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1 [The R.M.C. 803 session was called to order at 1331,
2 22 February 2016.]

3 MJ [COL POHL]: The commission is called to order.
4 Mr. Mohammad has joined us this afternoon. Any other changes
5 of the parties? Trial Counsel?

6 CP [BG MARTINS]: No, Your Honor.

7 MJ [COL POHL]: And defense counsel? If I hear nothing, I
8 assume nothing has changed. Okay. And Mr. Bin'Attash remains
9 absent.

10 Mr. Connell.

11 LDC [MR. CONNELL]: Your Honor, during the lunch break I
12 went over with the prosecution and detailed the exact pages
13 and line number from 400F that I want to refer to and I
14 understand they have a motion.

15 MJ [COL POHL]: Trial Counsel?

16 CP [BG MARTINS]: Your Honor, we move that this go to a
17 505(h) rather than what he proposes to elicit out in open
18 court.

19 LDC [MR. CONNELL]: I don't have an objection.

20 MJ [COL POHL]: Okay. That's what we'll do then. Okay.
21 Anything further from any other defense counsel?

22 Apparently not.

23 Trial Counsel, any rebuttal?

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1 CP [BG MARTINS]: Nothing further, Your Honor.

2 MJ [COL POHL]: Okay. So pending the 505(h) hearing, the
3 commission will take this motion under advisement,
4 understanding, both parties, that if we can't get through that
5 505(h) hearing this session, it will be the next session. And
6 so the status quo will remain until then.

7 That brings us to 254.

8 LDC [MR. NEVIN]: I was expecting more discussion on this
9 subject, and my paralegal, whom I need for assistance, is not
10 quite with us yet.

11 MJ [COL POHL]: We have two 254s, so that's okay. RRRR is
12 also -- that's, I believe -- actually, that's yours also,
13 Mr. Nevin. Okay. You need time for both of those then?

14 [Counsel stepped away from podium; no audio.]

15 MJ [COL POHL]: I got it.

16 He said not much time. I got it.

17 While we are doing that, let's talk about kind of the
18 way ahead. When we complete the 254, which is actually one of
19 the ones I wanted to make sure we got to this session, I am
20 open to suggestions for other things. There was an indication
21 that Mr. Mohammad's team wanted to get to 182.

22 Mr. Harrington, you'd referenced 152.

23 Trial Counsel, any -- you talked about 018 earlier

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1 too. I am saying when we get done with 254, understand we
2 have got another piece of 254, I understand, that's still
3 outstanding in a classified session.

4 CP [BG MARTINS]: Your Honor, having looked at the orders
5 the commission issued over the weekend and today, our
6 preference would be to seek to move up any classified, you
7 know, 806 closed session earlier in the week to deal with the
8 witnesses tomorrow.

9 MJ [COL POHL]: Let's do this. For planning purposes,
10 without deciding, we will flip-flop Thursday and Friday, and
11 since we are going to have one session closed pursuant to
12 military -- or Commission Rule of Evidence -- or R.M.C. 806,
13 we will do that closed session on Thursday and then we will
14 pick up back in open session on Friday, assuming -- the issue
15 there of course dealt with government witnesses or witnesses
16 that were requested, and we will go from there. Okay?

17 CP [BG MARTINS]: Your Honor, our preference, of course,
18 is then to be able to get to the point where we can argue, not
19 prejudging.

20 MJ [COL POHL]: Okay. Here is where we are at, is on
21 Thursday we will take whatever additional witnesses we are
22 going to take and we will see where we are at. There are some
23 orders coming out. Until you get the orders -- I don't like

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1 to kind of preview them -- wait for the orders to come out and
2 we will discuss what we will actually do on Thursday and then
3 on Friday. It is conceivable we may get finished with 254
4 this week, except there is one outstanding issue with
5 Ms. Bormann on her discovery issue. There is an order that's
6 coming out on that, and I think they are all going to be
7 issued today, so tomorrow I think we can talk more
8 intelligently about the way ahead on that issue.

9 LDC [MR. CONNELL]: Sir, we have received those orders.

10 MJ [COL POHL]: You have got them all?

11 LDC [MR. CONNELL]: All that I was accounting for,
12 tracking, yes.

13 CP [BG MARTINS]: We have read an order regarding
14 discovery, so...

15 MJ [COL POHL]: Okay. So you have got I think it is 254,
16 I think YYYY or something like that. It deals with -- it's
17 the one -- okay.

18 CP [BG MARTINS]: UUUU.

19 MJ [COL POHL]: UUUU that I issued about what we are going
20 to hear at the 806. Okay. Everybody has got that. Okay. So
21 given that, it is on Thursday we will hear the witnesses I
22 indicated we are going to hear on the classified evidence, and
23 we are obviously not going to hear what we will not, and at

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1 that time the defense should be prepared, although it's still
2 up in the air, depending upon the current discovery issues, to
3 make their classified argument on 254. Okay?

4 And then if we are done with everything else, we will
5 do the unclassified argument on 254 on Friday. But that's
6 still contingent. I still have outstanding discovery so if it
7 doesn't get there, it doesn't get there. I am trying to tell
8 you that's where we are.

9 Ms. Bormann.

10 LDC [MS. BORMANN]: I do have something unclassified to
11 put on the record. There was an outstanding discovery request
12 for some material from the government that the government
13 mistakenly asserted to you had been provided.

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

15 LDC [MS. BORMANN]: It involved the period of the ----

16 MJ [COL POHL]: I know what you are talking about.

17 LDC [MS. BORMANN]: ---- the pre-interim order for the
18 case October 2014 to January 2015. We have not received that.
19 Mr. Trivett was kind enough to let us know that it was their
20 error. They believed they have provided it. They have not
21 provided it. We still don't have it.

22 MJ [COL POHL]: Was this the issue that we discussed that
23 you said you didn't get and Mr. Trivett said you did

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1 initially?

2 LDC [MS. BORMANN]: Correct, and we have not received it.

3 MJ [COL POHL]: Okay.

4 LDC [MS. BORMANN]: They believed that they provided it.
5 They provided different dates. Dates not germane to 254 have
6 not yet been provided.

7 MJ [COL POHL]: Got it. That was the issue you raised at
8 the 505(h) hearing, correct?

9 LDC [MS. BORMANN]: I raised it previously without the
10 discussing classified information again at the 505 hearing,
11 but I want to make the record clear that the material has not
12 yet been provided.

13 MJ [COL POHL]: I got it.

14 LDC [MR. CONNELL]: Two things, Your Honor. The first is
15 at the closed session on Friday, it was -- the military
16 commission ultimately ruled that further argument on 397 and
17 its children 112 and 195 should be held in open session rather
18 than in closed session. I just wanted to bring that to the
19 court to do that.

20 MJ [COL POHL]: Just to be clear, after discussion that
21 there is no longer a need to discuss classified information
22 relating to 396, 397 and 112, and so if we want to come back
23 to that, we can, when we get done with the other stuff.

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1 Also just to be clear is that not just 254, also 396
2 would be on Thursday, the classified portion of 396. Okay?

3 LDC [MR. CONNELL]: Thank you, sir. The other thing is
4 that the military commission gave me a homework assignment
5 relating to AE 296 about the relationship between the
6 legislature and the executive and the judiciary. I did the
7 research on that. It turns out to be a wonderfully rich area
8 and I request the opportunity to brief it.

9 MJ [COL POHL]: I look forward to reading your pleading.

10 LDC [MR. CONNELL]: Thank you, sir.

11 MJ [COL POHL]: Okay. Mr. Nevin.

12 LDC [MR. NEVIN]: Your Honor, thank you. I'm going to
13 present slides in support of this argument, and I have
14 previously shown these to the court security officer, who has
15 approved them. They have been marked previously as 254VVVV,
16 and I ask for permission to publish these to the gallery.

17 MJ [COL POHL]: Are these new?

18 LDC [MR. NEVIN]: Yes, sir.

19 MJ [COL POHL]: They're all unclassified?

20 LDC [MR. NEVIN]: Yes, sir.

21 MJ [COL POHL]: Go ahead.

22 LDC [MR. NEVIN]: So, Your Honor, this is 254YYY, which
23 was our motion asking you to reconsider 254XXX. The

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1 background on this is that beginning with 254PP, on 20 January
2 2015, the defendants filed nine separate discovery requests up
3 through June of 2015; and then in October of 2015, you issued
4 254XXX, and that's the motion that we are asking you to
5 reconsider. And 254XXX denied many of our discovery requests,
6 and it permitted -- in large measure, I think it's probably
7 correct to say it permitted the testimony that we have
8 received so far. And that's where we are now. We have moved
9 in 254YYY to ask that you reconsider 254XXX. The government
10 did not file responsive pleadings, and so the only pleading
11 that you should have before you on this is 254YYY.

12 Could I have the next slide?

13 In 254YYY, we made three arguments, and I am really
14 going to focus on only one of them, but we argued that you did
15 not grant us oral argument despite our request that you do so.
16 And we also argued -- the third argument was that you had used
17 the incorrect test for discoverability. But the primary issue
18 that's presented by 254YYY is the second issue; namely, the
19 failure to apply Eighth Amendment standards.

20 The next slide, please.

21 You know, with respect to permitting oral argument,
22 the military commission may recall there was -- 254XXX relied
23 on the proposition that the prosecution had made some

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1 references to its desire that you decide that without oral
2 argument and you pointed out that we had not objected to that
3 or stood up and, you know, formally stated another objection,
4 and yet we had requested oral argument, and we make the point
5 in our motion to reconsider that, you know, we didn't know
6 that -- that a failure to object to every time the prosecution
7 states its position would be treated as us having waived any
8 objection to it.

9 MJ [COL POHL]: Just to be clear on this point, Mr. Nevin,
10 because I don't think we need to dwell on it too much.

11 LDC [MR. NEVIN]: Yes.

12 MJ [COL POHL]: Whether or not you get or request an oral
13 argument, I look at what your motion says, quite frankly, and
14 that's my starting point. I don't always give it to you. I
15 got it.

16 LDC [MR. NEVIN]: Yeah.

17 MJ [COL POHL]: But if you think I ruled only because of
18 what the government said, that's not true. If you put in your
19 motion request oral argument, that's what controls whether you
20 request it or not, not failure to object to whatever they say.

21 LDC [MR. NEVIN]: Yes, sir.

22 MJ [COL POHL]: And I look at that, when I don't have an
23 oral argument, I do look at the position of the parties. And

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1 again, I don't always give it to you, but that's what controls
2 unless somebody stands up and says we specifically don't want
3 oral argument, and when that happens next time will be the
4 first time. So understanding that this rule that you think I
5 may be applying or whatever it is, I'm not -- that's not my
6 rule.

7 LDC [MR. NEVIN]: It's true that you stated in 254XXX that
8 you were overruling the request for oral argument and there
9 was a reference to this matter of us not objecting and I
10 wanted to bring that to your attention.

11 MJ [COL POHL]: Sure.

12 LDC [MR. NEVIN]: Can I have the next slide?

13 Much can be said to the Agurs standard and this is
14 not an Agurs situation, this is not a failure to provide
15 exculpatory evidence, it's a discoverability standard. I do
16 believe this was simply referred to in passing and I bring it
17 to the military commission's attention.

18 And the next slide, please.

19 The gist of this, however, is that 254XXX failed to
20 apply the Eighth Amendment, and I know the military commission
21 knows this, but I am going to touch some of these things
22 quickly, that the Eighth Amendment normally is not going to be
23 applied to pretrial detainees directly in those terms, because

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1 the Eighth Amendment only applies to punishment, and the only
2 people that we can punish are people who have already been
3 convicted.

4 But the same exact standards are applied to pretrial
5 detainees. And when I put "PTD" in this outline as we go
6 through, that's what I am referring to. The same exact
7 standards are applied through the due process clause to
8 pretrial detainees, and some of the courts say, for example,
9 that the test is identical to that applied in Eighth Amendment
10 cases. In actually the City of Revere v. Mass General
11 Hospital, 1983 Supreme Court case, actually said that the
12 protections for pretrial detainees are at least as great,
13 implying that there would be greater protections for pretrial
14 detainees, which would, of course, make sense, given that a
15 pretrial detainee hasn't been convicted of anything.

16 The next slide, please.

17 So I also make the point that 254XXX doesn't address
18 the Eighth Amendment argument anywhere, despite the fact that
19 we made it, and that's a problem -- and as I read, and I read
20 it carefully. As I read XXX, this statement at page 15, the
21 Turner factors govern -- state the test appropriate to protect
22 any constitutional right that may apply in this case.

