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1 [The R.M.C. 803 session was called to order at 0903,  
2 30 January 2018.]

3 MJ [Col RUBIN]: Commission is called to order. All  
4 parties present when the commission's last open session  
5 recessed are present, with the exception of Lieutenant  
6 Commander Lofland. I will address his absence in a moment.  
7 The accused is present.

8 Trial Counsel, who is here to represent the  
9 government?

10 TC [CDR SHORT]: Good morning, Your Honor. All members of  
11 the government who were present when the commission recessed  
12 are once again present. However, Mr. Spencer has transitioned  
13 to civilian life and he is now representing the United States  
14 Government in his civilian capacity, Your Honor. He will read  
15 his qualifications for the record.

16 MJ [Col RUBIN]: Mr. Spencer, please announce by whom you  
17 have been detailed, your legal qualifications and status as to  
18 oath, and whether you have acted in any disqualifying manner  
19 in this case.

20 ATC [MR. SPENCER]: Yes, Your Honor. I have been detailed  
21 to this military commission by the Chief Prosecutor in  
22 accordance with Rule for Military Commissions 503. I am  
23 qualified under Rule for Military Commissions 502(d) and have

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1 been previously sworn in accordance with Rule for Military  
2 Commissions 807. I have not acted in any manner which might  
3 tend to disqualify me in this proceeding. The detailing  
4 document has been filed with the commission as Appellate  
5 Exhibit 003I.

6 MJ [Col RUBIN]: Thank you. Trial Counsel, please  
7 announce for the record where the proceedings are being  
8 transmitted to by closed-circuit television.

9 TC [CDR SHORT]: Absolutely, Your Honor. These  
10 proceedings are being transmitted stateside via CCTV to remote  
11 viewing sites at Fort Meade, Maryland and Fort Devens,  
12 Massachusetts, pursuant to the commission's order Appellate  
13 Exhibit 005I.

14 MJ [Col RUBIN]: Thank you. Commander Cooper, who is here  
15 to represent the accused?

16 DC [CDR COOPER]: Good morning, Your Honor.

17 MJ [Col RUBIN]: Good morning.

18 DC [CDR COOPER]: All members of the defense team who were  
19 at the last hearing session are currently present with the  
20 exception, as you noticed, of Lieutenant Commander Keith  
21 Lofland, Your Honor. Also I would note that Mr. Brent  
22 Rushforth is absent today and the defense has filed a motion  
23 AE 007S asking for his permission for him to be excused.

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1 Attached to AE 007S is a waiver signed by  
2 Mr. Al-Tamir excusing Mr. Brent Rushforth for the calendar  
3 year or fiscal -- calendar year 2018.

4 MJ [Col RUBIN]: Thank you. The commission was notified  
5 in AE 007R that the Chief Defense Counsel excused Lieutenant  
6 Commander Lofland as defense counsel for the accused. The  
7 Chief Defense Counsel's excusal memoranda, AE 007R,  
8 Attachment B, dated 15 December 2017, referenced  
9 R.M.C. 505(d)(2)(B) applicable to changes after the formation  
10 of an attorney-client relationship as exists for Lieutenant  
11 Commander Lofland.

12 After formation of the attorney-client relationship  
13 an authority competent to detail counsel may excuse or change  
14 such counsel only, one, upon request of the accused or  
15 application for withdrawal by such counsel; or, two, for other  
16 good cause shown on the record.

17 Furthermore, under Military Commission Rule of  
18 Court 4.2.a.(3), after detailed military counsel make an  
19 appearance, their excusal must be approved by the military  
20 judge.

21 Attachment B of AE 007R, the Chief Defense Counsel's  
22 15 December 2017 memoranda excusing Lieutenant Commander  
23 Lofland, states, and I quote, I have reviewed your attached

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1 request to withdraw as defense counsel for Mr. Nashwan, the  
2 applicable statute and regulations governing military  
3 commissions, the relevant rules for professional  
4 responsibility, and the applicable case law.

