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1 [The R.M.C. 803 session was called to order at 0904,  
2 12 February 2015.]

3 MJ [COL POHL]: The commission is called to order. Is  
4 Mr. al Baluchi with us today?

5 LDC [MR. CONNELL]: No, sir.

6 MJ [COL POHL]: He is not. Okay. Other than  
7 Mr. al Baluchi, all parties are again present that were  
8 present when the commission recessed.

9 Trial Counsel?

10 CP [BG MARTINS]: Please bring in the witness. Would you  
11 please move to the witness box, stand, face me, and raise your  
12 right hand for the oath.

13 Captain, U.S. Marines, was called as a witness for the  
14 prosecution, was sworn, and testified as follows:

15 **DIRECT EXAMINATION**

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

17 Q. Captain, are you one of the assistant staff judge  
18 advocates that services the high-value detainee camp?

19 A. Yes, sir, I am.

20 Q. All right. Did you have occasion this morning to  
21 advise each of the accused of their right to be present here  
22 today?

23 A. Yes, I did.

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1 Q. With respect to Mr. Ali Abdul Aziz Ali, did you  
2 advise him of his right to be present?

3 A. I did, sir.

4 Q. What time did you do that?

5 A. It was around 0510 in the morning.

6 Q. All right. And did he indicate that he wanted to  
7 attend or not attend today's proceedings?

8 A. He said that he did not want to attend.

9 Q. Did he execute a waiver of his right to attend?

10 A. He did, sir.

11 Q. Was that done in English or in Arabic?

12 A. It was in English, sir.

13 Q. You have in front of you what's been marked as  
14 Appellate Exhibit 351, consisting of two pages. Did Mr. Ali  
15 sign that document?

16 A. Yes, sir, he did.

17 Q. And do you believe that he understood his right to be  
18 present?

19 A. Yes, sir, I believe he did.

20 TC [MR. SWANN]: No further questions.

21 MJ [COL POHL]: Mr. Connell, do you have any questions?

22 **CROSS-EXAMINATION**

23 Questions by the Learned Defense Counsel [MR. CONNELL]:

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1 Q. Good morning.

2 A. Good morning, sir.

3 Q. My name is James Connell. I am the attorney for  
4 Mr. al Baluchi.

5 A. Yes, sir.

6 Q. What's your name, sir?

7 TC [MR. SWANN]: Objection, Your Honor.

8 MJ [COL POHL]: Sustained.

9 LDC [MR. CONNELL]: Your Honor, the reason I asked the  
10 question is sometimes the prosecution files a notice of  
11 pseudonym, and they haven't done that in this situation for  
12 this individual.

13 MJ [COL POHL]: Okay. I sustain the objection. Do you  
14 have any more questions?

15 LDC [MR. CONNELL]: No, sir, I do not. Thank you.

16 MJ [COL POHL]: Thank you, you may be excused.

17 WIT: Thank you, sir.

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

19 MJ [COL POHL]: Before we begin what I am going to call  
20 the Hawsawi motions, Mr. Nevin, you wanted to put something on  
21 the record?

22 LDC [MR. NEVIN]: Thank you. I want to articulate an  
23 objection to going forward until the matters related to the

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1 former CIA interpreter utilized by the Ramzi Binalshibh team,  
2 until those matters are resolved. This is the motion I  
3 articulated yesterday.

4 I gather the military commission made a decision to  
5 go forward on some of these motions that were under discussion  
6 yesterday, although I didn't hear that directly as a decision  
7 that that was essentially overruling my objection. I want to  
8 articulate, and lest there be any doubt, that this situation  
9 with this former CIA interpreter is maybe not exactly the same  
10 as 292, but directly analogous. It creates at least the  
11 potential for a conflict of interest to try to understand  
12 fully what this situation is.

13 And until we get to the bottom of it, the military  
14 commission is bound by the U.S. Supreme Court's ruling in  
15 Holloway that says, when a potential conflict of interest is  
16 presented, everything has to stop and there has to be an  
17 inquiry conducted by the judge, by the military commission.  
18 And in due course, we will file a motion for discovery similar  
19 to 292VV about this, of course, but that is a separate matter  
20 from the issue of a conflict of interest, and we object to  
21 going forward in any way until that gets resolved.

22 MJ [COL POHL]: Thank you, Mr. Nevin. Your objection is  
23 overruled.

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1 Mr. Ruiz.

2 LDC [MS. BORMANN]: Judge, may I be heard before Mr. Ruiz  
3 starts?

4 MJ [COL POHL]: Yes, ma'am.

5 LDC [MS. BORMANN]: After the commission adjourned  
6 yesterday, I had an opportunity to go back and look at the  
7 series of motions that Mr. Ruiz is scheduled to argue today.  
8 It occurred to me that with respect to 192, 332 and 340,  
9 Mr. Bin'Attash has a vested interest in the procedural and  
10 factual outcomes with respect to those ----

11 MJ [COL POHL]: I'm sorry, which numbers, please?

12 LDC [MS. BORMANN]: 192, 332 and 340.

13 The law and the facts pertain directly to issues  
14 which affect Mr. Bin'Attash, and so we are currently operating  
15 under at least some form of conflict issue raised in 292, and  
16 I would have an objection to ----

17 MJ [COL POHL]: I'm sorry, Ms. Bormann, did you say 292?

18 LDC [MS. BORMANN]: 192, which is their motion to  
19 disqualify the legal advisors.

20 MJ [COL POHL]: I have that as 192.

21 LDC [MS. BORMANN]: I'm sorry. If I said 292, I meant  
22 192. I have 192 written here; I think I am saying 192. If  
23 I'm not saying 192, I mean 192. 332, which has to do with

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1 medical issues, and 340.

2 MJ [COL POHL]: Okay. Let me ask you a question then --  
3 since you brought it up I'm going to give Mr. Ruiz a chance to  
4 hear about it, but 192 was disqualification of Mr. Breslin.

5 LDC [MS. BORMANN]: Mr. Breslin. And then there is a  
6 coordinated one that seeks the disqualification of Ms. Kelly,  
7 I believe.

8 MJ [COL POHL]: Is Mr. Breslin still with the commissions?

9 LDC [MS. BORMANN]: No, not as far as I am aware.

10 MJ [COL POHL]: Mr. Ruiz?

11 LDC [MR. RUIZ]: Judge, I think there is slight confusion.  
12 196 was not discussed yesterday on the record. It was not one  
13 of the motions that was listed on the prosecution's list.

14 MJ [COL POHL]: We are talking different numbers here.  
15 You said 196.

16 LDC [MR. RUIZ]: 192 was the unlawful influence with  
17 respect to Mr. Breslin. 196 addresses Ms. Kelly, and I was  
18 going to address 196 when I got up today.

19 MJ [COL POHL]: But is 192 mooted by Mr. Breslin no  
20 longer -- I mean, the relief requested to disqualify him, if  
21 he is no longer working there, it would strike to me there is  
22 no issue in controversy any more.

23 LDC [MR. RUIZ]: Judge, what I was going to ask the

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1 commission to do is to issue a ruling on the underlying facts  
2 as they are raised in the motion, but I was not prepared -- I  
3 was not going to make argument on it.

4 MJ [COL POHL]: Okay.

5 LDC [MS. BORMANN]: And that is specifically what I want  
6 to bring to your attention, because the underlying actions,  
7 that is, unlawful influence that seems to permeate these  
8 proceedings in lots of -- from lots of different areas is an  
9 underlying legal and factual issue that needs to be examined,  
10 I think, and decided upon as they arise, and I think they  
11 pertain to all of the individuals sitting here in court.

12 So when I looked back at them -- you know, at first  
13 blush when you look at them and you're a lawyer, you go back  
14 and you look and say, okay, it is not my issue. But it is  
15 really my issue because, as you know, there are more recent  
16 allegations of unlawful influence made based upon rulings by  
17 the Secretary of Defense at the request of the current  
18 convening authority. So the underlying factual issues and the  
19 law as they apply to these proceedings affect each and every  
20 one of the men here.

21 And as I stand here, I can't tell you that I'm not  
22 operating under at least some form of conflict that I am  
23 unaware of because I don't know, but I can tell you that, with

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1 respect to Mr. Binalshibh, his counsel is. And so I would ask  
2 you to reconsider at least closing the argument on those cases  
3 today and allowing us to argue issues as they arise later.

4 MJ [COL POHL]: Okay. What I will do, Ms. Bormann, is,  
5 what you are basically asking me to do, I will hear from  
6 Mr. Ruiz on the one he is prepared to argue. I will  
7 reserve -- if there is a Hawsawi-specific -- I will rephrase  
8 this, but if you wish to be heard on them at a later time, you  
9 can.

10 LDC [MS. BORMANN]: There is ----

11 MJ [COL POHL]: But on the other thing, on Mr. Breslin,  
12 the requested relief is that he be disqualified, and since the  
13 relief is basically -- you have gotten that, you want me to  
14 issue an advisory opinion on what I would have done had he not  
15 been disqualified?