23 Actually the Supreme Court has never applied Turner to Eighth

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1 Amendment issues. And, you know, in essence, what we come
2 down to is that we have not been able to adequately present to
3 you the effect of this unwanted touching by women on the
4 detainees, the effect that it has on these detainees in this
5 specific, and I hope unique, situation. We have never been
6 able to make that record.

7 So next slide, please.

8 So the way the Eighth Amendment shakes out is one
9 of -- it is one of two ways. One idea is the intentional
10 imposition of punishment on pretrial detainees, and people who
11 haven't been convicted of anything can't be punished, period.
12 And if there is any implication that they have been punished,
13 then those actions are inappropriate, because you can't punish
14 people. You can incarcerate them and you can do what's
15 necessary to get them to court on time, and you can take those
16 kinds of actions, but you can't punish them.

17 And the second thing you can't do is unnecessary and
18 wanton infliction of pain, and unnecessary and wanton
19 infliction of pain is a violation of the Eighth Amendment.
20 You can't do that to people, even people who have been -- who
21 have been charged and convicted and sentenced. It's just --
22 it's just not allowed.

23 The next slide, please.

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1 So one -- one of the things that our record, the way
2 it is to date, is that there is in our record the inference of
3 an intention to punish, and we, I think, are entitled to
4 develop that and -- next slide, please -- and we have seen
5 this in many different ways, Your Honor, and we -- we know
6 that the case, because of its subject matter, obviously raises
7 extremely high emotions, and I understand that. I think it's
8 fair. It's expected. But we've seen it in the proceedings in
9 this court and we have seen it in proceedings and events that
10 are occurring outside the court. And we know that this female
11 guard touching thing was never a problem in the past, and it
12 has become a problem, it has become a big problem; and the
13 fact that it isn't -- it wasn't necessary, it was never
14 necessary in the past, is some ground for saying that the
15 intention behind it is a bad one, is an intention to punish,
16 as a way of getting back at these men.

17 And we know that this policy was intentionally
18 planned and imposed, apparently, and I'll say more about that
19 in a few minutes. We made an effort to meet with the -- with
20 the camp commanders, with the SJA. We asked Colonel Heath to
21 meet with us; we were flatly refused. And we have also heard
22 the remarks of political leaders that these men should be
23 allowed to rot in hell, that we should return to

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1 waterboarding, and we will talk more presumably in argument on
2 a separate motion about the treatment of your -- the reaction
3 to your interim order, and also this issue of the clandestine
4 amendment of SOP 39, which was discussed with Colonel Heath
5 during his testimony in December and which comes up in the
6 context of -- comes up in the context of the -- of another
7 motion for discovery in 254.

8 Next slide, please.

9 So here is the proposition, though. Set aside --
10 setting aside the question of whether there is an intent to
11 punish -- and I know the government denies it or that the
12 government witnesses have denied it, but I say to you there
13 is -- there is grounds on this record by which to infer it.

14 But setting that aside, even for persons who may be
15 punished, even for purposes -- for persons who have been
16 convicted and sentenced, and certainly for pretrial detainees,
17 the unnecessary and wanton infliction of pain constitutes
18 cruel and unusual punishment forbidden by the Eighth
19 Amendment.

20 So next slide. The three elements of an Eighth
21 Amendment claim are the infliction of pain, and it has to be
22 unnecessary and wanton. We have made that out in this case.

23 The next slide, please. And, you know, I -- we have

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1 argued throughout these proceedings that Mr. Mohammad's
2 personal history, and these detainees -- all five of these
3 defendants' personal histories of sexualized torture that has
4 specifically involved extensive unwanted touching by women,
5 forced nakedness and the like, all of which is contrary to
6 their religious beliefs and was aimed at manipulating them.
7 These are programs that were designed by psychologists that
8 specifically were pointed at degradation of their religion. I
9 made reference during the cross-examination to these kinds of
10 events, putting them in an unclean state that makes it
11 impossible to pray.

12 The next slide, please.

13 And the fact that forced touching by women at
14 Camp VII starts this all over again. And I put here in this
15 outline, "re-living, not re-remembering," because that is
16 exactly what we have here. This is not just something that
17 brings it to mind again; there are physiological responses
18 that are generated by the recapitulation of this kind of -- of
19 these kinds of events.

20 The case, the primary case that we have pointed to in
21 our moving papers -- and although it's by no means the only
22 one -- is a case called Jordan v. Gardner. It's a Ninth
23 Circuit case. It's a case in which women were subjected to

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1 cross-gender clothed body searches, and the Ninth Circuit
2 conducted an extensive analysis of this. And for our purposes
3 I just want to direct the military commission's attention to
4 the fact that in Jordan v. Gardner the court received expert
5 testimony, indeed ten experts, if I remember correctly, to
6 prove that exactly how this works, to prove what
7 retraumatization is and to prove the reason why this kind of
8 touching has an outsized impact on these detainees because of
9 the torture which was previously inflicted on them and -- next
10 slide.

11 This is really the reason we are here with 254YYY is
12 that we want to be able to prove this by expert testimony, and
13 we requested an expert witness in our earlier -- and I think
14 actually our very first pleading on this, on this subject in
15 the 254 series. In the 254Y series, we requested to present
16 expert testimony, and it is in 254XXX that the military
17 commission denied that.

18 So next slide, please.

19 The point of what I just said was to make the point
20 that we have infliction of pain here, and the cross-gender
21 clothed body searches that occurred in Jordan v. Gardner were
22 not infliction of pain in the traditional sense of one person
23 striking another violently or using a deadly weapon on another

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1 person, something to that effect. Rather, the determination
2 that there had been an infliction of pain flowed from the
3 history of the women who had been incarcerated in that prison,
4 and they were sexual abuse -- they had histories of having
5 been sexually abused, and the court looked at that and said
6 touching them is a different matter than touching anybody else
7 would be. And I raised -- I hope the military commission will
8 remember that I raised this with Colonel Heath -- I'm sorry, I
9 raised it with Major. I raised it with -- I'm sorry, I raised
10 it with Major Prior.

11 I said if you have beaten a child with a book
12 repeatedly whenever you come into the child's presence, the
13 child after a while is going to be frightened of a book. And
14 I might hold up a book in front of my children and they might
15 say, "Oh, great, my dad is going to read to me." But if you
16 are -- or if a child is one who has been beaten with a book,
17 that child is going to have a very different reaction to it.

18 So I make the point that they are clearly -- on our
19 record that we have now, there clearly is the infliction of
20 pain. We want to complete the record. Really, that's -- we
21 want to complete the record, and that's why we are asking you
22 to reconsider 254XXX.

23 MJ [COL POHL]: I got it. Do you think if this regulation

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1 we are talking about, not my order, the initial, if you want
2 to call it a regulation permitting female guards to touch
3 them ----

4 LDC [MR. NEVIN]: Yeah.

5 MJ [COL POHL]: ---- because that's the context that I
6 came to this discussion ----

7 LDC [MR. NEVIN]: Yes.

8 MJ [COL POHL]: ---- do you believe the Turner test when
9 it talks about the four-part test would also -- if it was
10 necessary, wouldn't it be embedded into the Turner test?

11 LDC [MR. NEVIN]: I think the unwanted female touching
12 issue fails the Turner test too.

13 MJ [COL POHL]: But could it pass the Turner test and not
14 pass your Eighth Amendment analysis?

15 LDC [MR. NEVIN]: Yes, it could. That's really the reason
16 you didn't address the Eighth Amendment issue because I think
17 it's a -- it's a more clearly -- it's a more favorable test
18 from the defendants' standpoint.

19 MJ [COL POHL]: What would be the standard?

20 LDC [MR. NEVIN]: Say it again.

21 MJ [COL POHL]: What would be the standard review of the
22 Eighth Amendment analysis of the regulation, compelling
23 government interest?

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1 LDC [MR. NEVIN]: No, it's exactly -- it's exactly what I
2 said a couple of slides ago. If there is the wanton and
3 unnecessary infliction of pain, you can't do it, period.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: As a matter of fact ----

6 MJ [COL POHL]: I understand now.

7 LDC [MR. NEVIN]: I actually have this on the screen.
8 That's a piece of luck.

9 If you would look at the third bullet point, in
10 Bell v. Wolfish, the U.S. Supreme Court talks about this
11 specifically in a footnote, note 20. They have this example.
12 You take the pretrial detainee and you load him in chains and
13 shackles and you throw him in a dungeon and you say we are
14 doing this because we can get him -- because we have to get
15 him to court ----

16 MJ [COL POHL]: So basically, to summarize, if I find an
17 Eighth Amendment violation, then that's the end of the
18 inquiry?

19 LDC [MR. NEVIN]: Yes, I think it would be.

20 MJ [COL POHL]: There is no balancing, which would be more
21 the Turner approach?

22 LDC [MR. NEVIN]: No, there is -- I think there is
23 balancing. I think there is balancing in this as well. No,

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1 there absolutely is balancing in the Eighth Amendment context
2 as well.

3 MJ [COL POHL]: So you could have unnecessary --
4 unnecessary wanton and whatever the third term you used, and
5 that could be -- well, it wouldn't be unnecessary I guess if
6 it is ----

7 LDC [MR. NEVIN]: I was thinking that you could articulate
8 it as balancing being embedded in the idea of unnecessary and
9 probably also in the definition of wanton.

10 MJ [COL POHL]: Yes. That was kind of my question, how
11 your Eighth Amendment analysis interfaces with the Turner
12 analysis. I got it.

13 LDC [MR. NEVIN]: I see them as two separate analyses.
14 The first issue is infliction of pain. The second is it has
15 got to be unnecessary, and, Your Honor, I don't want to -- I
16 don't propose to argue 254Y at this point, but I feel like I
17 need to lay out enough of our position about it to you so that
18 it's clear that there is something here, that there is a
19 meaningful issue in play here, and so that's why I go on to
20 talk for just a minute, a minute about the requirement that it
21 be unnecessary.

22 And it is -- just as I said, if you would look at the
23 second bullet point here, Bell v. Wolfish, and this is the

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1 idea that each new situation requires some balancing of the
2 need for the particular search against the invasion of the
3 rights that it entails.

4 So next slide, please.

5 And I think we see very clearly in the evidence we
6 have so far that the female touching isn't necessary to
7 running Camp VII, and they are -- they all testified without
8 hesitation that they are carrying out their mission entirely
9 successfully under the interim order. You may recall the
10 point was made that when you drafted your interim order, you
11 had in it a provision for exigency, exigent circumstances, you
12 can do this touching, and that -- the testimony was that
13 exception was never used, and the testimony was that morale
14 issues weren't making the guard force ineffective.

15 MJ [COL POHL]: Aren't you saying because the government
16 has tried to make it work, you are now holding their efforts
17 to make it work against them?

18 LDC [MR. NEVIN]: That gets done to me all the time so
19 maybe turnabout is maybe fair play, but I think it is -- I did
20 not and I hope the military commission didn't get the
21 impression that these people were having to undertake heroic
22 efforts to somehow manage to take that hill against all odds.
23 The impression that you get, in all fairness, from the

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1 testimony is that we're doing it just fine. I believe our
2 current camp commander said, yeah, it's all going fine, with a
3 sort of a like, what's the problem?

4 I understand what the military commission is saying,
5 and my remark about it was that, you know, I think from time
6 to time -- I am referring to the interpreter problem that we,
7 you know, spent a couple of sessions saying we'll get by,
8 we'll get by, and I felt like that was held against me. I
9 know what you're talking about; I just don't think, in
10 fairness, that that's the way the record shapes itself up.

11 So next slide, please.

12 You know, they have been doing it the other way for
13 years. It's not hard. It's -- it is a -- we get to the
14 question of penological purpose in another place, but it is
15 not penological interests that are driving this, it's military
16 wide, taken for -- taken -- putting the best gloss on it, it's
17 military-wide gender equality issues, but that is -- these are
18 decisions that the military has made. This is not -- this is
19 not exigency; this is not anything inherent to the detention
20 operation that requires female touching.

21 MJ [COL POHL]: So, for want of a better term, the general
22 equality policy of the military at wide is not a legitimate
23 penological interest?

