 Q. To what extent are they dissimilar?

19 A. Sir, I can answer what we have done to make it
20 comparable. I don't know that I could articulate the specific
21 differences.

22 Q. Okay. And we've heard about the medical
23 accommodations that have been afforded or medical measures, if

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1 you will, but in terms of the structure and not, again, going
2 into classified information, but is there anything about the
3 structure of the cell that creates any safety concern for the
4 accused?

5 A. Not that I'm aware of. I did have an opportunity to
6 see this -- see the enclosure, the cell, before its final
7 conclusion. At that time, it was almost adequate and the
8 improvements have been made, to my knowledge, to make it safe.

9 Q. So one of the things alleged is that there were
10 exposed wiring throughout the temporary cell.

11 Has that been addressed?

12 A. I can't answer that, sir. I haven't seen that today.
13 [Pause.]

14 MJ [LtCol LIBRETTO]: Defense, any questions?

15 **CROSS-EXAMINATION**

16 **Questions by the Defense Counsel [LCDR MEUSCH]:**

17 Q. Good evening, sir. My name is Lieutenant Commander
18 Jake Meusch. I have a few questions for you.

19 A. Sure.

20 Q. You just testified and I believe you used the words
21 "final conclusion" and "almost adequate." When you said
22 "final conclusion of construction," about what time would you
23 say that happened?

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1 A. That was within the last 30 days or -- when I
2 visited, I was asked to give some insight/input into its
3 construction on the interior, the enclosure itself, placement
4 of the -- the sufficiency of the walls as such, placement of
5 equipment that might be inside the cell.

6 Q. And you just testified that -- 30 days. Did you view
7 the jumbo cell yesterday?

8 A. I was not.

9 Q. So you cannot testify to this commission what -- the
10 state of the jumbo cell yesterday?

11 A. I did not see the cell yesterday.

12 Q. But when you saw the jumbo cell within the last 30
13 days, construction was not complete?

14 A. No, sir. It had not finished -- the details had not
15 been completed. The enclosure was there inside the -- inside
16 the building, and the internal parts of the cell were there.
17 We just made some recommendations on further making it safe
18 for both the guard force and the -- and the defendant.

19 Q. Sir, you testified that your occupation is military
20 police?

21 A. I am.

22 Q. Do you have a background in structural engineering?

23 A. No, sir.

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1 Q. Do you have a background in electrical engineering?

2 A. No. I am a -- I am an environmental health safety
3 manager on the -- as a civilian job. As part of that is some
4 safety aspects, but my implicate -- my statements to the -- my
5 inputs to the -- what the cell should look like was based on
6 input from experience in detention operations that I've had as
7 well as general safety that I pull from my civilian job as
8 well. OSHA-related-type items.

9 Q. So the Army employs you as a certified inspector?

10 A. No, sir.

11 Q. So you would not be certified to inspect, say, like a
12 fire marshal would be?

13 A. No.

14 Q. Or, say, a structural engineer or electrical
15 engineer?

16 A. No, sir.

17 Q. Okay. And specifically, I guess more to the point,
18 you're not an occupational therapist either?

19 A. I do not work in the medical field.

20 Q. And you did not inspect the cell along those
21 dimensions either?

22 A. No, sir.

23 Q. Is there an instruction by which that cell needs to

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1 be certified?

2 A. Sir, I can't remember a particular instruction that
3 would require that other than what's been established in
4 general building codes for detention operations.

5 Q. Is a general matter in security in the Army, is there
6 an instruction regarding detention cells?

7 A. There are the -- the DoD follows -- typically follows
8 ACA rules, Army Corrections Command type rules.

9 Q. But those rules aren't in effect here?

10 A. I'm not aware which -- which ones might be and which
11 not.

12 Q. The DoD -- the rules you just referred to for an
13 Army -- an Army detention cell.

14 A. Those typically would be involved when we're talking
15 about a fixed disciplinary barracks at various -- various
16 detention operations throughout the world.

17 Q. So just -- I'm not trying to belabor the point, but I
18 want to make this clear. There's been no instruction by which
19 this has been inspected?