16 LDC [MS. BORMANN]: No. What I would ask you to do is  
17 rule on whether or not the underlying actions constituted  
18 unlawful activity in violation of the rules that pertain to  
19 this commission.

20 MJ [COL POHL]: Okay.

21 LDC [MS. BORMANN]: And obviously disqualification is moot  
22 because he resigned, but that doesn't mean that the issue  
23 disappears. The issue permeates this entire system and so to

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1 be able to make an issue moot by simply leaving your position  
2 doesn't seem to be a proper method by which to resolve an  
3 allegation of unlawful influence.

4 MJ [COL POHL]: But if you have an unlawful influence  
5 allegation, the court, the commission is asked to fashion a  
6 remedy, and basically you have been given your remedy, in  
7 essence ----

8 LDC [MS. BORMANN]: But unlawful -- I don't mean -- I'm  
9 sorry.

10 MJ [COL POHL]: What I am just saying is you requested a  
11 certain remedy. The remedy is basically to disqualify  
12 Mr. Breslin. Mr. Breslin is no longer there, but you want me  
13 to issue an opinion about what he allegedly did anyway.

14 LDC [MS. BORMANN]: The conduct involved.

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: And the reason for that is simple.  
17 The case law points to a cumulative effect when you are  
18 examining allegations of unlawful influence. So while one act  
19 may not rise to the level to point to a system permeated with  
20 unlawful influence, several actions coming from various  
21 stakeholders in a situation, in this case the convening  
22 authority, point to a systematic problem.

23 And that's the issue and that's why we believe it's

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1 important that you resolve the underlying factual  
2 determination as to whether or not that action by Mr. Breslin  
3 constituted unlawful influence.

4 MJ [COL POHL]: Okay. Thank you. Sure.

5 LDC [MR. NEVIN]: On behalf of Mr. Mohammad, I believe  
6 this is covered by an exception to mootness for situations  
7 that are capable of repetition yet evading review. And in  
8 that situation, mootness doesn't prevent the military  
9 commission or a court from reaching the issue.

10 MJ [COL POHL]: Thank you.

11 Mr. Harrington?

12 LDC [MR. HARRINGTON]: Judge, I would join in  
13 Ms. Bormann's objections with respect to the motions that she  
14 articulated; and obviously with respect to the conflict issue,  
15 I'm at a much higher level in terms of the analysis of that,  
16 but I join in that.

17 MJ [COL POHL]: Thank you.

18 Mr. Connell, we have not heard from you. Do you wish  
19 to say anything before we get started with Mr. Ruiz?

20 LDC [MR. CONNELL]: We join automatically.

21 MJ [COL POHL]: Okay. Thank you.

22 Trial Counsel, anything at this time? Okay.

23 Mr. Ruiz? Did I hear you just say you are going to

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1 rest on brief on 192?

2 LDC [MR. RUIZ]: I'm sorry, say that again.

3 MJ [COL POHL]: Did I hear you just say that you are going  
4 to rest on brief on 192?

5 LDC [MR. RUIZ]: And 196, which was not originally on  
6 your -- on the list of motions that were raised.

7 MJ [COL POHL]: The housekeeping thing you provided today  
8 was something you wanted to use, an audiovisual aid?

9 LDC [MR. RUIZ]: Yes, sir. This was a supplement that was  
10 submitted in AE 214D, May 8 supplement. That supplement was  
11 filed on October 14, 2014. That supplement is essentially the  
12 State Department's guide for counselor notifications and  
13 actions.

14 MJ [COL POHL]: You understand that when you want to use  
15 that, it's supposed to be provided within 24 hours prior to  
16 its use to the court security officer as a separate ----

17 LDC [MR. RUIZ]: Yes. But I made the erroneous assumption  
18 that, since it was filed in October of last year and included  
19 in a motion, that it would get there.

20 MJ [COL POHL]: But you understand there is no way that we  
21 can know that everything that's filed to a motion is  
22 necessarily going to be in courtroom technology. Be that as  
23 it may, it's being reviewed. If it's reviewed in time to use

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1 it, you can use it. If not ----

2 LDC [MR. RUIZ]: I would simply say that perhaps we can  
3 put that to the back of the line of the other motions.

4 MJ [COL POHL]: Sure. Which one is that related to?

5 LDC [MR. RUIZ]: 214. This is our request for access to  
6 the government of Saudi Arabia so Mr. Hawsawi can speak to  
7 representatives of his government. The supplement in question  
8 is our State Department's, the United States State Department  
9 publication on consular notification and access. So it comes  
10 from our government, through our government. Hopefully we  
11 will clear them; otherwise, the State Department will probably  
12 be a little surprised.

13 But having said that, I understand there is a  
14 procedure, Judge.

15 MJ [COL POHL]: Okay.

16 LDC [MR. RUIZ]: Just on 192 and 196, I think obviously  
17 our intention is not to have any further argument on the legal  
18 objections raised in those motions or to seek additional  
19 remedy. I simply want to expand a little bit on what  
20 Ms. Bormann said and I think what Mr. Harrington also did as  
21 well, which is the reason that, even though in 192 Mr. Breslin  
22 has left, and yet I think I would like you to persist in going  
23 through the analysis of the facts that are raised within the

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1 motion, it's because we, as you know, Judge, have had a very  
2 large number of unlawful influence issues.

3           Many of those were under the umbrella of AE 031.  
4 Obviously AE 031 is a motion that I think has seven or eight  
5 supplements based on different instances, and from time to  
6 time we have talked about whether we wanted to begin a new  
7 series of unlawful influence motions or whether we wanted to  
8 put them under the umbrella of 031. But the relevant point in  
9 that, Judge, is that in the government's response -- or one of  
10 the prosecution's responses to 031 is that we have filed an  
11 unusually large number of unlawful influence claims and I  
12 expect that their argument on 031 will be along the lines that  
13 it's been an indiscriminate use of unlawful influence in the  
14 use of that law.

15           To the extent we have raised an issue in another  
16 area, it is important for the court to go through that legal  
17 analysis, because when we have to meet that allegation which  
18 has already been made in their response in 031, we do need to  
19 have the court's analysis on the factual predicate within the  
20 motions on the unlawful influence we have raised.

21           So that's, I think, where the nexus and the link  
22 comes in which allows 192's legal analysis to survive and puts  
23 us in a position to respond to the prosecution, similar to

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1 what we have asked you to do in 032 with the companion motion  
2 of 018. Which you recall, 032 was our motion on the legal  
3 mail issue that we litigated for a lengthy period of time, 018  
4 was the legal mail communications order. And the positions  
5 have been that 032 was moot because we have resolved 018 to  
6 some degree, but we have asked you to nevertheless issue  
7 findings of fact on 032 because they are intertwined. So  
8 that's my position on 192 and 196, and that's all I have to  
9 say about those two motions.

10 I would like to at least talk with you about the way  
11 forward with the motions that we have in place and our vision  
12 for doing that. Obviously these motions have been filed at  
13 numerous points in history, and we are ready and prepared to  
14 proceed and argue each and every one of these motions.  
15 However, some of these motions have companion discovery issues  
16 that deal with documentary evidence, also deal with witness  
17 evidence, and so it seems, and I would suggest to the court,  
18 that the appropriate starting point is for us to engage in  
19 advocacy respectively on why we think witnesses are important,  
20 should be granted, why discovery still remains that will allow  
21 us to litigate that motion.

22 With respect to 214, which is asking for access to  
23 government representatives in the government of Saudi Arabia,

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1 there is a motion which is 214A. 214A requests discovery  
2 matters and it was a discovery request for diplomatic -- in  
3 essence diplomatic notes and documents of communications  
4 between the government of the United States and the government  
5 of Saudi Arabia as it pertains to access to Mr. al Hawsawi.  
6 So that's 214A. I would submit to the commission that we  
7 should address that issue before we go on to 214. That will  
8 also hopefully give us time to get back the exhibit from the  
9 review.

10 With respect to AE 332, Judge, which is one of the  
11 other motions that we have on the list for today, 332 is the  
12 emergency medical motion for Mr. al Hawsawi that we filed on  
13 December 15 of 2014. As you may recall, at the time we were  
14 very concerned about having the commission address this issue  
15 and meet some of the concerns that we had in that motion.  
16 That is 332.

17 Within 332, one of the most important issues we  
18 raised was the access to medical records, full access to  
19 medical records, including records that are up to date and  
20 contemporaneous with the medical care Mr. al Hawsawi is  
21 receiving. That continues to be an issue that we must address  
22 and it was relief requested in the motion.

23 Along with that, we also asked to have a meeting with

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1 Mr. al Hawsawi's treating physicians, and that was to include  
2 the senior medical officer. And, again, Judge, please  
3 understand that we operate from a position of lack of power on  
4 this because we don't know exactly who the people are, we  
5 don't know their names, obviously we know positions, and we  
6 don't always know exactly who the person that's doing the  
7 actual treatment is, regardless of whether we have records  
8 that are often a little bit ambiguous on who that is.