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1 LDC [MR. NEVIN]: No, it's different from the idea of a
2 different penological interest, and we made the point that
3 accommodations for women, both in the United States on the
4 U.S. side, separate facilities, separate -- we make
5 accommodations all the time. Gender equality is not some --
6 some lock -- locked-in state of mind that everything has to be
7 equal ----

8 MJ [COL POHL]: Shouldn't they -- basically you want me to
9 restrict a female military police officer, a female MP from
10 doing duties simply because she is female?

11 LDC [MR. NEVIN]: No, I want you to, because in ----

12 MJ [COL POHL]: I am not saying I will or won't, but I am
13 saying isn't that the effect of what I have done, at least
14 temporarily, that females cannot do the same job that the
15 males can do?

16 LDC [MR. NEVIN]: That's not -- well, yes, you have said
17 that, but that's not a complete or correct statement of what
18 you have done. You have looked at a situation where you have
19 people who were specifically tortured by the United States
20 using their religious -- their religious tenets that forbid
21 contact between adult men and women who are not married who
22 were specifically tortured using -- working on those religious
23 tenets. And you have said -- you have said, as to those

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1 people, you may not touch them.

2 MJ [COL POHL]: Now, let's make it clear. What I simply
3 did was maintain the status quo as you guys presented it. I
4 made no ruling one way or the other as far as this is good.
5 And I'm just curious if, you know, you said they had some
6 sexualized torture. I am going to take that, but they were
7 also were tortured by men in various ways, men who were
8 military police, men who were guards. If they didn't want to
9 be touched by them, is that different or because it is
10 religious based it's a different distinction? I am trying to
11 figure out how far this goes.

12 LDC [MR. NEVIN]: I don't think it goes any farther than
13 we have asked you to take it.

14 MJ [COL POHL]: Okay.

15 LDC [MR. NEVIN]: I saw some reference in -- you will
16 recall that Colonel Heath said it happens to be here, the last
17 bullet point, that his primary objection was not to this
18 order, but rather to what he was afraid of what might be a
19 follow-on order. And I heard some discussion in the press
20 from General Kelly and from others that next they are going to
21 want to not be touched by Catholics or by something else, and
22 there is no -- I think just as we said with Colonel Heath, the
23 military judge can deal with it. If we come in and ask not to

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1 be touched by Catholics or by people with blonde hair, the
2 military judge will know what to do with that. This is
3 something of a completely -- this is a horse of a completely
4 different color that is tied and that's why I cite
5 Jordan v. Gardner because it was the exact same thing. The
6 Ninth Circuit said it's a touching that under other
7 circumstances could be imposed and wouldn't be unreasonable,
8 but because of the history of these people, we're not doing
9 it, because it violates the Eighth Amendment.

10 So anyway, Your Honor, the -- this is the part of the
11 argument that -- that it's unnecessary. We are dealing with
12 the idea that it's unnecessary, and on this record, there
13 certainly is a strong argument that this rule was absolutely
14 not necessary.

15 And could I have the next slide.

16 So the last part of it is that it has to be "wanton,"
17 quote/unquote, and Wilson v. Seiter and other Supreme Court
18 cases make it clear that it's the deliberate indifferent
19 standard of Estelle that's applied to Eighth Amendment issues
20 when you are talking about -- when you are talking about
21 wantonness. And of course we know that the guard force, all
22 of them, have said that they do not consider the fact and
23 effect of their torture in deciding how to deal with them, and

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1 that is, in essence and on its face, deliberate indifference.

2 And, you know, Whitley v. Albers, a U.S. Supreme
3 Court case in which there was a prison riot and a guard shot a
4 prisoner who was in a place where he, the prisoner, shouldn't
5 have been, and then the prisoner sued and, you know, the
6 courts have pointed to that as a one-off situation involving
7 one person, an emergent situation involving one person at one
8 time, involving nobody else, and pointing out that that's very
9 different from a policy that is applied to all detainees and
10 that is purposely and intentionally arrived at.

11 Could I have the next slide, please.

12 And we know that Mr. Mohammad originally objected to
13 the female touching, said, "Please don't do this to me because
14 of the effect that it has on me." We wrote the prison
15 repeatedly. We asked for a meeting. We know that it was --
16 that this touching was directly in violation of an SOP, an
17 SOP #39 that was describing the requirements of Islam. We
18 know that it -- that that was amended when this became an
19 issue, when this became a legal issue. We know it was amended
20 at the suggestion of lawyers. We know that it was done in
21 such a way -- we know that it wasn't provided in discovery and
22 we know that it was done in such a way -- at least the record
23 suggests that it was done in such a way as to conceal the fact

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1 that this female touching was in violation of an SOP.

2 And one of the things that I have to say I
3 appreciated about Colonel Heath was when he acknowledged to me
4 that an element of his declaration was exaggerated, and also,
5 as I said before, when he acknowledged that -- when he
6 acknowledged that the -- that his declaration was prepared
7 originally -- an earlier draft of it was prepared by others
8 and that it was done, the impetus behind it was lawyers.

9 So if I could have the next, and I believe this is
10 the last slide, just to recapitulate this, to re-inflict this,
11 we have the infliction of pain, it's unnecessary and it's
12 wanton, you know, and on this record we are entitled to put
13 evidence before you in the form of expert testimony that
14 explains why and the extent to which this is the case, that
15 this recapitulation and this reliving of the torture takes
16 place and 254XXX prohibits us from doing that. And so for all
17 those reasons, we ask you to reconsider it.

18 MJ [COL POHL]: Okay. Your reconsideration is really two
19 parts, as I read it. One is you want to -- the commission to
20 address the Eighth Amendment issue, and the other is -- and
21 again, I am not holding you, again, to your presentation. But
22 based on the record so far you believe the issue has been
23 raised, but you want to present additional information. And

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1 one of the concerns I had, I think, initially was you asked
2 for an unnamed Islamic expert in the original thing, and that
3 was -- if you read my XXX ruling, one of the concerns is I
4 can't give unnamed people.

5 Now, you have another guy in there, I believe
6 Doctor -- is it Stewart?

7 LDC [MR. NEVIN]: Yes, sir.

8 MJ [COL POHL]: So is he the one you want?

9 LDC [MR. NEVIN]: Well, and correct me if I am wrong ----

10 MJ [COL POHL]: I can't deal with unnamed people.

11 LDC [MR. NEVIN]: Understood.

12 MJ [COL POHL]: My next question will be, what would this
13 person add to the record that already exists?

14 LDC [MR. NEVIN]: First of all, I don't think we requested
15 a person to be named later. I believe that was another
16 defendant. In 254GG, 18 December 2014, we requested Dr. Pablo
17 Stewart, and at the time we said that we wanted Dr. Stewart to
18 testify to the continuing physiologically and psychologically
19 tortuous impact of the threatened or actual infliction of this
20 religiously prohibited unwanted and inappropriate sexual
21 touching and its effect on Mr. Mohammad and the other
22 defendants on their ability to attend and rationally
23 participate in the proceedings.

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1 I think it would be fair to say that Dr. Stewart is a
2 person who has expertise in this area and who could state, as
3 a matter of expert opinion, exactly how the reliving, the
4 recapitulation occurs, how and why it occurs, and explain that
5 it has a physiological base, explain that it is not some
6 imaginary, you know -- we have Colonel Heath opining that
7 these objections were made for -- not made for genuine --
8 genuine religious reasons, but rather for other reasons.

9 MJ [COL POHL]: I'm sorry, what was the exhibit number
10 again that you ----

11 LDC [MR. NEVIN]: 254GG.

12 MJ [COL POHL]: Date?

13 LDC [MR. NEVIN]: 18 December 2014.

14 MJ [COL POHL]: I may have multiples that day. This was
15 one that was joined by Mr. al Baluchi and Mr. Binalshibh?
16 This is a reply?

17 LDC [MR. NEVIN]: Yes, it is.

18 MJ [COL POHL]: Where does it reference, and it may -- I
19 am operating from a computer version. Where does it reference
20 Dr. Stewart?

21 LDC [MR. NEVIN]: I am actually looking at my notes that I
22 took after I read it, so let me see if I have it in front of
23 me, Your Honor.

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1 I don't believe I have it in front of me, but I'm
2 sure we could produce it for you quickly.

3 MJ [COL POHL]: Okay.

4 LDC [MR. NEVIN]: And I might -- Mr. Sowards has kindly
5 handed me a note here just to point out that Dr. Stewart's
6 specific expertise is in pretrial institutional policies and
7 practices.

8 MJ [COL POHL]: Yeah. I just wanted to see where you
9 requested him and what you said he would do. That's all I am
10 asking.

11 LDC [MR. NEVIN]: He has been quoted and relied upon by
12 the Supreme Court and ----

13 MJ [COL POHL]: Mr. Nevin, I am not saying he hasn't been.
14 I am simply saying, where was he requested and what was he
15 requested to do? Just a second.

16 LDC [MR. NEVIN]: That's good. I understand, Your Honor.
17 So I am finished unless you have additional questions. Do you
18 need us to produce GG for you?

19 MJ [COL POHL]: No. I am reading it now. Okay. I found
20 it. It was in your witness request, it wasn't in the fact
21 pattern. It's on page 12. I got it. Okay. Thank you.

22 LDC [MR. NEVIN]: Thank you, Your Honor.

23 MJ [COL POHL]: Okay. Do you want to slide into your

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1 other discovery request that's also 254?

2 LDC [MR. NEVIN]: Right. Regarding SOP 39?

3 MJ [COL POHL]: Yeah.

4 LDC [MR. NEVIN]: Actually, I think it might be better if
5 I could hear the government's argument on this before I do
6 that.

7 MJ [COL POHL]: Okay.

8 LDC [MR. NEVIN]: But I will do it if you prefer.

9 MJ [COL POHL]: No, that's fine. That's fine. Thank you,
10 Mr. Nevin.

11 Any other defense want to be heard on Mr. Nevin's
12 request for reconsideration? Mr. Connell.

13 LDC [MR. CONNELL]: With the court's indulgence.

14 Your Honor, may I approach the bench?

15 MJ [COL POHL]: Sure. Do you have a copy? Do you have a
16 copy for you? Okay. I have got it. I have got one.

17 LDC [MR. CONNELL]: Your Honor, I have provided a copy of
18 the slides to counsel for all the defendants and to the
19 prosecution. I have previously provided them to the court
20 security officer in accordance with the military commission's
21 directive. I would ask that they be marked as the next
22 exhibit in 254 and entered into the record.

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. CONNELL]: Thank you. What's the AE number, sir,
2 for the record?

3 MJ [COL POHL]: They just handed it to me. What was it
4 again? 254WWW.

5 LDC [MR. CONNELL]: Thank you, sir. I would ask
6 permission of the military commission to display the slides to
7 the parties in the gallery and ask that we have the feed from
8 Table 4.

9 MJ [COL POHL]: Go ahead.

10 Mr. Connell, let me ask you this: Did you file a
11 separate motion for reconsideration or are you doing this just
12 as joinder to Mr. Nevin's?

13 LDC [MR. CONNELL]: Joinder, sir, and I am only going to
14 address my piece of this, which is 254VV, which you denied in
15 254XXX.

16 MJ [COL POHL]: I am looking at your first group of
17 circles ----

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: ---- and I see the Eighth Amendment
20 mentioned there.

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: Are all the others relevant to the request
23 for reconsideration?

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1 LDC [MR. CONNELL]: So what I want to talk to you today
2 about is the appropriate standard for gauging conditions of
3 confinement in law of war detention. I was -- in 254XXX the
4 military commission adopted a non-law of war framework without
5 oral argument that I think was a mistake. And so what I want
6 to talk to you about is what the appropriate law is in law of
7 war confinement, and that briefing on this matter is found in
8 254PPP. It was our reply to the government's response. I
9 fully acknowledge that 254VV was -- got very little, was a
10 very tiny part of a large order in 254XXX, and it was -- I do
11 want to explain why it wound up I think in the 254 series at
12 all. As you know, we don't have any control over what series
13 things wind up in.

14 MJ [COL POHL]: I know.

15 LDC [MR. CONNELL]: But in January of 2015 the military
16 commission issued 254MM, a trial conduct order, and the order
17 said if you have anything that touches on 254 at all, get it
18 filed by a date certain. And so 254VV is our motion for -- to
19 compel information regarding conditions of confinement in
20 Camp VII. That included one sentence about 254, and that
21 sentence was something like "Another matter of conditions of
22 confinement which is before the military commission is 254Y
23 regarding female guards." And so given the trial conduct

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1 order and the fact that there was a mention of 254Y in 254VV,
2 it wound up in the 254 series.

