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1 [The R.M.C. 803 session was called to order at 0858,
2 14 January 2019.]

3 MJ [LtCol LIBRETTO]: This commission is called back to
4 order. All parties that were present when the commission last
5 recessed are again present. In addition, Mr. Spencer rejoins
6 the government counsel table and Mr. Hadi is also present this
7 morning.

8 Mr. Hadi, we will take breaks again today every 30 or
9 so minutes in order to permit you to stand up, stretch, change
10 positions, et cetera. However, if you do need to do any of
11 those things between times that we take a break, I want to
12 urge you and encourage you to do so in order to allow you to
13 remain as comfortable as possible as we go through these
14 arguments this morning.

15 Following the last session of the commission, the
16 parties sent me a proposed order of march for taking up the
17 motions this morning. I intend to follow that proposed order
18 of march this morning as we go through the motions.

19 I also advised the counsel, as I will again now, that
20 I do not need or desire recitation of the written pleadings.
21 Rather, Counsel, please limit your arguments by highlighting
22 the main points on which you rely for your position and a
23 brief comment on the opposing party's positions and arguments.

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1 Before we begin, Ms. Hensler, you indicated during an
2 R.M.C. 803 session -- I'm sorry, 802 session that you desired
3 certain -- to re-brief certain issues in lieu of presenting
4 oral argument on them this morning. Can you please remind me
5 which issues you'd like to do that for?

6 DDC [MS. HENSLER]: Your Honor, we withdraw that request.
7 It related to AE 027, but we've decided to simply request
8 supplemental argument as directed in the docketing order.

9 MJ [LtCol LIBRETTO]: Okay.

10 DDC [MS. HENSLER]: However, Your Honor, there are two
11 scheduling issues which I'd like to raise with the court
12 briefly before the witness takes the stand.

13 MJ [LtCol LIBRETTO]: Go ahead.

14 DDC [MS. HENSLER]: So first, Your Honor, the -- per
15 AE 122, which is the calendar year 2019 scheduling order, we
16 have a March 4th to 15th hearing and an April 29th to May 3rd
17 hearing.

18 I would ask that, if the court is inclined to shorten
19 the March hearing as it did with this hearing, that you would
20 consider calendaring in the first week rather than the second
21 week because -- because, Your Honor, I'm expecting a child and
22 so that would be right on the cusp of when I won't be
23 permitted to travel anymore. The first week would be fine,

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1 but the second week would be problematic.

2 For the same reason, I would ask that the court --
3 and we'll put this in writing -- cancel the late April
4 hearing; leave the July hearing as scheduled, but cancel the
5 late April hearing. Your Honor, none of the other attorneys
6 on the defense team have significant criminal defense
7 experience, and I'd rather not give birth to a child here in
8 Guantanamo Bay. So I just wanted to put that on the -- on the
9 court's -- in front of the court.

10 The second scheduling issue relates to something
11 which happened to my client this weekend. Mr. Al-Tamir was
12 informed that he -- by camp staff that he had an ICRC call
13 scheduled for January 23rd. And, Your Honor, this is a Skype
14 call with family in Iraq, and it only happens once every three
15 months.

16 He was informed on -- and it's a significant event,
17 not only because it happens once every three months, but
18 because his family members in Iraq need to travel three hours
19 both ways to get to the ICR -- ICRC office in Iraq for the
20 call.

21 He was alerted on Saturday that the call had been
22 moved up to yesterday unexpectedly, and -- and told that if he
23 wanted to have the ICRC call this quarter, he would have to

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1 show up yesterday morning.

2 He indicated that this was a problem because of the
3 court's scheduled for today and his limitations. And he also
4 informed them that having heard the testimony on Friday that
5 he -- if he was going to go to the ICRC call, he requested an
6 ambulance take him there. Your Honor, he was informed that if
7 he wanted to make the call, it would happen yesterday and he
8 would have to travel by van. When he decided to forgo what
9 was on offer yesterday, he was informed that he had
10 refused ----

11 MJ [LtCol LIBRETTO]: Slow down, please, Ms. Hensler.

12 DDC [MS. HENSLER]: Excuse me.

13 MJ [LtCol LIBRETTO]: Thank you.

14 DDC [MS. HENSLER]: He was effectively told that he'd
15 waived his right to a Skype call with his family this quarter.

16 Your Honor, I would like to put this on the record
17 because we may ask at some point for the court's intervention
18 in scheduling this Skype call. But also, we have noted a
19 pattern of events being moved around to happen -- to basically
20 coincide with court hearings.

21 So Your Honor will note that the neurosurgeon
22 testified that his six-month consultation, the evaluation that
23 occurs after the -- that was supposed to occur after the May

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1 surgery could have happened in a window of time of about a
2 month, and it was scheduled by the camps to happen during the
3 week of our November hearing. In January we saw a similar
4 event. We were all here on island, and the second day of
5 court, after years of requesting, Mr. Al-Tamir was taken for a
6 late evening MRI.

7 Your Honor, to the extent that the camps have -- the
8 camps certainly have some ability to schedule things so as not
9 to interfere with our commissions proceedings, but to -- in
10 this particular case, we would like to put on the record that
11 not only is it a great inconvenience to Mr. Al-Tamir's family
12 to have to travel seven hours for a Skype call that didn't
13 happen, but it's cruel and unusual to make him choose between
14 a talk with his family, which can only happen once every three
15 months, or attending court. And for that reason we may ask
16 for the court's intervention.

17 MJ [LtCol LIBRETTO]: Okay, Ms. Hensler. Thank you very
18 much. It's -- the commission appreciates the unfortunate
19 change of what appears to be a schedule with the ICRC call;
20 however, if you believe that this commission ought to and has
21 the authority to intervene or provide some sort of relief, I
22 would ask that you frame the issue in a written pleading so it
23 can be briefed appropriately and responded to, and then I can

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1 make an informed decision one way or the other. But I note it
2 for the record.

3 DDC [MS. HENSLER]: Thank you, Your Honor.

4 MJ [LtCol LIBRETTO]: With respect to your first
5 scheduling matter, my intent is, after the close of the
6 session today, to have an R.M.C. 802 session with the parties
7 to discuss both the hearing schedule for the remainder of the
8 fiscal year as well as the litigation schedule. So we will
9 take that up during the 802 session.

10 ATC [MR. SPENCER]: Your Honor, may the government briefly
11 be heard in response to Ms. Hensler's allegation?

12 MJ [LtCol LIBRETTO]: Go ahead.

13 ATC [MR. SPENCER]: Your Honor, it's the government's
14 understanding that the Skype calls are scheduled by ICRC. JTF
15 does not have control over what the ICRC does. Otherwise, the
16 government disputes certain facts as stated by Ms. Hensler,
17 and we will respond to whatever motion they file.

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

19 At the close of the last session, Ms. Hensler, you
20 indicated a desire to recall the senior medical officer for
21 additional testimony. Is that your desire this morning?

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

23 MJ [LtCol LIBRETTO]: What is the subject matter that

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1 you're requesting the senior medical officer be recalled for?

2 DDC [MS. HENSLER]: Your Honor, Mr. Al-Tamir requested to
3 be present for the SMO's testimony on his health. So while we
4 will try not to retread too many of the same issues that we
5 reached last week, there are a number of topics which we did
6 not address and which we would ask to address today; for
7 instance, the need for a board-certified pain management
8 specialist, representations regarding accommodations that have
9 been made for Mr. Al-Tamir, and also, Your Honor -- excuse me.
10 Oh -- representations made regarding both in the SMO reports
11 and made during testimony about client rapport and refusing
12 visits.

13 MJ [LtCol LIBRETTO]: So your desire is to clarify some of
14 the testimony we've taken already?

15 DDC [MS. HENSLER]: Yes, Your Honor.

16 MJ [LtCol LIBRETTO]: Understanding that the commission
17 sees no need as this is not -- the testimony was taken not for
18 an adversarial purpose but as a fact-finding endeavor by the
19 commission, the commission is not going to permit a complete
20 redo of the testimony that we heard last week; however, if
21 you'd like to briefly clarify some of the testimony, the
22 commission will permit you to do so.

23 Is the senior medical officer present?

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1 ATC [MR. SPENCER]: He is, Your Honor.

2 MJ [LtCol LIBRETTO]: If you would, please call him.

3 ATC [MR. SPENCER]: Your Honor, the government calls --
4 recalls the senior medical officer to the stand.

5 Doctor, if you would please stand by the witness
6 stand and face me and raise your right hand, I will re-swear,
7 as you were released previously as a witness.

8 SENIOR MEDICAL OFFICER, U.S. Navy, was recalled as a witness
9 for the defense, was sworn, and testified as follows:

10 **DIRECT EXAMINATION**

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

12 Q. For identification purposes, are you the senior
13 medical officer currently assigned to Camp VII?

14 A. I am.

15 Q. Did you testify previously on Wednesday,
16 9 January 2018?

17 A. I did, yes.

18 Q. Have you had an opportunity to review your transcript
19 from that testimony?

20 A. I have, yes.

21 Q. Do you adopt that testimony today?

22 A. I do. I do.

23 ATC [MR. SPENCER]: Defense, your witness.

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1 MJ [LtCol LIBRETTO]: Ms. Hensler.

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

3 Q. Good morning, Doctor.

4 A. Good morning.

5 Q. Last Wednesday you testified that you're board
6 certified in family medicine, correct?

7 A. That's true, yes.

8 Q. But that you also hold a certification as a medical
9 acupuncturist?

10 A. Yes.

11 Q. And trial counsel asked you whether or not medical
12 acupuncture falls underneath the specialty of pain management,
13 correct?

14 A. Yes.

15 Q. And it does?

16 A. Yes.

17 Q. But it's not the same thing -- having the
18 certification is not the same thing as being a board certified
19 pain management specialist, right?

20 A. That is true. That is true.

21 Q. Because you're not one of those, right?

22 A. No. Pain management generally is considered a
23 subspecialty of anesthesia. Sometimes it's a subspecialty

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1 of -- sometimes it's a subspecialty of other medical
2 professions, but there is such a thing as a fellowship in pain
3 management specifically, right.

4 Q. And they have their own specialty medical board,
5 correct, which administers ----

6 A. They have a separate medical board, right. So my --
7 my level of training is not to that level, that's true.

8 Q. Okay. And so you're -- not only are you not
9 certified, but you don't meet the eligibility criteria to ----

10 A. Right, I have not completed a fellowship in pain
11 management.

12 Q. And excuse me, sir. Simply for the record, if you
13 could allow me to finish my question before you answer.

14 A. Oh, I'm sorry. Go ahead.

15 Q. Oh, no. It's fine.

16 So in the two most recent SMO reports, you indicated
17 that the Joint Medical Group is looking for a pain management
18 specialist for Mr. Al-Tamir, correct?

19 A. That is true.

20 Q. But you indicated -- and you indicated that was the,
21 quote, next step in our plan of care, right?

22 A. Yes, it is the next hurdle that I seek to try to
23 overcome as a senior medical officer for him.

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1 Q. And am I correct that you're characterizing it as a
2 hurdle because I think, as you noted last week, there's a
3 critical shortage of pain management specialists in the
4 military Medical Corps?

5 A. That's true.

6 Q. And so while initially you thought that a -- that a
7 specialist consultation could be calendared for January 2019,
8 this month, that's now been deferred so that you have time to
9 find someone with the availability to consult on
10 Mr. Al-Tamir's case?

