

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 [The R.M.C. 803 session was called to order at 0934,  
2 7 January 2019.]

3 MJ [LtCol LIBRETTO]: This commission is called to order.  
4 All parties present when the commission last recessed are  
5 again present with the exception of Mr. Thurschwell and Major  
6 Miller for the defense. The accused is also present.

7 Trial Counsel, please state who is here to represent  
8 the government.

9 TC [CDR SHORT]: Thank you, Your Honor.

10 All members of the government who were present when  
11 the commission recessed are once again present.

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

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

18 Ms. Hensler, please state who is here for the defense  
19 to represent the accused.

20 DDC [MS. HENSLER]: Good morning. Susie Hensler on behalf  
21 of Nashwan Al-Tamir. Seated today at counsel table also  
22 present is Lieutenant Dahoud Askar; Lieutenant Charles Ball;  
23 linguist [REDACTED]; defense paralegals Chief Petty Officer

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Shenika Mayes; and Raul Ayala; and Defense Information  
2 Security Specialist James Anderson.

3 Your Honor, there are also two logistical issues that  
4 I would like to raise with the court before we begin just to  
5 put on Your Honor's agenda.

6 MJ [LtCol LIBRETTO]: What are those?

7 DDC [MS. HENSLER]: The first issue is my understanding of  
8 Your Honor's 802 ruling yesterday was that these public  
9 hearing days would run for approximately four to five hours.  
10 I wanted to let the court know that Mr. Al-Tamir left his cell  
11 around 7:30 this morning, so we would ask that the clock be  
12 started then.

13 We also wanted to inform the court that though  
14 yesterday during the 802 conference the court indicated that  
15 we might reach the testimony of the senior medical officer  
16 today, we -- JTF has permitted us to interview him, but this  
17 morning at the appointed time, 7:30, the senior medical  
18 officer didn't show up. By the time he did show up, it  
19 conflicted with Lieutenant Ball and Askar's meeting of  
20 Mr. Al-Tamir for the first time.

21 We are planning to meet with him this afternoon, but  
22 we would ask that Your Honor defer beginning that testimony  
23 until we have an opportunity to interview him.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 MJ [LtCol LIBRETTO]: Okay. I understand, and I will take  
2 that under consideration if and when we get there this  
3 afternoon.

4 With respect to the duration of the meetings today,  
5 or the sessions of the commission today or any other remaining  
6 day, although it's previously been indicated in declarations  
7 by the senior medical officer as to recommended times for the  
8 sessions to conclude on any given day, I think it's best at  
9 this point, having not had yet the opportunity to hear from  
10 the senior medical officer or the neurosurgeon, to play it by  
11 ear. And as best we can, we'll proceed and get as much  
12 accomplished as possible given the circumstances. But I  
13 understand your request and will take it under consideration  
14 in our scheduling this week. Thank you.

15 DDC [MS. HENSLER]: Thank you.

16 MJ [LtCol LIBRETTO]: Earlier this morning the defense  
17 provided the commission AE 007EE and AE 007FF, the detailing  
18 letters for Lieutenant Askar and Lieutenant Ball.

19 Lieutenant Askar, please state for the record by whom  
20 you have been detailed, your legal qualifications, the status  
21 of whether or not you have acted in any disqualifying manner.

22 DC [LT ASKAR]: Yes, Your Honor. Good morning.

23 MJ [LtCol LIBRETTO]: Good morning.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 DC [LT ASKAR]: Lieutenant Askar on behalf of  
2 Mr. Al-Tamir. I have been detailed to this military  
3 commission by the chief defense counsel in accordance with  
4 R.M.C. 503. I'm qualified under R.M.C. 502 and I have been  
5 previously sworn. I have not acted in any manner that might  
6 tend to disqualify me in this proceeding.

7 MJ [LtCol LIBRETTO]: Okay. Lieutenant Askar, for  
8 purposes of this commission, I'm just going to swear you in  
9 again. Please raise your right hand.

10 [Counsel was sworn.]

11 MJ [LtCol LIBRETTO]: Thank you very much. You may be  
12 seated.

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

14 MJ [LtCol LIBRETTO]: And, Lieutenant Ball, same for you,  
15 please state by whom you have been detailed; your legal  
16 qualifications; status of whether or not you have acted in any  
17 disqualifying matter.

18 DC [LT BALL]: Thank you. Your Honor, I have been  
19 detailed by the chief defense counsel in accordance with  
20 R.M.C. 503. I'm qualified under R.M.C. 502, and I was  
21 previously sworn. I have not acted in any manner which might  
22 tend to disqualify me, and the document detailing me as  
23 defense counsel is included as Appellate Exhibit 007FF.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 MJ [LtCol LIBRETTO]: Thank you very much,  
2 Lieutenant Ball, and please raise your hand.

3 [Counsel was sworn.]

4 MJ [LtCol LIBRETTO]: Thank you very much. You may be  
5 seated.

6 I note, as I previously did, the absence of  
7 Mr. Thurschwell and Major Miller was granted by the commission  
8 in AE 132A and 132C.

9 The commission has also granted the absence of  
10 Mr. Brent Rushforth after the request by him was submitted on  
11 3 January last week. At the last session of this commission  
12 in November, the commission found the justification for his  
13 excusal to be insufficient and indicated that permission would  
14 not be granted for his excusal until such time as additional  
15 information pertaining to his purported justification for  
16 excusal had been presented. The commission had expected that  
17 such information would have been submitted prior to this  
18 hearing such that his excusal could have been addressed. No  
19 filing was or has been submitted.

20 In order to resolve Mr. Rushforth's future status  
21 related to his representation of the accused in this  
22 commission, this commission hereby directs that Mr. Rushforth  
23 submit the additional information justifying the good cause

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 for his excusal by 30 January 2019 or that he personally  
2 appear at the next session of the commission currently  
3 scheduled for 4 March 2019.

4 Mr. Hadi, good morning.

5 ACC [MR. HADI]: Good morning.

6 MJ [LtCol LIBRETTO]: Before we get too far along this  
7 morning, I would like to know, of the attorneys now  
8 representing you, who do you designate to be your lead defense  
9 attorney?

10 ACC [MR. HADI]: Ms. Susan Hensler.

11 MJ [LtCol LIBRETTO]: Thank you very much, Mr. Hadi.

12 And before I proceed with the 802 summary, I was  
13 remiss in clarifying Lieutenant Ball and Lieutenant Askar's  
14 current security clearance status.

15 Lieutenant Askar, beginning with you, if you would  
16 please state whether or not you have all necessary clearances  
17 to proceed with these commissions today?

18 DC [LT ASKAR]: I do, Your Honor.

19 MJ [LtCol LIBRETTO]: And Lieutenant Ball.

20 DC [LT BALL]: Likewise, I do as well, Your Honor.

21 ATC [MR. SPENCER]: Your Honor, may the government request  
22 briefly just to follow up on the Mr. Rushforth issue  
23 considering the absence of justification?

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Pursuant to R.M.C. 805(c) discussion, if the  
2 commission would ask of the accused whether he consents to  
3 Mr. Rushforth's absence, that would certainly alleviate any  
4 potential appellate issue.

5 MJ [LtCol LIBRETTO]: Okay. Despite the commission  
6 believing that none exists in light of his consent for his  
7 excusal, Mr. Hadi, Mr. Rushforth remains as counsel on your  
8 case; however, he is not present here at this commission  
9 session today and will not be present all week. Do you  
10 consent to his absence?

11 ACC [MR. HADI]: Yes.

12 MJ [LtCol LIBRETTO]: Moving on, a Rule for Military  
13 Commission 802 conference was held at 1030 on 6 January 2019  
14 in a conference room within the Andrews Air Force Base  
15 passenger terminal. The military judge and both parties were  
16 present. The accused was not present.

17 The commission made note of the presence of two new  
18 defense counsel, Lieutenant Askar and Lieutenant Ball, who  
19 have since been detailed to this case and have just stated  
20 their qualifications. The defense informed the commission an  
21 attorney-client relationship had not yet been formed with  
22 either counsel but would be accomplished prior to coming on  
23 the record today.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Lieutenant Ball and Lieutenant Askar, have you, in  
2 fact, formed an attorney-client relationship with Mr. Hadi?

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

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

5 MJ [LtCol LIBRETTO]: Thank you. The commission notified  
6 the parties on the order of the issues that will be addressed  
7 at today's hearing as well as the tentative schedule for the  
8 remainder of this January session. The commission informed  
9 both parties that, in addition to the appellate exhibits  
10 listed in the docketing order, the commission would also  
11 conduct a 505 hearing as requested in AE 131C.

12 The government informed the commission that the  
13 accused's neurosurgeon will be available to testify today via  
14 VTC and that they do not expect to elicit any classified  
15 testimony from either the neurosurgeon or the senior medical  
16 officer.

17 The government requested clarification from the  
18 commission as to the procedure with regard to the testimony  
19 being taken. And as ordered in AE 131, the commission  
20 explained that it had questions that it intended to ask but  
21 would invite the parties to ask questions to better inform the  
22 commission's decisions moving forward, as well as to provide  
23 clarity to previously submitted declarations by both the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 neurosurgeon and senior medical officer.

2           Finally, the defense informed the commission that  
3 they no longer have working space within the ELC and are  
4 located in AV-34, making their communications with the  
5 commission a bit more difficult. They also requested an hour  
6 to meet with the accused prior to the start of today's  
7 session, which was granted.

8           Counsel for either side have anything to add to my  
9 summation of the 802 conference?

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

11          DDC [MS. HENSLER]: Your Honor did sketch out at the 802  
12 conference a tentative schedule for the week up until next  
13 Monday in detail, and we would be happy to supplement the  
14 filing on exactly what the expected schedule was supposed to  
15 be.

16          MJ [LtCol LIBRETTO]: Okay. I had planned to cover that  
17 here in a moment. It will look remarkably and sound  
18 remarkably similar to what was covered in the 802, but when we  
19 take up what we're going to be covering this week, I'll go  
20 through that.

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

22          MJ [LtCol LIBRETTO]: During the previous session of the  
23 commission, the defense conducted voir dire and challenged the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 military judge based on R.M.C. 902(a) and 902(1) -- 902(b)(1).  
2 I denied the challenge but afforded the defense the  
3 opportunity to request reconsideration and brief the issue as  
4 they deemed appropriate. No request for reconsideration has  
5 been made as of this date.

6 I will now advise the accused of his right to be  
7 present and his right to waive his presence at future  
8 sessions.

9 Mr. Hadi, you have the right to be present during all  
10 sessions of the commission. If you request to be absent from  
11 any session, your absence must be voluntary and of your own  
12 free will. Your voluntarily -- voluntary absence from any  
13 session of the commission is an unequivocal waiver of your  
14 right to be present during that session.

15 Your absence from any session may negatively affect  
16 the presentation of the defense in your case. Your failure to  
17 meet with and cooperate with your defense counsel may also  
18 negatively affect the presentation of your case.

19 Under certain circumstances, your attendance at a  
20 session can be compelled regardless of your personal desire  
21 not to be present. Regardless of your voluntary waiver to  
22 attend a particular session of the commission, you have the  
23 right at any time to decide to attend any subsequent session

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 of the commission.

2 For example, if you decide not to attend a morning  
3 session of the commission but wish to attend the afternoon  
4 session, you must notify the guard force of your desires.  
5 Assuming there is enough time to arrange transportation, you  
6 will then be allowed to attend the afternoon session. You  
7 will be informed of the time and date of each commission  
8 session to afford you the opportunity to decide whether you  
9 wish to attend that session.

10 Do you understand what I've just explained to you?

11 ACC [MR. HADI]: Yes, sir, I understand.

12 MJ [LtCol LIBRETTO]: Thank you, Mr. Hadi.

13 And as I'm sure your counsel have explained to you,  
14 my plan for the week is to proceed in your presence today,  
15 Wednesday, and as necessary, Friday or next Monday to provide  
16 you a day in between each session where your presence is  
17 expected to rest and to minimize the aggravation of your back  
18 condition.

19 If at any time throughout these proceedings, you need  
20 a break to stretch or to change positions in your chair or to  
21 lay down on the medical bed that has been provided for you,  
22 just let your counsel know and we can take a break to  
23 accommodate that. Do you understand?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 ACC [MR. HADI]: I did understand, but I have some  
2 observations that I talked to the attorney about regarding  
3 laying in bed.

4 MJ [LtCol LIBRETTO]: Okay. Is that -- Ms. Hensler, is  
5 that something that you'd like to address?

6 DDC [MS. HENSLER]: Yes, Your Honor. Mr. Al-Tamir this  
7 morning was in pain before he came over to the courtroom, and  
8 for that reason he took a Prozac. Your Honor will remember in  
9 the last session when he indicated that he was -- the level of  
10 pain was increasing and the corpsman administered a Valium,  
11 Your Honor had him take a nap in the medical bed in the  
12 courtroom.

13 Mr. Al-Tamir found that to be degrading and quite  
14 humiliating. So he asked that if similar circumstances  
15 present again today, that Your Honor permit him either to move  
16 the bed out of the courtroom so he's out of public view, or in  
17 the future, we erect some sort of barrier so that he has a bit  
18 of privacy.

19 MJ [LtCol LIBRETTO]: Okay. I understand the concern and  
20 the request. I will note that the commission did clear the  
21 entire courtroom for the duration of the time that Mr. Hadi  
22 was resting as a result of the medication that he had taken;  
23 however, I will -- should the event arise again, I will take

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 his request under consideration.

2 DDC [MS. HENSLER]: Thank you.

3 ATC [MR. SPENCER]: Your Honor, may we clarify one thing  
4 with a question? Defense counsel indicated that he had taken  
5 Prozac, which is an antidepressant. I believe she may have  
6 meant Percocet which is prescribed as needed for pain.