3 And so -- but that's okay. I mean, I'm not
4 complaining, but I just wanted to explain the posture of how
5 we got where we are.

6 MJ [COL POHL]: WWW. Mr. Connell, I am always willing to
7 let people be heard, but is this a motion to reconsider my
8 Eighth Amendment issue or is it a motion to reconsider
9 something else?

10 LDC [MR. CONNELL]: The thing I wanted to talk about is
11 why Turner v. Safley is the wrong standard.

12 MJ [COL POHL]: But understand, I have a motion to
13 reconsider from Mr. Nevin that deals primarily with a failure
14 to consider the Eighth Amendment analysis. You just stood up
15 there and said, "I want to talk about law of war detention."

16 LDC [MR. CONNELL]: Well, I just reread -- and that's our
17 PPP is the law of war detention. I just reread in the course
18 of this the pleading from Mr. Mohammad's team, and their
19 argument is the same as mine, that Bell v. Wolfish is the
20 controlling standard, not Turner v. Safley.

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: We get to that point through different
23 routes. Theirs is described in their pleading, ours is

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1 described in 254PPP, but the thing that I don't want to happen
2 is for 254XXX's Turner v. Safley standard to become the law of
3 the case, if you will, without ever having oral argument on it
4 or anything else.

5 We have heard the prosecution, both in December and
6 in this hearing, saying, look, you have already decided
7 Turner v. Safley is the standard and so the -- I want the
8 opportunity to address why Bell v. Wolfish is the appropriate
9 standard.

10 MJ [COL POHL]: Shouldn't you have filed a motion for
11 reconsideration like Mr. Nevin did?

12 LDC [MR. CONNELL]: I will be 100 percent honest if I did,
13 because I did not participate in the motions to reconsider
14 because they are not generally looked on with favor, so I
15 refiled 254VV -- I'm slowing down -- as AE 404, and, you know,
16 fully explained in AE 404 that a recycled version of AE 254VV
17 and took out the one sentence referring to 254Y and said
18 because the reason that you denied 250 -- I know it was only
19 one sentence in XXX, but the reason you denied 254VV was it
20 didn't sufficiently relate to the Turner v. Safley factors
21 which I thought was a circular reasoning because I am trying
22 to say Turner v. Safley doesn't apply and you denied the
23 motion because it is not related to Turner v. Safley, and it's

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1 related to a law of war detention facility.

2 MJ [COL POHL]: You have filed a motion 402 ----

3 LDC [MR. CONNELL]: 404, yes.

4 MJ [COL POHL]: 404, yes, dealing with law of war
5 detention, for want of a better term.

6 LDC [MR. CONNELL]: Yes.

7 MJ [COL POHL]: Okay. Okay.

8 LDC [MR. CONNELL]: And I filed it prior to because that's
9 what you ruled on in 254XXX.

10 MJ [COL POHL]: I got it. What I am simply saying is, and
11 I am looking at your slide here, the issue in 254 where
12 Mr. Nevin focused on the Eighth Amendment analysis, I should
13 have done that. I got that. But for you to come in and say I
14 want to argue all this other stuff because implicitly, but it
15 has not been briefed on 254.

16 LDC [MR. CONNELL]: It has been briefed on, 254VV, Your
17 Honor, and ----

18 MJ [COL POHL]: I ruled, I know you don't like it. That's
19 the way it works.

20 LDC [MR. CONNELL]: I'm used to it.

21 MJ [COL POHL]: Sometimes you win, sometimes you lose.
22 What I am simply saying is sometimes I am trying to focus the
23 argument. Is the argument before me is related to the motion

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1 for reconsideration?

2 LDC [MR. CONNELL]: Yes.

3 MJ [COL POHL]: Not -- not a new theory?

4 LDC [MR. CONNELL]: This is not a new theory, Your Honor,
5 this is the same theory that we have never had oral argument
6 on. The motion to reconsider is on the question of whether
7 Turner v. Safley is the appropriate standard or
8 Bell v. Wolfish.

9 MJ [COL POHL]: So you believe -- you believe that on that
10 basis, if the motion to reconsider is, Judge, you applied the
11 wrong standard -- or you didn't apply all the standards, let's
12 just put it that way. Okay?

13 LDC [MR. CONNELL]: Sure.

14 MJ [COL POHL]: Whichever way you put it and Mr. Nevin
15 says you also should have applied the Eighth Amendment
16 standard is what I'm kind of am hearing him saying, Turner
17 applies, Eighth Amendment applies, and you are now saying that
18 the law of detention -- law of war detention standard applies?

19 LDC [MR. CONNELL]: Yes.

20 MJ [COL POHL]: But that part has never been briefed
21 subsequent to XXX.

22 LDC [MR. CONNELL]: Well, it's been briefed multiple
23 times.

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1 MJ [COL POHL]: Not on 254.

2 LDC [MR. CONNELL]: Not in the 254 series, but I don't
3 control what goes in the 254 series. It has been briefed in
4 321 (AAA Sup), it's been briefed in 404, it has been briefed
5 in 309.

6 MJ [COL POHL]: Mr. Connell, despite your lack of
7 confidence in the reconsideration process, I understand that.
8 Okay. But what I am simply trying to structure this is that
9 both sides come here, the government and the defense, prepared
10 to discuss what's on the docket.

11 LDC [MR. CONNELL]: Of course, sir.

12 MJ [COL POHL]: On the docket was 254.

13 LDC [MR. CONNELL]: XXXX.

14 MJ [COL POHL]: YYY, motion to reconsider. So if you wish
15 to discuss things that are raised in there focusing on the
16 Eighth Amendment, you can do that now. If you wish to go on
17 something else that's not included fairly embraced in that and
18 I'm rejecting your argument that it is fairly embraced because
19 you disagree with the Turner test, okay, that's not it. We
20 can do that on 404 whenever we get to it, but I can't start
21 opening up a whole new -- the other side has no notice that
22 this was part of the 254 reconsideration motion. I have heard
23 what you said.

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1 LDC [MR. CONNELL]: If that's your ruling, that's your
2 ruling.

3 MJ [COL POHL]: Understand, if it is a 404 issue, when I
4 get to it I'll get to it, but what I am saying is I am
5 limiting everybody here from the defense who did not file a
6 motion for reconsideration to issues fairly embraced in
7 Mr. Nevin's reconsideration motion as I have limited in your
8 respects or defined it in my respects.

9 So that means -- so that being said, do you have
10 anything to add to Mr. Nevin's Eighth Amendment analysis?

11 LDC [MR. CONNELL]: Yes.

12 MJ [COL POHL]: Okay. Feel free. I know it's only one
13 line in your circles, but...

14 LDC [MR. CONNELL]: Right. So what I wanted to talk about
15 is whether Turner v. Safley is the appropriate framework, and
16 I will reserve until you ask me the question, "What is the
17 appropriate framework, then, Mr. Connell," what I think the
18 appropriate framework is, but I will tell you why I do not
19 think Turner is the appropriate framework in this situation.

20 The core of Turner is the application of penological
21 interests. And in this slide that I have prepared here, you
22 can sort of see a scale of where penological interests lie.
23 At the upper left grid where a person who has not been

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1 convicted of any crime is being detained under the law of war,
2 there simply are no penological interests. The penological
3 interests are punishment, rehabilitation, incapacitation.

4 On the other hand, a person who has been convicted of
5 a crime and has been in a criminal situation has very strong
6 penological interests, and that is in fact what Turner is
7 addressing.

8 So there are no cases that address -- that talk about
9 the law of war in this situation, but there are cases that
10 talk about the places where penological interests do not
11 apply. So one of those is Benjamin v. Frasier at 264 F.3d
12 175, Second Circuit case from 2001, which explains that
13 penological interests as highlighted in Turner are interests
14 that relate to the treatment, including punishment,
15 deterrence, rehabilitation, et cetera, a person convicted of
16 crimes. Penological interests are therefore arguably not an
17 appropriate guide for the pretrial detention of accused
18 persons.

19 The appropriate standard, however, is, as Mr. Nevin
20 argued, Bell v. Wolfish, and there is a case applying
21 Bell v. Wolfish in the pretrial context as opposed to Turner,
22 which is Demery v. Arpaio, 378 F.3d 1020, Ninth Circuit, 2004,
23 and Demery applied -- rejected Turner and applied

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1 Bell v. Wolfish again to a claim involving alleged pretrial
2 punishment in part because Turner dealt with convicted
3 prisoners, not pretrial detainees.

4 The problem here is that the government -- and I
5 don't just mean this government, I mean the United States
6 Government -- has very much picked and chosen when it came to
7 the law of war in that -- in that when it is convenient for
8 litigation purposes to use a standard which applies to federal
9 prisoners who have been convicted of a crime in a civilian
10 court, they choose that standard, whereas if -- when it comes
11 to the standard of, for example, does the portion of the
12 Eighth Amendment concerning excessive bail and fines, does
13 that apply, their argument is no because they are a law of war
14 detainee.

15 When we brought the issue before the court of whether
16 it was possible to have a meaningful acquittal in this
17 scenario, the government's argument was, well, they are law of
18 war detainees. If they are not convicted, we can continue to
19 hold them as law of war detainees.

20 My argument, and I won't go into that, since they are
21 law of war detainees, they must be dealt with under the rules
22 of law of war.

23 The reason this first came up when we first argued

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1 that pretrial -- Turner v. Safley should not apply in a
2 pretrial detainee, the government argued that they are not
3 pretrial detainees, they are law of war detainees and that is
4 my point, that Turner doesn't have application in this
5 situation because there are no penological interests. The
6 word "penological" means related to punishment, and these men
7 have not been convicted of anything. The government doesn't
8 have any interests related to punishment.

9 MJ [COL POHL]: So what would you envision the Bell test
10 to be?

11 LDC [MR. CONNELL]: So the Bell test takes the standard of
12 whether administrative regulations are implemented in the
13 genuine interests of safeguarding institutional security. The
14 appropriate standards for that I think are found in the law of
15 war. I am not going to go into it.

16 MJ [COL POHL]: You're right, you're not going to go into
17 it.

18 LDC [MR. CONNELL]: I am not going into it.

19 MJ [COL POHL]: Okay. But let me ask you this, do you see
20 a difference between -- and again, Turner has got the
21 four-part test ----

22 LDC [MR. CONNELL]: Sure.

23 MJ [COL POHL]: ---- in the Bell test you just

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1 articulated?

2 LDC [MR. CONNELL]: Yes, certainly there is a difference.
3 You know, Turner was widely considered to be a substantial
4 limitation of the Bell test. The Bell test routinely applies
5 in pretrial situations. The Turner test applies in
6 post-conviction situations. And one can freely understand why
7 there would be a different test for people who have not been
8 convicted of a crime versus people who have been convicted of
9 a crime.

10 In a situation, say a prison situation, where after
11 people have been convicted of a crime are sentenced to a
12 certain amount of time, they go to a prison, one can easily
13 understand why the Turner standard, which is so deferential to
14 the government, would apply in that situation. Detainees who
15 have not been convicted of any crime, however, still enjoy the
16 presumption of innocence, still enjoy the protection of the
17 excessive bail clause, still enjoy the protections of the due
18 process clause, and, as Mr. Nevin pointed out, still enjoy an
19 analogous protection of the cruel and unusual punishment
20 clause of the Eighth Amendment. So yes, absolutely, there is
21 a difference between the two. They do both involve balancing,
22 as the military commission pointed out earlier, but the Turner
23 test is much more deferential to the government.

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1 On the other hand, the Bell v. Wolfish standard
2 allows -- does not overly interfere with the administration of
3 pretrial detention facilities, but does limit the ability of
4 those pretrial detention authorities to act in ways that
5 burden the interests of -- the rights of defendants but are
6 not in the genuine interests of safeguarding institutional
7 security.

8 MJ [COL POHL]: Thank you.

9 LDC [MR. CONNELL]: Thank you.

10 MJ [COL POHL]: Anything further from any defense counsel
11 on the motion for reconsideration? Ms. Bormann?

12 LDC [MS. BORMANN]: Judge, simply that we adopt both
13 Mr. Nevin and Mr. Connell's arguments and specifically cite to
14 Bell v. Wolfish as the proper standard.