11 A. That's true.

12 Q. Okay. But it would be helpful to have one, right?

13 A. It would be helpful. Like I said, having a -- having
14 a consultant evaluate his case and to make recommendations
15 would be helpful, yes.

16 Q. And you noted in the December 5 -- excuse me -- in
17 the December 5th evaluation which was admitted into evidence
18 last week, I believe it was marked AE 131J, that you yourself
19 had initially done review of the various pain management
20 offerings that had been raised with Mr. Al-Tamir, correct?

21 A. Yes, that's correct.

22 Q. And it was a comprehensive review?

23 A. Yes. Yes. To the best -- within the scope of the

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1 practice that I provide, yes.

2 Q. Okay. One of the things on that list that you noted
3 was a TENS unit, correct?

4 A. Yes.

5 Q. And you noted in AE 131J with respect to the TENS
6 unit, quote, two-channel worked - has one channel and doesn't
7 like. Can you -- do you know what you meant by that? Or can
8 you explain what you meant by that?

9 A. Right. So a TENS unit has different channels,
10 usually they come with different electrical pads. It's a
11 transcutaneous electrical nerve stimulator, so it has
12 different pads that plug into different channels. And he had,
13 the time that I evaluated him, he had one with one channel,
14 and he said that if you place it on one side, it -- maybe it
15 helps that side, but it makes the other side a little worse.

16 But at some point in the past, the physical therapist
17 had applied a two-channel TENS unit to him. Now, she has one
18 herself, the physical therapist, but it's in her stock. So
19 sometimes in the medical profession, we'll give a patient a
20 TENS unit to use on their own. So that's why I said we're
21 trying to acquire him a two-channel TENS.

22 Q. Okay. So the TENS unit that is currently available
23 to him is a one-channel unit?

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1 A. Correct. Correct.

2 Q. He indicated that when the one-channel unit was
3 tried, it caused him more pain because the application of
4 the -- of the electricity ----

5 A. Yes.

6 Q. ---- was uneven. But the two-channel TENS unit
7 worked, he indicated, right?

8 A. That's what he had told me.

9 Q. But he doesn't currently have access to that?

10 A. He does not currently have one.

11 Q. Okay. In the SMO report which you signed last
12 Wednesday, you addressed a discrepancy in a recent report,
13 right, regarding ----

14 A. Can you be more specific?

15 Q. Yes. You had noted in your December 26th SMO report
16 that there had been seven legal visits between November 9th
17 and December 26th?

18 A. Yes.

19 Q. The SMO report signed January 9th offered the reasons
20 for that discrepancy, right?

21 A. Yes.

22 Q. Okay. But you now admit that the information
23 initially offered with respect to seven legal visits in your

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1 testimony in that December 26th report was incorrect, right?

2 A. Right. Would you like me to elaborate or just answer
3 yes or no?

4 Q. Please elaborate.

5 A. So he -- there was a day where he had two legal
6 visits, and -- but I believe somewhere in there it said
7 something along the -- or movements. He did not have two
8 movements that day, he had one movement because it was two
9 legal visits in the same location on the same day. And then
10 another one that had been counted as a legal visit was
11 actually the final day of his commissions. So we just made
12 the distinction at that -- that that was not a legal visit; a
13 legal visit being not for commissions but to meet with legal
14 representation. And so ----

15 Q. And you mentioned in your testimony that when you
16 initially made that representation, you worked in -- you had
17 been working in conjunction with the ASJA ----

18 A. Yes.

19 Q. ---- to come up with a number of legal visits, right?

20 A. Yes.

21 Q. Okay. And also with respect to the December 26th
22 report, you noted ----

23 DDC [MS. HENSLER]: And, Your Honor, for the record, this

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1 is AE 099XXX Attachment B.

2 Q. You noted, quote -- in paragraph 6 -- For the recent
3 patient movements as noted above, we have given the patient a
4 single Percocet before the moves and one Valium after
5 completing the moves, end quote.

6 A. Yes.

7 Q. Now, would you be surprised if I told you that
8 members -- three members of the defense team, including
9 myself, were present in one of those legal visits and we
10 watched Mr. Al-Tamir during the visit be administered a second
11 Percocet?

12 A. I would not be surprised to -- to discover that
13 during a visit.

14 Q. During a visit?

15 A. Right.

16 Q. Okay. But why -- so the legal visit in question was
17 on December 15th, which is approximately 11 days before this
18 report was signed.

19 A. Okay.

20 Q. What would explain the discrepancy between, let's
21 say, a second Percocet being administered during a legal visit
22 and this representation in the report? Was it a
23 record-keeping -- some sort of disparity in record keeping?

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1 A. Can you read to me my exact words in the report?

2 Q. Yes. "For the recent patient movements as noted
3 above, we have given the patient a single Percocet before the
4 moves and one Valium after completing the moves. This has
5 worked well to control pain and spasms as evidenced by
6 continued good functional status and no acute worsening of
7 symptoms."

8 A. So my -- my statement was speaking in the general
9 sense, so what we typically do, and not getting into the
10 specific details of every single instance.

11 Q. Okay. So it was a general statement regarding what's
12 required before and after a move?

13 A. Well, what has -- what we've discovered has worked,
14 yeah.

15 Q. Okay. But in this particular instance, you
16 acknowledge that -- well, you acknowledge the possibility that
17 he may be given additional pain medication during the move,
18 and you may not have noted that specifically in your SMO
19 report?

20 A. Correct.

21 Q. Last week you testified with respect to -- on
22 Wednesday, and during that testimony you talked about the day
23 before, on Tuesday; and you noted that on Tuesday,

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1 January 8th, Mr. Al-Tamir refused an examination ----

2 A. Yes.

3 Q. ---- correct? And you testified that he refused you,
4 quote, Despite me requesting, saying, 'I would like to
5 evaluate you in the medical space. Would you please move,'
6 end quote.

7 A. Yes.

8 Q. When you said "in the medical space," you were
9 referring to a special area in Camp VII where medical
10 evaluations occur, correct?

11 A. Correct.

12 Q. And you were referring to the fact that you examine
13 him in that dedicated medical space?

14 A. What's the question exactly?

15 Q. You typically examine him in that dedicated medical
16 space?

17 A. So he was in a different location before, and that
18 was where I had previously examined him. Since -- since his
19 move, I've not examined him in the medical space of which you
20 speak.

21 Q. Okay. But you have invited him to the medical
22 space ----

23 A. Yes.

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1 Q. ---- for an examination?

2 A. Yes.

3 Q. Okay. And you understand that the move to the
4 medical space requires a special movement, meaning that it
5 requires that he be transported in a wheelchair in restraints,
6 correct?

7 A. Yes.

8 Q. Okay. And so on that day, he refused to be
9 transported to the medical space for the evaluation, right?

10 A. That's true.

11 Q. And you never offered him the possibility of
12 examining him in his cell, correct?

13 A. I did not. I'm not -- I'd have to consult with the
14 Detention Group whether that's a possibility.

15 Q. And are you aware that -- that prior SMOs have
16 conducted their evaluations of Mr. Al-Tamir in his cell in
17 Camp VII?

18 A. I was not, because that precedes my time. The whole
19 time I've been taking care of him, he has been in this other
20 location.

21 Q. So the practice since you've been in Camp VII, which
22 is since early November, has been that in order to be
23 evaluated, an individual must be transported in restraints in

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1 order to be evaluated, correct?

2 A. Yes.

3 Q. Excuse my -- my poor wording there.

4 January 9th was the day that Mr. Al-Tamir missed
5 court, right? Last Wednesday.

6 A. Yes.

7 Q. And you testified that on that day you went to the
8 door of his cell?

9 A. That morning, yes.

10 Q. Okay. And the military judge asked you ----

11 ATC [MR. SPENCER]: Your Honor, I apologize for
12 interrupting. All of this testimony was specific to the
13 question which the commission decided it did not need to reach
14 on voluntariness. This testimony was not for 131.

15 To the extent that the SMO's testimony this morning
16 was for the purpose of evaluating or further evaluating
17 details on the 131 series, the government objects as to
18 relevance.

19 MJ [LtCol LIBRETTO]: Okay. I understand your objection.
20 It's overruled.

21 However, Ms. Hensler, please move it along.

22 DDC [MS. HENSLER]: Okay.

23 Q. And the military judge asked you on that day, quote,

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1 From your assessment, were you able to detect whether he was
2 limited in movement any way -- in any way.

3 And you responded, "And he was able. I witnessed
4 that he sat up to talk to me. He sat up quickly. You know,
5 it didn't take him a lot of effort to sit up. He sat up
6 quickly and started to talk to me."

7 Do you recall that testimony?

8 A. I do.

9 Q. And -- but you're aware that Mr. Al-Tamir has a
10 handrail next to his bed, right?

11 A. He does.

12 Q. Okay. And this is one of the accommodations which
13 the camp put in place to -- one of the medical accommodations
14 to permit him to move more easily in his cell, right?

15 A. Yes.

16 Q. Okay. And so despite the fact that he's had four
17 spinal operations, with this accommodation he's able to pull
18 himself up, right?

19 A. Yes.

20 Q. Okay. And that's different than a spontaneous
21 sit-up, for instance ----

22 A. It is.

23 Q. ---- with no assistance. Okay.

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1 And last week you also testified about some other
2 accommodations. You testified specifically that Mr. Al-Tamir
3 had requested, quote, nonskid strips in his shower?

4 A. Yes.

5 Q. Okay. And he had done that because the floor of the
6 shower was slippery and uncomfortable for his feet given his
7 neuropathy?

8 A. Yes.

9 Q. And you testified that, quote, The metal flooring of
10 the shower was uncomfortable, so we put in these nonskid
11 strips?

12 A. Yes.

13 Q. Have you seen those nonskid strips?

14 A. I have not seen them as they've been applied in his
15 cell. We have put them in other places for similar reasons,
16 so I know what they look like.

17 Q. Okay. So would it surprise you to hear that those
18 nonskid strips were never actually put in the shower?

19 A. I was told that they were.

20 Q. Okay. And so that leads me to ask: Have you done a
21 physical examination of the accommodations which have been
22 made in Mr. Al-Tamir's cell?

23 A. So I did. It was maybe the day or two before he

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1 moved back in. So they have been in the process of upgrading,
2 and I have asked the camp leadership to fill me in on how --
3 how we've done as far as fulfilling the needs for
4 accommodations for him, but I haven't inspected every
5 single -- every single modification that they've made, so no.

6 Q. Okay. When was the last time that you -- when, if
7 ever, have you done a physical examination of his cell?

8 A. It was -- it was approximately two days before he
9 moved out there, approximately, but it was within the week
10 before he moved back to Camp VII.

11 Q. Okay. And the date of his move was December 24th,
12 correct?

13 A. That's correct.

14 Q. And you represented in the SMO report dated December
15 26th that -- that you had done an examination of Mr. Al-Tamir
16 on that day, right?

17 A. The 24th?

18 Q. Yes.

19 A. Yes.

20 Q. Now, when you meet with Mr. Al-Tamir, do you ever see
21 him taking -- jotting down little notes?

22 A. Do I see him jotting down little notes?

23 Q. Jotting down notes?

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1 A. No, I have not noticed that.

2 Q. Would it surprise you to hear that -- that per his
3 records, you didn't conduct an evaluation of him on December
4 24th?

5 A. That was -- it was -- well, would it surprise me. So
6 is the answer would it surprise me or is the answer did it
7 happen?