20 A. I'm not aware of what instruction it may have been
21 inspected, if at all.

22 Q. And so there's no, like, inspection report?

23 A. I have not seen one.

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1 Q. Do you know approximately when construction began?

2 A. No, sir. It -- I arrived here almost -- about two
3 months ago. I think it was under -- already under
4 construction at that point.

5 Q. And was it your understanding that construction would
6 be complete before yesterday?

7 A. That was the intent, as far as I understood it.

8 Q. Was it your understanding that at -- tonight,
9 Mr. al-Tamir would be spending ----

10 MJ [LtCol LIBRETTO]: Lieutenant Commander Meusch, we
11 don't need to know that answer from this witness. And further
12 with respect to this witness's knowledge, I'm concerned with
13 the status in its current state, not over the past 30 days
14 with which he's viewed it. So let's move.

15 DDC [LCDR MEUSCH]: Yes, Your Honor.

16 Your Honor, I will say that I have some questions
17 regarding the specifics of the medical accommodations. And
18 it's my understanding that I should be careful asking those
19 questions.

20 MJ [LtCol LIBRETTO]: Are these the same questions that
21 the senior medical officer had previously provided answers to?

22 DDC [LCDR MEUSCH]: No, Your Honor. I can ask the
23 questions and proceed forward and ----

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1 MJ [LtCol LIBRETTO]: Okay. Let's see where it goes.

2 DDC [LCDR MEUSCH]: Okay.

3 **Questions by the Detailed Defense Counsel [LCDR MEUSCH]:**

4 Q. Sir, do you know if there's been a -- you testified
5 that there are adequate medical accommodations and there's a
6 plan to respond?

7 A. Yes.

8 Q. Does that plan include, say, a button that
9 Mr. al-Tamir will have in the cell with him to press and alert
10 medical staff?

11 A. Unfortunately I can't remember if that -- that was
12 involved in the emergency medical response. I was aware that
13 we did have medical personnel available and immediate response
14 for medical care -- further medical care -- medical care if
15 desired or needed.

16 Q. Is there a specific plan for how he will call for
17 medical care?

18 A. I cannot remember how it was initiated, sir.

19 Q. In terms of -- you said you didn't know if -- too
20 much on the details on what was dissimilar between ----

21 A. Yeah.

22 Q. ---- the jumbo cell and Camp VII. But would you say
23 that the shower is a dissimilar item?

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1 A. It is dissimilar in that it's not in his cell. I
2 would not have a comparable.

3 Q. Are there any other aspects of the shower that may be
4 dissimilar?

5 A. Not that I know personally, only from hearsay.

6 Q. And just to make this clear, the military judge
7 directed us to focus on the current status of the jumbo cell.
8 And would it be fair to say that having not viewed it
9 yesterday or today that you cannot provide testimony on the
10 current status of the jumbo cell?

11 A. Not having seen its final completion, no.

12 Q. All right.

13 DDC [LCDR MEUSCH]: No further questions, Your Honor.

14 MJ [LtCol LIBRETTO]: Government, do you have any
15 questions in light of mine or the defense's?

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

17 **CROSS-EXAMINATION**

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

19 Q. Colonel Gray, did you see the cell very briefly
20 today, if not in its detailed form?

21 A. I was able to step in, but I did not observe it, the
22 entirety of the ----

23 Q. So you didn't -- you didn't inspect it like you had

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1 previously?

2 A. Right.

3 Q. But you were able to stick your head in?

4 A. I was able to.

5 Q. Was there anything that stuck out to you as
6 immediately concerning from a security standpoint?

7 A. No. No. The accommodations were made for his bed.
8 That was one thing that was definitely different than the
9 previous incarnation of it. So methods have been employed to
10 bring that -- his bed and other comfort items there as well.