9           So in 332 we requested access to the treating  
10 physicians, the senior medical officer, as well as  
11 Mr. al Hawsawi's specialist. As we have referenced in the  
12 motion, there are a series of longstanding chronic medical  
13 ailments, some of those stemming from his torture and abuse  
14 that he received when he was in detention from 2003 to 2006.

15           MJ [COL POHL]: Mr. Ruiz, you are kind of jumping from  
16 motion to motion to motion. It seems to me the rubric here is  
17 let's take each motion, and if there is discovery or a factual  
18 predicate that needs to be addressed first, let's go to that;  
19 and then if we can get to the motion, we will get to the  
20 motion. Are you with me on this? Because you talk about 214  
21 in the discovery, you talk about 332 of information on -- so I  
22 understand that approach.

23           LDC [MR. RUIZ]: Okay.

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1 MJ [COL POHL]: But let's just pick each motion and do it  
2 within the context of what motion you want.

3 LDC [MR. RUIZ]: I wanted to be very clear with the  
4 commission that that would be our approach, to suggest that we  
5 have motion and witness issues.

6 MJ [COL POHL]: I understand.

7 LDC [MR. RUIZ]: The other issue, and this is more a  
8 process or procedure as we go forward on this, is that while I  
9 am prepared to argue the witness issues and the discovery  
10 issues on these motions, my colleagues are going to argue the  
11 substantive parts of those motions if we get to them. I see  
12 those as separate.

13 I see the witness and discovery request issues as  
14 being an independent, standalone kind of argument. But I know  
15 in the past you have always said one lawyer, one motion, but  
16 in this case I am asking the commission to allow me to at  
17 least address up front the witness availability, discovery  
18 availability issues, and the greater part of the motion or the  
19 substantive part of the motion as prepared by my colleagues.

20 MJ [COL POHL]: The colleagues on your team?

21 LDC [MR. RUIZ]: Yes, sir, Lieutenant Colonel Gleason and  
22 Lieutenant Colonel Williams.

23 MJ [COL POHL]: Under these circumstances, that will be

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1 appropriate. Go ahead.

2 LDC [MR. RUIZ]: So my intention would be to address  
3 Mr. al Hawsawi's medical motion, which is AE 332, first.

4 MJ [COL POHL]: Okay.

5 LDC [MR. RUIZ]: Sir, on AE 332 -- and I have to say that  
6 I think 340 and 332 have overlap. AE 340 is the motion where  
7 we seek the deposition of Mr. al Hawsawi's prior senior  
8 medical officer, who I believe has since departed from the  
9 island. It also requests the deposition of his current senior  
10 medical officer, as well as the gastrointestinal specialist.  
11 So I'll speak to 332, but I want to make the court aware that  
12 340 also contains issues that have overlap. And to the extent  
13 that you would like me to address that overlap, I'm happy to  
14 do that.

15 For purposes of 332, what we have asked -- Judge, as  
16 part of the relief that we have asked in 332, which was  
17 Mr. al Hawsawi's emergency medical motion, is that a number of  
18 witnesses be provided and be available for the defense to  
19 speak to in relation to that motion which, as you know, raises  
20 serious concerns about Mr. al Hawsawi's ongoing bleeding,  
21 about the issues that are related to the lack of ruling out of  
22 cancer based on the blood that has continued to be found in  
23 Mr. al Hawsawi's urine, as well as the longstanding chronic

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1 conditions, colorectal issues, that stem from Mr. al Hawsawi's  
2 time in captivity, as we have seen in the Senate Intelligence  
3 report. It very graphically related that numerous detainees,  
4 and in this case Mr. al Hawsawi it was also referenced, was  
5 subjected to excessive rough rectal examinations, there were  
6 medical procedures that were used without medical necessity,  
7 and those conditions have never been addressed or never been  
8 remedied for Mr. al Hawsawi, Your Honor.

9           You may have noticed from time to time, Your Honor,  
10 Mr. al Hawsawi, when he comes in the commission, sits on a  
11 pillow. And I will tell you that these concerns have  
12 continued to grow, to get worse, and they are getting to the  
13 point where they are affecting our ability to meet with  
14 Mr. al Hawsawi because of lack of comfort because these issues  
15 are indeed serious.

16           Where the necessity and the need to speak to the  
17 medical providers comes is this, Judge -- and the  
18 prosecution's answer has been that we have received largely  
19 all of their -- all of his medical records, not all of them up  
20 to date, and that some of his medical records continue to go  
21 through a declassification process. Having seen what is in  
22 his medical records up to date, again, I'm not privy to the  
23 declassification process, but how Mr. al Hawsawi's urine or

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1 any other aspect of his medical condition may be classified or  
2 there is a concern about classification of just the extent to  
3 which he is suffering, it escapes my imagination.

4           Having said that, Judge, what I would tell you is  
5 that when you look at the circumstances under which a person  
6 who is in need of medical condition -- and look, Judge, I  
7 understand that the purpose of this prosecution and the  
8 purpose of this case is eventually to kill Mr. al Hawsawi, but  
9 I also think that we all understand that we have a legal  
10 responsibility, an ethical responsibility, while he is in our  
11 care awaiting judgment, to make sure that he receives  
12 appropriate medical care, Judge. And not just to say that,  
13 not just to say repeatedly that he receives adequate medical  
14 care or that he receives the same standard of care that our  
15 troops do, but to actually in practice and that the procedures  
16 that are carried out are given to Mr. al Hawsawi.

17           As we know now, Judge, medical professionals,  
18 psychological professionals were intimately involved in  
19 devising and creating the system of torture that was utilized,  
20 and that cannot be lost on the commission when the commission  
21 is asked to allow the defense and Mr. al Hawsawi simply to  
22 make medical decisions based on medical records.

23           Judge, as I have related to you in my motions, my

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1 relationship with Mr. al Hawsawi has stemmed from 2009, and I  
2 will tell you that during the course of that time, one of the  
3 most difficult aspects of that has been to develop a trusting  
4 relationship. As you know, when I first started representing  
5 Mr. al Hawsawi, I was in uniform and I represented  
6 Mr. al Hawsawi in uniform for five of those years. And that  
7 was a process that took time. It took time and it took  
8 effort.

9           Where we are now is to the point where there is a  
10 measure of trust between Mr. al Hawsawi and myself and the  
11 uniformed representatives of his team who have been assigned  
12 by the United States to carry out our laws and to make sure  
13 there is faithful application to those laws. And in that --  
14 in the context of that trust that we have developed,  
15 Mr. al Hawsawi has asked us to meet, to speak to his doctors  
16 so that we can communicate in our own language with our own  
17 expertise and professional expertise and then have a  
18 meaningful conversation with him about what we think is  
19 appropriate, answer questions for him.

20           We are in a position where Mr. al Hawsawi does not  
21 have what a typical patient in a typical doctor-patient  
22 relationship would have, which is the ability to talk to a  
23 trusted family member or to a trusted friend and to run by

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1 critical and important medical decisions. And that's where  
2 the necessity comes for the legal team to be able to speak  
3 simply to doctors, Judge. And as I know from my practice in  
4 state and federal courts, the relationship between doctors,  
5 patients and lawyers often has been, largely in my experience,  
6 a collaborative experience. But for whatever reason here, the  
7 procedures and the standards and the policies that have been  
8 followed have been ones where the medical providers' names are  
9 not provided to the defense, they are kept hidden from the  
10 defense, and they are not allowed to talk and speak or meet  
11 with the defense. That's the effect. I know we can stand up  
12 here all day and talk about policies and practices, but that's  
13 what's been happening, Judge.

14           Now, in terms of what my team has done in efforts to  
15 open up lines of communication with doctors, we have written  
16 letters to the doctors asking them to meet with us, we have  
17 written letters asking questions to the doctors and hoping to  
18 get answers. The problem, Judge, is that, to the extent there  
19 is any communication with a middle person whose native  
20 language is not English and who has come through a series of  
21 events that create obstacles to a trusting relationship with  
22 medical professionals, it distorts our ability to speak to  
23 them.

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1           So what I am standing here asking you help us do is  
2 to preserve Mr. Hawsawi's health, to make sure we have  
3 meaningful contact and engagement with his medical providers,  
4 and we can have a conversation that will allow us to  
5 understand and maybe advise Mr. al Hawsawi and give him our  
6 opinion in that role of his counsel, his advocate, of what  
7 issues we have ----

8           MJ [COL POHL]: Have you attempted to talk to his medical  
9 providers?

10          LDC [MR. RUIZ]: Yes, sir.

11          MJ [COL POHL]: And what is their position?

12          LDC [MR. RUIZ]: We have been denied on one occasion. The  
13 letter they declined to speak with us. In one of the  
14 prosecution's filings, which I can't recall the number now,  
15 they take the position that I think yourself can now make the  
16 medical doctors speak with us. In other instances we have  
17 simply heard silence. And so we have gone through and talked  
18 to Mr. al Hawsawi and tried to see if there has been any  
19 feedback to him, but invariably there is this distortion.  
20 It's very difficult to understand what one end is saying  
21 through another end.