8 Q. Did it happen?

9 A. Oh. Yes, I did examine him.

10 Q. Okay. In person?

11 A. Yes, in person.

12 Q. Okay. And ----

13 MJ [LtCol LIBRETTO]: Ms. Hensler, we are now getting
14 farther and farther away from the purposes of AE 131.

15 DDC [MS. HENSLER]: Okay. Your Honor, given that we're at
16 a half hour, would this be a good time to take a movement
17 break for Mr. Al-Tamir?

18 MJ [LtCol LIBRETTO]: We're not there quite yet. I'm
19 going to give you five more minutes to get you through the
20 testimony that you'd like to get through.

21 Q. Okay. With respect to your client rapport, this is
22 an important part of your job as a doctor, right?

23 A. Yes.

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1 Q. Okay. Because is it one of your core medical
2 principles to listen to your patient?

3 A. Yes.

4 Q. Okay. And when you were talking about the
5 accommodations afforded to Mr. Al-Tamir last week, do you
6 recall saying, quote, I think it's going to be an ongoing
7 process of trying to have a dialogue with the patient and
8 figure out what's going to best accommodate him?

9 A. Yes.

10 Q. Okay. Have you been able to develop a rapport with
11 Mr. Al-Tamir?

12 A. Prior to the last week, we had -- we had a reasonable
13 rapport. He -- last week was the first time that he had
14 basically refused to see me. Prior to that, we have been able
15 to sit down and talk face to face for, you know, 30 minutes to
16 an hour without any issues.

17 Q. Okay. And the -- you weren't here, Doctor, but the
18 neurosurgeon testified that Mr. Al-Tamir was always forthright
19 with him and he spoke with candor about his medical care.
20 Setting aside the past week, would you agree with that
21 assessment?

22 A. Yeah. I -- sometimes he -- he will generally answer
23 questions. Sometimes he will -- if we bring up a topic, he

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1 will evade it or say that that's not what he wants to talk
2 about right now. But yeah, I think as a general statement, I
3 would say he's generally forthright.

4 Q. He's generally forthright.

5 And -- but in the last week, you noted he's back in
6 Camp VII, and this was the first time you had to invite him
7 out of his cell via transport in order to evaluate him, right?

8 A. I'm -- so can you rephrase the question so I
9 understand what you're asking?

10 Q. It's okay. Strike that. I think we've -- I think
11 we've covered it.

12 You talked a little bit last week about your
13 examination of Mr. Al-Tamir after his -- the last day of his
14 November court hearing, on November 9th. Do you recall that
15 last week?

16 A. Talking about the examination on the last day of his
17 previous commissions?

18 Q. Yes.

19 A. Yes.

20 Q. And you represented that that was the last time --
21 that was, excuse me, the first time that you examined him
22 since you arrived at Camp VII?

23 A. Face to face, yes. Yes.

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1 Q. And you testified that initially in September you
2 arrived to JTF, and you were the medical doctor overseeing the
3 lower-value detainees, correct?

4 A. That's true.

5 Q. But then in November, you assumed care of the
6 high-value detainees when the other SMO had a medical
7 emergency, right?

8 A. That's true.

9 Q. And you testified that you anticipated this would
10 be -- this was a nine-month assignment?

11 A. I have a nine-month assignment.

12 Q. Okay. Which means that you would -- your assignment
13 ends in May or June or so?

14 A. That's true.

15 Q. Okay. I understand there was another doctor with you
16 the last time that you examined Mr. Al-Tamir, correct?

17 A. We have a psychiatrist in Camp VII. I think the
18 psychiatrist accompanied me.

19 Q. Okay. That's --

20 A. I think that's what we're talking about.

21 Q. So as far as you know, there's no new SMO coming.

22 A. No, there is; there is a new SMO. The Army has
23 identified and dispatched a new SMO. So we have a new medical

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1 provider here now.

2 Q. Okay. And that is the person who will be taking over
3 for you before ----

4 A. So we have ----

5 MJ [LtCol LIBRETTO]: Doctor, I'm sorry. That was five
6 minutes, Ms. Hensler. We're going to take a recess. At the
7 close of the recess, I'll give the government -- or when we
8 come back from the recess, Government, you will have an
9 opportunity to follow up with any questions that you might
10 have, and then we're moving on to substantive issues at hand.

11 The commission is in recess.

12 [The R.M.C. 803 session recessed at 0932, 14 January 2019.]

13 [The R.M.C. 803 session was called to order at 0939,
14 14 January 2019.]

15 MJ [LtCol LIBRETTO]: This commission will come back to
16 order. All parties present when the commission recessed are
17 again present. The senior medical officer remains on the
18 witness stand.

19 Mr. Spencer.

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

21 **CROSS-EXAMINATION**

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

23 Q. Doctor, I'll remind you you are still under oath.

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1 A. Yes.

2 Q. Two questions, sir.

3 What's the timeline for getting the two-channel TENS
4 unit, one made available to the accused full-time?

5 A. Normal supply chains take about three -- three weeks
6 to get something on island once we've identified it. So I'd
7 say once we identify the right TENS unit and talk to my
8 physical therapist, we could have it here within a month.

9 Q. And how long ago did you begin that process?

10 A. Well, we -- we talked about it a while ago. I'll be
11 honest, it hasn't been the first priority as far as his
12 medical care because -- because, in my experience with TENS
13 units, not related to this case, but they -- they don't
14 generally help, not in the long term. They help maybe in the
15 short term. But since it's been brought to my attention, you
16 know, that -- it reminded me that it did help him, we can
17 certainly prioritize it. It will probably be within a month
18 we'll have it.

19 I have talked to the physical therapist and the one
20 that she has is hers. She doesn't have one we can give to him
21 for home use.

22 Q. Understood. Finally, sir, the shortage of pain
23 management providers in -- on the active duty side, is that

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1 what -- is that why active duty service members who need pain
2 management generally go to or are referred to family medicine
3 or internal medicine for pain management?

4 A. I -- it depends. It depends on the location where
5 you are in, you know, the United States or the military health
6 care system. Some places are better stocked -- stocked for
7 pain management specialists than others.

8 We use the term "pain management specialist," and in
9 reality it's -- there are two different kinds of pain
10 management specialists. So there are interventionalists, and
11 interventionalists offer primarily injections, steroid
12 injections, epidural steroid injections; those are the
13 anesthesiologists. Those we can usually -- we can usually
14 find, for example, where I practice in a normal -- my normal
15 practice in a military treatment facility, those are
16 available. That's what we have been working to get to see if
17 some type of an injection would help. Those pain management
18 specialists will often consult on the medical plan of care as
19 well with the medicines that we've tried and what's working
20 and what hasn't worked.

21 There are -- there is a smaller subset of pain
22 management specialists that are typically primary care
23 doctors, family medicine or internal medicine or any of a

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1 number of other specialties that have done a fellowship in
2 pain management that mostly focus on medical management of
3 care. Typically, those are the folks that take care of
4 patients on chronic opiate use, that have been on large doses
5 of opiates for a long period of time. What we're seeking to
6 get is an interventionalist here to see if that person has a
7 procedure that he can offer the defendant or if he has any
8 input as far as the medical plan of care.

9 ATC [MR. SPENCER]: Understood, sir. Thank you. I have
10 no further questions.

11 MJ [LtCol LIBRETTO]: Doctor, thank you very much for
12 coming back into the commission this morning to provide
13 testimony. We have no further questions for you. You may
14 step down and return to your normal duties. Thank you.

15 WIT: Thank you, Your Honor.

16 [The witness was excused and withdrew from the courtroom.]

17 MJ [LtCol LIBRETTO]: Moving on to the first substantive
18 matter that was proposed be taken up by the parties, that is
19 AE 121. In AE 121, the defense requested the commission
20 compel funding of a mitigation expert in the field of
21 neurosurgery. The government responded in AE 121A and had no
22 objection on the basis that the expert is granted and utilized
23 only for mitigation purposes. Defense replied in AE 121B.

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1 Defense, do you have any additional argument to
2 present outside of your written pleading?

3 DC [LT ASKAR]: Briefly, Your Honor. Good morning, Your
4 Honor.

5 MJ [LtCol LIBRETTO]: Good morning.

6 DC [LT ASKAR]: Lieutenant Askar on behalf of
7 Mr. Al-Tamir.

8 MJ [LtCol LIBRETTO]: Good morning.

9 DC [LT ASKAR]: We appreciate Your Honor's summary. That
10 is correct. The government has acknowledged that Mr. Al-Tamir
11 is entitled to the services of a mitigation expert in the
12 field of neurosurgery. We've identified Colonel McCafferty
13 and we believe that he would be able to, under every standard
14 applicable to this tribunal, assist Mr. Al-Tamir in preparing
15 for mitigation.

16 I think the key indicator here, the key point of
17 contention here, Your Honor, is on the topic of timing. And I
18 think one of the things that I'd like to direct the
19 commission's -- the commission's attention to is the testimony
20 of the senior medical officer this past Wednesday. On
21 Wednesday, the senior medical officer testified with respect
22 to continuity of care, Your Honor -- and I wrote it down
23 because I wanted to make sure I remembered it.

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1 He said continuity of care is important because, when
2 you have handoffs, handoffs in the medical community are when
3 errors happen. The SMO testified, Your Honor, that a lot of
4 information is lost in all of the turnover. And that when a
5 person who knows the patient better -- excuse me, that a
6 person who knows the patient better can provide better care
7 within the context and history of that patient.

8 The exact same thing holds true for a person
9 assessing that patient, Your Honor. So the quicker that we
10 can get Colonel McCafferty on board, the faster he can begin
11 to familiarize himself with thousands of pages of medical
12 discovery, the sooner he's going to be able to examine
13 Mr. Al-Tamir, the more useful he's going to be in assessing
14 all of the things appropriate for him to assess within the
15 confines of Rule 1001(c) of the Military Commissions Manual
16 with respect to extenuation and mitigation.

17 Your Honor, it's been made abundantly clear that
18 judicial efficiency is going to be difficult to come by in a
19 lot of these situations moving forward; that there are going
20 to be inevitable delays. If we don't have someone on board as
21 quickly as possible, Your Honor, all that's going to mean is
22 that it's going to take longer when we finally do have a
23 mitigation expert for him to be able to understand all of the

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1 information that he's going to need to understand to provide
2 the defense a meaningful opportunity to present that to
3 members, to provide the defense a meaningful opportunity to
4 understand whether or not Mr. Al-Tamir's ever going to be able
5 to really walk again.

6 MJ [LtCol LIBRETTO]: Has the defense reached out to
7 Colonel McCafferty in the recent past to ascertain his
8 availability -- if the -- if he was to be assigned at this
9 time?

10 DC [LT ASKAR]: Yes, Your Honor. And he would be capable
11 of -- we would have to -- obviously, there would be some cost
12 in terms of temporary duty assignments from San Antonio where
13 he currently is stationed, Your Honor.

14 MJ [LtCol LIBRETTO]: I'm not talking about costs. I'm
15 talking about his availability from his perspective as to
16 whether or not he can assist the defense moving forward for
17 the -- in order to provide the expert assistance for which you
18 request him.

19 DC [LT ASKAR]: Yes, Your Honor. And he is able to, Your
20 Honor.

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

22 DC [LT ASKAR]: Your Honor, the other thing that I think
23 is important to note here is that Colonel McCafferty has a

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1 Secret security clearance. He has the exact same security
2 clearance that the neurosurgeon who worked with Mr. Al-Tamir
3 has. He has the exact same security clearance that the senior
4 medical officer who just testified has.