7 DDC [MS. HENSLER]: Yes, thank you so much for correcting  
8 the record. He took an opioid medication of Percocet this  
9 morning.

10 MJ [LtCol LIBRETTO]: Okay. Thank you for that  
11 clarification. And Ms. Hensler, do you have any concerns in  
12 light of his having taken that medication, his ability to  
13 communicate and understand what's going on today?

14 DDC [MS. HENSLER]: At this point, Your Honor, he has  
15 indicated that he would like to go forward, but it's worth  
16 noting that I'm not a forensic pharmacologist, so it's  
17 difficult for me to determine the impact of opioid medications  
18 on my client's ability to perceive the proceedings.

19 MJ [LtCol LIBRETTO]: Based on your conversations that  
20 you've had with him this morning following his taking that  
21 medication, have you observed anything that would give you  
22 indication that he's not understanding? I mean, he has  
23 understood the questions that I have asked. Any indication

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 that he has not understood what your discussions have been  
2 about?

3 DDC [MS. HENSLER]: Not at this point, Your Honor.

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

5 Before proceeding this morning with any substantive  
6 issues, I want to address one matter pertaining to the excusal  
7 of counsel. In AE 007Z and AE 007BB, the defense provided  
8 notice to the commission that Mr. Thurschwell and Major Miller  
9 requested to withdraw as counsel for the accused and requested  
10 permission to withdraw in accordance with applicable rules of  
11 court and legal precedent.

12 At the 9 November session of the commission I  
13 withheld a determination of good cause for excusal of either  
14 counsel pending turnover to recently detailed counsel and the  
15 assignment of additional counsel.

16 Although Ms. Hensler has apparently conducted a  
17 turnover of lead counsel responsibilities with  
18 Mr. Thurschwell, and two uniformed attorneys have now been  
19 detailed and formed an attorney-client relationship with  
20 Mr. Hadi, the commission is continuing to withhold a  
21 determination on the excusal of Mr. Thurschwell and  
22 Major Miller until such time as the commission can assess the  
23 impact of such excusal has had or will have on the defense's

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 ability to comply with previously ordered litigation  
2 deadlines.

3           Along those lines, the commission notes that in  
4 AE 110C, the commission ordered the parties file notice to the  
5 commission and opposing counsel of the evidentiary motions  
6 they intend to file along with motions to compel witnesses,  
7 evidence or other precursory motions necessary for the  
8 litigation of the noticed evidentiary motions no later than  
9 26 November of 2019 [sic].

10           I note the government timely filed its notice  
11 according to the litigation schedule, but the commission  
12 received no notice or associated motions from the defense.

13           Ms. Hensler, does the defense not intend to file any  
14 evidentiary motions ahead of trial?

15           DDC [MS. HENSLER]: We do, Your Honor. However, there are  
16 two issues. The first issue is our reading of the court's  
17 orders in AE 125 and AE 131, was that the court was making a  
18 determination as to whether or not we would continue to move  
19 forward with the current schedule.

20           Second, we've objected to the current schedule  
21 because we simply don't have the resources right now to make  
22 those determinations. For instance, we don't have a defense  
23 investigator, so it's difficult for us to determine if we plan

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 to file a suppression motion. One's coming on staff shortly,  
2 but he will need some time to get up to speed. So we would  
3 ask that the court implement a trial schedule to allow us to  
4 forecast what those motions would be with some certainty.

5 MJ [LtCol LIBRETTO]: When did the defense intend to file  
6 a motion for a continuance of the litigation schedule?

7 DDC [MS. HENSLER]: Your Honor, we had filed a motion --  
8 we'd filed a motion for abatement, and we had filed a motion  
9 for reconsideration of our abatement motion. I would be happy  
10 to file a motion for continuance of the litigation scheduled  
11 by the end of this week.

12 MJ [LtCol LIBRETTO]: We're going to revisit the  
13 litigation schedule, the current hearing schedule, and the  
14 pending excusals of Mr. Thurschwell and Major Miller later in  
15 the week, and address the defense's issues with failing to  
16 comply with the currently ordered litigation schedule.

17 I will consider any motions based on that litigation  
18 schedule, provided that there's good cause to do so, when they  
19 are appropriately filed by the commission. The commission  
20 notes that no such filing has yet been made. But again, we  
21 will address that issue more in depth later on during the  
22 week.

23 For now, we will move on to discuss some of the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 preliminary matters to be taken up as discussed during the  
2 R.M.C. 802 before moving on to the motions on the docketing  
3 order, the first of which are matters raised in the  
4 government's notice and request pursuant to M.C.R.E. 505, that  
5 is AE 131B and C, and the defense's response thereto, AE 131D.

6           Specifically, the government noted an intent to  
7 request the accused be excused from certain portions of the  
8 R.M.C. 803 dealing with AE 131. During that session we are  
9 expected to take testimony from the accused's treating  
10 neurosurgeon, the senior medical officer, and the  
11 JDG commander.

12           Government, for what portions of the hearing are you  
13 specifically requesting the commission exclude the accused and  
14 what legal authority do you believe the commission has to do  
15 so?

16           ATC [MR. SPENCER]: Your Honor, may I approach the lectern  
17 to ----

18           MJ [LtCol LIBRETTO]: You may.

19           ATC [MR. SPENCER]: Good morning, Your Honor. Mr. Spencer  
20 for the government.

21           MJ [LtCol LIBRETTO]: Good morning.

22           ATC [MR. SPENCER]: Your Honor, with respect to the 803  
23 session for Appellate Exhibit 131, the government's request to

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 exclude the accused for the classified portion of the  
2 JDG commander's testimony only. The government does not  
3 intend to elicit any classified testimony from either the  
4 senior medical officer or the neurosurgeon.

5           The authority for that is multifold, Your Honor. The  
6 easiest way for me to address that question would be to refer  
7 to Appellate Exhibit 083C. As I'm sure Your Honor's aware,  
8 AE 083C was an order dispositive of this issue entirely as  
9 litigated fully by both parties. The government has  
10 consistently been of the position that on a case-by-case basis  
11 under certain circumstances, the case law, the rules, the  
12 statute, all allow for the same thing, which is limited  
13 exclusion of the accused when classified information is to be  
14 discussed in a preliminary matter.

15           It's a preliminary matter, a collateral issue, in  
16 fact, the most collateral of issues in some sense. And the  
17 information from the JDG commander, a good portion of it,  
18 remains classified. The commission does not have the  
19 authority to order the release of classified information to  
20 the accused.

21           To the extent that AE 131D is a reconsideration or  
22 motion for reconsideration of 083C, the government obviously  
23 objects to that. The defense did not meet the requirements

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 for reconsideration.

2 I can go into more detail, if you would like, Your  
3 Honor. I'm prepared to do that. But I will say the -- an  
4 R.M.C. 803 conference, which falls under the statute from  
5 949d, is -- does incorporate 505. So a 505(h) hearing is an  
6 R.M.C. 803 session. It's the R.M.3 [sic] 803(a)(4) session,  
7 performing other procedural functions. So the statute  
8 contemplates excluding the accused from certain sessions for  
9 classified information.

10 The statute also specifically cross-references with  
11 the Classified Information Protective Act, which Judge Rubin's  
12 order in 083C also did. And so the findings in 803C [sic]  
13 remain in effect unless and until this commission reverses  
14 itself. And if the commission desires to do that or intends  
15 to do that, the government would ask for the opportunity to  
16 more fully brief that issue and require the defense to  
17 properly meet the requirements for a reconsideration motion.

18 MJ [LtCol LIBRETTO]: Thank you, Mr. Spencer.

19 Bear with me just a moment.

20 [Pause.]

21 MJ [LtCol LIBRETTO]: Ms. Hensler, your position is well  
22 articulated in the response to the government's request for a  
23 hearing, but I'll permit you to comment on the government's

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 argument as you deem appropriate, both on the merits as well  
2 as their argument related to AE 083C.

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

4 Before getting into the substance of my argument on  
5 the sufficiency of their 505 notice and their request that  
6 Mr. Al-Tamir be -- that the hearing be closed and that  
7 Mr. Al-Tamir be precluded from attending a hearing in which  
8 the JDG commander testifies, I'll note that we are not  
9 requesting a reconsideration of AE 083C. We, in fact -- Your  
10 Honor, I was prepared to argue that the government was  
11 requesting a reconsideration of that very motion.

12 There is one -- there are two key issues in that  
13 ruling. One is that Mr. Al-Tamir be -- the court ruled --  
14 excuse me, Judge Rubin ruled that Mr. Al-Tamir could be --  
15 could be precluded from attending a 505(h) hearing. We  
16 understand that's the position of the court. We're noting our  
17 position is we've requested that he be permitted to attend,  
18 but we understand that that is the current ruling.

19 The more substance of our objection to this  
20 particular 505(h) notice relates to the second part, which is  
21 the government's request that he be -- the hearing be closed  
22 to the public and Mr. Al-Tamir without providing such  
23 justification.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           So Judge Rubin's ruling notes that the case law,  
2 federal case law and the statutes and the regulations support  
3 a case-by-case determination of whether or not Mr. Al-Tamir,  
4 an accused, should be precluded from attending classified  
5 hearings that may be closed to the public. So we accept that  
6 that's the -- we understand the standing of the issue with  
7 respect to Mr. Al-Tamir's presence at the 505(h) hearing.

8           But with respect to the JDG commander's testimony, we  
9 embrace the standards set forth in AE 083C, and we are asking  
10 at this point that that case-by-case determination be made.  
11 However, as we raised in our filing in the AE 131 series,  
12 the -- there are three discrete issues in play here with this  
13 particular 505(h) notice:

14           First, the sufficiency -- or rather the insufficiency  
15 of the government's 505(h) notice.

16           Second, the government's refusal to acknowledge that  
17 closed hearings must be narrowly tailored to Mr. Al-Tamir's  
18 right to be present and his right to a public trial.

19           And third, we have requested that Mr. Al-Tamir be  
20 permitted to be present even in any closed hearings that be  
21 held on this subject matter because of the subject matter and  
22 because of the Bell factors, which again is the legal standard  
23 which was embraced by Judge Rubin in AE 083C.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           So, Your Honor, to begin, with respect to the  
2 government's 505(h) notice, a 505(h) notice, it's a  
3 mandatory -- there's a mandatory requirement that the  
4 government provide notice with specificity. So it's a  
5 requirement that the government tender notice and not just  
6 notice, notice that is specific to the classified information  
7 that will be the classified information that it intends to  
8 raise in a hearing. And that specificity requirement really  
9 comes into the fore when it is contrasted against -- excuse  
10 me, statutory language farther down in the same rule, which  
11 references generic categories.

12           And here the 505 notice -- it's interesting --  
13 specifically identifies on the cover of AE 131B, the second  
14 paragraph, the government specifically identifies the general  
15 category of classified information as detention operations  
16 onboard Naval Station Guantanamo Bay. So the government on  
17 the face of this filing seems to acknowledge that it doesn't  
18 meet the specificity requirements.

19           The burden is on the government to provide this  
20 notice, not the defense.

21           MJ [LtCol LIBRETTO]: Ms. Hensler, I'm sorry to interrupt.  
22 I just want to -- because the government's filing goes on to  
23 state specifically the facts found at -- and lists the facts

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 found in your motion, and then -- or your filing, and then  
2 specifically indicates that it also includes information  
3 related to the location, layout, design, and structure of the  
4 detention facilities as well as information pertaining to the  
5 guard force.

6 DDC [MS. HENSLER]: Your Honor --

7 MJ [LtCol LIBRETTO]: And it's the defense's position that  
8 that is not enough specificity?

9 DDC [MS. HENSLER]: Yes, Your Honor, that is not enough  
10 specificity.

11 So this is -- it's worth distinguishing this  
12 situation from the typical situation. The typical situation  
13 where this matter arises is the defense would argue, for  
14 instance, in a suppression hearing that we are entitled to  
15 present documents or request information with respect to --  
16 with respect to some classified information, for instance, the  
17 identity of an informant or targeting location. And then that  
18 specific piece of information, the government argues in a  
19 505(h) hearing, is we move to the standard of relevant, useful  
20 material.

21 In this case, because of the development of the  
22 issue, we actually have the exact opposite circumstance. In  
23 this case, it was the court that raised the issue. In AE 125,

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Your Honor directed trial counsel to provide its proposed  
2 course of action to ensure the accused's presence at currently  
3 scheduled future sessions. That's in AE 025 [sic].

4 And that occurred after the failure to launch, of  
5 sorts, in the September hearing where Mr. Al-Tamir was feeling  
6 very poorly, and while there was a bit of testimony on his  
7 health, Your Honor was not able to reach the substantive  
8 matters on the docket. So as a result of that September  
9 hearing not taking place as planned, Your Honor ordered the  
10 trial counsel to provide its proposed course of action.

11 In response to that order, they submitted a  
12 classified filing -- and that was basically the substance of  
13 their proposal for the court to move forward with this case as  
14 scheduled -- was classified by the government.

15 Then later in the November hearing, after  
16 Mr. Al-Tamir suffered an hourlong muscle spasm on the first  
17 day of the hearing, the court issued AE 125F, which directed  
18 trial counsel to provide an updated course of action that it's  
19 currently capable of putting in place to ensure the accused  
20 can safely be transported and remain present for and all  
21 future sessions of the proceeding.

22 As a result of that order the government tendered the  
23 neurosurgeon's declaration and agreed to afford Mr. Al-Tamir



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 certain accommodations with respect to his transport to and  
2 from the commission and his presence in the court.