5 After careful reflection on the same, discussion of  
6 your request with your team's leadership, to include the  
7 impact of your remaining on the team on interteam dynamics,  
8 and taking into account that in the attached letter  
9 Mr. Nashwan consents to your withdrawal, end quote.

10 In Lieutenant Commander Lofland's request to withdraw  
11 as counsel included in AE 007R, Attachment B, Lieutenant  
12 Commander Lofland states that his three-year orders to the  
13 military commission expire in 2018 and he is facing a  
14 statutory retirement date of July 2019. He further states,  
15 given the current posture of the case, the timing of his  
16 withdrawal allows time for a replacement to be identified and  
17 provide continuity in the representation of the accused.

18 At this time I would like to address the accused  
19 about the excusal of Lieutenant Commander Lofland.

20 Mr. Hadi, good morning, sir. Did you consent to the  
21 excusal of Lieutenant Commander Lofland?

22 ACC [MR. HADI]: Yes, sir.

23 MJ [Col RUBIN]: Thank you, sir.

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1           Notwithstanding the purported excusal of Lieutenant  
2 Commander Lofland without prior consent or notification to the  
3 commission, based on the statements from the Chief Defense  
4 Counsel and Lieutenant Commander Lofland, and in light of the  
5 accused's consent, the commission finds that good cause exists  
6 for excusal of Lieutenant Commander Lofland pursuant to his  
7 request to withdraw due to his impending expiration of orders  
8 and retirement.

9           In addition, based on the vast experience of counsel  
10 that remain on the defense team and the timing of the excusal,  
11 the accused will not be negatively affected by the withdrawal  
12 and excusal of defense counsel.

13           Moving on to Mr. Brent Rushforth, currently lead  
14 counsel for the accused, the commission previously excused  
15 Mr. Rushforth from 2017 hearings in AE 087B due to an ongoing  
16 health issue. Mr. Rushforth was absent from yesterday's  
17 505(h) hearing. However, the defense notified the commission  
18 that the accused had waived Mr. Rushforth's presence for all  
19 hearings in 2018. The commission found the accused to be  
20 adequately represented in accordance with Rule for Military  
21 Commissions 805(c).

22           Mr. Rushforth's request for excusal and the accused's  
23 waiver of Mr. Rushforth's presence was subsequently filed by

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1 the defense in AE 007S. The commission continues to find that  
2 the accused is adequately represented at this hearing in  
3 accordance with R.M.C. 805(c) by several highly-qualified  
4 counsel, including acting lead counsel.

5 In light of this, the commission accepts the  
6 accused's waiver and excused Mr. Brent Rushforth from this  
7 hearing.

8 I will now advise the accused of his right to be  
9 present and his right to waive his presence.

10 Mr. Hadi, sir, you have the right to be present  
11 during all sessions of the commission. If you request to be  
12 absent from any session, your absence must be voluntary and of  
13 your own free will. All requests to be absent are at the  
14 discretion of the military judge.

15 Your voluntary absence from any session of the  
16 commission is an unequivocal waiver of your right to be  
17 present during that session. Your absence from any session  
18 may negatively affect the presentation of the defense in your  
19 case. Your failure to meet with and cooperate with your  
20 defense counsel may also negatively affect the presentation of  
21 your case. Under certain circumstances, your attendance at a  
22 session can be compelled regardless of your personal desire  
23 not to be present.

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

12           Do you understand what I just explained to you?

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

14       MJ [Col RUBIN]: Thank you.

15       DC [CDR COOPER]: Your Honor?

16       MJ [Col RUBIN]: Yes.

17       DC [CDR COOPER]: One item of clarification. Pursuant to  
18 AE 007S you stated that you excused Mr. Brent Rushforth for  
19 this session and I wanted to clarify if he was excused from  
20 all sessions pursuant to the waiver of Mr. Al-Tamir.