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

16 Mr. Harrington?

17 LDC [MR. HARRINGTON]: We are the same, Judge.

18 MJ [COL POHL]: And Mr. Ruiz?

19 LDC [MR. RUIZ]: We adopt all arguments. Thank you.

20 MJ [COL POHL]: Okay. We are going to take a -- no, we're
21 not.

22 Trial Counsel, do you wish to be heard? Go ahead.

23 TC [MR. SWANN]: Thank you, Your Honor. I understand

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1 Mr. Nevin did not argue 254Y, but I thank him very much for
2 the preview of his argument.

3 A couple of things. Mr. Nevin's motion for
4 reconsideration essentially addressed three areas. They
5 indicated that you should have given them oral argument in
6 this case. I note that there have been 163 pleadings totaling
7 more than 1500 pages. I don't know what more could have been
8 said.

9 Second of all, I understand -- and quite frankly,
10 there is a 24-page order in this case with 165 footnotes, and
11 it seems to me that the court considered every motion filed
12 and did an excellent job in addressing each and every one of
13 those in the footnotes in the application across the board.

14 The second instance is that a motion for
15 reconsideration really should only be granted when there is an
16 intervening change in the law -- there has not been one in
17 this instance -- or the discovery of new evidence that wasn't
18 previously available; and three, there is a clear error of law
19 in the first instance. None of that applies here. The motion
20 for reconsideration is not the defense's opportunity to
21 reargue facts.

22 Now, a couple of things pointed out by Mr. Nevin in
23 his argument. He mentions this Jordan v. Gardner case, and I

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1 had occasion to simply look at the facts in that case and kind
2 of tried to extend them to what we're dealing with here.

3 What we're dealing with here essentially is a
4 touching on the shoulder, the arm, the forehead so as to
5 protect these men when they go into a van, their ankles, and
6 their feet. In the Jordan case, there the superintendent
7 authorized that male guards could search females, to search
8 the clothes, the bodies of the female inmates randomly and
9 routinely, using a grab-type motion to rub, stroke, squeeze
10 and knead the women's interiors included their covered
11 breasts, buttocks, inner thighs and crotches. The guards were
12 told to push inward and upward when searching the women's
13 upper thighs and crotches and to check the crease in their
14 buttocks with a downward motion of the edge of the hand.

15 Now, that's a far cry from what we're doing in this
16 instance, these simple touchings that are required.

17 I won't argue 254Y. That's not my obligation here,
18 but the court's -- Mr. Nevin's motion for reconsideration and
19 to the extent that Mr. Connell argued a motion for
20 reconsideration should be denied.

21 I'd also like to point out for the court that despite
22 what Mr. Connell said, the Turner standard is the standard
23 according to Florence v. Board of Chosen Freeholders of the

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1 County of Burlington since 2012. That's a pretrial detainee
2 case, and they applied the Turner test to pretrial detainees.

3 Subject to your questions, sir.

4 MJ [COL POHL]: Do you see -- I have no questions. Thank
5 you.

6 TC [MR. SWANN]: Thank you, sir.

7 MJ [COL POHL]: Mr. Nevin, I am reading this from a
8 pleading, and it appears -- I'm just -- reading the defense
9 pleadings in this case, which have been extensive, it's a
10 little unclear to me at times the constitutional -- and I am
11 reading from a defense pleading here, that the constitutional
12 test for this is Turner understanding the limitations for
13 pretrial as opposed to post-trial detainee and then later on
14 in the same brief it talks about Bell. So as far as which
15 tests to apply, it appears that you are sort of applying both.

16 Anyway, this is a quote from Bell, that may detain a
17 pretrial detainee to ensure his presence at trial and may
18 subject him to restrictions and conditions of the detention
19 facility so long as those conditions and restrictions don't
20 amount to punishment or otherwise violate the Constitution.
21 So would that support your Eighth Amendment analysis?

22 LDC [MR. NEVIN]: Yes, exactly. Other cases say that the
23 Eighth Amendment applies to pretrial detainees via the due

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1 process clause of the Fifth Amendment, but it's the exact same
2 standards that apply.

3 So what they -- and this was -- I referred you to the
4 footnote before in Bell where they say just because the thing
5 has a penological purpose that supports what you are allowed
6 to do with these particular prisoners doesn't mean that you
7 can do it, it doesn't mean then it's not cruel and unusual and
8 they give the example of putting somebody in chains in a
9 dungeon which would make it easier to assure their presence in
10 court, but which clearly is not permitted.

11 So the point is even though they are pretrial
12 detainees, they have an Eighth Amendment right or they have an
13 Eighth Amendment right that is -- they have a right that is
14 coextensive at least with the Eighth Amendment, probably at
15 least possibly -- possibly they have more rights, but it's
16 just that it comes through the Fifth Amendment.

17 MJ [COL POHL]: Okay.

18 LDC [MR. NEVIN]: Okay. And just with respect to
19 Mr. Swann's argument, first, I believe there is a clear error
20 of law, and that is the military commission's failure to deal
21 with the Eighth Amendment argument which we had raised
22 previously.

23 And second, the remarks about Jordan v. Gardner, yes,

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1 there was -- I believe he summarized the -- may I have just a
2 moment, Your Honor?

3 MJ [COL POHL]: Sure.

4 [Pause.]

5 LDC [MR. NEVIN]: And I believe there are some other facts
6 that are -- that could -- that if the military commission
7 reviewed Jordan v. Gardner, you might see there is some
8 additional aspects to it. But this is really why we wanted to
9 present Dr. Stewart's testimony to you, exactly on this issue,
10 because -- because of the torture that was imposed on these
11 men, they have an outsized response to this touching, and it
12 is religiously based and it is pervasive and it is extremely
13 painful to them and extremely -- imposes a high burden on
14 them. And that's exactly why we wanted to have Dr. Stewart
15 testify, exactly the argument that Mr. Qualm -- sorry, that
16 Mr. Swann was making: "What's the degree of this? Why, there
17 is only just this touching on the arm. Well, that's -- and
18 there was much worse touching that occurred in
19 Jordan v. Gardner, so, Your Honor, pay no attention to any of
20 this."

21 Well, it's -- the harm flows from the torture, and
22 the harm is inescapable, and it is that that we wish to prove
23 to you through the testimony of Dr. Stewart, exactly what we

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1 joined issue here. Okay?

2 MJ [COL POHL]: Thank you.

3 Mr. Connell, do you have anything you wish to add?

4 LDC [MR. CONNELL]: No, thank you.

5 MJ [COL POHL]: Any other defense counsel wish to add
6 anything? Apparently not.

7 Mr. Swann, anything further?

8 TC [MR. SWANN]: No, Your Honor.

9 MJ [COL POHL]: Okay. That brings us to the other part of
10 your -- of 254, Mr. Nevin. We are going to take break in
11 about 45 minutes or so, about 1530, just to kind of let you
12 know the way ahead. Not that you have to fill up the whole
13 time, but...

14 LDC [MR. NEVIN]: Yes, and I ----

15 MJ [COL POHL]: Just hold that thought. And after that,
16 we will discuss the way ahead as we discussed earlier of what
17 to do and just kind of have both sides and kind of get an idea
18 of what we are going to do after that.

19 In fact, rather than waiting, let's do that now.
20 After we get done with this part of 254, I have laid out
21 various courses of actions. All sorts of motions are out
22 there. Mr. Connell or Mr. Nevin talked about 182.

23 Mr. Harrington, do you still want to do 152 again?

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1 LDC [MR. HARRINGTON]: Yes, Judge.

2 MJ [COL POHL]: Okay. We've still have got stuff on 397
3 and others. Okay. Look through the docket sheet. If there
4 is anything -- if you won't choose, I will. So I am just -- I
5 mean, but go ahead. Okay.

6 Okay. Mr. Nevin.

7 LDC [MR. NEVIN]: Thank you, Your Honor. And I would like
8 to have the document camera, please. I am going to display
9 what has previously been received by the military commission
10 as 2540000 and 254IIII. These are two iterations of SOP 39.
11 May I do that, please?

12 MJ [COL POHL]: Sure. Go ahead.

13 LDC [MR. NEVIN]: Thank you. And, Your Honor, I will say
14 that this is -- the motion we are arguing here is 254RRRR. It
15 is a motion to compel discovery of certain materials related
16 to SOP 39. And just so that we are on the same page, the
17 testimony at prior proceedings was to the effect that there is
18 an SOP entitled JDG SOP #39, a standard operating procedure,
19 and it's entitled "Religious Support of Detainees." And the
20 version of it that I have up on the screen is a version that
21 was effective in June of 2014. I would just call your
22 attention, as I have previously, to paragraph (11), and it
23 says that "Female guards and interpreters should not insist

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1 that the detainees make eye contact with them during
2 interactions. Close contact with unrelated females is
3 culturally inappropriate."

4 And the testimony was that on -- and as I said
5 previously, and I am just going to turn this over so that we
6 can see, this is a version that was effective on 24 June of
7 2014. By the time we get to the fall of 2014, a motion has
8 been filed in this case and in the Iraqi case objecting to the
9 new policy that's been imposed that involves the touching of
10 male detainees -- they're all male, of course -- by female
11 guards.

12 And in support of that, in support of the
13 government's position on that motion, in their objection to it
14 in the Iraqi case, Colonel Heath files a declaration on the
15 29th of October, 2014; and on the very same day, 29th of
16 October, 2014, a new version of Joint Detention Group SOP #39
17 comes out. And of course I know the military commission
18 knows, but the primary effect of the change occurring on the
19 29th of October, the same day that -- the same day that
20 Mr. Heath is signing his declaration in the Iraqi case, JDG
21 SOP 39 is being changed so that this paragraph,
22 paragraph (11), now has removed from it the language that
23 close contact between men and women is culturally

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1 inappropriate and ----

2 MJ [COL POHL]: Hold it, Mr. Nevin. Put the other one up
3 for a second, because I wonder if now another word is missing.

4 LDC [MR. NEVIN]: This is the 24 June version.

5 MJ [COL POHL]: Right. Okay. I know it's kind of hard
6 with that overhead, but the court reporters sent me a note to
7 ask, please remember to talk into the microphone.

8 LDC [MR. NEVIN]: Oh, yeah. Sorry.

9 MJ [COL POHL]: Just the word "female" is also redacted,
10 the first "female."

11 LDC [MR. NEVIN]: And we heard some testimony that the --
12 that the intention was -- or that the claim was made that the
13 intention was to say that no guard force personnel should
14 insist on making eye contact during interactions, not just
15 female guards.

16 From our standpoint, and with respect to the
17 complaint about female guards, what's most striking about this
18 is that the language "close contact with unrelated females is
19 culturally inappropriate." We heard testimony during the
20 course of the last commission session that the SOPs are
21 considered binding and we know that when you have a statement
22 that close contact is culturally inappropriate, close contact,
23 whatever else it may mean, certainly will involve -- would

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1 apply to touching. And so, read fairly, this is saying that
2 it's inappropriate to touch, for an unrelated female to touch
3 a detainee.

4 A complaint is made about this, and I would say this
5 SOP, among other things, is based on the laws of Islam, and we
6 heard testimony to that effect. It's based on the laws of
7 Islam, so it is, in a sense, codifying for purposes of the
8 guard force the laws of Islam, or at least some of them.

9 And we also heard testimony that at the time this
10 change was made there had been no change in the laws of Islam
11 that changed the proposition that close contact is culturally
12 inappropriate.

13 So you have this change occurring on the same day
14 that Colonel Heath is filing his declaration in the Iraqi
15 case, and he files an identical declaration a couple of weeks
16 later, I believe November 7, in our case, and this change is
17 being made behind the scenes. And I say "behind the scenes"
18 because even though discovery requests that were made -- were
19 made that reached this SOP, not by -- not by language -- not
20 by terms, in those terms, but even though we made discovery
21 requests that would have covered this, we did not receive this
22 in response.

23 And then you have, finally, the testimony of Colonel

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1 Heath that he changed this -- he entered this change, he
2 didn't really remember why he had made this change, and if I
3 remember correctly, he didn't even particularly remember that
4 he had changed it. But -- but he said that he relies on
5 lawyers and people in that position to give him guidance on
6 how these rules should look.

7 So I'll just put on the presenter now the last page
8 of the -- the last page of the -- of JDG SOP 39, the
9 29 October 2014 version of it. This is the errata sheet or --
10 I guess that would be the right -- not the errata sheet. It's
11 a description of the changes that this version of the document
12 contains, and there is a reference in subsection D to some
13 Muslim fasts that's not applicable here.