22                 And ultimately where we want to get to is where we  
23 can have a discussion with Mr. al Hawsawi where we said we

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1 talked to your physicians, this is their position, this is the  
2 way ahead. And we are not doctors, I realize that; but what I  
3 am asking you to realize, Judge, is we stand in that  
4 relationship of trusted friend, advisor. We are not his  
5 family members, but nevertheless, the circumstances have  
6 brought us to a time and a place that that's where we stand.  
7 So those are two key issues, Judge.

8           In 332 we also ask for additional relief which, as  
9 you have seen, includes a number of different courses of  
10 action. However, here is what I am telling the commission.  
11 In December when we first learned of the gravity of  
12 Mr. al Hawsawi's condition, at that time Mr. al Hawsawi had --  
13 from the beginning of the time when Mr. al Hawsawi was  
14 captured, when he was approximately 140 pounds, to at that  
15 time Mr. al Hawsawi was 99, under a hundred pounds at one  
16 point, he continued to suffer from lack of sleep and other  
17 additional ailments. So we were very concerned about this  
18 when we filed this in December. And that's why I tried as  
19 much as I tried to get the commission to listen to us at that  
20 time, but I understand the commission made a ruling, and we  
21 are here now discussing that issue.

22           But the fact of the matter is that the first step for  
23 us has to be to be able to have a discussion and a

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1 conversation with the medical doctors. Now, in the face of  
2 their willingness to meet with us and in the face of what  
3 seems to be the position of the government, which is that they  
4 can't be ordered to do that, that's why we filed 340. And 340  
5 is the deposition motion. And when I get to 340, I will  
6 explain that I think there are extraordinary circumstances  
7 given some of the items that I just related to you, and I can  
8 use that to argue on 340.

9           So our position is in 332, either, Judge, you order  
10 to make those doctors available, in 340 we order the  
11 deposition for the reasons that I have articulated.

12           MJ [COL POHL]: Just so I am clear, on 332 your relief  
13 sought has a number of items on it, one of which is to just  
14 meet with his physicians ----

15           LDC [MR. RUIZ]: As well as release of all medical records  
16 to date.

17           MJ [COL POHL]: Yes, but there also appears to be other  
18 things, such as immediate and appropriate medical testing to  
19 determine the exact source of blood in his urine. Are you  
20 asking me to direct the doctors to do certain type of medical  
21 tests?

22           LDC [MR. RUIZ]: I understand that's a very challenging  
23 thing to ask you to do. That's not lost on me, given the

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1 state of the record. That's why I went back and tried to  
2 articulate for you the context in which we filed this motion  
3 which, as we showed up in December, we were in preparation for  
4 a hearing and we became very concerned about the state of his  
5 health. We did not feel that we had time to parcel out a  
6 motion that would ask for additional relief as it progressed  
7 in time, and we needed to inform you of the gravity of the  
8 situation and the things that we needed to have happen.

9           So ultimately, yes, I would like to ask you that, but  
10 right now what I am asking you -- and we have asked you that,  
11 but what I am asking you most importantly is for access to the  
12 doctor and also as well for access to all his medical records.  
13 I believe that that was always the first step in this motion  
14 when we would have argued this to you in December, I would  
15 have keyed my arguments on that issue.

16           Again, this truly is and was an emergency issue. The  
17 fact that Mr. al Hawsawi is still here in court and is here  
18 doesn't dispel that, Judge. And I have tried to, in a short  
19 amount and efficient amount of time to you explain to you the  
20 gravity of the situation. The gravity of the situation,  
21 Judge, is that Mr. al Hawsawi continues to bleed and guards  
22 find his clothes has blood on it. And this is a condition  
23 that pertains and remains. I'm walking a balance here between

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1 an issue that is very sensitive to Mr. al Hawsawi and I am  
2 trying to articulate it for the commission, but the gravity is  
3 not one that is lost. That's why when we provided you with  
4 332, we attached the medical records. The medical records  
5 themselves indicate that there are certain things that have  
6 not been ruled out. That's as much as we know. We really  
7 don't know much more than that.

8           In that motion we also asked for a couple of other  
9 reliefs and I will address those since you brought those up.  
10 We asked for the return of all medical devices for  
11 Mr. al Hawsawi. It is my belief that largely for the most  
12 part that has happened. There are issues that we are still  
13 discussing with the Staff Judge Advocate, but the return of  
14 all medical devices seems to have gathered some progress, and  
15 I need to check with Mr. al Hawsawi to make sure 100 percent  
16 that those things were returned to him.

17           In terms of the return of his legal bins, which  
18 includes the legal materials of Mr. al Hawsawi, those  
19 materials have been made available to Mr. al Hawsawi.  
20 However, the issue that we run up against with that right now  
21 is simply he doesn't have access to the particular bins at all  
22 times. He has to be given an individual legal bin at any  
23 particular time, and so he didn't have independent access to

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1 his legal materials when he wanted to do that. I think that's  
2 an issue that's easily resolvable if the Staff Judge  
3 Advocate's office would be involved.

4           Unfortunately the Staff Judge Advocate has taken the  
5 position that they no longer meet and discuss things with  
6 attorneys at the lower level. So the new Staff Judge  
7 Advocate, unlike different Staff Judge Advocates, have taken  
8 the position that they will not meet, they will not even  
9 release the names of some of their personnel. Whereas, before  
10 we took first steps, we tried to have conversations, we tried  
11 to find middle ground before we got to the level of the  
12 commission. That's no longer an option we have because the  
13 current Staff Judge Advocate has removed himself from the  
14 process where we could actually try to address things at a  
15 lower level and see if we could remedy some of these issues  
16 before they become issues that I have to bring to the  
17 attention of the commission by way of motion. So that's  
18 partly why this is here, Judge. I will tell you that I made  
19 attempts to speak to the Staff Judge Advocate about these  
20 issues and -- to try to remedy these issues at a lower level,  
21 but that's the policy and the position that the current Staff  
22 Judge Advocate has taken.

23           I will also just briefly mention, Judge, and I only

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1 do that because it seems relevant to mention it now, this past  
2 Saturday I first learned that two of -- and I just mention  
3 that because it is relevant to the legal issue, and it is one  
4 that I also tried to run by the Staff Judge Advocate but it  
5 didn't work. It goes to the legal bin, legal materials issue.  
6 This past Saturday right before the 802, I learned that two of  
7 Mr. al Hawsawi's attorney-client legal pads have been seized  
8 and have been returned to him without any explanation of where  
9 they were -- why they were taken. I tried to talk about that  
10 with the Staff Judge Advocate and he did not have any personal  
11 knowledge. A motion on that is coming, and I'm sure we will  
12 use the entire briefing cycle.

13           But the point is that the kinds of issues that we see  
14 continue to raise themselves. However, at this point where we  
15 are today, the most pressing thing that I would like to ask  
16 the commission to do is the two issues I have highlighted for  
17 you and I am going to ask ----

18           MJ [COL POHL]: Are those the doctors and the records?

19           LDC [MR. RUIZ]: Yes, sir.

20           MJ [COL POHL]: Okay.

21           LDC [MR. RUIZ]: So as I go through the list of witnesses  
22 that we have requested, we have requested the current senior  
23 medical officer for Mr. al Hawsawi. We also used the term

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1 "treating physicians," because we don't really understand --  
2 even after having to have these communications with  
3 Mr. al Hawsawi, we don't understand how many people have a  
4 hand in treating Mr. al Hawsawi. As well as we believe there  
5 is a specialist, a gastrointestinal or colorectal specialist  
6 that may be on the island that would be available to speak  
7 with us about particular medical options. This is somebody  
8 that we have also requested.

9           And as you know in our motion, we also requested the  
10 Staff Judge Advocate for the camp as well as the camp  
11 commander and the assistant watch commander. They are  
12 requested essentially to establish the efforts that we have  
13 made -- the Staff Judge Advocate, the efforts that we have  
14 made to communicate.

15           The question you asked, have we made an effort to  
16 communicate. The responses that we have received, the role  
17 that the Staff Judge Advocate has played, because we  
18 believe -- and I think if we are able to talk with him, that  
19 the Staff Judge Advocate has played a role in how these  
20 relationships have not developed, policies that continue to  
21 exist that prevent access and prevent us from speaking with  
22 doctors. So we requested that the current Staff Judge  
23 Advocate be made available for us to question since we have

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1 not had an opportunity to have a conversation with him because  
2 he has taken the approach and the policy that he will not meet  
3 with us.

4           With respect to the camp commander and the assistant  
5 watch commander, we want to talk to them about the  
6 circumstances under which Mr. al Hawsawi's legal materials  
7 were moved, the medical devices that were removed. And they  
8 are in the best position to address that issue and to tell us  
9 why that is something that's relevant. So what I am asking  
10 you right now is to order the prosecution to provide us with  
11 medical records up to date and to also order that these  
12 individuals meet with Mr. al Hawsawi's legal representatives.