11 Q. Previously the bed was a smaller size ----

12 A. I was expecting ----

13 Q. ---- is that correct?

14 A. I'm sorry, sir?

15 Q. Previously the bed was a smaller size?

16 A. Yes.

17 Q. And it was enlarged. Do you know why?

18 A. As a preference to the detained.

19 Q. Was it done -- is it similar now to the bed that --
20 at least the platform that he had ----

21 A. Yes.

22 Q. ---- in Camp VII?

23 A. We did take measures to make it the same height and

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1 size of his current, so ----

2 Q. Is it safe -- without going into detail,
3 understanding the potentially classified nature of details on
4 this question, is it -- is it the monitoring or the over-watch
5 that guards have here similar to that that they have in
6 Camp VII?

7 A. Yes.

8 Q. So if the guards in Camp VII became aware that he was
9 suffering a medical issue, they would initiate the proceedings
10 for medical emergency?

11 A. It would.

12 Q. And the guards here have that same capability. Is
13 that accurate?

14 A. Yes.

15 Q. Okay. Thank you, sir.

16 ATC [MR. SPENCER]: I have no further questions.

17 MJ [LtCol LIBRETTO]: Thank you, sir. That's all the
18 questions that we have for you. I appreciate you taking the
19 time today. You may return to your normal duties. Thank you.

20 [The witness was excused and withdrew from the courtroom.]

21 DDC [MS. HENSLER]: Sir, for the record, given the delay,
22 our client was not able to communicate one point which we
23 would have elicited from -- we would have at least raised in

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1 the cross-examination of the JDG commander.

2 MJ [LtCol LIBRETTO]: What is that?

3 DDC [MS. HENSLER]: The size of the bed is not the same as
4 the size of the bed in Camp VII.

5 MJ [LtCol LIBRETTO]: Okay. The witness's testimony was
6 that it was. If you'd like to present evidence to the
7 contrary, then you are free to do so.

8 And with that, to the extent we are going to address
9 AE 163 this evening, Defense, do you have any additional
10 evidence to present?

11 DDC [MS. HENSLER]: Sir, we filed an affidavit -- a sworn
12 affidavit by a doctor, Sandra Crosby, who viewed the facility
13 yesterday.

14 MJ [LtCol LIBRETTO]: I have received that.

15 Is there any additional evidence to present beyond
16 that?

17 DDC [MS. HENSLER]: She would have testified today had
18 Commander Short not threatened her clearance. And that is why
19 we asked to first address ----

20 ATC [MR. SPENCER]: Objection. Assumes facts not in
21 evidence.

22 MJ [LtCol LIBRETTO]: Is there any evidence that you'd
23 like to present at this time? Understanding that you'd like

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1 to put that on the record you may do so in a moment, but
2 before doing so, is there any evidence that you'd like to
3 present that is available?

4 DDC [MS. HENSLER]: Not at this time.

5 MJ [LtCol LIBRETTO]: Okay. You may state for the record
6 what it is that you would have put on but for issues raised in
7 AE 164.

8 DDC [LCDR MEUSCH]: It's difficult to answer that
9 question, Your Honor, because the whole purpose of the meeting
10 this morning with Dr. Crosby was to meet with Mr. al-Tamir as
11 a component of evaluating the conditions of the jumbo cell.
12 She needed to observe him, see his condition, and compare it
13 to the accommodations that have been made.

14 So having lost that opportunity ----

15 MJ [LtCol LIBRETTO]: The opportunity to what? I'm sorry.

16 DDC [LCDR MEUSCH]: The opportunity to consult with
17 Dr. Crosby this morning. That was the plan, Your Honor, was
18 to consult with Dr. Crosby this morning so we'd have
19 additional evidence to present to this commission today.

20 But because ----

21 MJ [LtCol LIBRETTO]: What additional evidence were you
22 going to present? She signed an affidavit and provided it to
23 the commission.

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1 DDC [LCDR MEUSCH]: In that affidavit, I believe, and
2 correct me if I'm wrong, she noted that she had not met with
3 Mr. al-Tamir. Her observations, any additional information
4 she could have provided that relied upon knowledge of his
5 condition, would have been relevant for this commission to
6 consider, especially if you're looking at the jumbo cell today
7 and his condition today. She would have seen him this
8 morning.