21       MJ [Col RUBIN]: Yes, Mr. Rushforth will be excused from  
22 all sessions.

23       DC [CDR COOPER]: Thank you, Your Honor.

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1 MJ [Col RUBIN]: Thank you, Commander.

2 Counsel, I am now going to summarize our R.M.C. 802  
3 conferences. During the 9 and 10 January 2018 Military  
4 Commission Rule of Evidence 505(h) hearing, counsel and I  
5 conducted three Rules for Military Commission 802 conferences.  
6 These conferences were held outside the presence of the  
7 accused.

8 The first of these three 802 conferences occurred at  
9 0930 on 9 January 2018. At this conference, the mechanics of  
10 the 505(h) hearing were discussed and the order of the  
11 appellate exhibits were to be addressed.

12 The defense counsel noted they had several objections  
13 to going forward with the hearing based on additional material  
14 provided by the government prior to the hearing. These  
15 objections were discussed briefly and then the position of the  
16 parties were captured on the record during the conduct of the  
17 505(h) hearing.

18 The second conference was conducted on 9 January 2018  
19 at approximately 1400. During this conference, it was  
20 discussed how a binder brought by the government would be  
21 entered into the record as an appellate exhibit. It was  
22 determined it would be filed as a supplement by the  
23 government, which subsequently became AE 070JJJJ (Sup). In

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1 addition, we discussed the way ahead for the hearing on  
2 10 January 2018.

3 The third conference was conducted at 0900 on  
4 10 January 2018. The defense proposed a new way ahead after  
5 conducting a review of the additional material the government  
6 had provided. The government opposed this way ahead. The  
7 position of the parties was then captured on the record at the  
8 505(h) hearing.

9 Subsequent to the 505(h) hearing, at approximately  
10 0945, the parties again discussed the way ahead for the  
11 completion of the M.C.R.E. 505(h) hearing. On 28 January 2018  
12 at 1700, the counsel and I conducted an R.M.C. 802 conference.  
13 All counsel were present at AV-34 here at Naval Station  
14 Guantanamo Bay. The accused was not present.

15 The counsel and I discussed several counsel issues,  
16 including Mr. Spencer putting his qualifications on the  
17 record, the status of Lieutenant Commander Lofland and  
18 Mr. Rushforth, and the anticipated turnover plan for certain  
19 members of the defense team in the coming months.

20 We then discussed the proposed order of motions, the  
21 505(h) hearing, and whether we would hear argument on some  
22 newly filed defense motions. I informed the parties that I  
23 would largely be sticking to the items docketed on AE 107C,

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1 the Amended Docketing Order.

2           The defense then informed the commission they would  
3 be requesting some accommodations for the accused due to his  
4 current medical condition, including shortened hearings and  
5 longer breaks. I informed the parties that I may need to hear  
6 from the current senior medical officer on the accused's  
7 health. Defense mentioned they may have a witness or more  
8 than one witness to testify about the accused's current  
9 medical condition.

10           The defense requested the commission view the  
11 procedures required to bring the accused into the courtroom.  
12 We discussed the timing of upcoming medical appointments of  
13 the accused, including an MRI this week and a medical  
14 appointment next week.

15           The defense requested to argue the motion to continue  
16 the deposition early in the hearing, and I indicated we would  
17 likely litigate other motions first to ensure the continuance  
18 was ripe before hearing argument.

19           Finally, we discussed whether certain motions would  
20 be addressed in the 505(h) hearing. Additionally, I conducted  
21 an R.M.C. 802 conference yesterday afternoon, 30 January  
22 2018 [sic], approximately 1600 here in the courtroom. That  
23 conference took place after the conclusion of the

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1 M.C.R.E. 505(h) hearing. The counsel and I discussed the  
2 proposed order of motions for today's hearing.