13           Would you like me to jump to 340 or stay on here?

14           MJ [COL POHL]: This is related to 340?

15           LDC [MR. RUIZ]: 340 is where we ask for deposition in  
16 lieu of personal contact.

17           MJ [COL POHL]: Okay.

18           LDC [MR. RUIZ]: And so the argument there is based on the  
19 factual predicate, but we are asking that they be made  
20 available for deposition because there are extraordinary  
21 circumstances in this case where you have the relationship,  
22 longstanding relationship, and the trouble between doctors  
23 acting in capacities where they have tortured and assisted --

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1 facilitated in torture.

2 I understand -- and I am not staying that these  
3 doctors did that, let me be clear about that, I don't have any  
4 knowledge of that, but that that past and that history does  
5 create barriers to communication and has created barriers to  
6 communication where it is important for us to come in and try  
7 to bridge some of that gap and facilitate that communication.

8 The prosecution's response on that is that it is not  
9 necessary to preserve their testimony at trial. Well, Judge,  
10 the rule for deposition doesn't necessarily just tie it to  
11 trial, it says if it would be in the interest of justice to  
12 preserve their testimony for military commissions. Judge, I  
13 would say to you that it is absolutely in the interest of  
14 justice to preserve the testimony of these individuals since  
15 they will not meet and speak with us for future sessions of  
16 this commission, for future litigation that we may have,  
17 whether it's in the trial itself where we have mitigating  
18 evidence -- and here is the thing, Judge, I don't know their  
19 names so I don't know what their names -- I am not going to be  
20 able to request them by name.

21 But nevertheless, the point is right now the  
22 interests of justice weigh heavily in having the ability to  
23 speak to these individuals, whether it's on a personal

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1 one-on-one interview or as a deposition that preserves the  
2 essence and the substance of their knowledge and their  
3 testimony for this commission, so this commission can then use  
4 that to continue to inform itself and to continue to rule on  
5 issues such as is Mr. al Hawsawi getting appropriate medical  
6 care.

7           Judge, if I'd had the opportunity to speak to these  
8 doctors previously, I would have done so and I would have been  
9 in a better position here to argue to you why there hasn't  
10 been adequate medical care. And I would ask you not to hold  
11 that against us -- I know you are asking me to do this, and  
12 you are asking me to do that. You are the only person right  
13 now on this island who can grant us relief. You are the only  
14 person on this island who doesn't have a pseudonym and whose  
15 face I know -- I mean, I know other people -- but who has the  
16 authority to make this happen. And not only the authority,  
17 Judge, but the responsibility to make sure that we maintain  
18 Mr. al Hawsawi's care.

19           We certainly have the responsibility as his  
20 advocates -- quite frankly, the prosecution, I don't know what  
21 their position is, but you do, sir, and I'm asking you to  
22 provide us access to these witnesses and medical records so  
23 that we can continue to progress and move this issue, this

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1 very important issue, forward.

2 MJ [COL POHL]: Thank you.

3 Trial Counsel?

4 TC [MR. RYAN]: Good morning, Your Honor.

5 MJ [COL POHL]: Good morning, Mr. Ryan.

6 TC [MR. RYAN]: Judge, as I understood counsel's  
7 submission to the commission, he was only speaking about the  
8 need for discovery and/or witnesses, and then I believe he  
9 said the other members of the defense team were going to argue  
10 the substance of the motions. But on the other hand, during  
11 his argument it seemed that not only the substance as well the  
12 need for witnesses were conflated, but also 340 was sort of  
13 pushed into 332.

14 If the court -- if the commission would be willing, I  
15 would prefer to make one argument at one time, which I think  
16 would cover all of the bases, including the substance ----

17 MJ [COL POHL]: Okay, Mr. Ryan.

18 Mr. Ruiz, is there anything more? You said some  
19 other members of your team wanted to argue for 332 on the  
20 substance of 332 or 340 or -- I'm sorry?

21 LDC [MR. RUIZ]: May I confer just briefly?

22 MJ [COL POHL]: Sure.

23 LDC [MR. RUIZ]: So, Judge, as I see it, there needs to be

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1 additional argument on the adequacy of care and whether  
2 Mr. al Hawsawi is receiving adequate care. That issue is one  
3 that I have not addressed fully because I think we are not --  
4 we don't have the access to the information to do that. That  
5 piece would be argued by Lieutenant Colonel Williams. In  
6 requesting that relief to the commission in regards of the  
7 access to documents and witnesses, we don't have any  
8 additional.

9 MJ [COL POHL]: Can we get to the adequacy of care issue  
10 without first addressing and resolving the discovery issues?

11 LDC [MR. RUIZ]: I don't believe so.

12 MJ [COL POHL]: Okay.

13 LDC [MR. RUIZ]: And that's what I was trying to  
14 articulate.

15 MJ [COL POHL]: Got it. So, Mr. Ryan, you can conflate,  
16 if necessary, to have a complete argument on the discovery  
17 issues, but let's -- because I think it's hard to say they are  
18 not interrelated, but -- so go ahead, with that being said.  
19 I'm sure gave -- that gave you great, clear guidance, but  
20 again, I don't know how you can quite -- discovery is never a  
21 vacuum so it is in the context of the larger motion. So go  
22 ahead.

23 TC [MR. RYAN]: Thank you, sir. Your Honor, as to 332,

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1 this -- the motion arises out of a specific incident, although  
2 at times from counsel's argument it seems, and I guess it is,  
3 very much related to a much larger medical issue, medical  
4 concerns that counsel is putting forth to the court at this  
5 time.

6           The incident, though, that was the basis for 332  
7 occurred on the 7th of December 2014. The government's  
8 pleading has a record attached to it as Attachment B that  
9 describes in some significant detail the actual incident  
10 itself. I won't go through the entire incident or the entire  
11 report, but I will just make three points about it. First is  
12 that the accused caused the incident by refusing a lawful  
13 order from those guarding him to return into his cell. In  
14 that same document there is noted at some point by the author  
15 that this is not uncommon, that detainees often test the  
16 guards by refusing orders to see how far they can get. I  
17 don't think this is unusual in the world of any ----

18           LDC [MS. BORMANN]: Judge, I am going to object to that  
19 because there is no evidence of that in the record. And  
20 although you are giving me an opportunity to argue, this  
21 affects my client's procedural rights.

22           MJ [COL POHL]: The objection is overruled. Go ahead.

23           TC [MR. RYAN]: Thank you, Judge.

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1           Second, I note that the accused initiated the force  
2 that ultimately led to a medical issue by, quote, "pushing and  
3 pulling against the guards" and then, quote, "dropping to the  
4 floor where he proceeded to kick, thrash, and bite at the  
5 guards." And, in fact, one guard did receive a minor bite on  
6 his hand.

7           Final point from the record attached that is evidence  
8 in this matter is that the accused, although being given the  
9 opportunity to receive medical treatment for whatever this  
10 incident might have done to him, steadfastly refused. It is  
11 only after some point that the accused met with counsel that  
12 this became apparently a medical issue and, in fact, it was  
13 then filed and styled as "Emergency Motion for Appropriate  
14 Medical Intervention." From that, then, as counsel has noted,  
15 he not only asks for medical intervention, but he asks for  
16 many things, and I'll take these requests up one at a time:

17           First, he asked for immediate and appropriate medical  
18 testing to determine the exact source of blood in his urine;  
19 number two, provide whatever immediate medical procedures are  
20 necessary under established standards of care to remedy  
21 Mr. Hawsawi's severe and chronic medical conditions. And this  
22 is where we get into this crossing from one incident in which  
23 the accused wouldn't even take medical attention to it being a

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1 much larger issue wanting to revisit every medical procedure  
2 that's been going on in his time here.

3 I would submit, Your Honor, that this is a recurring  
4 theme. In the time that we have been litigating this matter,  
5 this commission has often been asked to make itself the  
6 jailer, to be the court of final resort, to be the ultimate  
7 decider over what should happen at times on a minute-by-minute  
8 basis in terms of how these five individuals ----

9 LDC [MR. RUIZ]: Objection, relevance.

10 TC [MR. RYAN]: ---- need to be guarded.

11 MJ [COL POHL]: Overruled.

12 TC [MR. RYAN]: Now this commission is being asked to not  
13 just be the jailer but, in fact, be the doctor of the jailer  
14 as well and go behind the scenes, go behind the curtains, go  
15 behind the medical professionals' judgment and decide if, in  
16 fact, they are doing the right thing, they should be doing  
17 more, they should be doing less. I would submit, Your Honor,  
18 at this point that the commission should decline to do that.  
19 The accused are getting medical care pursuant to the  
20 protocols that an accused has the right to request the medical  
21 treatment.