5 He would be able to -- assuming the same rules apply
6 to everyone, he would be able to examine Mr. Al-Tamir and
7 present to us a deeper understanding that we can provide to
8 members as to whether or not he's going to have to live with
9 the excruciating muscle spasms that make it difficult and
10 painful for him to breathe, whether or not there's going to be
11 any relief in the future, whether or not he's going to spend
12 the rest of his life having to deal with this ----

13 MJ [LtCol LIBRETTO]: I understand the purposes for which
14 you are requesting him, Lieutenant Askar, and I appreciate
15 your argument.

16 For purposes of efficiency, let me turn it over to
17 the government briefly to understand if they -- if their
18 position has changed at all or if they believe that now is the
19 appropriate time to grant the expert assistance that they
20 conceded is relevant and necessary.

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

22 ATC [MR. SPENCER]: Good morning, sir. Mr. Spencer for
23 the government.

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1 MJ [LtCol LIBRETTO]: Good morning.

2 ATC [MR. SPENCER]: Your Honor, as the commission
3 correctly summarized, the government has no opposition to the
4 defense obtaining this particular witness as a consultant for
5 mitigation and extenuation.

6 MJ [LtCol LIBRETTO]: Have you reached out to
7 Colonel McCafferty as the government and determined whether
8 he's available to assist the defense in this capacity?

9 ATC [MR. SPENCER]: We have not, sir, only because there
10 appears to have already been conversations with the defense on
11 this. Whether he's done that in a sort of pro bono capacity,
12 even though he's not yet assigned, the government didn't want
13 to pierce or interfere in any way with the privilege that
14 would attach to an expert consultant.

15 The problem with this, Your Honor, as the government
16 details in its motion -- or its response is that this is a
17 process foul really by the defense, not necessarily an
18 intentional one. But as it played out, it was submitted
19 ex parte with really no valid basis for an ex parte submission
20 to the convening authority; and in the initial request to the
21 convening authority, it barely mentioned sentencing, focussed
22 a lot on other things not related to sentencing.

23 This -- not this defense team, but the accused's

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1 defense has made repeated attempts or references to obtaining
2 an expert to oversee his current medical care, which the
3 government contends is clearly not appropriate and not
4 something that this witness should be -- or this consultant,
5 the requested consultant, should be permitted to do.

6 In the sentencing context, had the government been
7 allowed to weigh in on the defense's request to the convening
8 authority, the government would have attempted to find an
9 adequate substitute very similar to the person that they've
10 proffered.

11 So I think part of the problem with this is the way
12 that procedurally this occurred. The government's position
13 now is, while the government doesn't object to this person,
14 Colonel McCafferty, being assigned to the defense, the proper
15 way really for this to happen is for the defense to go back,
16 submit a proper request to the convening authority limited to
17 mitigation and extenuation, which is what should have been
18 done in the first place, not the much broader request that was
19 denied and then the defense sort of tailored their needs to
20 something they thought the commission might find more
21 palatable.

22 The process foul -- the proper process would be for
23 them to go back and ask the narrow basis for the witness -- or

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1 for the consultant, excuse me, and then the convening
2 authority could properly draft the contract and properly do
3 all of those things; otherwise, the commission is left to do
4 things that it shouldn't -- that shouldn't be before the
5 commission at this point.

6 Had the defense properly complied with the procedure,
7 we wouldn't be having this discussion, sir. But as a general
8 concept, the government does not have an objection to this
9 witness -- or this consultant being assigned exclusively for
10 extenuation and mitigation.

11 MJ [LtCol LIBRETTO]: Okay. Mr. Spencer, I understand
12 your position on the way in which the focus of the request was
13 tailored from what it originally was to what it's now being
14 presented to the commission.

15 What I want to avoid is this issue being litigated at
16 a future session. So speaking on behalf of the government, is
17 it the government's position that, if the defense were to
18 submit a supplemental request to the convening authority,
19 tailoring it to its issues similar to that which was presented
20 in the motion, that the government would either grant
21 Colonel McCafferty or an adequate substitute that could assist
22 the defense from this point forward?

23 ATC [MR. SPENCER]: Sir, presuming that that request to

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1 the convening authority was not ex parte, what typically would
2 happen is the convening authority would reach out to the
3 prosecution, the government, asking for -- to endorse the
4 request.

5 It's the government's position that we would
6 favorably endorse the request for Colonel McCafferty because
7 we believe he is an adequate substitute to Dr. Cobey, the
8 previous civilian expert that the defense requested.

9 Now, whether the convening authority would ignore
10 our -- the government's -- the prosecution's endorsement, I
11 don't know. That's not something that typically happens
12 either at the military commissions or in military practice;
13 but ultimately, were the request to be resubmitted to the
14 convening authority, it would be the convening authority's
15 responsibility to either grant or deny that request. I'm
16 certain that the commission could encourage the convening
17 authority in such a way that we would likely avoid further
18 litigation on this matter.

19 MJ [LtCol LIBRETTO]: Okay. I understand your position.
20 I believe I have in my head what the commission is going to
21 do. I'll take both parties' positions under advisement, and I
22 will be issuing a written ruling here in the near future with
23 respect to the defense motion.

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

2 MJ [LtCol LIBRETTO]: Thank you.

3 It's the parties' desire to move on to AE 117. In
4 AE 117, the defense requests that the commission dismiss
5 Charge V due to lack of jurisdiction. The government opposes
6 the defense motion as set forth in AE 117A. The defense
7 replied in AE 117B.

8 The defense had previously filed AEs 025 and 028,
9 which in AE 119C, they stated they have been subsumed by AE
10 117 motion. Accordingly, all of these AEs will be addressed
11 during argument on AE 117.

12 With that, does the defense desire to supplement
13 their written pleadings with oral argument on this -- on these
14 motions collectively?

15 DC [LT BALL]: We do, Your Honor.

16 MJ [LtCol LIBRETTO]: Please proceed.

17 DC [LT BALL]: Your Honor, good morning.

18 MJ [LtCol LIBRETTO]: Good morning.

19 DC [LT BALL]: As we pointed out in our brief in AE 117,
20 we point to the fact that the Supreme Court had held two
21 things must be true in order to try a law of war tribunal.
22 And the first is that the offense must be recognized as a
23 violation of the laws of war; and secondly, it must be a class

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1 of offense constitutionally triable only by a jury.

2 A conspiracy has historically not been an offense
3 against the law of nations which pertains to conduct of war.
4 Conspiracy has historically been an infamous crime, as we
5 point out in our brief. It has long been established that
6 Congress' authority to codify the violations of the law of war
7 come from Article I, the Define and Punish Clause. And we've
8 cited Yamashita, Quirin, and Hamdan.

9 Now, in Hamdan, the court there pointed to
10 Colonel Winthrop, who is noted as the Blackstone of --
11 the Blackstone of military commissions. And there he clearly
12 points out that Congress' authority to codify the laws -- to
13 define the laws of nation comes from the Define and Punish
14 Clause. As we point out, this is the Define and Punish
15 Clause, not the create or declare new laws that we see in
16 Charge V today.

17 The Constitutional Convention also wanted Congress to
18 choose which international norms to incorporate. And the
19 Supreme Court has previously evaluated offenses charged in
20 military tribunals to make sure that these offenses are, in
21 fact, offenses against the laws of nations.

22 MJ [LtCol LIBRETTO]: Lieutenant Ball, please slow down a
23 little bit for the court reporters. Thank you.

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1 DC [LT BALL]: Yes, sir.

2 As I pointed out earlier, conspiracy, notwithstanding
3 the points that we've made that it is not a violation, but it
4 is generally accepted as an international war offense
5 historically.

6 I'd point to the Nuremburg trials. We did in that
7 situation bring a conspiracy or a common plan to commit
8 international crimes. It was controversial then, and it is
9 still controversial today, the fact that we're bringing these
10 conspiracy charges. However, historically, when those
11 conspiracy charges were brought, it was -- it was -- it was
12 only as a theory of liability, not as a separate crime as we
13 see it today.

14 Now, we anticipate -- and we saw in the government's
15 response in 117A that the -- they will point to the Bahlul
16 case. We do take note -- or we would like to make note that
17 the Bahlul case does not hold to this court. It doesn't have
18 any application to this case. That was an appellate
19 procedure, and it was a plain error issue.

20 In this situation, we have the Supreme Court rulings
21 in Quirin and Yamashita, both of which point that the law of
22 war military commission stems from Congress' power under the
23 Define and Punish Clause, and that it really looked to

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1 international law and not to domestic U.S. law and whether
2 conspiracy is a valid international law crime.

3 We believe that Judge Kavanaugh in the Bahlul case,
4 who made the decision as a plurality, not necessarily as a
5 majority but as a plurality, he only suggests that military
6 commissions are constitutionally permitted for international
7 law of war offenses; however, he is not acting for a full
8 majority in that case.

9 Now, there are very different type of military
10 commissions. The military commissions vary in this situation.
11 We have a law of war military commission; therefore, we must
12 look to the Define and Punish Clause. And it makes it very
13 clear that the offenses must be violations of the law of war.
14 Hamdan as well points to the fact that conspiracy is not a law
15 of war crime as well.

16 I'd like to point out that the government makes
17 several errors in its argument. The government argues that
18 the Necessary and Proper Clause allows Congress ample basis to
19 make conspiracies to commit war crimes triable by military
20 commissions. The problem with this is that it would require
21 Congress to enact and implement a law that is
22 unconstitutional. Congress is still limited by what it can
23 act and do within the limitations of the Constitution. And

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1 the Define and Punish Clause is clear; it is to define and
2 punish piracies and felonies committed on the high seas and
3 offenses against the law of nations.

4 The Supreme Court has previously rejected legislation
5 enacted by Congress that was unconstitutional. We look at two
6 situations and two cases. The Reid case, which we cite in our
7 117B motion, as well as the Quarles v. Toth case, again cited
8 in our 117B motion.

9 In those situations where the court, the Supreme
10 Court looked at Congress' enactment of legislation that was
11 outside of the Define -- outside of the war clause, we see
12 that the Supreme Court has turned down or estopped that type
13 of legislation as unconstitutional. In the Reid case, spouses
14 living with servicemembers, the Supreme Court held that the
15 UCMJ did not apply to spouses. In the Quarles case, the UCMJ
16 did not apply to former servicemembers.

17 This is backed up in the Quirin case, which again
18 we've quoted in 117B, quoting, Sanctioning within
19 constitutional limitations, the jurisdiction of military
20 commissions is founded within its authority to define and
21 punish offenses against the law of nations.

22 I'd like to point out another issue with the
23 government's brief. They do point to the U.S. common law of

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1 war that we've seen in Hamdan that what the government --
2 within Hamdan, as the court there quoted, what the government
3 calls U.S. common law of war is not the international law of
4 war. There is no such thing as a U.S. common law of war. We
5 cannot apply that to the international theater.

6 The U.S. precedence may inform the contents of the
7 law of war, but we alone, the United States legal system, we
8 do not dictate or we do not restructure or reorder or create
9 or declare what is in the international law of war. We may
10 lead, but we need to take stock of our international neighbors
11 and understand what laws apply. Conspiracy is not generally
12 recognized as an international law of war.