3 I will note that the accused was not present for  
4 yesterday's hearing or for the 802 conference.

5 Counsel and I discussed the availability of the  
6 current and two previous senior medical officers to testify  
7 this morning on the accused's health. We discussed  
8 accommodations for the accused and the duration of today's  
9 hearing in light of the accused's health and medical  
10 appointment scheduled for later tonight.

11 We discussed the defense request for the commission  
12 to view the accused's entrance into the courtroom this  
13 morning. I did observe the accused's entrance into the  
14 courtroom via a video feed located in my chambers. We  
15 discussed the possibility of conducting a closed session this  
16 afternoon. Finally, we discussed timing of argument on  
17 several defense motions to compel.

18 Do counsel for either side have any additions or  
19 corrections based on the commission's summary of our various  
20 R.M.C. 802 conferences?

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

22 MJ [Col RUBIN]: Defense counsel?

23 ADDC [Maj MILLER]: [Microphone button not pushed; no

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1 audio.]

2 MJ [Col RUBIN]: Thank you. AE 107C, the Amended  
3 Docketing Order, lists 14 motions for the commission to hear  
4 argument and receive evidence on as required. During  
5 yesterday's R.M.C. 802 conference, I told the government to  
6 have the senior medical officer available to testify today,  
7 this morning, at approximately 0-9.

8 Trial Counsel, is the government prepared to call the  
9 senior medical officer?

10 ATC [MR. SPENCER]: Your Honor, I was informed immediately  
11 before we came on the record that there is an issue. If we  
12 could have a brief recess for me to assess how -- whether we  
13 need you to get involved with that issue or not.

14 MJ [Col RUBIN]: How much time would you like,  
15 Mr. Spencer?

16 ATC [MR. SPENCER]: Five minutes, Your Honor.

17 MJ [Col RUBIN]: Very well. The commission is in recess.  
18 [The R.M.C. 803 session recessed at 0919, 30 January 2018.]  
19 [The R.M.C. 803 session was called to order at 0936,  
20 30 January 2018.]

21 MJ [Col RUBIN]: The commission is called to order. All  
22 parties present when the commission recessed are again  
23 present. Mr. Spencer?

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1       ATC [MR. SPENCER]: Your Honor, as I indicated earlier,  
2 moments before coming on the record initially this morning I  
3 was informed by one of the JTF Staff Judge Advocates that the  
4 current SMO from whom you had wished to hear is citing patient  
5 appointments and administrative duties as conflict as why he  
6 can't be here, despite the fact that I very clearly  
7 communicated to him yesterday that the commission and you  
8 wanted to hear from him first thing this morning.

9               So we are now asking that the commission order his  
10 presence, which is unfortunate it has come to this; but we did  
11 not anticipate him ignoring my communication of your request.  
12 Another Staff Judge Advocate yesterday when I met with the  
13 doctor had indicated that he would bring him. So it was  
14 unfortunately a situation that we did not anticipate, but we  
15 now require the court's assistance in ordering him here.

16       MJ [Col RUBIN]: If I issue an order, at least oral and  
17 follow it up in writing, when do you anticipate the medical  
18 officer could be here to testify?

19       ATC [MR. SPENCER]: Your Honor, I can't answer that  
20 question immediately. My suggestion would be as soon as  
21 possible by whatever means necessary. I can, if the  
22 commission desires, proffer what he might say. I suspect one  
23 of the reasons he doesn't want to come in addition to feeling

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1 conflicted with leaving patients is that he feels he doesn't  
2 have much to add to the conversation since he's relatively  
3 new.

4           So I was hoping that between yesterday's and today's  
5 conversation he would continue to review past medical records,  
6 consult with other physicians. I don't know whether that's  
7 happened or not. But I can proffer, if the commission  
8 desires, what he would likely testify to based on my  
9 conversations with him yesterday.