22 This is where I think the gravamen of it all is,  
23 Judge. Your Honor's role should not be to oversee every

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1 aspect of their detention. The detention of these individuals  
2 is in the care of the Department of Defense. It is being run  
3 by persons who are professionals, and you have heard from some  
4 of them through the course of this litigation. People take  
5 the stand or people come to this job after many years of  
6 experience, oftentimes roles in civilian life or in previous  
7 life that gave them special training, and come in here, I  
8 would submit, with an indicia of professionalism, in that they  
9 do their job pursuant to the protocols that have been  
10 established and probably altered as time has gone by as in  
11 everything we learn as we go.

12           So although it's easy for counsel to rush in with  
13 every motion over every incident that occurs, including every  
14 time a legal bin is seized or every time someone falls on the  
15 floor and tries to bite a guard, I would submit that that's  
16 not Your Honor's position. I don't think you want to be  
17 involved in that.

18           MJ [COL POHL]: What about the request to see his medical  
19 records?

20           TC [MR. RYAN]: Yes, sir. As to medical records, the  
21 government has been providing on a rolling basis all  
22 unclassified medical records of the accused. The most  
23 recent -- with the court's indulgence, just one moment. The

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1 most recent batch of records was submitted on the 12th of  
2 December and covered the period of time through August of  
3 2014.

4 As it pertains to unclassified records, counsel has  
5 records for the accused governing his full time going back  
6 to '06 through, as I said, August of 2014. The next batch,  
7 which I understand, of course, would include this time period,  
8 is due any time now. The word that was given to me was  
9 "imminent."

10 MJ [COL POHL]: You used the word "unclassified." Are  
11 there classified records that have not been provided?

12 TC [MR. RYAN]: Yes, sir. That brings me to the next  
13 point. The classified medical records, of course, that exist  
14 will not be produced to the accused or to the accused's  
15 counsel until counsel signs the memorandum of understanding.

16 And, Judge, I have got to point this out at this  
17 time. Counsel uses some big words, some frightening words  
18 here, things like "cancer," things like "life-threatening."  
19 Now we are back to the MOU argument again, and he is saying  
20 give me the doctor because I have to know everything. If it  
21 was that important -- strike that.

22 Going back, you have heard arguments in this court  
23 that MOUs don't have to be signed because they are nothing

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1 more than a redundancy; that counsel shouldn't have to do it  
2 yet again because they have signed their name a whole bunch of  
3 times saying they understand their obligations and out of  
4 principle and out of resentment for one more time, they are  
5 not going to sign this MOU.

6 But in this case where counsel is concerned literally  
7 about the life of his client, you would think they could bring  
8 it -- bring themselves to one more time just sign their name,  
9 one more time go through that indignity so that they can get  
10 full medical ----

11 MJ [COL POHL]: I understand your point. And I don't want  
12 to get down into the road of the MOU at this time.

13 Let me ask you this: So your position is the  
14 classified records will be provided upon signing the MOU; is  
15 that correct?

16 TC [MR. RYAN]: That's correct, Your Honor.

17 MJ [COL POHL]: How about the physicians' interviews?

18 TC [MR. RYAN]: Your Honor, the physicians' interviews,  
19 like all government -- like all witnesses working for the  
20 government, are governed by standards of behavior and  
21 protocols, and this is, I can generally refer to it as sort of  
22 the Touhy world, where persons working for the government who  
23 somebody wants to question about their official work are

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1 necessarily seeking discovery of the internal workings of the  
2 government, and there are basic procedures that have to be  
3 followed.

4           In this case -- but getting to Your Honor's point,  
5 and I understand it, more importantly than all of that, I  
6 would submit this: No doctor should be treating with a lawyer  
7 looking over his shoulder. The doctor in this case -- and I  
8 do not -- I am not speaking with knowledge of any decision  
9 made on that person's part, but a doctor in this case is  
10 ultimately in a position of having to treat a patient. It's  
11 not a simple matter of a guard who has got this generic job or  
12 neutral job of having to guard anyone, any number of persons.  
13 In a doctor situation, as Your Honor can understand, there  
14 involves a much more deeper level of a relationship, more  
15 discussion, more understanding and so on.

16           Doctors are, and this is no secret, are reluctant in  
17 any part of life, not just this one, to engage with persons  
18 outside of the direct relationship they have with a patient.  
19 So it would be entirely within a doctor's realm to decide that  
20 they do not want to speak with anyone except the patient as to  
21 that patient's care. Put on top of it, sir, this: In this  
22 case, anyone who is in a role of a doctor could look at  
23 what -- could look at this case and decide trying to treat a

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1 patient while trying to get a lawyer's involvement and even  
2 approval is not a recipe for good care.

3           And that is something, sir, that I submit that should  
4 be left to the doctor. It should not be something where, A,  
5 the lawyer is getting involved; and, B, if he doesn't like the  
6 answers he is getting or lack of answers, goes to a military  
7 commission to intervene as well. For the same reason, sir,  
8 the medical personnel should be presumed to be acting  
9 appropriately and at a level of medical care that is  
10 sufficient under the circumstances.

11           As far as anyone then going behind the scenes of  
12 supervising that person, I would submit there is a system in  
13 place of going to the camp commanders, to the head of JTF, to  
14 the head of SOUTHCOM.

15           As far as other items that are sought, Your Honor,  
16 counsel made mention of the return, immediate return of the  
17 accused's medical devices and medications. I think he said  
18 that they have, for the most part, been returned. Just so we  
19 are clear, Judge, we are talking about one or two neck braces  
20 which the document attached to the government's response  
21 indicates he wears very rarely, except for legal visits; an  
22 orthopedic pillow, which is available to him any time he wants  
23 it, although on a recent occasion he kicked it outside the

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1 cell and said he didn't want it; and last being of a medical  
2 cream, which is again available upon request. So in that  
3 case, Judge, I would submit it's moot.

4           You asked about medical records. I have stated that  
5 so I would submit that is moot as well.

6           The return of the legal bins, it is our understanding  
7 that they were taken from the accused for the length of about  
8 an hour or so during the course of this incident on December  
9 the 7th and has been made available. I don't think counsel  
10 disputes that, so I would submit that is moot as well.

11           All reports of the incident are sought. As  
12 Your Honor can see from the attachment to the government's  
13 response, we have provided a detailed report of what went on  
14 that day. I will, Judge, say that I have received this  
15 morning some updated reports that have been going through a  
16 security review, classification review, and we can make them  
17 available to counsel. With that, they will have all reports  
18 regarding this incident.

19           There was a request of a videotape of the incident.  
20 There was none taken. This was an incident that occurred  
21 spontaneously. It was not a planned extraction or anything  
22 like that, so there is no video.

23           Request for videos ----

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1 LDC [MR. RUIZ]: Judge, I believe that's not in these  
2 motions. I believe that's a separate discovery motion. I  
3 addressed only two motions, I guess 332 and -- 332 ----

4 LDC [MS. BORMANN]: 340.

5 MJ [COL POHL]: I don't see that on 332, Mr. Ryan.

6 TC [MR. RYAN]: Judge, I think I was conflating myself on  
7 that point, so I will stop.

8 MJ [COL POHL]: Okay.

9 TC [MR. RYAN]: As to 332, Your Honor, as a whole, the  
10 argument basically comes down to Bell v. Wolfish and  
11 Turner v. Safley, cases that have been cited to this  
12 commission many times in the past. In short, it is  
13 recognized -- it has been recognized by the Supreme Court and  
14 others that the running of any detention facility is no easy  
15 day at the beach, and it is something where the commissions or  
16 the courts have generally been told and generally concluded  
17 that it is best to give due deference as much as possible to  
18 those persons who are on the ground who do it on a daily  
19 basis.

20 For those reasons, Your Honor, I would submit that  
21 defendant -- the accused's motion in 332, both for request of  
22 discovery and personnel as witnesses should be denied as  
23 either irrelevant or moot.

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1           And, Your Honor, at this point I think it makes the  
2 most sense for me just to go into 340 as well, which was the  
3 request for depositions. My argument there is really quite  
4 similar and shouldn't take much time.

5           The accused asks for a deposition of all of the  
6 persons that counsel noted to Your Honor, the current senior  
7 medical officer, treating physicians, specialists and others.  
8 The commission should deny the accused's request for three  
9 reasons as we have noted: One, the depositions are  
10 unnecessary because the factual record documenting his health  
11 care and medical conditions already exists in the form of  
12 medical records; two, Mr. al Hawsawi fails to state a proper  
13 ground for taking a deposition because he does not seek the  
14 deposition to preserve testimony for future trial; and three,  
15 Mr. al Hawsawi fails to offer any evidence that his healthcare  
16 providers will be unavailable at trial and no circumstances  
17 relieve him of his obligation to demonstrate their  
18 unavailability.

19           Simply stated, Your Honor, the purpose of depositions  
20 is to preserve testimony. It's not to start a road. It's not  
21 to go down some investigation into a medical malpractice case  
22 or for even seeking the commission to intervene in places that  
23 it really should not be. It is for purposes where a witness

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1 won't be there at the time they are needed for trial.