14 But in -- above there, in Section A (11), you see
15 that there, the close contact with unrelated females is
16 culturally inappropriate and you see that in strikethrough
17 language, in strikethrough text or font, and that's how
18 that -- that's how that change occurs, that memorialize that
19 change.

20 The language that is blacked out in this version is
21 one we discussed at some length in open court and my intent is
22 to refer to my understanding of what that says. I don't know
23 why it's blacked out. This is the version that I downloaded

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1 from the -- from the commission's website, and so my intention
2 is to say -- well, my intention is to describe my
3 understanding of what's behind that block, but I won't do it
4 if the military commission tells me not to.

5 MJ [COL POHL]: I have no reason why it's blocked out if
6 it's on the website. Trial Counsel?

7 TC [MR. SWANN]: My understanding, sir, is it was
8 highlighted in green when the defense got it, so it looks like
9 it's blacked out.

10 MJ [COL POHL]: Okay. That seems to solve that issue.

11 Mr. Nevin.

12 LDC [MR. NEVIN]: Well, I don't think that's correct, but
13 I'm glad to speak to it anyway. It says that it is
14 recommended by the SJA; in other words, the Staff Judge
15 Advocate, for the Joint Detention Group. And that's
16 consistent with Colonel Heath's testimony ----

17 MJ [COL POHL]: If it is consistent with Colonel Heath's
18 testimony, we have the documents that speak for themselves;
19 why do we need all these other witnesses?

20 LDC [MR. NEVIN]: I don't understand your question.

21 MJ [COL POHL]: What I said is I read your motion here and
22 your motion is for all these witnesses for how this was
23 processed including the SJA.

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1 LDC [MR. NEVIN]: Oh, I'm sorry.

2 MJ [COL POHL]: And what I am saying is Colonel Heath, the
3 documents, quite frankly, and the timing speak for themselves
4 to a degree. Colonel Heath said, "They put it in front of me
5 and they made the changes and I adopted them." What would all
6 these other people add? I looked at your discovery requests
7 and it seems to be pretty vague as to what they would add to
8 this issue.

9 LDC [MR. NEVIN]: Well, we asked for all persons who
10 participated in updating it, and we asked that they be
11 identified, and we went on to say that by "identify" we mean
12 any person who suggested or directed that the update occur,
13 provided an original interim or final draft, conducted legal
14 or factual research, provided supporting information, or was
15 consulted on any issue. And I gather that the SJA made some
16 kind of a recommendation for this change, and I think we are
17 entitled to see that, but we are also entitled to know what
18 was behind this. Because if I understand correctly, it's the
19 government's position that there is a valid penological
20 purpose behind this, and they're asking you to apply the
21 Turner v. Safley -- the Turner v. Safley standard. But even
22 under the Eighth Amendment there is this issue of balancing
23 and referring to note 20 in the -- in Bell v. Wolfish. So it

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1 is their position that this is necessary in support of that.

2 And given the ----

3 MJ [COL POHL]: Isn't that their burden, not yours?

4 That's what I don't understand, is that we have what Colonel

5 Heath said. Okay. We got it. And he was the decider here.

6 He was the one who promulgated this. He was the one in

7 charge. He said on the recommendation of the SJA, this is

8 what we did.

9 Now, all of these people are going to come in and you

10 want them to articulate the legitimate penological purpose of

11 this? Isn't that the government's responsibility?

12 LDC [MR. NEVIN]: This is just a request for discovery. I

13 am not asking them to articulate anything. I am not asking

14 for them to be witnesses at this point.

15 MJ [COL POHL]: Yeah.

16 LDC [MR. NEVIN]: Because they may say -- they may have

17 some other explanation that will put an end to the whole

18 inquiry. But we have a situation where we have a claim of

19 valid penological purpose and we have -- we have an SOP that

20 is supposedly neutral on its face talking about the laws of

21 Islam, and we have it being amended at the very same time that

22 the Colonel is having to go on record for the reasons why

23 we're doing this, and we have that being hidden. And I don't

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1 know what's behind it, Your Honor. I don't know whether
2 someone at SOUTHCOM said do this, make this happen, change it,
3 because it's what we want to do, or because it's -- we know
4 that the detainees are vulnerable in this respect and so let's
5 push this, they've been making too many demands lately, let's
6 push back. I don't know what we're going to find there. But
7 that's a separate question from what we come back to you and
8 say okay. Now we want these people to testify and now we want
9 to provide a declaration. I am just saying ----

10 MJ [COL POHL]: But if it is a motion to compel
11 discovery ----

12 LDC [MR. NEVIN]: Yes, sir.

13 MJ [COL POHL]: ---- you still have to meet the discovery
14 standards. You can't just say I want them to want them.

15 LDC [MR. NEVIN]: No, no, and we agree ----

16 MJ [COL POHL]: Still has to meet on this issue, material
17 preparation to preparation of defense on this issue; is that
18 right?

19 LDC [MR. NEVIN]: Yes.

20 MJ [COL POHL]: Do you think what you have given me is a
21 sufficient showing to establish that?

22 LDC [MR. NEVIN]: Yes, and combined with what we include
23 in the moving papers, because as I say, the point is this

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1 seems to be where the government's case lives on this issue.
2 This seems to be their hinge point in this, is this valid
3 penological ----

4 MJ [COL POHL]: If the government's case hinges on this,
5 wouldn't you think the government would present this evidence
6 and not you?

7 LDC [MR. NEVIN]: No. My suggestion, my suspicion is it's
8 exactly the opposite because my suspicion is this evidence
9 would torpedo their case. That's why I want to get my hands
10 on it. But the idea that it's not relevant and material to
11 the preparation of the defense is -- is, is -- well, I mean,
12 it's for the reasons that -- the government comes here and
13 tells you they did this for a valid penological purpose and I
14 believe that this discovery would show otherwise. I think, on
15 its face, what we have suggests that it was otherwise, but we
16 need to look behind the curtain to be sure.

17 MJ [COL POHL]: I understand.

18 LDC [MR. NEVIN]: Okay.

19 MJ [COL POHL]: Okay.

20 LDC [MR. NEVIN]: Thanks, Your Honor.

21 MJ [COL POHL]: Any other defense counsel want to be heard
22 on this? Ms. Bormann?

23 LDC [MS. BORMANN]: No, Judge.

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1 MJ [COL POHL]: Mr. Harrington?

2 LDC [MR. HARRINGTON]: No, sir.

3 MJ [COL POHL]: Mr. Connell?

4 DDC [Lt Col THOMAS]: Lieutenant Colonel Thomas here. No,
5 Your Honor.

6 MJ [COL POHL]: And Mr. Ruiz? He said -- he shook his
7 head.

8 Okay. Trial Counsel, your response?

9 TC [MR. SWANN]: Your Honor, after 38 years I think I know
10 what the importance of an SOP is. It's instructional
11 guidance. It could be changed today. It could have been
12 changed any number of times since. But if you simply look at
13 the facts in this case, there has been ample testimony from
14 the lieutenant colonel in the Massachusetts National Guard as
15 to why she made that operational change. That operational
16 change was, quite frankly, made three weeks before the
17 29 October change to the SOP. So the government already had
18 set in place the plan going forward with the use of female
19 guards as an operational reason.

20 Now, Mr. Nevin says he wants a bunch of lawyers to
21 come in here and testify as to what Colonel Heath did.
22 Lawyers don't make decisions. Quite frankly, commanders don't
23 follow lawyers' suggestions very often, in my experience.

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1 There is no need to have lawyers come in here to tell you what
2 Colonel Heath has already told you. He is the commander. He
3 makes decisions.

4 MJ [COL POHL]: Thank you.

5 Mr. Nevin, last word.

6 LDC [MR. NEVIN]: Well ----

7 MJ [COL POHL]: On this issue.

8 LDC [MR. NEVIN]: First of all, it's not an instructional
9 SOP, all the testimony was that it's binding.

10 Second, Colonel Heath didn't make this decision about
11 this, he didn't even remember signing it. He said that it was
12 recommended by lawyers.

13 MJ [COL POHL]: Doesn't he own it, though? Who cares who
14 recommended it, though. Doesn't he own it as the commander
15 who signed it?

16 LDC [MR. NEVIN]: Yes, he does.

17 MJ [COL POHL]: Therefore, for good or evil, if he doesn't
18 read it, it's all on him?

19 LDC [MR. NEVIN]: Well, no, my point here is to know the
20 purpose behind it. If there -- if the government had not
21 asserted there was a valid penological purpose behind this,
22 then I wouldn't be here. But they assert that there is a
23 valid penological purpose here.

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1 If the military commission wants to rule that there
2 is no valid penological purpose or that the existence of it
3 vel non is not something you are going to consider, well, that
4 would simplify things. But if we are going to consider that
5 question, then we get to the -- you know, we hear about
6 deference to expert prison administrators, which I gather
7 refers to Colonel Heath.

8 The government made these arguments, not me, not us;
9 the government did. They advanced Colonel Heath as an expert
10 prison administrator, advanced this as a decision made to
11 effectuate a valid penological purpose.

12 MJ [COL POHL]: So isn't it on Colonel Heath to articulate
13 that purpose? If he doesn't do it ----

14 LDC [MR. NEVIN]: Colonel Heath said, quite frankly, that
15 he can't. He doesn't remember signing it.

16 MJ [COL POHL]: Then I come back to my point earlier is,
17 the penological purpose burden is on the government, not on
18 you. And if you have Colonel Heath's testimony to what it is,
19 whatever weight it has and what it says, but he is the guy
20 that made the decision, and if he is the guy who has got it
21 established -- and I am not saying that he is the only guy and
22 I am not saying anything else -- but the idea is his view of
23 the legitimate penological purpose of this SOP change, or lack

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1 thereof, would seem to be the relevant factor here, not what
2 some lawyer may have thought. And when you ask for things
3 like this, you sit there and you say I want to have the SJA
4 and everybody who touched this thing, and -- I'm not sure -- I
5 mean, my point being is, is in the decision-making process,
6 whether military or elsewhere, a lot of people will touch the
7 document all the way up. The eventual decision is made by the
8 decider. All these other people -- I mean, you want the
9 captain who drafted it the first time and the major who
10 reviewed the captain's work and the colonel who reviewed the
11 major's work.

12 The person who signed it is the owner of the
13 document. He is the owner of the policy. The motivation of
14 the other people, it's difficult for me, whether good or ill,
15 does it really make any difference what a bunch of lawyers
16 think on this issue if the head warden -- I am using that term
17 loosely -- says, "Here is my policy"?

18 LDC [MR. NEVIN]: I maybe could put it this way. It
19 seemed to me that Colonel Heath incorporated their remarks or
20 their input by reference. I mean, in other words, he said,
21 "This is why I have lawyers give me advice about this kind of
22 thing," and so he makes a suggestion that lawyers provided
23 some input or some reason for changing this SOP.

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1 MJ [COL POHL]: That he no longer remembers?

2 LDC [MR. NEVIN]: That he no longer remembers. He doesn't
3 even remember signing it. So I guess the point is to know
4 what the purpose for this in fact is, what was going on behind
5 the scenes that led to the changing of it, and ----

6 MJ [COL POHL]: Well, wasn't there some evidence it was to
7 make it gender-neutral?

8 LDC [MR. NEVIN]: Not the removal of the part about
9 touching.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: The prior sentence, yes, I understand
12 that, the prior sentence, but not the sentence about touching.
13 That was struck altogether. And, you know, we talked as
14 well -- and before we finish on this, we will submit to you
15 many things that the military has done to recognize this, the
16 objection to -- within Muslim cultures, the objection to adult
17 men and women who aren't married touching each other. The
18 military is well aware of this. That's why it was in that SOP
19 in the first place, but it gets taken out. It gets taken out
20 contemporaneously with this change that gets imposed, and
21 that -- this goes back to my slides about the Eighth Amendment
22 issue and the inferring an intent to punish.

23 If there is no reason for it, then you can infer that

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1 the change is made in part to impose punishment, but I'm
2 trying to get at the fact of why the change was made. And it
3 seems to me -- and I'm not asking for a bunch of lawyers to
4 come in here and testify. I'm not asking for anybody to come
5 in here and testify, I mean, except the request I made a
6 minute ago about the expert on -- on impact. But with respect
7 to this issue, I'm just asking for discovery. That's all.