10       MJ [Col RUBIN]: Just hold on one moment. Let me hear  
11 from Mr. Thurschwell. Sir.

12       ADC [MR. THURSCHELL]: Thank you, Your Honor. I  
13 before -- I mean, how the commission procures the testimony it  
14 decides it wants to hear is up to the commission and you can  
15 order it. But before you make that order, I would like first  
16 to put on the record some of the accommodations that have been  
17 made, so that the record is clear, for Mr. Al-Tamir; to put on  
18 other accommodations that have not been made but that we  
19 believe are required to proceed through the remainder of this  
20 hearing; and then finally to put on our -- explain our  
21 objection to the testimony of the witness, which if you were  
22 to grant, then presumably you would not be issuing the order.  
23 So we would ask for that opportunity before you decide whether

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1 to issue the order.

2 MJ [Col RUBIN]: And, Counsel, my concern -- I have  
3 several affidavits from past and, I believe, this current  
4 medical officer regarding the accused's physical condition.  
5 My concern as the presiding judge in this case -- obviously I  
6 can observe Mr. Hadi. I do note he is in a special -- I will  
7 call it an orthopedic chair. I did observe him coming into  
8 the courtroom this morning. He was able to transit from his  
9 wheelchair to this current chair.

10 My concern, and what I am operating in a vacuum of  
11 information is, is he able to attend these proceedings, which  
12 are docketed for two weeks? Am I jeopardizing his health in  
13 any way by having attend these proceedings? And what  
14 accommodations, if any, need to be made to ensure that he can  
15 attend and participate in his defense?

16 So I think, Defense Counsel, you can enlighten me on  
17 some of this information. Obviously he is here today; he  
18 doesn't appear to be in any great discomfort. I am sort of  
19 operating under, you know, normalcy that he is here and can  
20 attend. And absent other information, or to the contrary, I  
21 can only assume that he is healthy enough to attend and  
22 participate. That's the reason I wanted the medical officer,  
23 so that I wasn't operating in a -- you know, I'm an attorney,

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1 not a doctor. I don't know what I don't know.

2 ADC [MR. THURSCHELL]: Understood, Your Honor. And much  
3 of the AE 099 litigation and the filings, which were now some  
4 time ago, address some of the legal standards for making that  
5 determination, and also the -- you know, the normal  
6 procedures, which I would like to get into and are the basis  
7 of my objection to hearing from this SMO under the current  
8 circumstances.

9 So if I could be heard on the accommodations so that  
10 you're clear on the defense view, what -- get in the record  
11 what's been made, what's been needed, what we anticipate for  
12 your information, and then explain -- basically argue, to the  
13 extent I think it can be argued or needs to be argued now,  
14 AE 099 in order to set the framework for any additional  
15 evidence that the commission takes on the issue.

16 MJ [Col RUBIN]: Mr. Thurschwell, would it be beneficial  
17 if we moved forward into the litigation of AE 099?

18 ADC [MR. THURSCHELL]: Judge, that is what I am asking  
19 for. I think this will -- I can tell you, the argument is  
20 brief. It really touches on -- addresses AE 099; 103, AE 103;  
21 AE 098, which is not on the current docket, but because the  
22 availability of medical records which AE 098 addresses is  
23 going to be -- is a significant issue in connection with the

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1 other motions, I will be mentioning that, too.

2           So that -- this would be a relatively brief argument  
3 on the framework, which involves all three of those motions.

4           MJ [Col RUBIN]: So that is 099, 103, 098, 099CC as well?

5           ADC [MR. THURSCHELL]: 099CC presents a slightly  
6 different issue, but I can address that as well.

7           MJ [Col RUBIN]: All right. What I would like to do, let  
8 me introduce these issues for the record. I think we can  
9 litigate them simultaneously, so we are going to move forward  
10 right now.