2           In this case we are talking about at least it started  
3 as an incident on December 7 where the accused began a  
4 behavior that resulted in him having to be forcibly put into  
5 his cell. That should, as best I can figure, have nothing to  
6 do with the ultimate trial of this case for these five  
7 individuals being charged with mass murder. The rules  
8 regarding depositions are R.M.C. 702, which comes from Federal  
9 Rule of Criminal Procedure 15.

10           Mr. al Hawsawi, through counsel, doesn't even attempt  
11 to claim this is for trial or anything to do with trial.  
12 Rather, it seems clear, as I have stated, that this has far  
13 more to do with litigating the conditions of his confinement  
14 and/or to use it for some other purposes to question a  
15 doctor's care. Clearly that does not satisfy 702.

16           And as far as the argument, Judge, that even if we  
17 throw 702 out the window, even if his counsel says it's really  
18 in this world of the giant interests of justice, I basically  
19 go back to my argument that I made before, Judge, that this is  
20 an area where we would submit the commission is best -- is in  
21 the best position to leave such decisions to those who were  
22 there, those who were trained to do it. And for those reasons  
23 I would just rely on our arguments made previously on our

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1 pleadings and on the cases of Bell and Turner.

2 Subject to your questions, Your Honor, that's all I  
3 have.

4 MJ [COL POHL]: Thank you.

5 TC [MR. RYAN]: Thank you, sir.

6 LDC [MR. RUIZ]: Judge, I am going to just try to key in  
7 and rebut each of these points specifically, and then I will  
8 wrap that up.

9 Mr. Ryan's invitation to the commission to entertain  
10 the fact that this was somehow something that began on  
11 December 7, 2014 is absolutely incorrect. I understand why  
12 Mr. Ryan would like that to be the beginning point of the  
13 inquiry. Unfortunately, the facts simply do not support that  
14 statement. Judge, that goes along also with the statement  
15 that our motion was forced because of the December 7 event.

16 On March 19 of 2014, we sent our first letter to  
17 Mr. al Hawsawi's senior medical officer, and we have  
18 referenced this in our motion. That was March 19, 2014. On  
19 July 10, 2014, we sent an additional letter. Neither of these  
20 letters received any response. These letters raised some of  
21 the concerns that we have discussed. On August 18, 2014, we  
22 again asked and requested that medical personnel meet to  
23 discuss the serious conditions that we continue to have grave

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1 concerns about Mr. al Hawsawi. We received a response at that  
2 time from the JDG commander, at AE 332 Attachment F, declining  
3 to meet with us. On October 14, 2014, we also sent an  
4 additional letter that again went without a response. This, I  
5 will point out, is all before the 7th, December 7 of 2014, and  
6 they were all efforts that we had made repeatedly to try to  
7 resolve this issue before bringing it to the attention of the  
8 commission.

9           The blood -- and Mr. Ryan said, I think, I used big  
10 words. Not many people have actually accused me of using a  
11 lot of big words, but I guess "cancer" is a big word. Well,  
12 Judge, I did not use the word "cancer," I simply repeated the  
13 word "cancer." The word "cancer" first appeared in a footnote  
14 in one of the medical records we received. And what it said  
15 is the cancer had not been ruled out. Unfortunately I can't  
16 claim attribution and I can't claim that is my own word, but  
17 it is the doctor's word. So I guess in this instance it is  
18 the doctor who is using the big words, and I just happened to  
19 be repeating them for the commission's consideration.

20           Judge, the references to blood don't come from me,  
21 they come from some items that we have been able to discern.  
22 On July 23, July 28, August 5, and August 26 -- and that's  
23 where our medical records stop -- reference these conditions

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1 without much more to add about these conditions. So we are  
2 giving you what we have, what we have looked through these  
3 records and what we found. And yes, it is a serious matter.

4 Now, December 7, Mr. Ryan says when a detainee falls  
5 on the floor and tries to bite a guard. What he doesn't say  
6 is he was taken down while shackled by eight guards to the  
7 floor, and then they claim he tried to bite them as he fell  
8 down on his way to the floor. That man over there, who barely  
9 weighs 100 pounds, was taken down by at least eight members of  
10 the guard force while he was shackled, but Mr. Ryan thinks he  
11 fell. Well, Judge, we are asking for discovery in one of our  
12 motions to see if we can get any additional information to  
13 determine whether he fell while shackled and being handled by  
14 eight members of the guard force or whether he was taken down.

15 Now, Mr. Ryan says there is no video in this, the  
16 highest, most secure detention facility on the place of the  
17 earth. Apparently they do not monitor with videos ----

18 MJ [COL POHL]: Mr. Ruiz, if we are going to go into this,  
19 this is 333 now?

20 LDC [MR. RUIZ]: I am just rebutting what Mr. Ryan said.

21 MJ [COL POHL]: I understand, but do you want to go into  
22 333?

23 LDC [MR. RUIZ]: I would like to rebut what he said and

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1 then go into the next motion.

2 MJ [COL POHL]: Go whatever way you want, sir.

3 LDC [MR. RUIZ]: So those are the facts, and my colleague  
4 will argue the discovery portion on that, Your Honor.

5 MJ [COL POHL]: Okay.

6 LDC [MR. RUIZ]: What we did say in our motion in December  
7 was that this event, this excessive force exacerbated these  
8 longstanding and chronic medical conditions that didn't begin  
9 on December 7, 2014, but began somewhere between 2003 and 2006  
10 as we now know because the Senate Intelligence report tells us  
11 that there were excessive rectal examinations -- some would  
12 call that sodomy -- without appropriate, necessary medical  
13 need, and those acts caused longstanding chronic and medical  
14 conditions that have yet to be resolved. They can't get away  
15 from that fact regardless of how much they would like to, but  
16 it certainly didn't start on December 7, 2014. It started  
17 somewhere between 2003 and 2006 by members and agents of our  
18 government who violated our laws and tortured. That's where  
19 it began.

20 It is our responsibility now to provide the adequate  
21 medical care. And that first step to doing that, Judge, I  
22 would respectfully say to you, is that you, yes, insert  
23 yourself into this process because you are the only person who

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1 now has the authority to move this process along where there  
2 has been a refusal to allow us to get adequate information,  
3 communications to make a better submission to you as to why  
4 you should intervene. And the notion that you should somehow  
5 have hands off completely of what happens in this commission  
6 because they are the jailers and we are the jurors is not  
7 accurate.

8           Constitutional rights don't stop at a prison door.  
9 That's not what our law says. There continue to be legitimate  
10 interests in the court injecting itself in situations where  
11 that conduct places at risk and at issue one of an accused's  
12 rights. In this case, it is our right and our responsibility  
13 to preserve his health, Judge. And we are asking you, yes, to  
14 tell JTF to tell its doctors that they can't just play hands  
15 off, that they have to communicate, that they have to have  
16 this dialogue so that you can be in a better position to make  
17 these determinations on adequacy of care. Because as you  
18 pointed out, unless we resolve the discovery issues, unless we  
19 resolve access to the witnesses, we are just not there and we  
20 would be arguing from a position where we would not be able to  
21 provide you with all of the facts in order to do that.

22           With regards, briefly, to the MOU, it's not an  
23 indignity, it is a matter of integrity. That's a very big

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1 distinction. The MOU -- and I'm sure we will have further  
2 arguments about that -- has nothing to do with embarrassment  
3 or indifference or any of those issues, but it has everything  
4 to do with the belief that we have that by signing that MOU  
5 and the interplay of that MOU with reference to 018EEE creates  
6 in us a complicity in denying legal rights to Mr. al Hawsawi  
7 and his ability to complain about his torture, which by the  
8 way our government just affirmed in Geneva earlier this year.  
9 In 2014 we sent a diplomatic envoy to Geneva to say we still  
10 abide by the convention against torture; and yet here we deny  
11 his ability to complain against torture. And the interplay of  
12 that MOU in that issue is what we are arguing about, not  
13 indignity, and we will make that clear at a later point.

14 Judge, I am asking you to grant us access to  
15 Mr. al Hawsawi's medical providers and to his medical records.

16 One last point. It is my understanding that as of  
17 very recently even his own doctors did not have access to his  
18 medical records from 2003 and 2006. Did they sign an MOU? I  
19 don't know.

20 MJ [COL POHL]: Mr. Ryan, anything further?

21 TC [MR. RYAN]: No, sir. Thank you.

22 MJ [COL POHL]: Okay. Since it is related to this, let's  
23 do 333, and then we will take a break.

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1 DDC [LtCol GLEASON]: Good morning, Your Honor.

2 MJ [COL POHL]: Good morning.

3 DDC [LtCol GLEASON]: Your Honor, as Mr. Ryan already  
4 brought up the fact, there was an incident on 7 December 2014  
5 in which eight members of the guard force took down  
6 Mr. Hawsawi while he was shackled which resulted in injuries  
7 to Mr. Hawsawi.