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

10 Government, understanding you haven't had an
11 opportunity to respond, although I assume you've had an
12 opportunity to review AE 163, is there any additional evidence
13 that you'd like the commission to consider?

14 ATC [MR. SPENCER]: No, Your Honor.

15 MJ [LtCol LIBRETTO]: Beginning with the defense.
16 Ms. Hensler, you've had an opportunity to go into the cell, is
17 that correct, today?

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

19 MJ [LtCol LIBRETTO]: With respect to the exposed wires
20 that are identified within the pleading, has that been
21 addressed?

22 DDC [MS. HENSLER]: When I went into the cell a few --
23 excuse me, a few minutes ago, there was still one exposed wire

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1 and one set of wires being held up by electrical tape.

2 MJ [LtCol LIBRETTO]: Okay. And they were, in your
3 estimation, a safety concern?

4 DDC [MS. HENSLER]: The entire cell, in our
5 estimation ----

6 MJ [LtCol LIBRETTO]: Okay. I'm concerned with the
7 exposed wire. I would like you to explain the description of
8 the wire in terms of how it presents a -- as -- the
9 unnecessary pain and discomfort and a safety issue.

10 DDC [MS. HENSLER]: Sir, I'm not an electrical engineer.
11 My understanding is that Dr. Crosby's affidavit set forth that
12 there were exposed wires, which there were yesterday, less
13 than 24 hours before this hearing started, many of them, and
14 they have been there for weeks.

15 MJ [LtCol LIBRETTO]: But you're alleging that it is
16 woefully inadequate due to, among other things, that. So
17 explain to the commission why that is a safety concern.

18 DDC [MS. HENSLER]: Sir, at this time, that cell, as we
19 learned from the JDG Commander acting, has not been certified
20 by any safety standards that we are aware of or that this
21 commission has been advised of.

22 Mr. al-Tamir is in a very fragile medical state, as
23 Your Honor saw with your own eyes today. And for that reason,

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1 it's not a fit place for him to stay. These are not -- the
2 conditions of the -- and configuration of the facility where
3 this detainee is going to be held for extended period of times
4 [sic] are not decisions that should be made on the fly. These
5 are things which Your Honor should take under consideration
6 after being advised by experts of their safety.

7 And, Your Honor, at this point, the record isn't
8 sufficient on that point.

9 MJ [LtCol LIBRETTO]: Who's got the burden on this motion?

10 DDC [MS. HENSLER]: That's a difficult question, Your
11 Honor, because at this point we have several motions in play.
12 I've requested that my client be permitted to participate, and
13 Your Honor ----

14 MJ [LtCol LIBRETTO]: In AE 163, who has the burden?

15 DDC [MS. HENSLER]: The moving party always has the
16 burden, Your Honor.

17 MJ [LtCol LIBRETTO]: Any further argument on AE 163?

18 DDC [MS. HENSLER]: Yes, Your Honor. I -- I'd like to
19 know ----

20 MJ [LtCol LIBRETTO]: You can -- instead of -- feel free
21 to enter the well instead of having to push the button.

22 DDC [MS. HENSLER]: Sir, there were a number of
23 problematic things that happened today during the testimonial

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1 portion of this proceeding, beginning with the testimony of
2 the senior medical officer.

3 The senior medical officer had no credibility. She
4 would not commit to even saying that basic safety standards
5 would apply to the jumbo cell. She would not even confirm on
6 the record that Valium, Percocet, and Flexeril have an impact
7 on mentation. Would you want your client -- your -- a school
8 bus driver to be held to that standard? No.

9 This is a -- my client has a constitutional right to
10 participate in these proceedings. He -- it is incumbent upon
11 the court to make a determination as to his competency and
12 whether or not he is voluntarily absent from the proceedings
13 at this point and whether or not he is -- he is cognizant of
14 what is going on during the proceedings. And at this point,
15 the testimony that has been given by the senior medical
16 officer is not -- is not credible on that point.