13 The government also pointed out that historically the
14 commissions, they pointed to the Lincoln cases, the Nuremburg
15 cases. Again, as I pointed out very briefly earlier, both of
16 these ended with crimes, substantial crimes, not just
17 theoretical crimes, which is what we have today. The
18 Nuremburg explicitly rejected conspiracy as a standalone
19 crime. And the Civil War, the precedential value was again
20 limited, and that's pointed out in Hamdan as well.

21 Your Honor, in conclusion, just to point out that
22 conspiracy is not a defense against the law of nations. We,
23 therefore, request that Charge V be dismissed due to lack of

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1 jurisdiction. Thank you.

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

3 Let's take a brief five-minute recess. Court's --
4 commission's in recess.

5 [The R.M.C. 803 session recessed at 1003, 14 January 2019.]

6 [The R.M.C. 803 session was called to order at 1010,
7 14 January 2019.]

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

11 Does the government desire argument on AE 117?

12 DTC [CDR FLYNN]: Yes, Your Honor.

13 MJ [LtCol LIBRETTO]: Please proceed.

14 DTC [CDR FLYNN]: Good morning, Your Honor. Commander
15 Kevin Flynn for the government.

16 MJ [LtCol LIBRETTO]: Good morning.

17 DTC [CDR FLYNN]: Before beginning my presentation, I'd
18 like to request the commission's permission to use a
19 demonstrative aid, as I think it will assist and explain the
20 government's position.

21 MJ [LtCol LIBRETTO]: Go ahead.

22 DTC [CDR FLYNN]: I believe it's marked AE 117C. It's
23 been provided to the defense.

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1 MJ [LtCol LIBRETTO]: Very well.

2 DTC [CDR FLYNN]: The first thing I'd like to do, Your
3 Honor, is to invite your attention to the diagram, so if I
4 could publish that?

5 MJ [LtCol LIBRETTO]: Please do.

6 I've got it here.

7 DTC [CDR FLYNN]: Okay. Your Honor, we can -- if it
8 doesn't come up here, I can -- I just wanted to explain it to
9 you real quick.

10 As you can see from the diagram here, what we did was
11 to put all of the defense arguments in AE 117 in the yellow
12 triangles. And as you can see from the diagram, all of these
13 triangles lead to the same place -- lead to the same place,
14 which is basically nowhere.

15 No matter what argument it wants to make, the defense
16 cannot win on this issue. And because of the fact ----

17 MJ [LtCol LIBRETTO]: Before you go into the substance of
18 this slide, can we have it published to the big screen so
19 everybody is -- can see it?

20 DTC [CDR FLYNN]: It's on my screen, Your Honor.

21 MJ [LtCol LIBRETTO]: There we go.

22 DTC [CDR FLYNN]: Okay.

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

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1 DTC [CDR FLYNN]: And what I was saying, Your Honor, is
2 basically all of these lead to the same place. And because of
3 that, we're asking that you deny the defense motion in AE 117,
4 AE 025, AE 028, and for that matter AE 085.

5 Your Honor, the dilemma facing the defense is this:
6 Every single one of its arguments with respect to all of those
7 motions that I just mentioned rely on the assertion that the
8 Define and Punish Clause is the exclusive source of Congress'
9 authority when it comes to military commissions. If that
10 foundational proposition isn't true, then you don't even get
11 to their other arguments in these motions, which are that
12 stand-alone conspiracy and inchoate conspiracy are not
13 recognized under international law.

14 What I'd like to do, Your Honor, is just concentrate
15 on AE 117; however, if you have any questions on 025, 028, or
16 085 for that matter, I'll try to answer those as best I can.

17 Back to the problem, Your Honor. The Define -- the
18 argument that the Define and Punish Clause is the sole and
19 exclusive authority for Congress with respect to military
20 commissions has been rejected by Bahlul III. More
21 importantly, the United States Supreme Court has considered
22 this exact argument on at least four occasions that we could
23 find and have consistently rejected it as well. Specifically,

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1 I would invite the commission's attention to the Hamdan case,
2 the Madsen case, the Yamashita case, and the Quirin cases,
3 which are all cited in our response.

4 Now, I would like to spend a few minutes on
5 Bahlul III. It's discussed at length in our brief, so I'm not
6 going to spend a lot of time on it. I don't want to repeat
7 things, but just a few points about that. As you know, Bahlul
8 has a complicated history. It was back up and down with the
9 Superior Court -- our Superior Court. I wasn't planning on
10 going into a deep dive with respect to that. I will say this,
11 it came out in October of 2016. It was a six-to-three
12 decision upholding the conspiracy charge in that case.

13 Now, the plurality opinion phrased this issue this
14 way, Your Honor, quote, The premise of Bahlul's Article I
15 argument is that Congress' sole source of constitutional
16 authority to make offenses triable by military commission is
17 the Define and Punish Clause of Article I. And that's, of
18 course, the same argument being made today by the defense.

19 Now, there's quite a few interesting passages in
20 Bahlul III. I think we've quoted a few of them in our
21 response, I'm not going to go through all of those. I would
22 like to invite the commission's attention to one passage that
23 is directly on point, and I believe -- here it is right here,

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1 Your Honor. And it says, this is a quote, page 761 of the
2 opinion, "Regardless of the scope of the Define and Punish
3 Clause, an issue we do not decide, Congress' Article I
4 authority to establish the military commissions, including its
5 authority to determine which crimes may be tried by military
6 commissions, does not derive exclusively from that clause."

7 Your Honor, you can't get much clearer than that.
8 The argument that the Define and Punish Clause is the sole and
9 exclusive source of Congress' authority has been rejected by
10 at least four of the six judges in the majority.

11 And it's important also to point out that Bahlul III
12 also rejected this Article III argument that's being made by
13 the defense both in AE 117 and AE 028, and discussion of that
14 particular issue is found on pages 768 to 770 of the
15 Bahlul III decision. The Article III argument, Your Honor,
16 was also rejected by both of the concurring opinions. So all
17 six of the majority -- all six of the judges in the majority
18 rejected the exact same argument being made by the defense in
19 AE 028 and 117.

20 One other point, Your Honor, with respect to this
21 Article III argument. The government is unaware of any United
22 States court ever ruling that the jury trial protections of
23 the Constitution are applicable to military commissions. This

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1 same argument is raised in the Quirin case and rejected. Your
2 Honor, neither you nor I nor any military member on the
3 government or the defense team have a right to a trial by
4 jury. That would be an absurd result to say the least, if an
5 alien unprivileged enemy belligerent has a right to a jury but
6 a United States military member does not.

7 The last thing I will say about Bahlul III is this:
8 The defense obviously wants to downplay the significance of
9 Bahlul III. I would be doing the exact same thing if I was in
10 their shoes. But the fact of the matter is six out of the
11 nine judges who heard the case voted to affirm the defense --
12 the defendant's conspiracy conviction. More importantly, the
13 Supreme Court denied cert in this case on October 10th, 2017,
14 so this case is controlling law until it's overruled.

15 Now, the Supreme Court likewise has said on a number
16 of occasions that the Define and Punish Clause is not the only
17 source of authority for Congress. We cited a number of those
18 cases in our response. I won't go through those, Your Honor;
19 however, I would like to invite the court's attention to the
20 Hamdan case, which is 548 U.S. 557, also known as Hamdan I,
21 came out in 2006, and the Yamashita case, which was decided in
22 1945. That cite, Your Honor, is 327 U.S. 1.

23 Now, in Hamdan I, it's -- the Supreme Court expressly

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1 recognized that Congress' constitutional authority to define
2 offenses subject to trial by military commission is derived
3 not only from the Define and Punish Clause, but also from its
4 constitutional war powers. This is stated, Your Honor, at
5 page 591 and 592 of that decision. The court in a note cites
6 Colonel William Winthrop, who says that the power for military
7 commissions comes from the war powers. It's that clear.
8 Again, pretty clear language that the Define and Punish Clause
9 is not the sole and exclusive authority for Congress.

10 Now, with respect to Yamashita -- I'm actually very
11 surprised that the defense cited Yamashita because it says the
12 exact opposite of what the defense needs it to say. On
13 page 11 of that opinion, Your Honor, court states, quote, the
14 war power from which the commission derives its existence.
15 Again, pretty clear language.

16 So what does this all mean, Your Honor? Well, it
17 means that not only has a plurality of our direct superior
18 court rejected the exact same arguments being made by the
19 defense today, but the Supreme Court has indicated in at least
20 four cases that the Define and Punish Clause is not the sole
21 source of Congress' authority. That being the case, that
22 should end the inquiry. In other words, if the Define and
23 Punish Clause isn't the sole source of Congress' authority,

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1 then this argument that Congress is constrained by
2 international law falls by the wayside.

3 At this point, Your Honor, I'd like to direct the
4 commission's attention back to the diagram. The foundational
5 argument by the defense is false, and it's false because
6 Bahlul III says so, and it's false because those four Supreme
7 Court cases also say that. So it's the government's position,
8 Your Honor, that the defense's argument should be rejected,
9 and that would end the inquiry at this point.

10 I would just like for a few minutes to play this out,
11 if I could. Even if you would find, Your Honor, that the
12 Define and Punish Clause is the sole source of Congress'
13 authority, the next question that you would have to ask is,
14 does that clause limit Congress to codifying only crimes
15 recognized internationally.

16 That specific question has also been answered by
17 Bahlul III where the plurality pointed to, quote, The deeply
18 rooted history of U.S. military commission trials of the
19 offense of conspiracy, close quote, including the two most
20 important military commissions in the United States' history,
21 the trials of the Lincoln conspirators and the Nazi saboteurs.
22 That's found on page 766 of the Bahlul III opinion, Your
23 Honor.

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1 According to Bahlul III, even if the Define and
2 Punish Clause is the sole source of Congress' authority,
3 Congress looks to the law of war, which includes not only
4 international law, but it includes U.S. law of war experiences
5 in the practice of our wartime tribunals.

6 One more point on that, Your Honor, is I think -- and
7 I believe Judge Henderson has a good discussion of this in her
8 concurrence in Bahlul II; that cite is 792 F.3d at 44-45. She
9 talks about the debate at the Constitutional Convention
10 regarding the Define and Punish Clause, and we discussed this
11 just briefly in our response.

12 The only thing I will say, Your Honor, about that is
13 it was ultimately determined that Congress was not to
14 reflexively follow other nations' leads in formulating
15 offenses, but instead to contribute to their formulation. The
16 bottom line on this point is it is clear that the law of war
17 or the law of nations includes not only international law, but
18 also U.S. law of war experiences.

19 And turning back to the diagram, Your Honor, we're
20 here. The Define and Punish Clause limits Congress to
21 codifying only international crimes is false. It's false
22 because Bahlul III says it's false. It's false because Quirin
23 says that. And it's false because the Constitutional

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1 Convention says that.

2 That being the case, this commission doesn't even
3 have to get to the defense's other two arguments, which are,
4 stand-alone conspiracy and inchoate conspiracy have never been
5 historically recognized as an international war crime.

6 For the sake of argument, Your Honor, and to make a
7 record, just I'd like to spend a few of my final minutes
8 addressing these issues. Because it's clear from their
9 original motion, AE 117, and the reply that the defense is
10 confused on these two concepts.

11 Just to be clear, it's the government's position that
12 the commission should only address these issues if it
13 determines that the Define and Punish Clause is Congress' sole
14 authority with respect to commissions, and -- and that
15 international law does not include the experiences and
16 practices of U.S. wartime tribunals.