3           Then Your Honor issued, after the second day of  
4 hearings where Mr. Al-Tamir had great difficulty getting  
5 through the proceedings -- and Your Honor may recall that he  
6 was administered a Valium and required to nap in the  
7 courtroom -- Your Honor issued AE 131, which ----

8           MJ [LtCol LIBRETTO]: Ms. Hensler, not to cut you off, but  
9 in order to be more efficient, we don't need a recitation of  
10 the procedural posture as it relates to the orders of the  
11 commission and the filings.

12           What I'd like to know is why you believe the notice  
13 contained within the government's filing is not sufficiently  
14 specific.

15           DDC [MS. HENSLER]: Because in this particular case,  
16 unlike, for instance, the suppression circumstances which I  
17 recited, the court has invited the government to proffer a  
18 proposal for moving forward, and the proposal for moving  
19 forward proffered by the government is classified, but not  
20 detailed.

21           As a result of their proposal in 125B, we filed our  
22 505(g) notice to inform the court that if this is the subject  
23 matter that would be fleshed out in a hearing, we anticipate

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 some of it would be classified.

2 We have no idea what the JDG commander will testify.  
3 The government has not provided a declaration as it has with  
4 the neurosurgeon, so I can say with some certainty that it is  
5 unlikely I will attempt to elicit any information on  
6 cross-examination that's classified.

7 We have no idea the boundaries of what the  
8 classification privilege is because the government has not  
9 identified with specificity what is classified and what isn't.

10 So for instance, may I ask the JDG commander the  
11 height of Mr. Al-Tamir's bed or whether or not he has a toilet  
12 that can be used by somebody with a serious spinal condition  
13 in his new cell? May I ask questions about the vehicle, which  
14 is used to transport him to and from proceedings, and how  
15 specific may I ask those sorts of questions?

16 I'm not sure the boundaries of the testimony, so  
17 we're left in a situation where the government is asking that  
18 the court assume that everything that comes out of his mouth  
19 is classified, and that can't be the case.

20 There's much that he can testify to which is clearly  
21 unclassified. So for instance, there are public statements  
22 made by -- made by camp -- made by the JDG -- I would say made  
23 by public officers of the JDG about the state of Camp VII.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 There are budget requests which set forth the problems at  
2 Camp VII. All of these things are publicly available. Those  
3 are clearly not classified.

4 In the 9/11 proceedings after a motion was filed by  
5 Khalid Shaikh Mohammad about the use of female guards, this  
6 was in late 2016, there were public hearings in which case --  
7 at which point on the record -- again, these are publicly  
8 available records -- the government elicited detailed  
9 information about processes used by its detention staff.

10 So we're left in a position where we're not sure what  
11 the government is now maintaining is classified or not  
12 classified, but the onus is certainly on them to proffer with  
13 some specificity what that is so that we can litigate it  
14 properly in a 505(h) hearing.

15 And the law is clear that to the extent that there is  
16 a blanket preference for closed or unclosed hearing, the  
17 preference in this case is for an open hearing.

18 Which leads us to the second and third issues here,  
19 Your Honor, which are that we've asked that once a sufficient  
20 notice is processed, that the closed hearings be tailored --  
21 and this includes the 505 hearing -- be tailored only to the  
22 classified information. Again, everything that should be  
23 done -- that can be done on the record in open court needs to

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 be done on the record in open court.

2 And finally, really the troubling thing about this  
3 particular notice, again, is that much of this was litigated  
4 before I came on the case, but -- in the AE 083 series, and  
5 the government took the same position, that the court should  
6 adopt this sort of blanket approach to classified information  
7 and closed proceedings.

8 The law is clear. Hamdan is the reason that the  
9 Military Commissions Act of 2006 was replaced with the  
10 Military Commissions Act of 2009. The request that the court  
11 simply close proceedings and exclude Mr. Al-Tamir is an  
12 invitation to judicial error and it ignores the precedent that  
13 has given rise to these proceedings as we know them. It also  
14 isn't supported by the Bell standard.

15 MJ [LtCol LIBRETTO]: Do you believe that there's a  
16 distinction between collateral issues and issues presented on  
17 the merits that go to guilt or innocence?

18 DDC [MS. HENSLER]: Your Honor, no, because the particular  
19 issue in play here is competency and physical capacity. These  
20 are threshold issues. They're jurisdictional issues. And  
21 furthermore, they are issues which, unlike something like a  
22 suppression hearing, relate directly to Mr. Al-Tamir.

23 So the type of information that we anticipate they'll

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 elicit, information about his cell, for instance, Mr. Al-Tamir  
2 is already -- Your Honor, one moment. I have to check on the  
3 condition.

4 MJ [LtCol LIBRETTO]: Go ahead.

5 DDC [MS. HENSLER]: Not only is Mr. Al-Tamir already in  
6 possession of that information, but defense counsel is not  
7 able to access the information itself to challenge what the  
8 witness says. The only person that we have access to who can  
9 challenge the information provided, like of that nature, by  
10 the JDG commander is Mr. Al-Tamir.

11 Moreover -- and again, this reverts to the Bell  
12 factors -- there's no danger of him being present because the  
13 people that he has access to, other detainees in Camp VII, are  
14 also in possession of this information, and we know how  
15 closely the information in their possession is guarded, and  
16 this is not something which is likely to be publicly dispersed  
17 and it's something which they already possess.

18 Finally, again, and this goes to the matter -- the  
19 question of whether this is a guilt or innocence matter or a  
20 collateral matter. Questions of competency and physical  
21 capacity can't be collateral.

22 For instance, Mr. Al-Tamir needs to be here to hear  
23 the testimony from his medical providers because Mr. Al-Tamir

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 is a key participant in the consultations that they're  
2 providing, and he is our only source of information on the  
3 testimony that they'll give.

4           Likewise, in this case, for instance, we requested a  
5 tour of Camp VII so that we could take measurements and take  
6 pictures. We learned last week that that request, even though  
7 it had been granted with the consent of counsel in the 9/11  
8 cases, had been denied by the camp. We will, of course, file  
9 a motion to compel. But that just sets forth why it's so  
10 important that he not be excluded from this proceeding,  
11 because we have no access to the information that will be  
12 litigated.

13           So for those reasons we would argue that the court  
14 should first address the sufficiency issue. The notice is  
15 insufficient. We don't have access to the supporting  
16 documentation provided to the court, which details -- well,  
17 Your Honor, I have no idea what it details because I haven't  
18 seen it, but I presume it details what the privilege is and  
19 what it applies to, so that we can properly litigate first  
20 what should be discussed in a 505(h) session and then whether  
21 Mr. Al-Tamir should be permitted to attend any resulting  
22 closed session.

23           So, Your Honor, I think that first we would ask that

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 the court address that threshold matter so we can properly  
2 litigate these other questions.

3 MJ [LtCol LIBRETTO]: Thank you.

4 Government, I'd like to hear first from you in terms  
5 of whether or not -- and both Attachments B and C to AE 131C  
6 were filed in camera ex parte. Only one of those attachments,  
7 as far as I can tell, has had the additional statement that it  
8 not be disclosed to the defense counsel. Is it the position  
9 of the government that both Attachments B and C carry that  
10 same ----

11 ATC [MR. SPENCER]: Your Honor, may I have a moment on  
12 that?

13 MJ [LtCol LIBRETTO]: You may.

14 ATC [MR. SPENCER]: Sir, as you know, the rule allows to  
15 file both ex parte and in camera in support of that. As it  
16 stands, the distinction between the two, to my knowledge,  
17 remains to lift that restriction with respect to defense  
18 counsel. Obviously, it's not within the prosecution's  
19 authority to do so, that's the original classification  
20 authority's authority to do that. So I don't know that I can  
21 answer your question directly. We can certainly request that,  
22 but the rule does allow us to file it both in camera and  
23 ex parte.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           And I'd like to clear up a couple of other things,  
2 Your Honor, if I may, quickly ----

3           MJ [LtCol LIBRETTO]: Bear with me a moment.

4           ATC [MR. SPENCER]: Okay.

5 [Pause.]

6           MJ [LtCol LIBRETTO]: Are you going to address the  
7 specificity issue?

8           ATC [MR. SPENCER]: Yes, Your Honor.

9           With respect to the specificity issue, the defense is  
10 absolutely incorrect that specificity is required.

11 505(h)(2)(A) allows for both specificity and generality,  
12 depending on the circumstances. Specifically the last  
13 sentence of 505(h)(2)(A), "When the United States has not  
14 previously made the information available to the accused in  
15 connection with the case, the information may be described by  
16 generic category." The government has gone above and beyond  
17 what was required. Not only do we give the general category,  
18 we also gave specifics. To be more specific would require the  
19 disclosure of classified information.

20           The defense made repeated references to what they  
21 have no idea about: No idea about what the JDG commander is  
22 going to testify to; no idea what the boundaries are ----

23           MJ [LtCol LIBRETTO]: Well, let me ask you this, based on

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 that comment.

2 ATC [MR. SPENCER]: Yes, sir.

3 MJ [LtCol LIBRETTO]: And if you have it available to you,  
4 paragraph 11 of Attachment B.

5 ATC [MR. SPENCER]: I can get it, sir. I don't have it  
6 right here.

7 MJ [LtCol LIBRETTO]: Go ahead. Take a quick look at it.

8 ATC [MR. SPENCER]: Because it's filed classified, we  
9 didn't courier it into the courtroom. I can certainly get  
10 that on a recess if you need ----

11 MJ [LtCol LIBRETTO]: Well, my question is -- we're going  
12 to be taking a recess here in a few minutes.

13 My question to you is, if those items, not the  
14 substance of those items necessarily, but if those items are  
15 delineated for the defense such that they and the commission,  
16 for that matter, know what questions may or may not properly  
17 be asked in an open session, I think that would address the  
18 concerns of the defense and to some extent the commission in  
19 knowing the left and right lateral limits of the questions  
20 that may be asked in an open session as opposed to a closed  
21 session.

22 ATC [MR. SPENCER]: Sir, I understand completely. The  
23 answer to that question is that's the purpose of a 505(h)

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 hearing. That's exactly why we have the 505(h), is to discuss  
2 what the left and right limits are.

3 As a result of the 505(h) hearing that will happen  
4 tomorrow presumably, then the government, the defense, and the  
5 commission will be able to articulate what the left and right  
6 limits are: X isn't classified, Y is classified.

7 The government's never articulated or never been the  
8 position of the government that unclassified information  
9 should be held in closed session outside the presence of the  
10 accused. That's false.

11 So the government agrees with the defense that what  
12 can be discussed in an unclassified setting should be  
13 discussed in an unclassified setting. What cannot be, which  
14 is a large portion of it, must be discussed in a classified  
15 setting to at least know what the left and right limits are.  
16 Are substitutions possible? Are other alternatives possible?  
17 Potentially, but that's something that has to be fleshed out  
18 in the 505(h) hearing.

19 MJ [LtCol LIBRETTO]: I understand that. My -- one of the  
20 concerns that I have is that some of that information the  
21 classification authority has deemed not to be even -- to be  
22 turned over to the defense counsel.

23 ATC [MR. SPENCER]: Yes, sir.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 MJ [LtCol LIBRETTO]: So how, during the course of a  
2 505(h) hearing where the defense counsel is contemplated as  
3 being there and participating, the commission address those  
4 matters?

5 ATC [MR. SPENCER]: Yes, sir. Well, as you know, a 505(h)  
6 hearing can in part happen ex parte, just like the submissions  
7 can. The rule allows for that as well.

8 MJ [LtCol LIBRETTO]: It can?

9 ATC [MR. SPENCER]: Yes, sir. So while we will seek  
10 additional clarification on that particular paragraph -- I  
11 believe you said it was paragraph 11?

12 MJ [LtCol LIBRETTO]: Paragraph 11, Attachment B.

13 ATC [MR. SPENCER]: I will seek additional clarification  
14 from that -- from the OCA on that one, Your Honor. But to the  
15 extent that there is classified information that the defense  
16 does not have a need to know, then the court does not have the  
17 authority to release that information. Only the OCA makes  
18 that call.

19 The defense might be unhappy about it, and that's  
20 understandable, but they don't get to make that call. The  
21 prosecution doesn't get to make that call, Your Honor. That's  
22 the original classification authority's responsibility.

23 MJ [LtCol LIBRETTO]: Okay. I understand your position.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           ATC [MR. SPENCER]: Now, with respect to -- it's  
2 refreshing to hear from opposing counsel that they're not  
3 attempting to reverse AE 083C; however, their Appellate  
4 Exhibit 131D page 6, paragraph C says Military Commissions Act  
5 of 2009 prohibits the military commission from excluding the  
6 accused from pretrial hearings on the basis of  
7 national security.

8           So if they're reversing their position in the  
9 pleading that they just filed, then that's instructive. Not  
10 only does their pleading suggest that the law is not what the  
11 law is, but the pleading directly contradicts the rule -- this  
12 court's ruling in AE 083C.

13           That ruling, also the defense mischaracterized in  
14 saying that it only applied to 505(h) hearings. The second  
15 part of that paragraph under the ruling section, not just the  
16 findings, specifically references on a case-by-case basis 803  
17 sessions. And again, it's been the government's consistent  
18 position -- and I argued this motion on the record, and I  
19 understand that opposing counsel wasn't here and it was a  
20 different judge, I argued this motion and I specifically said  
21 we are not suggesting asking for a blanket exclusion  
22 authority. That's never been the government's position, not  
23 as long as I've been on this case for five years, Your Honor.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           The unclassified information which the defense  
2 referenced in her argument, everything that she said in terms  
3 of the unclassified information is not relevant to this issue.  
4 This issue is not about whether the accused is competent to  
5 stand trial. This commission, this military judge has ruled  
6 on that issue multiple times. This commission's previous  
7 military judge has ruled on that issue multiple times. The  
8 issue of the accused's competency is not before this  
9 commission. It's been settled.

10           The issue is logistically moving forward, which is  
11 why the commission, presumably, asked for input from the  
12 parties. But that doesn't somehow trigger the flow of  
13 classified information outside the protections afforded under  
14 M.C.R.E. 505.