11           We are going to start with AE 099, which was  
12 supplemented by AE 099 (Sup). The defense informed the  
13 commission that the accused had a medical condition requiring  
14 emergency attention, requested abatement of the proceedings  
15 until the accused is physically competent to stand trial. The  
16 government agreed that a continuance may be necessary, but  
17 objected to an abatement in AE 099E. Subsequently, the  
18 commission continued the scheduled October and December 2017  
19 hearings due to this -- due to the issues in AEs 099G and  
20 099V.

21           In AE 103, the defense requests the commission order  
22 the convening authority to appoint and approve funding for  
23 Dr. James Cobey to provide expert assistance in the field of

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1 orthopedic medicine and spinal surgery. The government  
2 opposes the defense motion as set forth in AE 103A. The  
3 defense replied in AE 103B.

4 In AE 098, the defense requested the commission  
5 compel the government to provide medical records of the  
6 accused. Subsequently, in AE 098C, the commission ordered the  
7 government to identify certain categories of medical records  
8 that would be provided to the defense. In AE 098E, the  
9 government asserted they had produced most historical medical  
10 records of the accused and would continue to deliver pertinent  
11 medical records to the defense within 30 to 45 days from the  
12 day the records came into the prosecution's possession.

13 Mr. Thurschwell, does the defense wish to be heard on  
14 AEs 098, 099, and 103?

15 ADC [MR. THURSCWELL]: We do, Your Honor.

16 MJ [Col RUBIN]: You may proceed, sir.

17 ADC [MR. THURSCWELL]: Again, with the commission's  
18 permission, I would like to put on the record the  
19 accommodations that we're aware of that have been made. They  
20 are actually relevant to the issues we're going to be  
21 discussing, legal issues in terms of accommodations, whether  
22 and on what terms these proceedings can go forward under the  
23 relevant legal standards, and their -- provide some evidence

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1 for his actual condition as evaluated at least by JTF staff.

2 I would also like to explain the problems so far that  
3 remain and the accommodations that are still required, and the  
4 government will obviously have its chance to respond.

5 I want to note, first of all, that the government has  
6 provided what the commission referred to as an orthopedic  
7 chair. It's a standard hospital-style chair that reclines.  
8 It has -- it is padded and it has wing tables on either side  
9 that fold up. We may introduce a photograph in the record  
10 later to give a sense of that.

11 The -- Mr. Al-Tamir, when he entered the courtroom,  
12 and for all travel between the camp -- and actually, my  
13 understanding is outside the cell to any other location --  
14 wears -- the medical term is a cervical thoracic orthosis or  
15 CTO. That is the body brace that he was wearing that extends  
16 from midthorax up to and directly under his chin. It is  
17 plastic. It provides support to his neck ----

18 MJ [Col RUBIN]: Mr. Thurschwell, is he currently -- I  
19 can't see. Is he currently wearing that?

20 ADC [MR. THURSCHELL]: He is not currently wearing it,  
21 and I was going to go into that a little bit later. He wears  
22 it to travel, and -- but it actually causes him pain in  
23 certain areas, so he -- when he is sitting, he is medically

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1 authorized to remove it. But when it is removed, his neck  
2 lacks the support that it provides and he experiences cervical  
3 pain that generally develops over time. And again, I will  
4 come back to that just briefly later.

5           So the -- we understand that the ride between the  
6 camp, and I'm not sure about the exact moment that this  
7 begins, but from his cell to the courtroom took approximately  
8 60 minutes today. I am informed, and if the others know  
9 otherwise they will correct me, but the typical time is 20 to  
10 30 minutes. That is a reflection, I think, both of the un --  
11 you know, packing him into his medical support equipment on  
12 the one hand, but also because the van moves at an  
13 extraordinarily slow speed is my understanding, an unusually  
14 slow speed when transporting him -- again, someone will  
15 correct me if I'm wrong -- because of his fragility and  
16 because that movement poses a risk.

17           So he is in his -- and he is in his wheelchair in the  
18 van. It's equipped for a wheelchair in his -- wearing his  
19 CTO.