17 We've heard testimony from the neurosurgeon earlier
18 this year that these medications do have an impact on med --
19 on mentation, though to what extent he could not testify.
20 Earlier SMOs have similarly testified that these medications
21 have an impact on mentation. This SMO in recent filings ----

22 MJ [LtCol LIBRETTO]: Ms. Hensler ----

23 DDC [MS. HENSLER]: ---- appeared ----

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1 MJ [LtCol LIBRETTO]: ---- I'm concerned today not with
2 addressing the issue of voluntary absence, I'm concerned at
3 this point to address the arguments raised in 163.

4 DDC [MS. HENSLER]: Sir, the reason that -- my
5 understanding of the reason that the military judge wanted
6 testimony from the senior medical officer in part was to have
7 a better understanding of Mr. al-Tamir's current medical
8 condition and to make a determination as to the adequacy of
9 these facilities based in part on that understanding.

10 Right now, the record on the question of his --
11 there's a significant record on his medical status -- his
12 infirm medical status. And the testimony that was offered
13 today was simply not credible. Your Honor saw with your own
14 eyes the impact of the hours of these proceedings on my
15 client. You are aware that he has taken at least two doses of
16 Valium and one Percocet and only recently called for a
17 corpsman.

18 This indicates, again, that he is in a very fragile
19 medical state and that it is abjectly inappropriate and in
20 violation of his -- in violation of his dignity, his rights as
21 a law of war prisoner under the Geneva Conventions, to keep
22 him in these facilities for any period of time, particularly
23 against his will.

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1 So I would ask that the court return this man who has
2 had five serious surgeries in the last two years to his cell
3 at Camp VII as he's been begging to go for the last eight
4 hours.

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

6 Mr. Spencer?

7 ATC [MR. SPENCER]: Thank you, Your Honor. I will be
8 brief.

9 Apparently the defense saw a different SMO testify
10 than the government did. The SMO was entirely credible
11 despite defense's repeated attempts to confuse her. She did
12 say that the Percocet, Valium, and those medications did
13 affect mentation, as defense says. But she also made clear
14 that long-term use -- which is what the accused has been
15 engaging in -- of this medication would mitigate that.

16 We've heard testimony from prior SMOs in this
17 courtroom that -- who observed him under the effects of Valium
18 immediately after taking them in the courtroom and that those
19 effects were not dramatic. So defense's attempt to
20 characterize the accused as confused, or whatever they were
21 claiming in terms of the effects of the medication, are
22 exaggerated and not borne by the medical evidence.

23 The Dr. Crosby argument is a red herring. Dr. Crosby

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1 is neither a building engineer, nor an electrician, nor an
2 electrical engineer. His treating physician testified today,
3 explained having reviewed the facility this morning after the
4 work was completed, that there are no safety concerns, there
5 are no medical concerns.

6 The JDG Deputy Commander, although he did not take
7 the opportunity to inspect it, did stick his head in, didn't
8 notice anything unusual. The government would again
9 respectfully invite the commission to personally view the
10 space as the commission did yesterday prior to the completion
11 of the construction. The government posits that the dramatic
12 change from the circumstances yesterday will not be lost on
13 the commission.

14 The government would note that the AE 163 was filed
15 prior to the defense re-reviewing or reinspecting the
16 facility. All of their allegations in AE 163 are based on
17 their roughly 1400 time frame inspection of the facility. The
18 government informed them that they would be afforded an
19 opportunity to reinspect between 17 and 1800. The government
20 did afford them the opportunity to inspect beginning at 1700.
21 They delayed because they were -- presumably because they were
22 filing this very motion. Eventually viewed the facility at
23 1830.

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1 The two counsel who signed the motion were not
2 present during that inspection, so the defense's
3 characterizations in the motion were not even current when
4 they were actually filed because it was filed well after the
5 work was completed.

6 That's obviously concerning to the government for a
7 variety of reasons, which I presume we'll address in the --
8 whatever series the alleged UI becomes. To the extent that
9 the government's objection earlier -- the objection being
10 assumes facts not in evidence, I probably should have put
11 "facts" in air quotes. Regardless, the government looked
12 forward to litigating that issue.