8 Now, the truth of what happened during this incident  
9 is in question. Now, in their response to this motion, the  
10 government provided us an unsworn, three-page letter from an  
11 unidentified government agent who was alleged to have been the  
12 OIC of the camp who says that Mr. Hawsawi began to kick,  
13 thrash, and bite at the guards as he threw himself to the  
14 ground, which was the cause of his injuries.

15 Now, the defense has not been provided with any type  
16 of records to substantiate the government's claims and we are  
17 expected to believe that in the most secure detention facility  
18 in the world there is no video of this incident taking place  
19 and that there is no records of Mr. Hawsawi's injuries because  
20 he refused medical care.

21 MJ [COL POHL]: If the government represents that there is  
22 no video records, which Mr. Ryan did a minute ago -- I mean,  
23 you keep saying, I heard it from you and I heard it from

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1 Mr. Ruiz, "I can't believe there is no video." Belief is up  
2 to you, but what I am saying is, okay, they say there is  
3 nothing, what am I supposed to do?

4 DDC [LtCol GLEASON]: If that's a representation there is  
5 no video, Your Honor, then we have to take them at their word.  
6 However, we have asked them on that specific point were there  
7 any records of audio recording, video, or any photographs that  
8 were taken. They responded with there is no video. They  
9 didn't comment at all on audio or photographs ----

10 MJ [COL POHL]: There was not a full response because we  
11 were drifting into a different motion at the time, but go  
12 ahead.

13 DDC [LtCol GLEASON]: Okay, Your Honor. Your Honor,  
14 getting back to the defense teams understanding of the truth  
15 of what actually happened, this is going to be critical, not  
16 only for the preparation of our defense but if we get to  
17 sentencing. And it's going to be a critical sentencing issue  
18 because there is Skipper evidence. If and when I refer to  
19 Skipper, Skipper v. South Carolina, 476 U.S. 1, 1976. And  
20 what that case is is that the defense is able -- the defense  
21 should always be allowed to present evidence on an accused's  
22 adjustability to prison life. It's a highly relevant fact in  
23 a capital case.

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1           The defense opened that door and then the government  
2 has the option to present evidence of future dangerousness.  
3 And we suspect that Mr. Ryan's argument in court regarding  
4 this incident, that that will be the government's approach.  
5 They will claim that Mr. Hawsawi caused this incident, injured  
6 himself, and that is evidence of his future dangerousness,  
7 therefore, he should be sentenced to death in part for that  
8 reason.

9           The problem with this -- with that is we have not  
10 been provided any facts to verify that or any evidence to  
11 verify that. And that raises a separate Skipper issue, which  
12 is a due process problem. At footnote 1 in Skipper, the court  
13 held that a defendant may not be sentenced to death on the  
14 basis of information which he has no opportunity to explain or  
15 deny.

16           So, Your Honor, that gets us to our request for  
17 discovery. We have requested three items of information that  
18 we would like to verify what actually happened on December 7,  
19 2014. The first is we asked for documents, you know, what  
20 reports are out there, what witness statements, what command  
21 investigations were conducted. We would like a copy of those.  
22 Any DIMS records, any medical reports for Mr. Hawsawi or from  
23 the guard Mr. Ryan claims was bitten. We would like to see

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1 that medical record to verify that allegation.

2 We would like to be provided with personnel or  
3 service records for the guards involved to determine whether  
4 they have any prior incidents of using excessive force,  
5 whether they were counseled in the past, and whether --  
6 regarding this incident, whether they were reprimanded or  
7 counseled for acting inappropriately.

8 And we have also asked for any videos, audio, or  
9 photographs that were taken. As you brought up, the  
10 prosecution responded that there were no videos, but they did  
11 not address the fact of whether there was audio recordings of  
12 this or whether there were any photographs in existence.

13 Now, Your Honor, regardless of what version of the  
14 facts is accurate, the defense needs all the facts to prepare  
15 their case for trial. This is what Skipper tells us and this  
16 is what is fair in this case, Your Honor.

17 MJ [COL POHL]: Thank you.

18 DDC [LtCol GLEASON]: May I have a moment, Your Honor?

19 MJ [COL POHL]: Sure.

20 DDC [LtCol GLEASON]: Your Honor, I have nothing  
21 additional. Thank you.

22 MJ [COL POHL]: Thank you.

23 Trial Counsel?

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1 TC [MR. SWANN]: Your Honor, if you look at AE 332, you  
2 will see attached an investigation done by the camp commander  
3 that Mr. Ryan made reference to, three pages. It was at one  
4 time classified and we turned it into an unclassified  
5 document.

6 In addition to that, the defense will be provided  
7 DIMS. And as Mr. Ryan indicated this morning, there is  
8 another report, it's called a serious incident report, that  
9 was done at the time of this incident. It will have attached  
10 to it some statements. It's 13 pages in length. And we would  
11 be more than glad to provide it to Mr. Ruiz and his team just  
12 as soon as we leave this room.

13 That said ----

14 MJ [COL POHL]: Are you saying both the DIMS report and  
15 the SIR?

16 TC [MR. SWANN]: Yes, sir.

17 MJ [COL POHL]: Okay.

18 TC [MR. SWANN]: The personnel and service records of the  
19 individuals involved, all of these individuals are soldiers.  
20 The indications are from the report and all of the witness  
21 statements, none of them did anything wrong.

22 Now, I have heard much about this, copies of all  
23 videos, photographic, and audio recordings of the use of

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1 force. As Mr. Ryan correctly stated, this was an incident  
2 brought about by Mr. Ruiz's client that morning. The report  
3 that you have in front of you and they have in front of you  
4 indicate that he wanted to go back to rec, recreational,  
5 after, I believe, recording some sort of statement for his  
6 family. He wouldn't go back in and then he was simply placed  
7 back in and then bit one of the guards through the glove that  
8 the guard was wearing. The only person that received any  
9 medical treatment that day was the guard. And I believe there  
10 is a statement from the guard as to that treatment also  
11 contained in the serious incident report that they will get to  
12 obtain.

13           There are no videos of this incident. Forcible  
14 extractions are videotaped. And we have, my last  
15 recollection ----

16           LDC [MR. RUIZ]: Objection.

17           TC [MR. SWANN]: ---- over time Mr. Hawsawi has  
18 experienced at least two forcible extractions ----

19           LDC [MR. RUIZ]: Objection, relevance.

20           TC [MR. SWANN]: I'm sorry, Your Honor, it's ----

21           MJ [COL POHL]: Just a second. Overruled. But I don't  
22 need to know about previous incidents. You just say that an  
23 FCE would be videotaped but this was not an FCE.

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1 TC [MR. SWANN]: This was not an FCE. It would have been  
2 videotaped if it was.

3 Now, the final item as I see here is F, the ability  
4 to examine, document, and photograph the cell which  
5 Mr. al Hawsawi has been isolated to. My best recollection is  
6 that we spent considerable time in this room addressing an  
7 order which is referred to as AE 108, the ability of the  
8 defense counsel to visit the camp and spend some time with  
9 their client at the camp.

10 This court permitted the accused three -- permitted  
11 the defense team to have three members of that defense team go  
12 to the camp and spend 12 hours at the camp. My recollection  
13 again is that you issued this order in the summer of 2013.  
14 Mr. Hawsawi's team has not been to the camp. And if they want  
15 to go, I will do my best to make that visit available in the  
16 next few days.

17 MJ [COL POHL]: Mr. Swann, as I recall, one of the issues  
18 that came up in this was the order was issued for the camp  
19 visit and then, as I recall, there was some discussion that we  
20 weren't going to -- that the government said you can't do the  
21 visit until you sign the MOU. Do you recall that?

22 TC [MR. SWANN]: And you -- I believe Your Honor ruled  
23 against us on that and said that they could go to the camp.

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1 And we have operated under that belief since this court  
2 determined that was not ----

3 MJ [COL POHL]: Just so it is all clear ----

4 TC [MR. SWANN]: It is clear.

5 MJ [COL POHL]: ---- those are unconnected events.

6 TC [MR. SWANN]: Unconnected events. And if you would  
7 like to go to the camp over the next two weeks, I will do my  
8 best to make it happen today.

9 MJ [COL POHL]: Okay. Defense, anything further?

10 DDC [LtCol GLEASON]: Just briefly, Your Honor.

11 Your Honor, our understanding of the facts was Mr. Hawsawi was  
12 being escorted by several guards back to his cell, he stopped  
13 at his cell door and asked to speak to the watch commander,  
14 which prompted the guards to slam him to the floor and for  
15 eight guards to jump on top of him which resulted in his  
16 injuries.

17 Now, the prosecution has a different version of the  
18 facts which they represented in their three-page, unsworn  
19 statement. The defense would like to verify those facts. We  
20 don't want to just trust the prosecution, we want to be able  
21 to verify those facts to see if their version is accurate.

22 And that is fair based on the Skipper. This is Skipper  
23 evidence, Your Honor, and the defense is entitled to it.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