15           Every case cited by the defense in AE 103D is --  
16 talks about merits. Every single test, every single issue  
17 talks about merits, or voir dire in one particular case, which  
18 is obviously still part of the findings phase. We are not  
19 having that discussion, Your Honor. We are some time from the  
20 merits on this case.

21           This is a preliminary, collateral matter, and the  
22 rules -- the statute and the law and the rulings of this  
23 commission clearly contemplate excluding the accused on a

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 limited basis from being exposed to classified information  
2 which he doesn't currently possess.

3 Subject to your questions, sir, I have nothing more.

4 MJ [LtCol LIBRETTO]: I do not have any. Thank you.

5 Does the other side need to take a recess?

6 Ms. Hensler, if you would like to consult with Mr. Hadi before  
7 the court proceeds with the taking of the testimony of the  
8 neurosurgeon who has been standing by here for quite some  
9 time.

10 ATC [MR. SPENCER]: Sir, may I add one thing very briefly  
11 after consulting with counsel?

12 MJ [LtCol LIBRETTO]: Stand by a moment. Let Ms. Hensler  
13 finish her talk. Ms. Hensler, stand by just a moment. You  
14 might -- go ahead.

15 ATC [MR. SPENCER]: I apologize, Your Honor. I should  
16 have mentioned this earlier. Part of the reason this has  
17 played out the way it's played out, and I believe the military  
18 judge probably sensed my confusion yesterday in the 802, is  
19 that because this originated with the commission, the request  
20 for these witnesses to be available, we are left in some sense  
21 reading tea leaves as to what exact information the commission  
22 desires to elicit.

23 So we can -- we understand questions that we think

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 might be relevant, but clearly the military judge may have  
2 additional questions, large -- the answers to which are likely  
3 classified. And again, that's the purpose of the 505, is so  
4 that we can flesh that out in that setting.

5 MJ [LtCol LIBRETTO]: Understood. Thank you.

6 DDC [MS. HENSLER]: Your Honor, my client does have a few  
7 requests with -- related to the break we're about to take, but  
8 I'd like to summarize my rebuttal.

9 MJ [LtCol LIBRETTO]: Please make it quick.

10 DDC [MS. HENSLER]: So, Your Honor, there are several  
11 issues here. The first issue is the -- the trial counsel's  
12 position that competency is a settled issue. That's clearly  
13 wrong. I mean, for instance, if Mr. Al-Tamir tomorrow were to  
14 have a stroke, then that would be a change in facts and it no  
15 longer would be a settled issue. We learned in a recent ----

16 MJ [LtCol LIBRETTO]: I take trial counsel's argument to  
17 mean that this, AE 131, is not a competency determination  
18 hearing. It is a matter to determine the logistics associated  
19 with getting Mr. Hadi to be able to, as best we can,  
20 facilitate his participation in attorney-client meetings and  
21 commission sessions.

22 DDC [MS. HENSLER]: That's right, Your Honor. And one of  
23 the factual questions that goes into that determination is,

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 for instance, what type of medication he's prescribed.

2           So we learned last week that the senior medical  
3 officer has referred him to a pain management specialist. We  
4 know that he right now takes opioid medications, Percocet and  
5 Valium, to manage his pain. We don't know if that regime, if  
6 that particular pain -- that sort of pain medication regimen  
7 will be altered after that meeting, and, if so, then that may  
8 be something that we have to litigate. But that is something  
9 which is encompassed within AE 131 and it's what I regard as  
10 its predecessor, AE 125.

11           Your Honor, the interesting thing about the  
12 government's position is that it is arguing that the  
13 determination of whether or not something is unclassified or  
14 classified be made in a 505(h) hearing while at the same time  
15 arguing that everything that isn't classified must be done in  
16 public. And that is -- that is what is so perverse about the  
17 argument here, and that is the issue which was addressed in  
18 the second portion of AE 083C.

19           These are the issues which need to be identified in  
20 detail in a 505(h) filing so that Your Honor does not need to  
21 go into unclassified matters in a closed 505(h) hearing  
22 because that clearly runs contrary to the statutory language.

23           So for that reason, Your Honor, I would ask, for

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 instance -- I'm fighting in the dark a little bit because I  
2 haven't seen paragraph 11 to the ex parte Attachment B, but it  
3 sounds as if the government has identified certain information  
4 which is not classified but which may be relevant and  
5 certainly relevant because they have mentioned it in their own  
6 supporting filing.

7           And that is the exact type of information which would  
8 be helpful to the defense in having these -- even these  
9 preliminary discussions about what should be in the 505(h)  
10 hearing and before we move forward, and that's the reason that  
11 even the government's own argument implicitly acknowledges the  
12 insufficiency of their pleadings.

13           Thank you, Your Honor.

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

15           And just for the record and the parties' information  
16 as to my interpretation of 505(h) and the purposes behind it  
17 is to determine, as trial counsel said, what may or may not be  
18 disclosed in an open session.

19           If there's matters of an unclassified nature that are  
20 addressed during a 505 session that are identified as such,  
21 then we can revisit that during the open session that follows  
22 to ensure that all matters that can properly be disclosed in  
23 public are disclosed in public.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 DDC [MS. HENSLER]: And I understand that's Your Honor's  
2 position at this point. We may note an objection once we see  
3 how this plays out in a 505(h) hearing.

4 But, Your Honor, with respect to the break we're  
5 about to take. My client's indicated he's feeling very  
6 poorly, and he asked that -- he noted that ten minutes is not  
7 enough. He does need to take a rest. This is around the time  
8 that he typically takes a rest.

9 He has asked that he be permitted to do so outside of  
10 the courtroom or at least with some privacy outside of the  
11 courtroom in the medical bed which is here, and we would ask  
12 that the court for that reason recess for some period of time  
13 so that we can proceed after he has regained his strength.

14 MJ [LtCol LIBRETTO]: Okay. Government, what is the  
15 timeline associated with the neurosurgeon's availability?

16 ATC [MR. SPENCER]: Your Honor, he's available now, and  
17 he's available all day effectively, but he's standing by now,  
18 so ----

19 MJ [LtCol LIBRETTO]: Okay. All right. We're going to  
20 take a recess until 1100. That will give 25 minutes for  
21 Mr. Hadi to remove himself from the courtroom, stretch, lay  
22 down if he desires, and then be prepared to take the  
23 neurosurgeon's testimony at the minimum when we get back

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 before we take a more extended break for the day.

2 The commission is in recess.

3 [The R.M.C. 803 session recessed at 1036, 7 January 2019.]

4 [END OF PAGE]

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 [The R.M.C. 803 session was called to order at 1315,  
2 7 January 2019.]

3 MJ [LtCol LIBRETTO]: The commission will come back to  
4 order. All parties present when the court -- commission  
5 recessed are again present.

6 A Rule for Military Commission 802 conference was  
7 held during the recess in the judge's chambers. Military  
8 judge, both parties were present. The accused was not  
9 present.

10 This conference was held following the accused's  
11 request to extend the recess set to expire at 1100. Defense  
12 counsel explained that efforts were being made to secure a  
13 privacy barrier to be used for purposes of the accused's  
14 requirements when he laid down in the courtroom to provide him  
15 some semblance of security. Counsel also explained that the  
16 accused took a Valium due to an increased pain and requested  
17 an additional one to two hours of rest.

18 The commission reiterated the intent of the testimony  
19 contemplated by AE 131, in that it provided an opportunity for  
20 the commission and the parties to build the record outside of  
21 existing medical declarations pertaining to the accused's  
22 ability to attend and participate in attorney-client meetings  
23 and commission sessions now and in the future.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           The commission and the parties discussed the purpose  
2 of the anticipated Rule of Evidence 505(h) hearing scheduled  
3 for tomorrow morning and the proposed ways of conducting that  
4 hearing, including the possibility of requiring the  
5 JDG commander to submit a declaration responsive to questions  
6 posed by the commission and the parties or, as an alternative,  
7 taking the substance of his testimony during the 505(h)  
8 hearing in order to better determine those matters which may  
9 properly be disclosed to the public.

10           Following this discussion, the commission agreed to  
11 extend the recess until 1300 and stated the intent to hear  
12 testimony from the neurosurgeon this afternoon, after which  
13 further guidance will be provided as to the way ahead, both  
14 for this afternoon as well as the scheduled 505(h) hearing  
15 tomorrow morning and future sessions scheduled for this week.

16           Do both parties concur with the judge's summation of  
17 the 802 or have anything to add?

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

19           DDC [MS. HENSLER]: Your Honor, just a few things.

20           First, one of the things which was noted by, I  
21 believe, government counsel Vaughn Spencer, was that the  
22 disputed paragraph 11 of Attachment B had been revisited by  
23 the OCA and the government was involved in efforts to have it

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 declassified or reclassified and plans to provide that to  
2 defense counsel, though they do not plan to provide it to the  
3 accused.

4 Defense counsel asked that that be provided quickly  
5 so that we can adequately prepare for the 505(h) which is  
6 scheduled for tomorrow.

7 We also -- in Your Honor's recitation of the proposal  
8 on the mechanics of the 505(h) hearing, Your Honor floated the  
9 proposal of taking testimony by the JDG commander tomorrow  
10 during the 505(h) hearing in an attempt to help decipher what  
11 is classified versus what is unclassified and, in effect,  
12 proposed a redo at a later hearing of the unclassified version  
13 in public and the classified version in a closed hearing.

14 The defense objected on the basis that it confronts  
15 basically the same issue, that that -- that that is an issue  
16 which should be taken up in the 505(h) notice and -- and for  
17 that reason suggested that the court enter another order as it  
18 did in -- in the 125 series requesting a declaration by the  
19 JDG commander on particularized issues so that both parties  
20 have more insight into what testimony the court is interested  
21 in eliciting and also into the classification of that subject  
22 matter.

23 Your Honor, there's also one objection which I'll

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 need to put on the record before the neurosurgeon testifies  
2 just to make a record.

3 MJ [LtCol LIBRETTO]: Go ahead. What is it pertaining to?

4 DDC [MS. HENSLER]: It's pertaining to the -- it's  
5 pertaining to the anonymous testimony issue.

6 MJ [LtCol LIBRETTO]: Okay. Your objection is already  
7 provided to the commission in a written filing; is that  
8 correct?

9 DDC [MS. HENSLER]: Yes, Your Honor. And based on Your  
10 Honor's ruling, the defense requested that the identity of the  
11 anonymous witnesses be provided to defense counsel so that we  
12 could do our background investigation and prepare for the voir  
13 dire portion of the anticipated testimony.

14 Late last week the government provided the identities  
15 of two of those witnesses but at a classified level. It also  
16 included, for instance, their unclassified e-mail addresses  
17 and their unclassified phone numbers, but those were  
18 classified in a manner in which we could not follow up on  
19 them. So it effectively barred any further investigation of  
20 those two witnesses.

21 So, for instance, we couldn't look on a malpractice  
22 database to see if either of them had ever been found to have  
23 provided insufficient care, we couldn't confirm whether or not

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 they graduated from medical school, just do basic defense  
2 investigation into their qualifications. For that reason, we  
3 are effectively barred from cross-examining them on the voir  
4 dire topics. So I wanted to note that [no audio] we get into  
5 the testimony. I'm not certain, obviously, of what -- what  
6 testimony the prosecution intends to elicit as to their  
7 qualifications.

8 MJ [LtCol LIBRETTO]: Okay. I understand the issue that  
9 you're now presenting despite the commission ordering the  
10 disclosure of those names to the defense counsel, albeit not  
11 disclosed to the accused personally.

12 We'll take that -- for purposes of efficiency and to  
13 ensure that we can get some substantive matters accomplished  
14 today, we may take that up -- understanding that I'm sure  
15 you'd like that information now in order to better assist you  
16 in questioning this witness as well. But again, in order to  
17 get something accomplished today, I'm going to defer that  
18 issue until a later date; at which time, if necessary and  
19 warranted, the commission will permit you to recall the  
20 witness to better inform your questioning of him.

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

22 TC [CDR SHORT]: Your Honor, may I have one second with  
23 counsel?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 MJ [LtCol LIBRETTO]: You may.

2 [Pause.]

3 ATC [MR. SPENCER]: Your Honor, just to clarify part of  
4 the summation by defense counsel of the 802 conference, the  
5 government is not in the process of either declassifying or  
6 reclassifying. We are in the process of producing that  
7 information to the defense, specifically in the paragraph  
8 referenced by the commission. And that process is ongoing.

9 MJ [LtCol LIBRETTO]: Do we have an anticipated time hack  
10 as to when those portions will be disclosed to the defense?

11 ATC [MR. SPENCER]: Your Honor, I'm optimistically hopeful  
12 that that will be completed by the close of business today.

13 MJ [LtCol LIBRETTO]: All right. With that, the  
14 commission issued AE 131 and directed that the commission will  
15 hear testimony and receive evidence from the accused's various  
16 medical treatment providers and other government stakeholders  
17 that oversee and facilitate the accused's detention and  
18 transportation as they relate to access to counsel and  
19 attendance at commission proceedings.

20 This hearing is to determine the viability of the  
21 current accommodations provided for the accused and whether  
22 additional accommodations may be required to facilitate the  
23 conduct of this commission in the long term while ensuring the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 accused's maximum participation.

2           With that said, we have the accused's neurosurgeon on  
3 the line via VTC. Is that all set up and ready to go,  
4 Government?

5           ATC [MR. SPENCER]: Yes, Your Honor.

6           MJ [LtCol LIBRETTO]: Please call the first witness.

7           ATC [MR. SPENCER]: Your Honor, the government calls the  
8 current treating neurologist to the stand pursuant to -- I'm  
9 sorry -- neurosurgeon pursuant to AE 014 to testify  
10 anonymously.