13 The bottom line is the defense makes these
14 allegations that were -- when they were made were stale. The
15 fact that they did not inform this commission of that fact is
16 deeply concerning. And again, the government would welcome
17 the commission's inspection of the facility as it currently
18 stands. Thank you.

19 MJ [LtCol LIBRETTO]: Thank you, Mr. Spencer.

20 DDC [LCDR MEUSCH]: Your Honor, I believe we need to
21 correct one thing that was represented by the government.

22 MJ [LtCol LIBRETTO]: Is it pertinent to the commission's
23 deliberations on this issue?

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1 DDC [LCDR MEUSCH]: We believe it is, Your Honor, due to
2 the fact that our position is AE 164 needs to be resolved
3 before AE 163. But the delay did not come about at the
4 request of the defense. It is my understanding that the delay
5 came from 1700, or wherever, until 1830 because the government
6 was reporting Dr. Crosby for a security violation ----

7 MJ [LtCol LIBRETTO]: Okay. That is not pertinent to the
8 commission's consideration of this motion.

9 DDC [LCDR MEUSCH]: Understood, Your Honor. But -- thank
10 you.

11 MJ [LtCol LIBRETTO]: The commission will stand in recess
12 for 15 minutes.

13 [The R.M.C. 803 session recessed at 1911, 21 August 2019.]

14 [The R.M.C. 803 session was called to order at 1932,
15 21 August 2019.]

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

19 Having reviewed AE 163 and its attachments and having
20 heard the testimony of the senior medical officer and the
21 Acting JDG Commander, the commission finds that the defense
22 has failed to meet its burden of proof to justify this
23 commission interfering with the penological decisions as to

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1 where and how the accused is detained.

2 The commission further finds that the accommodations
3 referred to as the jumbo cell will not expose the accused to
4 unnecessary pain, discomfort, or danger, as the defense
5 alleges.

6 The deficiencies originally noted in the defense
7 pleading are in large part now without a factual basis in that
8 the pleading was made yesterday, prior to the cell being
9 complete and prior to the -- receiving the benefit of the
10 testimony of the senior medical officer and the JDG Commander.

11 To the extent the defense alleges it amounts to cruel
12 and unusual treatment under the Eighth Amendment, the
13 commission disagrees. In fact, the accommodations provided to
14 him in the jumbo cell are comparable in every meaningful way
15 to the cell Mr. Hadi himself desires to return.

16 He will not be deprived any necessity of life, and
17 the government has provided suitable medical measures to
18 account for Mr. Hadi's medical condition. Moreover, the
19 implementation of this jumbo cell is not with the intent to
20 punish but rather to facilitate a legitimate nonpunitive
21 governmental interest and that is to ensure the accused can
22 attend and participate in commission proceedings.

23 This ruling should not be taken, however, as

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1 direction by this commission as to whether the JDG utilizes
2 the jumbo cell and the accommodations provided by it. That
3 decision is left to the sound discretion of the JDG commander.
4 But the commission intends to proceed tomorrow morning at
5 0930.

6 If the accused requests to not utilize the
7 accommodations referred to as the jumbo cell and the JDG
8 commander approves of that request, the accused -- and the
9 accused is not present at 0930 tomorrow, his request to not
10 utilize those accommodations may be considered by this
11 commission in determining whether his absence tomorrow morning
12 is voluntary.

13 Finally, if the accused is not present tomorrow, the
14 parties should be prepared to present evidence beginning at
15 0930 as to the voluntariness of that absence, including
16 witnesses who can speak to their observations and interactions
17 with the accused both this afternoon as well as tomorrow
18 morning.

19 Absent further direction from this commission,
20 Lieutenant Colonel Martin and Mr. Flinn, witnesses who were
21 scheduled to testify tomorrow, should be prepared to testify
22 beginning at 1330.

23 This commission is in recess until 0930 tomorrow

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1 morning.

2 [The R.M.C. 803 session recessed at 1936, 21 August 2019.]

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