17 Your Honor, I'm sure you're aware an inchoate
18 conspiracy typically requires proof of only two elements: An
19 agreement between two or more persons and intent to achieve a
20 certain objective. Does not require an overt act. More
21 importantly, it does not require a completed crime.

22 A stand-alone conspiracy just means a separate
23 charge, like Charge V in our case. There are numerous

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1 stand-alone conspiracy statutes, both internationally and in
2 the United States. International law has recognized and
3 continues to recognize conspiracy as a standalone offense,
4 both the ICTY and the ICTR statutes contain stand-alone
5 conspiracy charges. U.S. -- United States Code contains
6 dozens of stand-alone conspiracy statutes. In addition to
7 being a stand-alone crime, conspiracy can also be a theory of
8 liability. This is the so-called Pinkerton liability known as
9 JCE in international law.

10 Now, it is apparent, Your Honor, when you're reading
11 AE 117 that the defense has conflated the terms "inchoate
12 conspiracy" and "stand-alone conspiracy," and this is shown in
13 a number of places. First, it's shown on page 6 of their
14 original motion where they state that the government has
15 conceded that conspiracy is a stand-alone offense -- I'm
16 sorry, the government -- the defense states in their motion,
17 Your Honor, that the government has conceded that conspiracy
18 as a stand-alone offense is not an offense under international
19 law. That's not accurate.

20 The government may have conceded in Bahlul that an
21 inchoate, stand-alone conspiracy was not recognized under
22 international law, but it certainly did not concede that a
23 stand-alone conspiracy charge is not recognized at all.

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1 Another example of this confusion, Your Honor, is in
2 the defense reply, page 16, where the defense states, quote,
3 Conspiracy as a stand-alone offense is inherently incomplete
4 or inchoate, close quote. That's just flat-out wrong. The
5 stand-alone charge of conspiracy doesn't have to be inchoate,
6 and a great example of this is a conspiracy charge in the
7 Military Commissions Act, which requires a lot more than a
8 simple agreement.

9 Those things being said, Your Honor, if I could
10 invite your attention back to the diagram. Where are we?
11 Again, the defense claims that stand-alone conspiracy is not
12 recognized internationally. And on page 6 of their motion,
13 "Conspiracy may be a viable theory of liability under
14 international law, but it is not a separate crime constituting
15 an offense against the law of nations."

16 Is that a true statement? Again, that is not a true
17 statement. That's false. And we discuss this in our
18 response. And I would invite the commission's attention to
19 Judge Millett's concurrence in Bahlul III where this -- these
20 concepts are talked about in, for me, a very easy way to
21 understand.

22 It's very clear that the modern statutes defining
23 international law offenses permit punishment for conspiracy as

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1 a stand-alone offense in certain situations. The Nuremburg
2 military tribunals, the World War II tribunals in Japan had
3 conspiracy to wage aggressive war. There's conspiracy
4 statutes with respect to genocide. The notion that a
5 stand-alone conspiracy charge is not recognized in
6 international law is false.

7 At this point, Your Honor, I would invite your
8 attention one last time to the diagram. Even if you get down
9 to the fourth triangle, meaning that you find that an inchoate
10 conspiracy is not recognized by international law, the problem
11 that I referenced earlier in my argument still exists for the
12 defense, and that's because Charge V in this case is in no way
13 an inchoate conspiracy charge.

14 Remember, Your Honor, the reason the international
15 community has some trouble with inchoate conspiracy is because
16 it's concerned about criminalizing the mere intent of an
17 individual or the mere agreement to commit a crime without
18 anything more. And that is not what we have in this case.

19 The crime of conspiracy in the MCA is simply not an
20 inchoate conspiracy charge. It's materially different. It
21 requires a specific intent to commit overt acts, and it
22 requires that the accused himself personally do more than one
23 act. And again, there's a very good discussion of this in the

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1 two concurrences in Bahlul III.

2 The charge sheet in our case alleges that the accused
3 used unlawful means to achieve his goal of ridding the Arabian
4 Peninsula, Afghanistan, and Iraq of Americans, its allies, and
5 other non-Muslims. The government will prove beyond a
6 reasonable doubt that the accused personally did more than one
7 overt act to effect said conspiracy. To go even further, Your
8 Honor, the government will prove beyond a reasonable doubt
9 that one or more offenses alleged in the conspiracy charge
10 actually resulted in completed crimes. And proving completed
11 crimes is necessary under a joint criminal enterprise, which
12 is universally accepted in international law.

13 So to conclude, Your Honor, as I said -- if I could
14 just have you -- or invite your attention to the diagram one
15 last time, there's simply no support for the defense's request
16 to dismiss the conspiracy charge in this case. No matter how
17 you want to analyze this issue, there's no way for the defense
18 to go where it needs to go. I mean, whatever argument they
19 want to use ends the same way; they lose.

20 So, Your Honor, that would conclude the government's
21 presentation unless you have any further questions.

22 MJ [LtCol LIBRETTO]: I have none. Thank you very much.

23 DTC [CDR FLYNN]: Thank you, sir.

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1 MJ [LtCol LIBRETTO]: The commission will take AE 117,
2 025, and 028 collectively under advisement and issue a ruling
3 in the near future.

4 This appears to be a good time to take another recess
5 before we move into the next issue. The commission will stand
6 in recess for ten minutes.

7 [The R.M.C. 803 session recessed at 1033, 14 January 2019.]

8 [The R.M.C. 803 session was called to order at 1058,
9 14 January 2019.]

10 MJ [LtCol LIBRETTO]: Commission will come back to order.
11 All parties present when the commission last recessed are
12 again present.

13 Moving on to the next motion in order as proposed by
14 the parties, AE 102K. In AE 102K, the defense requested the
15 commission reconsider its ruling denying a motion to compel
16 the government to grant immediate access to counsel where the
17 accused resides or, in the alternative, abate the proceedings
18 until the indefinite ban on access to the defense counsel is
19 lifted as titled and presented by the defense.

20 The government opposes the defense motion as set
21 forth in AE 102L and requests the commission deny AE 102I.

22 The defense replied in AE 102N.

23 Does the defense desire to present additional

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1 argument outside of their filings?

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

3 MJ [LtCol LIBRETTO]: You may proceed.

4 DC [LT ASKAR]: Good morning again, Your Honor.

5 Lieutenant Askar on behalf of Mr. Al-Tamir.

6 Your Honor, AE 102 comes down in this moment to
7 judicial efficiency. We've heard time and again as this
8 commission has taken up AE 131 and a number of the other
9 motions about the inevitable delays that this commission is
10 going to experience. Even with Mr. Al-Tamir's removal from
11 his recovery facility back into the camps, I think the -- the
12 thrust of the argument in the 102 series, Your Honor, is that
13 Mr. Al-Tamir needs to be able to meet with his defense team
14 wherever he is.

15 He is realistic, Your Honor, about his health
16 situation. He understands that, as someone who's had five
17 major surgeries in the last year-plus, that there is an
18 opportunity or at least a realistic probability that his
19 health will not continue to consistently be on the upswing.
20 So to address this motion now, we need to address both
21 Camp VII and the possibility that he's back in a recovery
22 facility at some point.

23 The defense needs to be able to meet with him, Your

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1 Honor, wherever he is. We heard testimony from the
2 JDG commander who made clear that accommodations can be made
3 to create a secure meeting space for Mr. Al-Tamir to meet with
4 his counsel at Camp VII.

5 In addition to that, Your Honor, I think that the
6 important thing to note here is that these moves cost
7 Mr. Al-Tamir. Being here today costs Mr. Al-Tamir. He wants
8 to participate in his defense. He wants to be able to appear
9 before this commission. He wants to be able to meet with his
10 attorneys. He wants to be able to vigorously participate.
11 But every single time we comply with the current standard
12 operating procedures, Your Honor, every single time that we
13 have him moved to secure meeting spaces, he has to undergo the
14 pain of movement.

15 And this commission and this court has heard ad
16 nauseam at this point, Your Honor, about what those -- what
17 those movements entail and what they cost him. Every single
18 time he moves, he's got to take Percocet or Valium or
19 something to try and control the pain that these movements
20 cause him. He's only available for a couple of hours once he
21 is moved, Your Honor.

22 And so what the commission essentially has him facing
23 to participate in his legal meetings under the current

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1 framework is that he's got to choose between pain and
2 medication that he knows the more he takes the more dangerous
3 it will become, and meeting with his attorneys and
4 participating in his defense, when we have thousands of pages
5 of discovery to go through with him, when we have the
6 inevitable investigations following from those meetings to
7 follow up with him, when we have the government's discovery,
8 Your Honor, and the recent addition of the witnesses provided
9 by the government and potential exhibits provide by the
10 government to go through with him.

11 There is so much to do here, Your Honor. And
12 Mr. Al-Tamir understands that, and he wants to participate.
13 But if he is forced to do so in the same manner in which this
14 commission is struggling to -- and I don't mean that
15 pejoratively in any way, Your Honor. This commission is
16 trying to find a way forward for court to proceed. He is also
17 struggling to do that, to find a way forward to actually
18 create his defense.

19 At this point, Your Honor, you know, we've -- we have
20 personnel on island the vast majority of the time trying to
21 make sure that, if he's available to meet, if he's physically
22 capable of meeting, that we have personnel down here to do so.
23 But, Your Honor, we struggle to do so more than once -- or

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1 more than twice a week, excuse me.

2 Your Honor, I want to deal with the two main thrusts
3 and potentially three main thrusts of what I believe the
4 government's argument is based on their filing in 102.

5 The first main thrust of the government's argument is
6 that substantial deference is due to the JTF commander. And
7 that's true when that's reasonably related to legitimate
8 penological interests. What we haven't actually heard, Your
9 Honor, what I don't believe we haven't -- excuse me, what I
10 don't believe we've heard is a reasonable rationale.

11 The deference due to the JDG commander in this case,
12 Your Honor, is not arbitrary and it's not unlimited. There
13 has to be substantial reason for this court to essentially
14 impair its judicial efficiency to provide that deference to
15 the JDG commander. It can't just be we don't think that this
16 is appropriate, we don't think we want to do this, we don't
17 think it's how it should be.

18 Because right now, Your Honor, what we're hearing is
19 that accommodations can certainly be made to make sure that
20 Mr. Al-Tamir appears before you in commissions proceedings.
21 And we see those accommodations being made. But what we're
22 also hearing is that those accommodations don't seem to apply
23 to the moments where he's not in front of you, Your Honor, and

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1 I think that's really problematic.

2 I think that when we hear things like absolutely,
3 there's going to be -- he's going to have a choice between
4 being transported lying down, which is going to cause him less
5 pain, and using the van, which is not going to. And he's
6 going to have that choice. And the first time he has ever
7 been provided that choice is the day he comes to see you, Your
8 Honor, and he's not provided that choice, for example, to go
9 to an ICRC meeting or he's not provided that choice to go to a
10 legal meeting with his attorneys. I think that creates a
11 problem, and I think that demonstrates to this commission that
12 the accommodations that are being presented to it are not
13 being afforded to Mr. Al-Tamir when they're not under this
14 commission's watchful eye. And I think that that's a serious
15 problem.

16 I think the second issue that I want to make sure we
17 address, Your Honor, is that whether or not the
18 attorney-client meeting spaces will be secured. And I want to
19 make sure that -- I mean this as respectfully, Your Honor,
20 as -- I intend this as respectfully as possible. All that
21 needs to occur, it seems, for the meeting spaces to be secured
22 is for the meeting spaces to be left secured, Your Honor. I
23 want to make sure I'm not straying into any areas that will be

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1 problematic in an open session, but it does not strike me,
2 Your Honor, as overly onerous to ensure that the privileged
3 nature and the secure nature of attorney-client meeting spaces
4 are respected.