11          MJ [LtCol LIBRETTO]: Thank you.

12          ATC [MR. SPENCER]: Good morning, sir. Can you hear me?

13          WIT: Yes, I can.

14          ATC [MR. SPENCER]: Okay, sir. I'm Mr. Vaughn Spencer. I  
15 represent the United States in this case. I'm going to ask  
16 you to stand up and raise your right hand, please.

17          WIT: Yes, sir.

18          NEURO 2, U.S. Navy, was called as a witness for the  
19 prosecution, was sworn, and testified as follows:

20   DIRECT EXAMINATION

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

22           Q. Sir, are you the treating neurosurgeon for the  
23 accused in this case, Abd al Hadi al-Iraqi?

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. I am.

2 Q. And how long have you been treating the accused?

3 A. Approximately a year and a half.

4 Q. Did you perform any surgical procedures on the  
5 accused?

6 A. I did.

7 Q. How many?

8 A. Three.

9 Q. Have you had an opportunity to review your -- the  
10 declaration that you previously submitted in this case?

11 A. I just received it a few minutes ago and had a chance  
12 to briefly look at the first few paragraphs before it was  
13 taken from me.

14 Q. Okay. Do you have that available to you if need be?

15 A. I have it in the room, if it would be okay for me to  
16 have it in front of me.

17 Q. Okay. For the moment I would ask that you don't have  
18 it in front of you, but if you need to refer to it at some  
19 point either in my questioning or questioning by the defense  
20 counsel, or the military judge, then we'll have you refer to  
21 it at that time.

22 A. Thank you.

23 Q. Sir, how long have you been a physician?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. 15 years. 15 and a half.

2 Q. When did you graduate from medical school?

3 A. 2003.

4 Q. Were you -- did you enter the Navy after medical  
5 school or before?

6 A. It's part of the HPSP program, Health Professional  
7 Scholarship Program. So you're a reservist essentially while  
8 you're in medical school, and then I was given a residency  
9 within the military system.

10 Q. What was that residency in?

11 A. Neurological surgery.

12 Q. When did you complete that residency?

13 A. 2010.

14 Q. So the residency was a seven-year program  
15 effectively?

16 A. That is correct.

17 Q. And since that time did you receive a board  
18 certification in neurosurgery?

19 A. I did. I did a fellowship -- just to kind of move  
20 it -- add some information, I did a fellowship afterwards for  
21 a year in complex spine deformity and tumor, and then I was  
22 board certified.

23 Q. And how long have you been board certified as a

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 neurosurgeon?

2 A. Three years. Usually it takes about four years, five  
3 years, after you finish training to get board certified. I've  
4 been certified now for three.

5 Q. Do you hold any other board certifications?

6 A. No, just neurosurgery.

7 MJ [LtCol LIBRETTO]: If you would, both for you and the  
8 responses, if you would direct the witness to slow down in his  
9 remarks.

10 ATC [MR. SPENCER]: Yes, sir.

11 MJ [LtCol LIBRETTO]: Thank you.

12 Q. Doctor, with your responses with via VTC, can you  
13 please make sure that you're slowing down or that you slow  
14 down your answers enough? They have to be translated for the  
15 accused to have.

16 A. Yes, sir.

17 Q. So just please slow your answers down a little bit.

18 A. Yes. Sorry about that.

19 Q. I do the same. Thank you.

20 When did you last evaluate the accused?

21 A. Early November 2018.

22 Q. And was that around the same time that you completed  
23 your declaration ----

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. Yes, it is.

2 Q. ---- we referred to earlier?

3 A. Yes, it is.

4 Q. That declaration was dated 7 November 2018. Does  
5 that sound right?

6 A. Yes, it does.

7 Q. So you evaluated the accused prior to completing that  
8 declaration?

9 A. That is correct.

10 Q. Did you again evaluate him since completing that  
11 declaration?

12 A. No, I have not.

13 Q. So since the evaluation referenced, which was  
14 6 November 2018, you have not re-evaluated the accused?

15 A. That is correct.

16 Q. And you are -- your primary duty station is in CONUS;  
17 is that correct?

18 A. That is correct.

19 Q. Have you been back to Guantanamo Bay since you left  
20 in early November?

21 A. I have not.

22 Q. Have you had the opportunity to speak with the  
23 current senior medical officer who is treating the accused

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 since -- since you returned to the States?

2 A. I can't recall if there was an e-mail or two, but not  
3 by phone.

4 Q. Did you -- did he confer with you while you were  
5 here?

6 A. Oh, for this? No. I haven't spoken to anyone about  
7 this.

8 Q. No, in the sense of with the senior medical officer  
9 while you were in Guantanamo Bay evaluating the accused, did  
10 you coordinate with him at that time?

11 A. At that time, yes.

12 Q. Okay. Are you aware of any changes in the accused's  
13 medical conditions since November 2018?

14 A. I am not.

15 Q. You're aware of the -- how would you characterize his  
16 recovery since his latest surgery in May of 2018?

17 A. I think that he's recovered appropriately given the  
18 surgery he's had. I think he's on par, on track.

19 Q. Is his recovery consistent with other patients that  
20 you've treated with similar conditions?

21 A. I think that it -- there's a wide spectrum within  
22 that for recovery. There are some patients who, forgive me  
23 for saying so, go back to running and doing activities along

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 those lines. There are others who follow the same path as he  
2 is.

3 Q. So it is consistent with at least some of the  
4 patients that you've treated ----

5 A. Yes, very much so.

6 Q. ---- post surgical with similar surgical procedures?

7 A. Yes.

8 Q. I know there's been reference by you as well as by  
9 other senior medical officers as to the transit from his  
10 current camp location to the courtroom as being a possible  
11 risk factor for muscle spasms and the like; is that correct?

12 A. Yes. Yes.

13 Q. Other than the muscle spasms, is the transit or his  
14 participation in hearings -- in your opinion, are those  
15 endangering his health in any way?

16 A. Not that I'm aware of.

17 Q. Is -- even with the muscle spasm, is that  
18 exacerbating his underlying condition?

19 A. His underlying condition, no. But his quality of  
20 life, yes.

21 Q. In what sense?

22 A. Pain.

23 Q. Pain from the muscle spasms?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. Yes.

2 Q. Do you know what currently he is prescribed in terms  
3 of pain medication to treat those spasms or other pain?

4 A. Since November, no.

5 Q. How would one normally treat that type of pain or  
6 pain associated with post-surgical procedure -- or  
7 post-surgical recovery?

8 A. Early onset or at the stage he's at right now?

9 Q. Both.

10 A. Both. Early on we use opioids for pain control. We  
11 use antispasmodics, so typically Valium is the choice just  
12 because of the benefits of muscle relaxation with it. There  
13 are other medications that are non-benzo based that we use,  
14 Flexeril, Robaxin.

15 As far as long term, we try to wean opiates off as  
16 much as possible. In the beginning we use long-acting with  
17 short-acting pain medications for breakthrough. Usually  
18 sometime by the sixth week we like to, if not much earlier,  
19 get the long-acting off and use short-acting pain medications.

20 At that point we can begin to use nonsteroidals,  
21 Motrin, for example, Naprosyn, depending on the patient's  
22 tolerance, GI symptoms, for pain control because early on  
23 those things can affect bony fusion because they inhibit the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 inflammatory stages, so we try to avoid them early on. So  
2 around the six-week mark, we allow patients to begin to use  
3 those.

4           The Valium is excellent for a -- as an antispasmodic.  
5 We try not to use it often because of its addictive properties  
6 and if we can substitute, we'll substitute with the other  
7 medications I forementioned: Flexeril, Robaxin, et cetera.  
8 And the other medications we use, depending on the patient's  
9 preoperative symptoms, Neurontin or Lyrica, which are for  
10 nerve pain, sometimes patients will continue to have that  
11 afterwards. The paresthesias or the numbness that some people  
12 refer to, or the pins and needles or, in his case, he refers  
13 to it as the thickness in his feet, this is treated with the  
14 Neurontin and Lyrica typically.

15       Q. Have you discussed these pharmaceutical options with  
16 the accused?

17       A. I have.

18       Q. And what's his position with respect to taking pain  
19 medication? Do you know?

20       A. Early on he accepted them. He does not like the way  
21 they make him feel. Many patients don't because they do alter  
22 your mentation to some degree. It varies from patient to  
23 patient. But it does help with controlling the pain. And

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 early on he accepted that and it helped.

2 He is off the long-acting, occasionally uses the  
3 short-acting pain medication. And those help him get through  
4 the day along with the Valium for the muscle spasms.

5 Q. So the -- if he's currently prescribed Percocet and  
6 Valium as needed ----

7 A. Yes.

8 Q. ---- is that unusual?

9 A. No.

10 Q. Now, coming back to the spasms and the risk. Would  
11 reducing the transit time from his current location help  
12 minimize the risk of the muscle spasms occurring, transit time  
13 from his current location to the courtroom?

14 A. Potentially, yes.

15 Q. What about his positions within the courtroom, seated  
16 versus lying versus being free to move about?

17 A. Sure. I think he should have freedom to move as he  
18 would. This is what I would prescribe any of my patients who  
19 have this surgery. Some patients will be stiff after sitting  
20 down for 10, 20 minutes, sometimes longer, or standing for 10,  
21 20 minutes. It all depends, everybody is a little bit  
22 different. But they should have the option to do that.

23 Q. Sir, are you -- do you have an opinion as to the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 accused's long-term prognosis?

2 A. Prognosis in regards to ----

3 Q. Recovery from -- to what level he might recover ----

4 A. Difficult -- difficult to ----

5 Q. ---- with his current -- current medical conditions.

6 A. Sure. So he gained his strength back in his legs.

7 You know, from a clinical perspective, that is there. The  
8 neuropathic pain he continues to have. A lot of times what  
9 we'll tell our patients if they continue to have that past the  
10 six-month mark with little gain, there is a potential that  
11 they may not gain much there. But he did gain his strength  
12 back. And the shooting pains he was having on a regular basis  
13 are resolved as well or are significantly improved.

14 Q. So his current state being occasional pain,  
15 occasional muscle spasms ----

16 MJ [LtCol LIBRETTO]: You need to slow down again, please.

17 WIT: Oh, sorry.

18 Q. His current state being occasional pain and  
19 occasional muscle spasms, is it your opinion, then, that that  
20 may never improve?

21 A. It is possible, yes.

22 Q. Is that consistent with what you've seen in other  
23 patients as well?

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. In the wide spectrum, yes.

2 ATC [MR. SPENCER]: Your Honor, may I have a moment?

3 MJ [LtCol LIBRETTO]: You may.

4 ATC [MR. SPENCER]: Thank you, Doctor. I have no further  
5 questions for you. The defense has some questions for you at  
6 this time as well as the military judge.

7 WIT: Thank you.

8 ATC [MR. SPENCER]: And remember -- again, I talk fast as  
9 well, please remember to speak slowly.

10 WIT: Sorry about that.

11 MJ [LtCol LIBRETTO]: Ms. Hensler.

12 **CROSS-EXAMINATION**

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

14 Q. Good afternoon, Doctor.

15 A. Good morning, ma'am. How are you? Or good  
16 afternoon, I should say.

17 Q. We've met before, haven't we?

18 A. Yes, ma'am.

19 Q. In November of 2018?

20 A. Yes, ma'am.

21 Q. For several hours. You met with the defense team  
22 along with an ASJA, correct?

23 A. I'm not sure what the ASJA stands for, ma'am.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. A lawyer for the camps.

2 A. Yes, ma'am.

3 Q. I'd like to turn to your sworn declaration. I  
4 understand you have a copy accessible to you, though not  
5 necessarily in front of you.

6 A. Would it be okay for me to get it or should I hold  
7 off?

8 Q. Yes. Yes.

9 MJ [LtCol LIBRETTO]: You can do so.

10 WIT: Yes, ma'am.

11 Q. In paragraph 4 of this declaration, you summarize  
12 what you regard as the three diagnoses which apply to  
13 Mr. Al-Tamir, correct?

14 A. Yes.

15 Q. In paragraph 4.a., you first identify degenerative  
16 disc disease?

17 A. Yes.

18 Q. What is degenerative disc disease?

19 A. So degenerative disc disease, if you -- take a step  
20 back just for anatomy. If you think of your spine being a  
21 number of building blocks with jelly doughnuts in between  
22 them, the discs allow those building blocks to move. Not only  
23 do they allow them to move, they work as shock absorbers. So

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 each of those discs have two components. They have an outer  
2 annulus layer and they have an inner component which is  
3 gelatinous filled and water based.

4           So when you compress, it absorbs some of the force so  
5 that the building blocks, the bone, don't hit each other or  
6 rub up against each other, so the forces are absorbed. Over  
7 time, that middle portion breaks down. Wear, tear, lifestyle,  
8 it's variable. There's a genetic component, too, that's  
9 unidentified as well. There are certainly genetic conditions  
10 that are predisposed as well.

11           So what ends up happening is is that jelly, as it  
12 wears and tears and breaks down and loses its ability to fill  
13 with fluid, the height of the disc diminishes. So as it  
14 diminishes, the discs, what do they do? Those outer fibers,  
15 which are like a basket weave containing that jelly -- and  
16 forgive me for talking so fast; sorry -- what they'll end up  
17 doing is they will bow as the height diminishes because it has  
18 no other path. Not only will they bow, the web will fissure.

19           And what it does is it provides an opportunity  
20 sometimes for that disc material to either seep between those  
21 layers, to herniate outwards. There's a number of  
22 nomenclatures used to describe that which I won't go into.  
23 But bottom line is the forces are now being transmitted not

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 symmetrically. They're not being absorbed by the disc and the  
2 bone on the other end is absorbing it.