20           The government now -- the government has provided a  
21 special toilet seat that is -- may be familiar to the  
22 commission -- if we can get a photograph of something or  
23 something similar, we will enter it in evidence -- that is for

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1 people who have post-surgery or who are otherwise disabled, it  
2 is a -- my understanding is it is a plastic toilet seat that  
3 is on braces that can be held sort of like a walker that fits  
4 over the toilet itself and allows for a more comfortable  
5 sitting position. In particular, it allows for a much more  
6 raised sitting position in order to facilitate the back pain  
7 and the back needs.

8           Unfortunately, the toilet seat that the government  
9 has provided to date is broken. It actually does not --  
10 cannot be raised to a level that accommodates, you know,  
11 Mr. Tamir's pain. It is painful for him to sit at the usual  
12 level. He can do it. He has had to use it on occasion during  
13 attorney-client meetings, but it's painful.

14           And so he has this morning refused breakfast in order  
15 to avoid having to use that for bowel movements, and he has  
16 requested the kind of plastic hospital bottle that can be used  
17 for urination because that -- it's easier for him to use that  
18 in the holding cell for urination without pain.

19           He is wanded for security purposes at his cell, is my  
20 understanding. Today he was wanded while sitting in his  
21 wheelchair at the cell. He was wanded at the -- when he  
22 arrives at the holding cell, he is wanded again. I believe  
23 they requested that he stand. It was painful and he -- they

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1 allowed him to lie down and wand him.

2 But when he got to the courtroom door, there is  
3 another process. I don't think that wandling is the correct  
4 term, because I think it's a solid -- it's some kind of  
5 immobile unit that he is ordinarily required to crouch down or  
6 kneel to put his body near, again for scanning purposes.

7 He declined to do that because it was -- he couldn't  
8 do it. It was way too painful. And so we would request that  
9 the use of either -- at the courtroom door he be wanded in his  
10 wheelchair with a regular wand, a mobile wand, or that that be  
11 forgone since is -- he will already have been wanded twice on  
12 the way to -- on the way to the courtroom out of his cell and  
13 at the holding cell.

14 So a moment. Am I -- if I may consult for just a  
15 moment?

16 MJ [Col RUBIN]: Sure.

17 [Pause.]

18 ADC [MR. THURSCHELL]: Thank you, Judge. I'm happy to  
19 try to answer questions. I'm basing my information on what I  
20 have learned from the client and from others who ----

21 MJ [Col RUBIN]: The toilet seat is not an issue at the  
22 detention facility, it is more of a -- it's an issue in the  
23 holding cell?

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1       ADC [MR. THURSCHWELL]: It's -- the toilet at the  
2 detention facility I believe is outfitted with a -- its own  
3 special raised seat that is affixed to the toilet itself. I'm  
4 seeing Commander Cooper, if you want to ----

5       DC [CDR COOPER]: I will just say, sir, that it is an  
6 issue at Echo II where we meet. There is not a toilet seat  
7 and it is rusted and it doesn't move up and down. And it is  
8 an issue here because it is not here today. There wasn't a  
9 toilet seat brought here today.

10       ADC [MR. THURSCHWELL]: Oh, then I stand corrected. My  
11 understanding was it was the same toilet seat that was  
12 nonfunctional when we met with him at Echo II. At the  
13 detention facility itself, my understanding is there is not a  
14 problem because there is a permanent or semipermanent raised  
15 cushioned seat that raises the height of the toilet that's  
16 being used.

17               If I might, Judge, now, with your permission, I will  
18 proceed to the argument on 099.

19       MJ [Col RUBIN]: You may.

20       ADC [MR. THURSCHWELL]: And again, I'm going to try not to  
21 be too long, because I think the issue is fairly straight --  
22 the legal issues are fairly straightforward, although their  
23 application in this case under these circumstances is not.