5 I think the third thing, Your Honor, that I want
6 to -- the third argument that I want to focus on and what I
7 imagine may be some of the government's response, is that this
8 argument or this issue right now is moot; that Mr. Al-Tamir's
9 health has improved enough; that he's been moved to Camp VII
10 since this motion has been filed. And I think, Your Honor,
11 that we've outlined currently why it's not moot, why that --
12 why that facing Mr. Al-Tamir with the choice between movement,
13 restraint, pain, and medication to go to a facility that you
14 heard Colonel Yamashita speak about, Your Honor, the facility
15 is not equipped to handle currently his unique medical issues.

16 The facility he's currently meeting with his
17 attorneys doesn't have the same sort of bed that he can use to
18 rest. It has -- it doesn't have the same sort of
19 accommodations in terms of movement for him, and he faces the
20 kind of restraint that can cause immobility that leads to the
21 pain that we're dealing with here, Your Honor.

22 And so to that end, we believe that it is completely
23 appropriate for this commission to provide an order that his

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1 attorneys be allowed to meet with him wherever he currently
2 resides.

3 Pending your questions, Your Honor. That's all I
4 have for now.

5 MJ [LtCol LIBRETTO]: To what extent has the defense
6 requested Mr. Hadi be permitted to move about during meetings
7 that they've had for legal purposes?

8 DC [LT ASKAR]: Your Honor, may I take a moment to confer
9 with counsel, just because, as you know ----

10 MJ [LtCol LIBRETTO]: Sure.

11 DC [LT ASKAR]: ---- the first time I was allowed to meet
12 with him was in court.

13 MJ [LtCol LIBRETTO]: Sure.

14 [Pause.]

15 DC [LT ASKAR]: Your Honor, it's been apparently made
16 clear to Mr. Al-Tamir that these are the procedures under
17 which he is able to have legal meetings, and so no one was
18 aware that there was a possibility of accommodation in that
19 respect, Your Honor.

20 MJ [LtCol LIBRETTO]: So that the accommodations that
21 Colonel Yamashita spoke about the other day have not formally
22 been requested in conjunction with a request for a legal
23 meeting?

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1 DC [LT ASKAR]: They have not, Your Honor.

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

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

4 MJ [LtCol LIBRETTO]: Government, go ahead.

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

6 MJ [LtCol LIBRETTO]: Good morning.

7 TC [CDR SHORT]: Commander Douglas Short for the
8 government.

9 Your Honor, clearly the logistical concerns regarding
10 the accused's health have been and will be the focus of many
11 discussions in this commission, particularly as this
12 commission prepares to move to trial on the merits.

13 What the defense counsel now says, I think I'd like
14 to address a couple of quick things about the JDG commander's
15 testimony. I don't think he has the authority to build new
16 buildings or change the type of things in construction. What
17 he was talking about is the reasonable accommodations that
18 have been made and continue to be made within Camp VII.
19 Nonetheless, he was clear that attorney -- privileged
20 attorney-client meetings cannot occur in those locations, Your
21 Honor. The defense, nonetheless, pushes right to asking this
22 court to once again delve into matters that are reasonably
23 related to legitimate penological interests.

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1 The JDG commander testified that his
2 responsibility -- ultimate responsibility is for the safe,
3 legal, and humane treatment of law of war detainees. He takes
4 that obligation seriously. And he's moving forward to make
5 sure that those law of war detainees are safely, legally, and
6 humanely treated, Your Honor.

7 The government would -- in the fact-finding sessions
8 has put on quite a bit of evidence regarding what is to
9 become, and we are prepared to -- that should be up and
10 running by 3rd of March so that we can proceed in these
11 commission hearings efficiently and have the logistical issues
12 kind of obviated, Your Honor. Certainly, as Lieutenant Askar
13 mentioned, that we do think that at least as written -- the
14 motion as written is moot, Your Honor, because there are no
15 facts, there are no intervening facts that would make this
16 commission redo or revisit the orders that are already in
17 place regarding that.

18 I also invite this commission to read the
19 declarations that were attached in the AE 101 series,
20 particularly AE 101A Attachment C and AE 101G Attachment B,
21 Your Honor. Those are classified; however, they do lay out
22 some of the real issues that are involved in this matter.

23 Your Honor, it's just not as easy to say, hey, we

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1 can -- we want to meet him where he is. The SMO, the
2 neurosurgeon, have testified that moving -- any movement will
3 not create any additional harm to the accused. He is able to
4 move, he is able to meet with the client -- with the defense
5 counsel. And so, therefore, there is one meeting space
6 designated for that, and that is clearly within the
7 penological interests of the JDG and JTF commanders, Your
8 Honor.

9 Pending your questions, that's all I have.

10 MJ [LtCol LIBRETTO]: Thank you. I have none.

11 The commission will take under advisement AE 102K and
12 issue a ruling in the near future.

13 DDC [MS. HENSLER]: Your Honor, may I ----

14 MJ [LtCol LIBRETTO]: Ms. Hensler?

15 DDC [MS. HENSLER]: ---- note something for the record
16 simply regarding Mr. Al-Tamir's health today?

17 MJ [LtCol LIBRETTO]: Today?

18 DDC [MS. HENSLER]: Yes, Your Honor. I wanted to note
19 that he's informed us over the period -- the course of this
20 hearing that his pain has been increasing. So I just wanted
21 to let the court know in case we alert the court that we'd
22 like to recess the proceeding at some point in the near
23 future, in the next hour or so.

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1 MJ [LtCol LIBRETTO]: If you'd like to what?

2 DDC [MS. HENSLER]: So that we can inform the court if
3 he's unable to proceed, that ----

4 MJ [LtCol LIBRETTO]: Okay.

5 DDC [MS. HENSLER]: ---- we've had notice that he's not
6 been feeling well.

7 MJ [LtCol LIBRETTO]: Okay. Do we need to take a recess
8 at this time?

9 DDC [MS. HENSLER]: Your Honor, he can go a little bit
10 longer; however, at some point soon if we could have the
11 five-minute break so that he could move around.

12 MJ [LtCol LIBRETTO]: Okay. Let's do that now before we
13 take up the next motion. Court's in recess for the next five
14 minutes.

15 [The R.M.C. 803 session recessed at 1116, 14 January 2019.]

16 [The R.M.C. 803 session was called to order at 1123,
17 14 January 2019.]

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

21 Turning to the next substantive issue in order,
22 AE 027. In AE 027, the defense requests that the commission
23 dismiss the co-conspirator liability as a theory of vicarious

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1 liability for Charges II, III, and IV. The government opposes
2 the defense motion as set forth in 027A.

3 Does the defense request to present additional
4 argument outside of the written filing?

5 DC [LT BALL]: Yes, Your Honor.

6 MJ [LtCol LIBRETTO]: Please proceed.

7 DC [LT BALL]: Your Honor, when I -- I just recently
8 joined this team, so the reason I wanted to speak about
9 this -- this motion was just to reconstruct the argument
10 somewhat, because the team needs to focus more on how
11 international law applies to vicarious liability.

12 The government had responded in their motion that the
13 focus was more on Pinkerton, the Pinkerton liability and how
14 Pinkerton liability applies. They argue that Pinkerton
15 liability is recognized at international law, and they cite an
16 international law case, Tadic, in that respect.

17 The problem is that Tadic is not regularly
18 recognizable at international law. And because this is an
19 international -- excuse me, because this is a law of war
20 tribunal, as I stated this morning, there must be a violation
21 of the law of war. And we are not going to apply -- or we
22 should not apply the U.S. domestic law principles; rather, we
23 need to apply the international law principles as it applies

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1 to Mr. Al-Tamir.

2 Now, international law governs the question of
3 vicarious criminal liability, particularly for the acts of
4 others. International law provides whether the Pinkerton
5 standard applies in military commissions.

6 In our motion, we did cite the Presbyterian Church of
7 Sudan v. Talisman Energy case. Now, this concept of hiring a
8 military or a police force outside of the United States is a
9 foreign concept to us. Here in the United States, we do not
10 hire the military to perform security for our companies; our
11 private companies do not do this.

12 This kind of mirrors my prior practice before I
13 joined the Navy. I was an energy and natural resources
14 lawyer. This is quite common when we go to remote places of
15 the world, particularly Sudan, and another one in Indonesia
16 where I spent ten years.

17 Now in the Presbyterian Church of Sudan ----

18 MJ [LtCol LIBRETTO]: Do me a favor and just slow down a
19 little bit.

20 DC [LT BALL]: Yes, sir. I'm seeing that sign.

21 In the Presbyterian Church case, Talisman Energy had
22 reached out to the government of Sudan, their military, for
23 security purposes. The court back here in the States found

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1 that the company, Talisman, could not be responsible for any
2 acts that that military did. Under international law,
3 substantial assistance is required in facilitating the
4 offenses in order for there to be liability.

5 I'd like to cite another case, which wasn't included
6 in our motion. I have provided this to the government. I do
7 have a copy for the commission if you would like it, Your
8 Honor. But there is another famous case out of Indonesia that
9 is Doe v. Exxon Mobil Corporation, this is a D.C. Circuit
10 case. The specific cite is 654 F.3d. 11.

11 MJ [LtCol LIBRETTO]: Say that again, please.

12 DC [LT BALL]: 654 F.3d -- F.3d 11.

13 This is a 2011 case. ExxonMobil had hired the
14 Indonesian military in the Aceh Province, which is a very
15 remote province of Indonesia generally known for its
16 instability. And in that case, the military had allegedly
17 taken -- violated some human rights issues there. And in that
18 case, the D.C. Circuit Court found that, in order for there to
19 be liability, there has to be more of a scienter involved for
20 ExxonMobil Corporation.

21 Putting this together, the argument that the
22 government makes that Pinkerton liability or the level of
23 Pinkerton liability applies in this case can't be right. And

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1 I think the government has just taken a selective reading of
2 Pinkerton and Tadic.

3 I'd like to focus a little bit on how the government
4 applies Tadic. Now, Tadic in itself is a 1990 -- 1999 case
5 that addresses joint criminal liability under international
6 law. This case is interesting because it outlines three forms
7 of joint criminal enterprise, and the third of which is close
8 to Pinkerton-type liability, but it can be distinguished. And
9 I think the relevant paragraph within the Tadic, if you have
10 it, is at paragraph 220. And we can see the distinction
11 between Tadic and true Pinkerton liability where someone can
12 be responsible for the acts of others.

13 Another problem that I found with Tadic is that it is
14 not universally accepted. I found a case which I provided to
15 the government as well in Cambodia in 2007. It's referred to
16 as case number 2. I'm not sure how we cite this, but I can
17 provide a copy of this to Your Honor and the commissions if
18 you'd like.

19 There were four accused, Nuon, Ieng, another Ieng,
20 and a Khieu, who were tried by the Extraordinary Chambers in
21 the Courts of Cambodia. And in that case, they specifically
22 cite to Tadic to say that it does not apply.

23 I'll get there in a minute, but the point I'm making

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1 with this is that international law isn't completely settled
2 on the issue of whether Pinkerton-type liability or joint
3 criminal liability as it's outlined in Tadic applies as a
4 general -- as a blanket. So apart from Tadic, the only other
5 case that we can find clearly sort of overrules the Tadic
6 applicability as it applies.