3 Now, it's not just the bone. It's the joints in back  
4 as well. The joints absorb some of this force. And as that  
5 happens, those joints degenerate; and as they degenerate, the  
6 joint becomes sloppy and it can have added motion.

7 As a response to that, your body tries to,  
8 quote/unquote, stabilize it. How does it do this? It does  
9 this by producing what are called bony osteophytes. That is  
10 just one way in which it does it. Some patients have it so  
11 severe that eventually it just auto-fuses. What does that  
12 mean? The bone above and the bone below become one. That  
13 doesn't always happen.

14 But that is roughly what degeneration -- degenerative  
15 disc disease is.

16 Does it happen to every one of us? You bet,  
17 unfortunately. You know, when we start about 16, 17 with  
18 lifestyle all the way until we're into our 70s, 80s, and  
19 older, it is a continuing process. There are many people who  
20 have it who are asymptomatic, and there are those who have a  
21 little that are very symptomatic. Very difficult to predict.

22 Q. So while you indicated that all of us suffer from the  
23 spinal degeneration, only some of us would you diagnose with

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 this degenerative disc disease condition?

2 A. That is right, because it has complementation of  
3 pain, which can be joint related, it can be discogenic. So  
4 there's three types of pain. There's dermatomal, there's  
5 somatic, and sclerotomal. Those are three types of pain we  
6 deal with.

7 Dermatomal follows the nerves, so as the disc spaces  
8 degenerate, the openings where the nerves exit become  
9 compressed, the nerve can be compressed, and that can give you  
10 what's called dermatomal pain.

11 Sclerotomal pain follows a slightly different  
12 pattern, and that's because of the abnormal forces on the  
13 joints and the joints themselves have a distribution of pain.  
14 So that's sclerotomal.

15 And myotomal, which is muscular.

16 Sorry for the lengthy description.

17 Q. That's informative. In your analysis in the sworn  
18 declaration from November, you noted that Mr. Al-Tamir  
19 currently suffers from this condition. It's a diagnosis which  
20 is currently applicable to him, this degenerative disc  
21 disease.

22 A. Yes, ma'am.

23 Q. And you state in paragraph 4.a., quote, The patient

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 may never improve beyond his current condition and there is an  
2 ongoing concern for adjacent level disease.

3 A. Yes.

4 Q. Can you please explain what adjacent level -- what  
5 you meant by adjacent level disease?

6 A. Sure. Adjacent level disease has really come to the  
7 forefront since about 1997. A gentleman by the name of  
8 Hilibrand out of Philadelphia did a study on the cervical  
9 spine looking at his mentors' cases. And why did he do this?

10 Well, there are -- in the cervical spine, this starts  
11 with the cervical, and then we'll refer to the lower back. He  
12 looked at patients who had had degeneration at two levels but  
13 were only symptomatic at one. And what he wanted to know was  
14 should he have included the level above. That was the intent  
15 of the paper.

16 What he found was -- and this was statistically taken  
17 out to about ten years on these patients, is that about 25,  
18 26 percent of patients would develop -- would need another  
19 surgery at the level above the prior one. Okay. That was  
20 statistically extrapolated outwards.

21 Since then there's been a number of studies from that  
22 paper in the cervical spine and in the lumbar spine looking at  
23 the effects of a bony fusion on the levels above and below.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           The concept is simple. You create a lever arm. And  
2 so if you have a number of segments which are mobile, and you  
3 take two of them, and you make them immobile and the same  
4 forces are being transmitted through, there are more forces  
5 being absorbed above and below.

6           And so adjacent level disease has really been a  
7 discussion of the last, oh, I'd say, decade, especially in the  
8 cervical spine it has come to the forefront and in the lumbar  
9 spine.

10           So whenever we do lumbar fusions or cervical fusions,  
11 we now begin to talk about the potential that down the road  
12 because of that increased lever arm effect, there may be  
13 adjacent level symptomatic disease that may need to be treated  
14 at a later date.

15           Q. Okay. So because of the -- because of the  
16 performance of these cervical fusions and lumbar fusions, it  
17 has been found that the adjacent vertebrae may be more likely  
18 to become symptomatic and require some sort of treatment  
19 themselves?

20           A. It may break down.

21           Q. May break down.

22           A. So may break down and become symptomatic at a later  
23 date, yes.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. Okay. And this adjacent level disease causes further  
2 discomfort to the patient?

3 A. It depends -- it depends on the symptoms. I mean, if  
4 the symptoms in the cervical spine can be different than the  
5 lumbar spine, but yes.

6 Q. It may require additional surgery?

7 A. Yes.

8 Q. And with respect to Mr. Al-Tamir, were either of  
9 those surgeries performed?

10 A. For adjacent level disease?

11 Q. No, excuse me. The fusions.

12 A. Yes. He had a three-level cervical fusion followed  
13 by a posterior C3 to T2 lock. But in the cervical spine, he  
14 has no levels left to break down, really, if you consider it.  
15 He's got one level up top which is very low, and that's been  
16 shown in the literature as well. So in the lumbar spine, it  
17 is possible at the level above the L3, could break down.

18 Q. You go on to state that ----

19 A. I'm sorry, above the L4. Sorry, the L4.

20 Q. You go on to state in paragraph 4.a., quote, Though  
21 it is possible that with time he will see some improvement, it  
22 is also possible that his condition will remain static, or  
23 that he will get worse.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. That is true.

2 Q. So essentially, it could get a little better, it  
3 could stay the same or it could get a little worse?

4 A. Yes. He had significant improvements after surgery  
5 after -- which would be what we expect. And then now, he's --  
6 he could be at a static point. He could get better. I've  
7 seen patients at a year and a half to two years out improve  
8 significantly. I've had others who have been static and not  
9 changed and others who have gotten worse, yes, ma'am.

10 Q. I'd like to now move on to the second diagnosis which  
11 you found to be applicable to Mr. Al-Tamir.

12 In paragraph 4.b. of the report you identify  
13 neuropathy as the second applicable diagnosis, correct?

14 A. That is correct, ma'am.

15 Q. In layman's terms, what is neuropathy?

16 A. So the nerves themselves can be irritated through a  
17 number of different means. For example, one of the most  
18 common ones we see in the United States is diabetic  
19 neuropathy, where the blood vessels break down; they lose  
20 blood flow to the nerves. So areas that are far or peripheral  
21 from the circulation, for example, the feet, the hands, tend  
22 to be affected and the nerves lose their ability to function.

23 There are other things that can cause neuropathy.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 medications, trauma, compression can cause neuropathy.

2 DDC [MS. HENSLER]: Your Honor, it's our understanding  
3 that the translation stopped working.

4 WIT: Oh, sorry.

5 MJ [LtCol LIBRETTO]: No, not you, Doctor. It's some  
6 technical issues on our end.

7 WIT: Okay.

8 MJ [LtCol LIBRETTO]: All right, we are all set.

9 Q. Excuse me, Doctor.

10 A. Yes.

11 Q. You may continue.

12 A. And so one of the things we did to help confirm with  
13 this is we got an EMG to show that he did indeed have  
14 peripheral neuropathy.

15 Q. So an EMG was ordered as an objective evaluation of  
16 whether or not he, Mr. Al-Tamir, is suffering from neuropathy?

17 A. That is correct.

18 Q. And it confirmed that he is?

19 A. It helped support it, yes.

20 Q. And you also noted in paragraph 4.b., quote, The  
21 patient spontaneously reports symptoms that are similar and  
22 consistent with other patients whom have undergone similar  
23 surgeries.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. Uh-huh. Yes, ma'am.

2 Q. Meaning the nature of his symptoms also  
3 corroborate -- corroborate this -- the application of this  
4 diagnosis to Mr. Al-Tamir.

5 A. Yes, ma'am.

6 Q. Is neuropathy painful?

7 A. It can be, yes. Much of it is subjective.

8 Q. But it can be quite painful?

9 A. It can be. Again, it's subjective.

10 Q. And you state that, in -- again, in your declaration,  
11 Mr. Al-Tamir's neuropathy is, quote, unlikely to improve with  
12 time and may get progressively worse.

13 A. It may, yes.

14 Q. So it may ----

15 A. It may stay the same. It may improve as well.

16 Q. But you don't note that it probably will improve?

17 A. I don't know if any of those are going to happen,  
18 ma'am.

19 Q. Okay.

20 A. I've seen all three occur.

21 Q. Finally, in paragraph 4.c. of the report, you note  
22 that Mr. Al-Tamir is suffering from chronic pain.

23 A. Yes, ma'am.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. Okay. And that's a clinical diagnosis?

2 A. Yes.

3 Q. And in that portion of your declaration you note  
4 that, quote, The previous myelopathy, spinal compression and  
5 successive intrusive surgeries have changed the way his  
6 muscles function.

7 A. Yes.

8 Q. And you note that, quote, Muscle spasms of varying  
9 severity are a normal consequence of spinal compression and  
10 these types of surgeries.

11 A. Mainly in the surgery, ma'am, because we dissect all  
12 the muscle off the vertebrae, the back of the vertebrae. In  
13 the front there is very little muscle that we actually truly  
14 dissect. We retract more in the front.

15 In the back, we dissect vertebrae completely off of  
16 the spine from, in his case, the third thoracic -- the third  
17 cervical, sorry, all the way down to roughly the third  
18 thoracic. Even though we stop at the second, we still need  
19 the exposure.

20 So if you think about it, all of that muscle gets  
21 dissected off and then placed under retraction. Not typically  
22 a normal thing we do day to day, right? That's what we have  
23 to do to do the surgery.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           It is a painful experience without a doubt.

2           Q.   You noted -- we discussed muscle spasms when we met,  
3 correct?

4           A.   Yes.  Yes, we did, ma'am.

5           Q.   You noted that they can be brutal?

6           A.   They can be, yes.

7           Q.   And excruciating?

8           A.   That is correct, ma'am.

9           Q.   And going back to the question of the cause of these  
10 muscle spasms, you regard muscle spasms as a foreseeable  
11 consequence of the types of surgeries that Mr. Al-Tamir has  
12 undergone?

13          A.   Yes, very common, yes.  Varying degrees but very  
14 common, yes.

15          Q.   You also move on to -- excuse me.  Strike that.

16                 In your declaration you -- with respect to muscle  
17 spasms, you note that there's no surgical cure for these types  
18 of spasms.

19          A.   For the muscle -- for after the surgery?  No.

20          Q.   Okay.  And you mentioned to us that there may be ----

21          A.   You did -- I'm sorry.  Can I just step back?  You  
22 said surgical cure?

23          Q.   That's right.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. Yeah. Okay.

2 Q. You mentioned that there may be certain treatments  
3 that could be considered but only two or three years down the  
4 line. Do you recall that?

5 A. Surgical treatments or medications?

6 Q. I think the word was "treatment" in our discussions.

7 A. Treatments, there are. There are things, like you  
8 can do trigger point injections. You can do acupuncture. You  
9 can do TENS units. You can -- obviously physical therapy,  
10 working with muscle stretching, muscle releasing. Trigger  
11 point injections, I think I've already said. And then  
12 medications.

13 Q. And who would oversee those treatments?

14 A. Typically the primary care physician.

15 Q. Okay. And of those current options, can you describe  
16 the ones that are currently being administered to  
17 Mr. Al-Tamir?

18 A. As of the last time I was there, I cannot.

19 Q. Okay.

20 A. Physical therapy. Sorry, physical therapy. I know  
21 he has been receiving physical therapy.

22 Q. So physical therapy. But in addition to that, you  
23 aren't aware, because you haven't seen Mr. Al-Tamir in the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 past two months?

2 A. That is correct, ma'am.

3 Q. In paragraph 2 of your declaration, you state that  
4 the patient has healed from surgery.

5 A. Yes.

6 Q. You also stated in your direct testimony that he'd  
7 recovered appropriately.

8 A. Yes.

9 Q. But he can't walk on his own, correct?

10 A. No, but he's definitely stronger.

11 Q. He still has difficulty sitting down and standing up?

12 A. Yes, he does.

13 Q. And you noted on your direct testimony there's a  
14 spectrum of -- of individuals with respect to their abilities  
15 following surgery?

16 A. That is correct.

17 Q. At one end, there are people who are running?

18 A. Yes.

19 Q. Playing soccer?

20 A. No. I don't know anybody who is playing soccer, but  
21 I definitely know half marathons, yes.

22 Q. Half marathons, okay.

23 And you put Mr. Al-Tamir at the other end?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           A.   No.  I would put him probably -- not at the total  
2 other end, no.  But he's at that end, yes, as far as some of  
3 his symptoms.  But he's gained quite a few things back.

4           Q.   So you regard him as at the other end of the  
5 spectrum -- at the opposite end of the spectrum from people  
6 who are running?

7           A.   No, I don't put him at the opposite end.  The  
8 opposite end would mean he'd be doing nothing.

9           Q.   Okay.

10          A.   Or he'd be bedridden.  I mean, when I -- the last  
11 time I saw him, he was able to sit up, talk with me  
12 comfortably, stand when I asked him to stand.  He looked very  
13 comfortable.  Now, I understand he did have a Valium prior to  
14 that, but he looked very comfortable.

15          Q.   You're aware ----

16          A.   I have seen patients who have had successful  
17 surgeries and the surgery went fine, no complications, no  
18 issues, in, you know, still a lot of pain, far worse than what  
19 I saw this last visit.

20          Q.   So in your opinion, a patient can have recovered from  
21 a surgery but at the same time not be pain-free?

22          A.   That is correct.  Yes, ma'am.  That's a fair  
23 assessment.  His incisions are healed, he's healed from that

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 perspective. All of the hardware looks good. Yes. He's had  
2 improvements, yes.