8 MJ [COL POHL]: Okay.

9 LDC [MR. NEVIN]: Okay. Thank you, Your Honor.

10 MJ [COL POHL]: Thank you. Okay. I'll take the 254
11 discovery and request for reconsideration under advisement.

12 We've got time. Mr. Harrington, let's talk about
13 152.

14 LDC [MR. HARRINGTON]: Judge, on 152 we have developed
15 several witnesses that we would like to proffer to the court,
16 and Mr. Trivett and I have been exchanging requests to produce
17 and other information about that. I think if the two of us
18 could talk about that at the recess, I might be in a better
19 situation to advise the court on what their position might be
20 on it. We haven't had a chance to do that today.

21 MJ [COL POHL]: You want to do that at the recess?

22 LDC [MR. HARRINGTON]: Yes.

23 MJ [COL POHL]: Okay. Okay. I'll defer 152. You just

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1 tell me when you're ready to get back to it.

2 Mr. Nevin, I -- General Martins.

3 CP [BG MARTINS]: Your Honor, we wanted to give you some
4 idea of order of motions, but wanted a couple of minutes in
5 place just to confirm the order that we wanted to propose to
6 you.

7 MJ [COL POHL]: Hold that thought because we are going to
8 take a recess in a second -- well, in a few minutes.

9 Mr. Nevin, you indicated, and I don't know, is 182
10 long or short? It seems to be, as you talked about the other
11 day. Okay. Let's talk about 182, because I think it is a
12 factual issue perhaps that can be resolved.

13 LDC [MR. NEVIN]: Yes. That's correct, Your Honor.
14 Mr. Sowards is going to speak to that.

15 MJ [COL POHL]: Okay. Mr. Sowards. I want to start it
16 now. I don't like to burn daylight if we can avoid it.

17 CDC [MR. SOWARDS]: Always ready. Good afternoon,
18 Your Honor.

19 MJ [COL POHL]: Good afternoon.

20 CDC [MR. SOWARDS]: This is essentially encapsulated in
21 the motion. The background is in 182G, which is the
22 commission's third order, as far as we can count, giving the
23 defendants permission to have the original laptops that they

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1 used for about 16 months between 2008 and 2010, to have those
2 laptops returned to them at Camp VII. And the operative
3 language in the court's order, and I won't -- I think most
4 people -- obviously if the court has some questions about the
5 background, I will be happy to go into the details.

6 But the very small bore question and object of the
7 motion is reflected in the language of the court's order 182G
8 at page 2, in which the court explained the commission's
9 intent was that the subject laptops were to be provided to the
10 accused for their use after counsel had performed the required
11 review of material on the laptop to ensure compliance with the
12 information-handling procedures of the amended protective
13 orders and the privileged order communication.

14 We informed the commission and the prosecution that
15 that review had been conducted by our defense information
16 security officer and we were prepared to return the laptops to
17 Mr. Mohammad, and he has been waiting since then, but that the
18 prosecution indicated that despite the court having -- I'm
19 sorry, the commission having issued three orders, and
20 specifically the last one specifically designed to tell the
21 parties the commission's intent, nevertheless the prosecution
22 was of the impression that the military judge was likely
23 unaware of what he had ordered with respect to the return of

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1 the laptops.

2 So the very, you know, simple contained tight issue
3 here is did the military judge mean what he said in the three
4 previous orders beginning with 149L and continuing through the
5 one I just read, that the laptop that Mr. Mohammad had for his
6 use in 2008 through 2010 or through the early part of 2010, to
7 include the supporting backup media data and DVD/CD
8 write-and-read capabilities, was actually to be returned to
9 him? And that's all we are asking the commission to do, is to
10 tell the government a fourth time that you meant what you
11 said.

12 MJ [COL POHL]: Okay. Trial Counsel?

13 MTC [MR. TRIVETT]: Good afternoon, Your Honor.

14 MJ [COL POHL]: Good afternoon, Mr. Trivett.

15 MTC [MR. TRIVETT]: I don't think it's as simple as
16 Mr. Sowards seemed to indicate it was. And just to go through
17 a little bit of the history of the pleadings in this case,
18 originally when the defense requested the laptop back for
19 149A, we were willing to do that, providing they signed an MOU
20 and we litigated that to a certain degree and the judge found
21 that an MOU wasn't required, so we provided those laptops back
22 to them.

23 Two of the detainees actually have the laptops in

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1 their cells, so it's certainly not accurate to say that we
2 didn't provide the laptops back to the detainees.

3 When the laptops were provided in 2008, they were
4 provided primarily because the accused were representing
5 themselves and when they were representing themselves they
6 had -- the government agreed to provide certain functionality
7 in the laptops that allowed them to do so. Whether or not it
8 was legally -- they were legally entitled to it we never
9 conceded, but we have provided that.

10 However, they are no longer representing themselves.
11 They have attorneys. The attorneys have laptop computers,
12 they have all sorts of functionality, and they are fully
13 capable of assisting the accused in producing whatever
14 documents they want to produce for this court.

15 MJ [COL POHL]: Haven't I heard this argument before,
16 Mr. Trivett?

17 MTC [MR. TRIVETT]: In what respect, sir?

18 MJ [COL POHL]: I mean, I recall -- and, again, we have
19 been here a lot of times ----

20 MTC [MR. TRIVETT]: Sure.

21 MJ [COL POHL]: ---- something about this is different now
22 because they are no longer representing themselves and
23 therefore there is no need or whatever. Let's start with

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1 182G. Was it unclear?

2 MTC [MR. TRIVETT]: 182G was unclear, yes, sir.

3 MJ [COL POHL]: What was unclear about it?

4 MTC [MR. TRIVETT]: It didn't talk at all about the
5 functionality that the laptops needed to have.

6 MJ [COL POHL]: Okay. And what functionality ----

7 MTC [MR. TRIVETT]: So the functionality that it currently
8 has that JTF-GTMO was willing to allow back into the facility
9 after the problems that occurred in 2008 and 2009, which led
10 to their seizure, are this: The Wi-Fi was disabled, the CD
11 writing was disabled. They have discovery from 2008 available
12 for their review on it. They can also put additional
13 discovery on it, providing it goes through the PRT. They have
14 the ability to print documents off. They have this
15 functionality on the laptops that we provided back to them.

16 MJ [COL POHL]: You start out by saying two of them have
17 them. Do the other three of them have them too?

18 MTC [MR. TRIVETT]: All five of the teams have the
19 laptops. Two of them were given to the accused to take back
20 into the facility and they have been using them for whatever
21 purposes they have.

22 MJ [COL POHL]: You know, and I've said this before in
23 this last couple of weeks, it's almost like we are dealing

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1 with two separate sets of facts. Mr. Sowards stands up and
2 says they don't have the laptops; you say they do.

3 MTC [MR. TRIVETT]: They do.

4 MJ [COL POHL]: Okay. Let me ask you specifically.

5 MTC [MR. TRIVETT]: Sure.

6 MJ [COL POHL]: Does Mr. Mohammad have a laptop in his
7 cell?

8 MTC [MR. TRIVETT]: Mr. Mohammad's attorneys have his
9 laptop.

10 MJ [COL POHL]: Mr. Trivett, it goes much faster if you
11 answer the question I asked.

12 MTC [MR. TRIVETT]: I don't know if they gave it back to
13 him.

14 MJ [COL POHL]: You said you knew two people who had it in
15 their cell.

16 MTC [MR. TRIVETT]: Correct.

17 MJ [COL POHL]: How do you know that?

18 MTC [MR. TRIVETT]: I know that because they worked
19 through the protocol that was put in place to make sure it was
20 safe to go back into the cell.

21 MJ [COL POHL]: On the same assumption, has the protocol
22 been done for Mr. Mohammad?

23 MTC [MR. TRIVETT]: They have not put it through. Right.

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1 MJ [COL POHL]: All we are waiting for to get his laptop
2 back is his protocol?

3 MTC [MR. TRIVETT]: Yes.

4 MJ [COL POHL]: What is the said protocol here?

5 MTC [MR. TRIVETT]: We gave it in detail to the defense
6 counsel, but it involves, at least in part, the disabling of
7 the Wi-Fi, gluing of the screws. Most of them are security
8 related. It also includes disabling the CD/DVD writing
9 capability. However, there is a process in place where they
10 can upload the discovery we provide to them and go back
11 through the protocol in conjunction with the privilege review
12 team.

13 MJ [COL POHL]: I don't want to get into a technological
14 discussion here because I would probably be the least
15 qualified to do it.

16 MTC [MR. TRIVETT]: Yes, sir.

17 MJ [COL POHL]: I am going to ask Mr. Sowards in a second,
18 so we are going to come back to him, but I just want to make
19 sure that this is clear. Okay. No Wi-Fi capability. Okay.
20 I understand that.

21 MTC [MR. TRIVETT]: Yes, sir.

22 MJ [COL POHL]: Now, if they wish to -- they have printing
23 capability. If they wish to take screened-in information into

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1 their cell, can they do that in an electronic version that
2 they can load on their laptop? You say they won't have a CD
3 capability, so how would they load that on their machine?

4 MTC [MR. TRIVETT]: And this just arose I believe a couple
5 of days ago for the first time where they were trying to load
6 information up. They want to load information up on these
7 laptops that have gone through the PRT system.

8 MJ [COL POHL]: Right.

9 MTC [MR. TRIVETT]: The government is not objecting to
10 that at all.

11 MJ [COL POHL]: But say physically how do they do that?

12 MTC [MR. TRIVETT]: What happens is their IT folks
13 reenable the DVD/CD writing capability, they upload the
14 information on there, and then it goes back through the
15 Convening Authority IT person to certify that it has been
16 disabled again so that it can go. So they have the capability
17 of doing it, it's just a two-step process. It's PRT approval
18 and then recertification.

19 MJ [COL POHL]: And then if they want to provide something
20 in an electronic format to their counsel, how do they do that?

21 MTC [MR. TRIVETT]: The same way. They provide the laptop
22 to the defense counsel. The defense counsel go through that
23 process.

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1 MJ [COL POHL]: Is there some reason why they can't just
2 have CD writing capability, some security reason?

3 MTC [MR. TRIVETT]: I think it is a security reason, yeah.
4 JTF proposed these proposals to us as their concerns.

5 MJ [COL POHL]: I got it. Then you indicated their
6 discovery from '08 and '09 is either preloaded or in ----

7 MTC [MR. TRIVETT]: Correct.

8 MJ [COL POHL]: What about in any additional information
9 that's releasable to the detainee -- I got there is a
10 distinction between what's releasable to the detainee and
11 what's not ----

12 MTC [MR. TRIVETT]: Yes, sir.

13 MJ [COL POHL]: ---- will be provided to them. Turn the
14 CD on/off protocol you talked about.

15 MTC [MR. TRIVETT]: Yes, we have no problem with that,
16 certainly.

17 MJ [COL POHL]: The only thing holding this up is
18 Mr. Mohammad's team not following the protocol or not
19 completing the protocol, for want of a better term.

20 MTC [MR. TRIVETT]: Yes, sir.

21 MJ [COL POHL]: Okay.

22 MTC [MR. TRIVETT]: Just to clarify for the court, 182 was
23 filed, and even within the relief for 182, and I believe the

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1 defense argument stated that they weren't actually asking for
2 the older laptops back, the Panasonic Tough Book laptops back,
3 they were asking for an entirely new computer with Microsoft
4 enabled capabilities, write enabling, word processing,
5 database, video editing, all of those things. We never
6 actually litigated that. We never got to argue that, either
7 side.

8 MJ [COL POHL]: We're only talking about the old laptops.

9 MTC [MR. TRIVETT]: Correct. So that's why the
10 prosecution's position is that your order was silent as to the
11 other capabilities that the laptop needed to have, and that's
12 why we were acting in good faith.

13 MJ [COL POHL]: But after I issued the order, was that
14 when these protocols were put in place?

15 MTC [MR. TRIVETT]: After you issued the order to allow
16 for it to go back, that's when we began working on the
17 protocol. I don't have the exact date. Yes, sir.

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

19 Mr. Sowards. Just a second, Mr. Connell. I will let
20 you talk, but I just -- again, I want to get back into the
21 factual predicate here.

22 By the way, Mr. Trivett, who are the two accused who
23 have the laptops?

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1 MTC [MR. TRIVETT]: I believe Binalshibh and
2 Mr. Bin'Attash.