7 I'd like to point out to a couple of the arguments
8 that the government makes in its motion as well. The
9 government cited the Altstoetter case at pages 8 to 9 of its
10 motion. I think the important part of the Altstoetter case,
11 and I'd like to just read it quickly here, is that it says,
12 "In addition to the separate charge of conspiracy, there was
13 also participation in the formulation and execution of plans
14 to commit war crimes and crimes against humanity which
15 actually involve the commission of such crimes."

16 If we go back to the Presbyterian Church case that we
17 cite, we see that the court holds that international law at
18 the time of the Nuremburg trials recognized aiding and
19 abetting liability only for purposeful conduct. This is
20 something I alluded to this morning. The difference is in the
21 Altstoetter case that the government cites, there are very
22 different facts. Altstoetter, if you read it carefully, had
23 specific intent and not mere foreseeability, not the issue of

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1 foreseeability which we have in our cases today.

2 The government also cited the Ruto case at page 10 of
3 their motion. If we look at the Ruto case as a whole, not
4 just the specifically cited language that the government
5 quotes, there's nothing in that case that's about -- or that
6 raises Pinkerton liability or that -- or that allows Pinkerton
7 liability to apply.

8 You know, the comments, if you look at paragraph 351
9 of the Ruto case, it's not cited in ours, but if you pull up
10 that case, at paragraph 351, there's the quote that says,
11 "these crimes were committed pursuant to a common plan by
12 Mr. Ruto." Excuse me, I'll say it slowly. "These crimes were
13 committed pursuant to a common plan by Mr. Ruto."

14 The -- this shows the allegations and the proof in
15 that case was about specific intent, the scienter involved.
16 And the object of foreseeability which we have in our case is
17 not -- not the issue. So I don't think Ruto -- or Ruto can be
18 distinguished from Pinkerton and our case in that respect.

19 The government also cited the Prosecutor v. Lubanga
20 Dyilo at page 11. Again, the language quoted in that
21 parenthetical does not support liability on the basis of
22 foreseeability. And I think it's clearer if you read the
23 whole case. There is a quote in there, it says, "In the view

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1 of the majority, the mental requirement that the common plan
2 included the commission of a crime will be satisfied if the
3 co-perpetrators knew that in the ordinary course of events
4 implementing the plan will lead to that result."

5 This is a conscious scienter requirement. So when we
6 have the international law, when we apply the international
7 law to our case, we need to have a conscious scienter
8 requirement. And simply that doesn't -- we don't meet that
9 standard here in our case and, as a result, we ask that
10 Charges II, III, and IV are dismissed.

11 Pending any further questions, I have nothing
12 further.

13 MJ [LtCol LIBRETTO]: Thank you, Lieutenant Ball. I have
14 none.

15 Government, would you like to respond?

16 DTC [CDR FLYNN]: Yes, Your Honor.

17 MJ [LtCol LIBRETTO]: Please do.

18 DTC [CDR FLYNN]: Good morning, again, Your Honor.
19 Commander Flynn for the government.

20 Your Honor, the government's position, as it was when
21 this motion was first argued in January of 2015, continues to
22 be that conspiracy as a theory of vicarious liability is
23 authorized under the Military Commissions Act for at least two

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1 reasons.

2 First, the principle liability language in the
3 Military Commissions Act is taken almost word for word from
4 Article 77 Section 1 of the Uniform Code of Military Justice.
5 And that's a critical fact, Your Honor, because military
6 courts have long interpreted Article 77 Section 1 of the UCMJ
7 to include liability under a Pinkerton co-conspirator theory.

8 The second reason, Your Honor, and the more notable
9 reason, I would submit, is that the decisions in the United
10 States Court of Appeals ----

11 MJ [LtCol LIBRETTO]: Please slow down a little bit.
12 Thank you.

13 DTC [CDR FLYNN]: The decisions in the United States Court
14 of Appeals for the D.C. Circuit, our controlling court, in
15 both Bahlul I and Bahlul III have confirmed the validity of
16 the co-conspirator liability under the Military Commissions
17 Act.

18 With respect to the Military Commissions Act, Your
19 Honor, the controlling section is 950q. 950q is nearly
20 identical, like I said, to Article 77; and this specific
21 article has long been held to include co-conspirator liability
22 under Pinkerton v. The United States. The only difference
23 between the two sections, Your Honor, is that the MCA contains

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1 a Section 3 which deals with co-conspirator liability -- I'm
2 sorry, which deals with command responsibility while the UCMJ
3 does not have that specific section.

4 Now, for over 30 years, Your Honor, co-conspirator
5 liability has been recognized in the military. It's that
6 simple. There's two cases that are right on point. The
7 seminal case is talked about in our response, I won't go
8 through it, it's United States v. Jefferson. In that case,
9 just briefly, the Court of Military Appeals found that
10 although Article 77 does not specifically deal with vicarious
11 liability of a co-conspirator, it was broad enough to
12 encompass it. The later case, Your Honor, is the
13 United States v. Browning, which affirmed Jefferson and held
14 that Jefferson was consistent with prevailing federal
15 practice. These two cases have held that Article 77 of the
16 UCMJ, which 950q of the MCA is virtually identical to,
17 includes the concept of co-conspirator liability.

18 The other reason, Your Honor, that co-conspirator
19 liability is viable is because our controlling court has said
20 it is. Specifically in both Bahlul I and Bahlul III, the
21 court, U.S. Court of Appeals for the District of Columbia, has
22 indicated that the MCA allows for co-conspirator liability.

23 Judge Rogers, in her dissent in Bahlul I, talks about

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1 this at issue and indicated that the government should have
2 actually, in her opinion, charged the Pinkerton doctrine, and
3 they could have. So there's a discussion of that in her
4 dissent.

5 The more important case, Your Honor, and curiously
6 absent from the defense's argument, is the Bahlul III case.
7 It's also important to note that both the Bahlul III cases
8 were -- well, Bahlul III, I noted earlier, was decided in
9 October of 2016, so it was decided subsequent to this motion
10 being filed, subsequent to the motion being argued, and it's
11 basically right on point.

12 Now, as we talked about earlier, in Bahlul III, the
13 two judges who concurred in the opinion discussed this concept
14 of vicarious liability at length. And, in fact, they both
15 upheld the conspiracy under a vicarious theory of liability.
16 More importantly, Your Honor, even the judges in dissent in
17 Bahlul III indicated that the government could, quote -- and
18 this is a quote -- Could have charged the defendant with
19 recognized war crimes using conspiracy as a theory of
20 liability. That's found on page 805 of the Bahlul III
21 opinion.

22 So although the dissent agreed with the six judges
23 who affirmed the conspiracy charge in Bahlul III, the

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1 government would submit that all nine judges, the en banc
2 panel who listened and decided Bahlul III, would agree that
3 co-conspirator liability is available in the military
4 commission.

5 Finally, Your Honor, just a few comments on some of
6 the cases that the defense counsel cited in their argument --
7 cited in his argument. As he mentioned, the Exxon case was
8 not in their original motion. Lieutenant Ball did give that
9 to me on Friday, so I did have an opportunity to read that
10 case and the Cambodian case that he mentioned.

11 I would admit that the Exxon case is interesting;
12 however, after reading it three times, I'm still trying to
13 figure out its relevance to this motion. I might be missing
14 something, but I don't think I am. That case is a civil case,
15 number one, that dealt with the Alien Tort Statute, which
16 obviously is not involved in this case. And that case came
17 out before Bahlul I and Bahlul III.

18 The government would submit that the relevant statute
19 to look at in this case is a statute that controls these
20 proceedings, the Military Commissions Act. And the relevant
21 cases, Your Honor, to examine are Bahlul I and III, which
22 are -- specifically Bahlul III is right on point. And also,
23 the relevant cases to look at, Your Honor, are the two

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1 military cases that have interpreted Article 77 of the UCMJ.

2 Now, with respect to the Cambodian case, again, I'm
3 having some trouble processing its relevance to the facts in
4 our case. It basically talks about what is known as JCE III,
5 Joint Criminal Enterprise III. I'm not going to get into
6 that. There's a lot of law review articles on all of that on
7 JCE III. The only thing I will say about it is the
8 international cases are all over the place with JCE III; some
9 of the courts accept it, some do not.

10 But as I just stated, the government would submit you
11 need to look at Bahlul I, Bahlul III, Military Commissions
12 Act, and the two cases that have interpreted Article 77 of the
13 UCMJ.

14 Unless Your Honor has any questions, that concludes
15 the government's argument.

16 MJ [LtCol LIBRETTO]: I have none. Thank you very much.

17 DTC [CDR FLYNN]: Thank you.

18 DDC [MS. HENSLER]: Your Honor, Mr. Al-Tamir is in a great
19 deal of pain. We would ask for another recess so that we can
20 confer.

21 MJ [LtCol LIBRETTO]: We'll take a recess. Commission is
22 in recess.

23 [The R.M.C. 803 session recessed at 1142, 14 January 2019.]

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1 [The R.M.C. 803 session was called to order at 1201,
2 14 January 2019.]

3 MJ [LtCol LIBRETTO]: The commission will come back to
4 order. All parties present ----

5 DDC [MS. HENSLER]: Your Honor, excuse me. My client has
6 indicated that the spasms are starting to choke him.

7 MJ [LtCol LIBRETTO]: Okay. I will be about 30 seconds.
8 The commission will come back to order. All parties present
9 when the commission recessed are again present.

10 During a brief R.M.C. 802 session held a moment ago
11 in chambers between the parties and the military judge, the
12 defense notified the commission that Mr. Hadi's medical
13 conditions were rapidly diminishing and worsening.

14 The commission notes that we are approaching
15 apparently approximately the four-and-a-half-hour mark as to
16 when the accused was removed from his cell for transport to
17 these proceedings. The commission also notes the number of
18 outstanding issues that were able to be addressed during this
19 brief session this morning and the limited number of motions
20 still to be addressed and taken up today.

21 The commission is going to at this time recess for
22 the remainder of the week to avoid any unnecessary or
23 significant discomfort or pain that may be experienced by the

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1 accused.

2 The need to recess under similar circumstances will
3 soon be obviated by way of the future accommodations being put
4 in place by the government. The commission does not expect
5 this occurrence to -- or this circumstance to reoccur at any
6 future sessions.

7 Moving forward, the commission will permit the
8 parties to supplement their written pleadings on the
9 outstanding issues that were not addressed today in accordance
10 with the timeline that will be published by the commission
11 shortly. Such filings will be narrowly tailored to the issues
12 as they were originally presented and will not raise new
13 issues.

14 The commission and the parties will conduct an
15 R.M.C. 802 session at 1300 today in AV-34 to discuss the way
16 ahead with respect to the litigation and hearing schedules
17 that will necessarily need to be modified for various reasons.

18 Anything to take up before the court -- the
19 commission stands in recess?

20 ATC [MR. SPENCER]: Your Honor, briefly, just to clarify:
21 The supplemental briefings will be in lieu of oral argument on
22 the remaining motions docketed for this session?

23 MJ [LtCol LIBRETTO]: That is correct. We will not be

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1 hearing oral argument on the remaining issues.

2 Anything additional to address, Government?

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

4 DDC [MS. HENSLER]: Nothing from the defense, Your Honor.

5 Thank you.

6 MJ [LtCol LIBRETTO]: Very well. This commission is in
7 recess.

8 [The R.M.C. 803 session recessed at 1204, 14 January 2019.]

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