3 Q. So he can have healed from the surgery but still  
4 suffer from muscle spasms?

5 A. Yes.

6 Q. And despite having healed from a surgery, an  
7 individual may still struggle with everyday events like  
8 standing up, sitting down, walking around?

9 A. Yes, ma'am.

10 Q. In your declaration, you also discuss certain  
11 recommendations that you made to JTF about managing  
12 Mr. Al-Tamir's pain, correct?

13 A. Where in here, ma'am? Which part?

14 Q. Specifically paragraph 5, Conclusions a. and b.

15 A. Okay. Can you give me a moment just to take a look  
16 at it?

17 Q. Yes, of course.

18 A. Yes, ma'am.

19 Q. Excuse me. One moment.

20 In paragraph 5.a., you note, quote, The process of  
21 transporting the patient from his cell to the commission may  
22 exacerbate his pain, as would be expected with any other  
23 patient undergoing similar surgeries.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. Yes, ma'am.

2 Q. You also note that, quote, The movement process may  
3 also trigger muscle spasms.

4 A. Yes, ma'am.

5 Q. And in that paragraph, you're talking specifically  
6 about transportation from Mr. Al-Tamir's cell to the military  
7 commissions?

8 A. Any patient who had undergone the surgeries he's  
9 undergone.

10 Q. So this sort of -- the process of transportation for  
11 an individual who's undergone this type of surgery ----

12 A. Uh-huh.

13 Q. ---- may exacerbate an individual's pain no matter  
14 where they're going?

15 A. Yes. Often I tell my patients who have to travel,  
16 they have to stop every hour to get out of the vehicle,  
17 stretch. Some patients, they ride in the back seat. Some  
18 patients have the luxury of having an SUV and being able to  
19 put the seat back and relax. Everybody is different.

20 Q. Okay. So this would apply equally if he was going to  
21 the commissions or if he were going to an attorney-client  
22 meeting?

23 A. That is correct, ma'am.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. You also state that -- in paragraph 5.b., that "There  
2 is an increased potential for acute exacerbations if the  
3 patient is required to maintain a static physical position for  
4 any extended period of time."

5 A. Absolutely.

6 Q. What did you mean by acute exacerbations?

7 A. So acute meaning new onset. Exacerbation means  
8 ongoing muscle -- so if he's had muscle spasms, cramps, back  
9 pain, just like if you had back pain, because I'm sure you  
10 have, everybody has had back pain. Everybody knows what it's  
11 like to be stiff. And if they sit for any length of time, it  
12 hurts, so they stand in a certain way, it hurts.

13 So any of these things could acutely, meaning new or  
14 bring on, exacerbate, make worse, the pain that he has.

15 Q. So the holding of a static position may bring on new  
16 pain?

17 A. May, yes. Not new pain. The same pain that he  
18 typically has, it may exacerbate it. But acute being, it  
19 wasn't there before and now it's there.

20 Q. And ----

21 A. Exacerbating means making worse.

22 Q. And when you say "new," you mean in terms of the  
23 short term or the long term?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1           A.    So it would be -- for example, someone who has -- I'm  
2 just trying to relate it to something you would be able to  
3 relate to.

4                    If you've had acute back pain, you wake up in the  
5 morning, it's stiff, it hurts. As you go out throughout your  
6 day, it gets better. But then you know if you sit in your  
7 chair in your office for anything longer than whatever that  
8 time is, it's going to make it worse. Right? It's going to  
9 exacerbate it. Right? So that would be exacerbation.

10                   The acute part would be you know if you're going to  
11 mow the lawn and then you have no pain and you go mow the  
12 lawn, you get the acute pain that you get in your lower back.  
13 If you don't mow the lawn, you don't -- the tendency of having  
14 it is not there. That's what I'm trying to say.

15           Q.    So the -- to avoid the acute exacerbations, you  
16 recommend that he avoid being put in -- that they, JTF-GTMO,  
17 avoid putting him in situations where he's required to  
18 maintain a static position?

19           A.    More along the lines that he be allowed to change  
20 position, that's really the gist of that. That is what I tell  
21 all my patients. They should be allowed -- and this goes for  
22 active duty and nonactive duty, they should be allowed to  
23 change position.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. Okay.

2 MJ [LtCol LIBRETTO]: Ms. Hensler, that's actually  
3 probably a great segue into a question that I'm going to ask  
4 you. We've been going for about an hour, I have seen that  
5 Mr. Hadi has remained in a static position for quite some time  
6 despite my advisement to the defense earlier today that he is  
7 free to adjust himself as necessary and as he desires  
8 reasonably within that location.

9 So would you like to consult with Mr. Hadi to see if  
10 he'd be more comfortable in doing so?

11 DDC [MS. HENSLER]: Yes, I would, Your Honor.

12 [Pause.]

13 DDC [MS. HENSLER]: Your Honor, my client's going to do  
14 the best he can to get through the rest of this examination,  
15 even though he's experiencing some discomfort.

16 MJ [LtCol LIBRETTO]: Okay. I'll note for the record that  
17 the declaration that the doctor and Ms. Hensler has been  
18 referring to is AE 125G, Attachment B.

19 Go ahead.

20 Q. Finally, in paragraph 5.b., you noticed that you --  
21 excuse me, you note that -- and this is in the final sentence,  
22 "However, acute exacerbations are unpredictable despite any  
23 preventative measures."

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. That is correct, ma'am.

2 Q. So they ----

3 A. I'll ----

4 Q. No, no ----

5 A. Go ahead, ma'am.

6 Q. ---- continue.

7 A. I was just going to say, it would be very similar to  
8 the back pain I was using you as an analogy with mowing the  
9 lawn. That pain that you may have when you mow the lawn may  
10 come by itself just from sitting or falling asleep on the  
11 couch. I don't think there's probably a single person in this  
12 courtroom who hasn't had that happen. So that's what I meant  
13 by that.

14 Q. I'd like to move on to a different topic, and that is  
15 the provision of Mr. Al-Tamir's medical care.

16 You -- when we spoke in November, you noted that  
17 you're not the primary point person for his medical care.  
18 You're a specialist physician?

19 A. That is correct, ma'am.

20 Q. The primary point person for his medical care is the  
21 senior medical officer?

22 A. I would assume so, yes, ma'am.

23 Q. And you noted that the senior medical officer is the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 individual who reaches out to you for consultations?

2 A. That is correct, ma'am.

3 Q. And you noted in our meeting and again on direct  
4 examination that this is done by e-mail?

5 A. Yes, ma'am. Prior to -- now, that was based from  
6 November to now. Prior to that, they have called me.

7 DDC [MS. HENSLER]: Your Honor, I'd like to note for the  
8 record that, despite having requested the e-mails between the  
9 SMO and the neurosurgeon, the defense has yet to receive any  
10 from the calendar year 2018. And with the provision that he  
11 may at some point be recalled, we would be asked that the  
12 court order that the government disclose those e-mails.

13 MJ [LtCol LIBRETTO]: Following this session you can  
14 identify with specificity what you're requesting the court to  
15 order and file an appropriate motion and it will be taken up  
16 accordingly.

17 DDC [MS. HENSLER]: Yes.

18 Q. You also, when we met, agreed that there had been a  
19 number of different SMOs since you started working on  
20 Mr. Al-Tamir's case?

21 A. I want to say three. I may be off on that,  
22 but definitely two, possibly three.

23 Q. But despite this changeover, this is still the

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 individual that you regard as primarily responsible for  
2 overseeing his care?

3 A. No different than in the civilian sector where  
4 patients get transferred from one provider to another.

5 Q. And there are other specialists who may -- who may be  
6 called upon to assist ----

7 A. I'm sorry.

8 Q. ---- in his care.

9 A. You'll have to clarify that question or clear  
10 that ----

11 Q. Well, for instance, one of the things we discussed  
12 when we met was the provision of pain medications for  
13 Mr. Al-Tamir?

14 A. Uh-huh.

15 Q. You noted often for individuals with chronic pain  
16 conditions, they are referred to pain management specialists  
17 for the -- to determine an appropriate prescription regimen  
18 for their care and so forth?

19 A. They can be. They're not the only folks who can do  
20 that. Family practice folks, internal medicine folks can do  
21 that if they wish as well. It just tends to be the practice  
22 in the area that we're in or the area I'm in, that we tend to  
23 use -- rely on the pain management folks, but I've seen it

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 being done by internal medicine and family practice as well.

2 And there are other folks who will do it as well.

3 Q. But in your practice, individuals with chronic pain  
4 conditions resulting from spinal surgeries are often referred  
5 to pain management specialists when they have this type of  
6 chronic pain?

7 A. It depends. And I'll clarify what I mean by that.  
8 In the military setting we have internal medicine folks and we  
9 have family practitioners who are very comfortable doing that.  
10 And because of our active duty folks and enrollments, they'll  
11 see them and they'll take care of it; whereas sometimes for  
12 our retiree population, they don't have access to the active  
13 duty folks, so they'll tend to go into the community. And the  
14 practice in the community, not always but often is pain  
15 management, ma'am, yes.

16 Q. Okay. You noted that there are -- that some of the  
17 drugs prescribed to help manage the pain that Mr. Al-Tamir is  
18 suffering from, Valium and other pain medications, have been  
19 prescribed here on an as-needed basis?

20 A. Yes, ma'am.

21 Q. But you aren't familiar with whether or not in the  
22 past two months he's been taking those medications on a daily  
23 or twice-daily basis because you haven't reviewed the records,

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 correct?

2 A. That is correct, ma'am.

3 Q. You rely on the senior medical officer to reach out  
4 to you with any relevant information about his care?

5 A. I would rely on him to call me with any change in his  
6 status that was neurologically related or related to the  
7 surgery, yes, ma'am.

8 Q. And with respect to -- just circling back to the  
9 e-mail question, how often would you say that you and the SMO  
10 have e-mailed over the past year?

11 A. I can't -- I don't know.

12 Q. More than ----

13 A. Ma'am, I sometimes receive a hundred e-mails in a  
14 day. I don't know.

15 Q. Okay. Monthly?

16 A. I don't know.

17 Q. More than twice in a year?

18 A. Yes. More than twice, yes. Yes.

19 Q. More than ten times?

20 A. I don't know, ma'am.

21 MJ [LtCol LIBRETTO]: He said he doesn't know.

22 WIT: I don't know.

23 Q. We also discussed Mr. Al-Tamir's reliability when we

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 met.

2 A. Uh-huh.

3 Q. You indicated that -- do you recall telling us that  
4 Mr. Al-Tamir was one of your best patients because he tells  
5 you everything?

6 A. He does, yes.

7 Q. And do you recall telling us that you wished all of  
8 your patients were as in-depth as Mr. Al-Tamir because -- and  
9 that he's very in tune with his body?

10 A. He is, yes.

11 Q. Okay. And that he -- you also -- do you recall  
12 describing him as always honest and frank?

13 A. Yes.

14 Q. One last point. And, Doctor, this just goes to the  
15 substance of your declaration. In paragraph 1., the last  
16 line, it notes ----

17 A. Paragraph 1.

18 Q. ---- quote, In May 2018, I performed a lumbar spinal  
19 stenosis on the patient to correct additional compression  
20 related to his degenerative disc disease.

21 A. It should say decompression. It should say  
22 decompression. That's a typo.

23 Q. Okay. So it should say "I performed a

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 decompression"?

2 A. No, no. It should say "lumbar spinal stenosis  
3 decompression and fusion" ----

4 Q. Okay.

5 A. ---- is what it should say.

6 Q. And so in the next paragraph ----

7 A. Yes.

8 Q. ---- middle of the next paragraph, it says, quote,  
9 Second, I conducted a six-month post-surgical follow-up  
10 evaluation for the May 2018 lumbar spinal stenosis.

11 A. Yeah. So the spinal stenosis was part of the  
12 degenerative disc disease diagnosis because as a result of  
13 degenerative disc disease, you can get spinal stenosis. So  
14 that was just a follow-up for the surgery he had there.

15 Or wait. I'm sorry. "I conducted a six-month  
16 post-surgical evaluation for the" -- I think this is -- this  
17 statement is in reference to November, when I was there in  
18 November, ma'am.

19 Q. And where it says ----

20 A. And ----

21 Q. Where it says "May 2018 a lumbar spinal stenosis," is  
22 that also a typo?

23 A. "Second, I conducted a six-month post surgical

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 follow-up evaluation." No. What this is saying is that this  
2 is a six-month follow-up which was in November for the surgery  
3 that he had in May 2018 for lumbar spinal stenosis. So  
4 probably poorly worded but that's what its intent.

5 Q. With respect to this declaration, did you draft it  
6 from scratch?

7 A. This one? No. I was helped.

8 Q. And so were you -- who typed out the original draft?

9 A. The -- it was typed between myself and the attorney  
10 who was helping me at the time. Name, I don't have. But I  
11 did type.

12 Q. You did type. Okay.

13 And did you sit together in one session or did he  
14 prepare a draft and show it to you?

15 A. No. One session.

16 Q. One session.

17 A. One session. One session.

18 Q. But you reviewed it and signed it?

19 A. I did. And forgive me, that is a typo up there. I  
20 take full responsibility for that.

21 Q. Okay. And you're referring to the misspelling of the  
22 word "neurosurgeon"?

23 A. Point taken.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. Excuse me. You said "up there."

2 Okay. So finally, one last question: With respect  
3 to the scheduling of your November visit to Guantanamo Bay,  
4 you noted you were on island then for a six-month follow-up  
5 for Mr. Al-Tamir's May 2018 surgery.

6 A. Uh-huh.

7 Q. Excuse me. You -- you simply need to enunciate yes  
8 or no for the record.

9 A. Yes.

10 Q. And you noted when we met in November that those  
11 consultations do not need to take place on the exact  
12 anniversary date of the surgery?