3 MJ [COL POHL]: Okay. Mr. Sowards, I heard Mr. Trivett
4 say, and maybe you heard him too, he said he handed that to
5 the defense and waiting on you to fill out the protocols.

6 CDC [MR. SOWARDS]: Right, and the impression that
7 Mr. Trivett -- and, I'm sorry, Your Honor, that Mr. Trivett
8 decided to go the scenic route rather than just answering your
9 question and acknowledging that, bottom line, the prosecution
10 is not following your order. They are not returning the
11 computers which you ordered them to return. Okay. That's the
12 first thing.

13 MJ [COL POHL]: You are going on the scenic route yourself
14 there, Mr. Sowards.

15 CDC [MR. SOWARDS]: I have to follow Mr. Trivett down his
16 rabbit hole.

17 MJ [COL POHL]: You really don't.

18 CDC [MR. SOWARDS]: I do.

19 MJ [COL POHL]: Let me ask you this.

20 CDC [MR. SOWARDS]: Let me tell you ----

21 MJ [COL POHL]: No, let me ask the question first. He
22 says that the laptops have been returned to the defense team.
23 Okay? Simple question: True or not true?

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1 CDC [MR. SOWARDS]: Remarkably true.

2 MJ [COL POHL]: Okay. So you have them and then he says
3 that what you guys have not done is complete the protocol that
4 two other teams have finished.

5 CDC [MR. SOWARDS]: What we have not done is refused to
6 comply with their violation of your order. That's right. We
7 will not follow a protocol which violates your three orders,
8 two of which have been issued without opposition from the
9 government. And let me, if I may, explain.

10 MJ [COL POHL]: Sure.

11 CDC [MR. SOWARDS]: And I don't want to take up too much
12 time because you were kind enough to let us insert what we
13 thought was a very simple question of following your order.

14 149, the series of motions, said that what we wanted
15 returned to us were the computers, the hard drive computers
16 and associated media, backup media, that the defendants had
17 been allowed to work with between 2008 and 2010 for a 16-month
18 period. And during that time they had possession of the
19 computers in their cells and they were able to write and read
20 DVDs, fully functioning computers, with the only exception
21 being they were not Internet-enabled, so they couldn't e-mail,
22 blog or connect with wireless devices. But they were
23 otherwise a fully functional computer that anybody in this day

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1 and age uses to manage large amounts of data and to prepare
2 documents.

3 That motion was pending and the prosecution delivered
4 to the defendants what they called e-readers, which were
5 essentially disabled laptop computers to resemble what we
6 called an old-fashioned microfiche reader. So in the 182
7 series, while the 149 was pending, we moved for the right for
8 the defendants to resume the use of write-enabled, fully
9 functioning computers, again, with the exception that they
10 would not be Internet-enabled. And you're right, you heard
11 all of those same arguments that Mr. Trivett has given you
12 today with some of the same answers about, you know, then they
13 were pro se, now they're not, and we sorted all of that out.

14 Your Honor then said -- while 182 was pending, you
15 issued 149L and you said the prosecution will return the
16 computers and the associated media to counsel for each
17 accused, and then we were to handle all of this as if it were
18 classified information until we got appropriate review and
19 understood that it was cleared, to the extent the materials or
20 information contained therein is taken into the detention
21 facility.

22 So then when we asked for the resumption of
23 write-enabled computers, computers that were fully functional,

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1 not these static e-readers that they gave us, you very
2 appropriately pointed out, somewhat to our embarrassment, in
3 182G, that you had already ruled. You said, look, I said give
4 them back their computers, and we said, well, when you said
5 give them back the computers, you also said we had to sign
6 their protocol or their agreement for the return of the
7 computers, and one of the provisos in that -- in that
8 agreement was that the computers, those computers, were fully
9 capable of doing everything except of connecting to the
10 Internet, those computers would only be returned to the
11 defendants upon further order of the commission.

12 And so we were asking you for that further order, and
13 that's what you did when you explained in 182G what the intent
14 of the commission was, and you said, "My intent is to give
15 them back those fully functional computers that they had back
16 in 2008-2010. I've said it once, I've said it twice, I'll say
17 it a third time."

18 After that Mr. Trivett just gave you the typical
19 sliding two, three versions of an answer to the same question
20 about the development of the protocol. All along the way,
21 even though they didn't object to two of your orders
22 explaining what it was you had intended, but with the
23 presentation of these dead static e-readers, their resistance

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1 to 149 in terms of the computers going back to the defendants,
2 all along the way what they wanted to do was give them broken
3 computers, computers that would not allow them to handle large
4 amounts of data, that would not allow them to produce their
5 own media, produce their own video, produce their own CDs and
6 DVDs and exchange those with counsel or with each other.

7 They lost that three times. And then they didn't
8 come back to the commission and ask you to reconsider or say
9 that you hadn't considered something. What they did, in their
10 typical fashion, was to send a memo to Mr. Connell and others
11 and say -- they said in their letter, "The judge intends for
12 you to get back the computers you had in 2008-2010, but before
13 we do that we are going to break them, and the reason -- the
14 way we're going to break them is in compliance with security
15 protocols that have just been miraculously developed by our
16 good friends at Joint Task Force Guantanamo Joint Detention
17 Facility."

18 And what Mr. Trivett finally said the third time in
19 answer to your question is not that these protocols just
20 happened to come into being after the last of your orders, but
21 that the prosecution worked with the Joint Task Force
22 Guantanamo -- and this was the point of Mr. Nevin's comment
23 about 039. Anytime they want to do something, the prosecution

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1 wants to do something that is interfering with our ability to
2 communicate and work with our clients, they work with Joint
3 Task Force Guantanamo to come up with certain procedures that,
4 lo and behold, prevent us from doing that.

5 And in this instance, when Mr. Trivett was saying,
6 oh, we're going to make certain modifications, such as
7 disabling the Internet access, well, that was already there.
8 We had already acknowledged we weren't going to have any
9 Internet access, but we want to be able -- we want to be able
10 to transfer large amounts of data between the defendants and
11 their attorneys, and Mr. Mohammad, in his cell, when he is
12 going through these hundreds of thousands of pages of
13 unclassified discovery wants to be able to keep -- have a way
14 of organizing and keeping track of that. And I will be the
15 first to, full disclosure, acknowledge that I am in the same
16 boat with Your Honor in terms of being able to be conversant
17 and discuss the particulars of exactly how that works.

18 MJ [COL POHL]: Of all the functionalities I am hearing
19 about, is the one that you most object to, I guess the lack of
20 functionality, deals with the ability to have a writable CD
21 capability?

22 CDC [MR. SOWARDS]: That's one of them. I think the other
23 one is just to have databases, usable databases, such as

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1 CaseMap or Excel spreadsheet or -- I mean, some way of
2 managing large amounts of documents and keeping track of what
3 you have. Right now -- and I just want to emphasize that all
4 of these arguments have been made and have been made
5 repeatedly to Your Honor, and I think, you know -- we
6 obviously agree because we won, but for other reasons you came
7 down on the right side and said a defendant in a capital case
8 trying to communicate with counsel and consult as
9 Powell v. Alabama recognizes they have a right to do need a
10 computer.

11 MJ [COL POHL]: Just so I am clear what you are asking
12 for. Apparently, when I issue things, I am not always clear.

13 CDC [MR. SOWARDS]: Yes.

14 MJ [COL POHL]: This isn't -- okay. It is not a wish
15 list. What I am saying is you need the basic capability. You
16 need the capability of the ability for a detainee to prepare
17 in electronic format the CD-writable capability.

18 CDC [MR. SOWARDS]: Right. Yes.

19 MJ [COL POHL]: You say a database. Do you mean a
20 software of some ilk?

21 CDC [MR. SOWARDS]: My understanding is the software is
22 there. It may need -- just because of the passage of time, it
23 may need to be updated, but the software is there. We are not

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1 saying we are developing a proprietary software. It's basic
2 off-the-shelf Microsoft.

3 MJ [COL POHL]: You said case management and things like
4 that.

5 CDC [MR. SOWARDS]: Yeah.

6 MJ [COL POHL]: So you have that or you don't have that?

7 CDC [MR. SOWARDS]: My understanding is we are just using
8 what's on the computer now as long as it supports the current
9 counterpart of that, whatever is out there.

10 MJ [COL POHL]: I understand there may be some updating of
11 software.

12 CDC [MR. SOWARDS]: Yes.

13 MJ [COL POHL]: Again, I am just trying to make sure ----

14 CDC [MR. SOWARDS]: Sure.

15 MJ [COL POHL]: ---- so there is no lack of ----

16 CDC [MR. SOWARDS]: Sure.

17 MJ [COL POHL]: ---- of understanding here. So other than
18 this CD-writing capability, you have the software, it may need
19 to be updated, what else?

20 CDC [MR. SOWARDS]: When you said CD/DVD write and read
21 capability, I think we are also talking about ----

22 MJ [COL POHL]: Again, I am not very technological. I'm
23 not sure.

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1 CDC [MR. SOWARDS]: That's why I said we are in the same
2 boat.

3 MJ [COL POHL]: What do you need a DVD capability for?

4 CDC [MR. SOWARDS]: Exactly. Some of this involves
5 research and use of video and we have to have a way of
6 displaying that.

7 MJ [COL POHL]: That you would bring in, obviously.

8 CDC [MR. SOWARDS]: We would bring in and they might ----

9 MJ [COL POHL]: And review.

10 CDC [MR. SOWARDS]: Mr. Mohammad might wish to suggest to
11 us based on what he asks for and what we bring in.

12 MJ [COL POHL]: So, in essence, the disabling of the
13 CD/DVD capability is your biggest objection?

14 CDC [MR. SOWARDS]: One of the objections, and what I was
15 going to suggest so I don't pretend to know more than I do,
16 two things, if I may, one is to yield the floor to Mr. -- to
17 Mr. Connell. And the second thing is maybe a shorthand
18 version of this is to look at 182H, which is our joint defense
19 motion compelling the prosecution to obey why your three
20 orders -- and if you look at it, it would be Attachment E --
21 I'm sorry, that's Mr. Connell's, I beg your pardon. It would
22 be Attachment B. That is the letter from Mr. Trivett
23 indicating all the damage they're going to do to the computer,

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1 so that also includes disabling the USB ports and adaptors.

2 I mean, we have no objection to the wireless Internet
3 disconnection. We conceded that. We said that's fine.
4 That's the condition they were in originally. But everything
5 else in that laundry list of damage, we don't want done to the
6 computer because that is not what the court ordered. And then
7 also looking at Attachment F to 182H, another letter from
8 Mr. Trivett explaining that in view of your lack of awareness
9 of what you ordered, they were going to do some other things,
10 including the CD-write capability being disabled. That's
11 another thing we want done.

12 I think the more specifics can be answered by
13 Mr. Connell, but before I yield to him, what I would also
14 point out is that the court asked about print capability. And
15 when last we checked in with the prosecution, what they were
16 proposing was to allow us to bring the laptops to Echo II
17 where there would be a printer that we would be able to use to
18 print off material from our clients on a printer using a
19 printer -- an ink cartridge provided by the defense so that
20 during legal meetings, probably a large portion of that would
21 be devoted to trying to receive hard copy materials from the
22 thousands and thousands of pages of unclassified discovery
23 that Mr. Mohammad wanted to bring to our attention.

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1 And just to put ----

2 MJ [COL POHL]: Wouldn't it be better just to leave that
3 in electronic format ----

4 CDC [MR. SOWARDS]: Thank you. Absolutely.

5 MJ [COL POHL]: ---- rather than print it off?

6 CDC [MR. SOWARDS]: And that's why we don't want to go out
7 to Echo II with our replacement printer cartridge and hope the
8 machine is working, can we plug it in. We don't even have a
9 stove out there anymore.

10 Just to put all this into perspective what we are
11 dealing with and what Mr. Mohammad is dealing with in trying
12 to organize information and bring issues to our attention as
13 we prepare the defense. We are aware of, and I believe maybe
14 Mr. Trivett can correct me if I am wrong, of a recent
15 authorization just in the al Nashiri case for General Martins'
16 team to have the assistance of 25 paralegals that will be
17 necessary to process discovery which they had received from
18 other government agencies last September that will be going to
19 the al Nashiri team. That's 25 paralegals. We have three,
20 and we have Mr. Mohammad, and so we think that he should be
21 able to communicate with us with a standard mechanism that is
22 reflective of practice in the 21st century.

23 MJ [COL POHL]: Thank you.

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