13 A. No, they vary, just like they do in the civilian  
14 side.

15 Q. So in this case, the six-month anniversary would have  
16 been November 19th, 2018?

17 A. Sorry. Say -- you mean 19, the date. I see. Yes.

18 Q. But you met with Mr. Al-Tamir earlier than that?

19 A. Yeah. That's fine.

20 Q. Okay. And you noted ----

21 A. That's within ----

22 Q. You noted when we met with you that you, yourself,  
23 didn't select that, the date of that follow-up appointment?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 A. No.

2 Q. You were informed of the exact date, correct?

3 A. Of when they were going to travel based on  
4 restrictions and so forth and availability.

5 Q. Okay. All right. And what type of restrictions?

6 A. Schedules. I do -- I take care of other patients. I  
7 have other surgeries that are planned, I owe it to them to  
8 stick to that. So I -- but we make whatever accommodation we  
9 can.

10 Q. Any other schedules, any other individuals' schedules  
11 that you are aware of play into that analysis?

12 A. No, ma'am. No, ma'am. It's mine.

13 DDC [MS. HENSLER]: All right. Thank you. No further  
14 questions.

15 WIT: Thank you. And thank you for the spelling  
16 correction.

17 DDC [MS. HENSLER]: Excuse me.

18 **EXAMINATION BY THE MILITARY COMMISSION**

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

20 Q. Doctor, this is Lieutenant Colonel Libretto, the  
21 military judge. Most of the questions that I have have been  
22 answered to some degree. I do have some follow-up questions  
23 for you, though. Just bear with me as I go through my

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 notes ----

2 A. Yes, sir.

3 Q. ---- to determine which I need to follow up on.

4 Based on the accused's current status, are there any  
5 future tests, evaluations or, for that matter, treatments from  
6 a surgical perspective or standpoint planned?

7 A. No.

8 Q. Why is that?

9 A. There's nothing at this point that needs to be done  
10 surgically, sir.

11 Q. Your involvement with the accused's treatment to date  
12 has been generated by what? In other words, is it an ongoing  
13 course of treatment or evaluation, consultation that you  
14 undergo with the senior medical officer here, or is it more  
15 of -- and, for lack of a better term, an as-needed basis  
16 you're consulted and then intervene if necessary?

17 A. His follow-up care is standard to any other patient  
18 who would have had the same surgeries. Typically -- and it  
19 varies a little bit from surgeon to surgeon, but plan for him  
20 would be to have another six-month follow-up; that would put  
21 him at a year. And then we do a one-year after that. And  
22 typically at that point, if not earlier in some situations,  
23 the patient is discharged from our care.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Q. Discharged from the care of the specialist?

2 A. The specialist. Yes, the specialist. Sorry.

3 Q. With respect to Mr. Hadi's medications, to what  
4 extent are you personally consulted on what medications he  
5 ought to receive?

6 A. Primarily in the initial stages of the first six  
7 weeks; and then subsequent to that it tends to fall upon the  
8 primary care provider with occasional questions to us. That's  
9 how typically we do it, and that's how we've done it. "Us"  
10 being me, sorry.

11 Q. You spoke -- let me preface this question by stating  
12 sort of my purpose in asking you these questions and, in  
13 general, holding this session. I want to ensure that as we  
14 move forward, Mr. Hadi has every opportunity to attend these  
15 sessions and participate in these commission proceedings.

16 With that in mind, you noted a number of other  
17 treatments, medications, and similar forms or measures that  
18 may be used for purposes of allowing him to be -- remain more  
19 comfortable for extended periods of time.

20 Can you please identify them again and explain a  
21 little bit about them? And I'm noting -- I mean, I think  
22 referral to a pain management specialist is fairly  
23 self-explanatory, but some of the other treatments that you

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 spoke about, acupuncture, TENS unit, trigger point injections,  
2 and whether or not these would be viable alternatives for him  
3 in particular, as it relates to the main objective of why  
4 we're here.

5       A. Yes. So the TENS unit is simply a -- a  
6 battery-operated device that goes on the skin and it produces  
7 a vibratory sensation. And there's several thoughts as to how  
8 this benefits muscle spasms, but one of the ways is by  
9 distracting the nervous system into perceiving the vibration  
10 over the pain. There are other thoughts and I would leave a  
11 physiatrist or pain management specialist to go into detail  
12 for that. But that is one option.

13               The other option would be trigger point injections.  
14 This is where a pain specialist -- and it doesn't have to be  
15 pain management, there are other folks that do that -- where  
16 they go in and they inject medications into the muscle,  
17 trigger points within the muscle specifically, and that helps  
18 alleviate some of the symptoms patients may have for muscle  
19 spasms.

20               What was the other one, sir? Forgive me.

21       Q. Acupuncture. I think when you ----

22       A. Yeah.

23       Q. ---- when you responded to the question, you just

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 used examples that readily came to mind.

2 But generally speaking, are there any other  
3 treatments that you can think of that would assist Mr. Hadi's  
4 participation in these proceedings long term?

5 A. I mean sometimes, you know, with the physical  
6 therapist, they'll do muscle stripping. That can be very  
7 painful for patients, but some patients say they gain benefit  
8 from it.

9 Those are the ones that come to mind first, sir.

10 Q. Okay. From your perspective, having been his  
11 treating surgeon, are there any in particular that you would  
12 personally recommend would be most appropriate in his case?

13 A. As far as the modalities that I mentioned?

14 Q. That's correct.

15 A. These would be -- these would all be things I would  
16 offer my patients in general.

17 Q. Okay. And forgive my jumping around a bit.  
18 There's -- in light of me just going through my notes and  
19 identifying questions that remain, they may not have any  
20 seeming chronology to them.

21 You also spoke about how Mr. Hadi, in your opinion,  
22 has healed from his surgery, and you've noted that ----

23 A. Yes, sir.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*

1 Q. ---- he's become stronger through his legs. And the  
2 comment that I'm picking up on was he's gained things. Can  
3 you explain to me what things he has gained?

4 A. Sure. So starting with his arms. If I remember  
5 correctly, his left arm was weak and used to have a lot of  
6 pain. He -- the last time I saw him, he had gained a lot of  
7 strength back in his deltoid and bicep, and the pain that he  
8 was having into that area had diminished or at the time wasn't  
9 even there. I hate to say that it's not there because it can  
10 come on and off. But he definitely had improvements in his  
11 left upper extremity.

12 And then in his lower extremities, the gains would be  
13 the strength. He had a lot more strength on his last visit  
14 than he had had prior to surgery.

15 Q. Does continued strength at all increase -- or  
16 decrease the likelihood of muscle spasms or are they  
17 completely unrelated to one another.

18 A. Completely unrelated, sir. I don't think they're one  
19 in -- they're related to each other.

20 Q. Ms. Hensler went into this with you a bit, but as far  
21 as the mode of transportation you recommended in your  
22 declaration that he be afforded the opportunity to be  
23 transported while laying down, is that a measure that you

*UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT*



**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 would recommend be a constant or subject to his subjective  
2 feelings of how he's doing on any particular day when he's  
3 being moved?

4 A. Subjective, sir. That's how I would treat it with my  
5 patients. Often I tell them that, you know, if they feel more  
6 comfortable laying in the back seat or front seat reclined  
7 backwards, various options that they have. If they're going  
8 for any distance, take frequent breaks, get out, stretch.  
9 That way they're not stuck in one position the entire time and  
10 they're afforded the ability to change position.

11 Q. So if I understand correctly, it's not necessarily  
12 the position, whether it be lying down, sitting, standing,  
13 it's just the static nature of remaining in any position for a  
14 duration?

15 A. That. And if at all -- obviously, it depends. If  
16 you're in a chair on a bumpy road, it's going to hurt.  
17 Whereas if you're laying down on that bumpy road, it may not  
18 hurt as much. So there is some interpretation there.

19 Q. Okay. The long-acting versus short-acting  
20 medications, can you explain the difference and the purpose  
21 behind administering the two?

22 A. Sure. Sure. So typically, the regimen that I'll use  
23 for lumbar fusions or cervical -- posterior cervical fusions,

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 is I'll use, as long as they're not allergic to it, MS Contin.  
2 MS Contin is a long-acting pain med. So what you want is this  
3 baseline pain control with the ability for taking medication  
4 for acute exacerbations.

5           So what we do typically is I'll do 15 milligrams,  
6 twice a day, every 12 hours, with a patient, and we'll do that  
7 for anywhere from two weeks, sometimes longer, sometimes four  
8 weeks, and sometimes as long as six weeks. More often than  
9 not, it's shorter, about two to four weeks.

10           And during that time period, when they have an  
11 exacerbation of pain, that gives them a baseline pain control.  
12 We'll have them take Percocet or Norco, basically a  
13 short-acting pain medication that only has a duration of  
14 effect potentially of four to six hours, whereas the other  
15 medication is providing constant control for 12 hours.

16           So that gives them a better control of their pain  
17 because initially for the first two weeks it is extremely  
18 painful. Hopefully, that clarifies that, sir.

19           Q. It does. Thank you.

20           Do you believe that exacerbation of pain or the onset  
21 of muscle spasms is increased at all by the frequency of  
22 movement? In other words, if -- do those risks or the  
23 likelihood of those things occurring -- do they increase if

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 Mr. Hadi was to be transported every day vice every other day  
2 with a rest day in between, or is there really no direct  
3 correlation between the two?

4 A. There is for some patients, sir, without a doubt.  
5 There are patients that if you -- if you do whatever  
6 activity -- for example, even take physical therapy. They can  
7 only go to physical therapy on, you know, three times a week  
8 because if they go five times a week, they're going to be in a  
9 lot of pain.

10 So the level of activity can correlate with that,  
11 yes. With pain, that is.

12 Q. Okay. Thank you. But not the underlying condition?

13 A. That is correct.

14 Q. Are you aware of any objective test or measure that  
15 can be put in place or taken to determine -- I think I know  
16 the answer to this question, but I'm going to ask it any --  
17 when a muscle spasm may be more likely than not to occur?

18 A. I do not, sir. You may -- that would probably be a  
19 better question for a neurophysiologist or a neurologist. I'm  
20 sure there's a way you can measure the tension within muscle  
21 spindles, but it would not be a painless procedure by any  
22 stretch of the imagination.

23 Q. In conclusion, my final question to you: As again,

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 towards the end of -- or to the end of my stated objective  
2 earlier, what are the best -- in your opinion, what are the  
3 best measures that I as the military judge can put in place  
4 within my purview of the -- this courtroom at the very least,  
5 of putting in place so -- to ensure Mr. Hadi can participate  
6 for any length of time and for any duration in days or weeks  
7 moving forward that would allow him to do so comfort -- in the  
8 most comfort as possible.

9 A. My understanding is that he does have a hospital bed  
10 there right now; is that correct, sir?

11 Q. That is correct.

12 A. So I think that is an excellent start. That affords  
13 him the ability to sit up, sit back, relax if he'd like, stand  
14 if he would like. I think that that is an excellent  
15 beginning.

16 I think that there's the opportunity there to  
17 potentially have him closer, maybe not make the transportation  
18 all the way across. These are just options. Having him there  
19 during the commissions, if that were feasible, may make it  
20 more comfortable for him.

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

22 Trial Counsel, any questions in light of mine, or  
23 defense's for that matter?

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 ATC [MR. SPENCER]: Nothing from the government, Your  
2 Honor.

3 MJ [LtCol LIBRETTO]: Ms. Hensler?

4 DDC [MS. HENSLER]: Only one question, Your Honor. And  
5 I'd like to note for the record that my client has felt an  
6 increase of tension over the course of this proceeding.

7 MJ [LtCol LIBRETTO]: He's free to move about if that will  
8 assist him.

9 DDC [MS. HENSLER]: He understands that, Your Honor. I'd  
10 simply like to note that for the record, and that's the reason  
11 I'm only asking one question.

12 **RECROSS-EXAMINATION**

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

14 Q. Doctor, you noted that typically a patient receives a  
15 one-year consultation after surgery?

16 A. Yes, ma'am.

17 Q. Do you plan to conduct a one-year consultation of  
18 Mr. Al-Tamir after his May 2018 surgery?

19 A. Yes, I do. We discussed it at his last visit.

20 Q. So that will be ----

21 A. Or his last appointment.

22 Q. That will be somewhere in the ballpark of May 2019?

23 A. Give or take a few weeks, yes, ma'am.

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 DDC [MS. HENSLER]: No further questions. Thank you.

2 MJ [LtCol LIBRETTO]: Doctor, thank you very much for  
3 taking time out of your schedule to provide me the information  
4 that you have. We have no further ----

5 WIT: It's been my pleasure, Your Honor.

6 MJ [LtCol LIBRETTO]: We have no further questions for you  
7 at this time. We're going to go ahead and disconnect the  
8 feed. I hope you have a nice day.

9 WIT: You too, sir. Thank you.

10 [The VTC terminated.]

11 MJ [LtCol LIBRETTO]: That concludes the testimony from  
12 the neurosurgeon as discussed during the 802 and then  
13 summarized earlier today.

14 My intent is for tomorrow morning to convene with  
15 counsel to conduct the 505 hearing. I'm going to provide you,  
16 the parties, some additional information this afternoon with  
17 respect to how that is going to transpire.

18 The accused's presence will not be expected tomorrow;  
19 however, based on our discussions, we will next reconvene in  
20 his presence on Wednesday morning to continue with the  
21 testimony of the senior medical officer and any other  
22 witnesses that we will deem appropriate for addressing this  
23 issue, and then we will continue on with the substantive

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**

1 issues on the docketing order.

2 Anything to take up before the court stands in  
3 recess?

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

5 DDC [MS. HENSLER]: Nothing from the defense. Thank you.

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

8 [The R.M.C. 803 session recessed at 1431, 7 January 2019.]

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

**UNOFFICIAL / UNAUTHENTICATED TRANSCRIPT**