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1           An accused is not physically competent to stand trial  
2 either if his presence at trial would substantially increase  
3 the risks to his health or life, branch one; or if his present  
4 physical condition is such that it may substantially impair  
5 his ability to present a proper defense. That is language  
6 from a case called Landsman, 366 F.Supp 1027. It is, I don't  
7 think, a controversial standard. It's been applied elsewhere.  
8 That case and other cases are cited in our original AE 099  
9 brief.

10           So there's two prongs: Substantial risk to his  
11 personal health or life, or a physical condition that  
12 substantially impairs his ability to present a proper defense.  
13 And here, while we're talking about both, because under  
14 current circumstances, his engagement in the activity of  
15 participating in his defense causes him physical pain; and in  
16 that sense, we are even more clearly talking about his  
17 present -- his ability to substantially present a proper  
18 defense or the impairment of that.

19           Whether he is -- meets those standards is a judicial  
20 question. It is a judicial factual finding. It is a standard  
21 that's set out in legal cases that is decided by judges. And  
22 it requires, like other judicial findings of fact, disclosure  
23 of the pertinent facts to both sides and adversarial testing,

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1 meaningful adversarial testing. It is not a medical finding.

2 Certainly doctors have a great deal to say about  
3 that, the outcome of that, and that is usually much but not  
4 all of the evidence that has to be taken in order to decide  
5 whether the defendant is physically competent to stand trial.  
6 But it requires adversarial testing.

7 The defense also has to have its own opportunity to  
8 introduce expert testimony, at least where the government is  
9 proffering expert testimony. And what -- when you put these  
10 basic principles -- that I don't think the government has  
11 contested at any point in the litigation of AE 099 -- when you  
12 put that together, what they mean is that the commission may  
13 not rely solely on the government's unilateral assertions  
14 about Mr. Al-Tamir's physical competence or the state of his  
15 medical condition.

16 And again, the cases that address that are in our  
17 reply brief at pages 3 and 4, AE 099H, as well as in AE 099.

18 And, you know, these again are basic,  
19 not-controversial principles. And why am I stressing them  
20 now? I'm stressing them because this is not a normal  
21 situation, which we sometimes forget as we move forward in  
22 these proceedings but, in fact, we need to remind ourselves of  
23 fairly often; and this is one instance in which I need to

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1 remind the commission of the situation we're in. That's the  
2 norm.

3 Normally the defense would have access to the most  
4 current medical records in order to participate meaningfully --  
5 meaningfully in the adversarial judicial decision about  
6 medical competence. Normally the defense would have access to  
7 its own medical expert, whether it was funded by the court or  
8 pro bono, who would be able to reach her own medical  
9 conclusions and assist in evaluating the medical conclusions  
10 of the government experts.

11 Normally that expert would have access to the most  
12 current medical records. Normally the expert would meet with  
13 the patient, if that was necessary to make a diagnostic  
14 evaluation, either at the prison facility or, if necessary,  
15 sometimes by court order at some other more appropriate  
16 medical facility where the prisoner could be transported.

17 Normally the court would hold an adversarial hearing  
18 if there was a dispute, which there isn't always, about the  
19 defendant's medical competence to participate in his defense.  
20 And normally if a government's expert testified about the  
21 defendant's status at that adversarial hearing, the defense  
22 would be equipped to meaningfully contest that expert opinion.  
23 The defense would be privy to the factual basis of the

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1 expert's opinion, as is required by the Rules of Evidence in  
2 the military commissions and other venues, then the defense  
3 would have its own expert with access to the same information  
4 and to the client/patient to assist in the cross-examination.

5 And finally, normally consistent with that disclosure  
6 of information and adversarial testing, the government expert  
7 would not be testifying anonymously.

8 This is -- none of that is true here. And as we --  
9 the basis of -- you know, and this is not -- this system is  
10 not normal in any of those ways, for reasons that are in the  
11 records, there are -- and I'm not here now to contest that.  
12 We have contested various pieces of that and we're here to  
13 argue certain motions in order to get expert testimony. But  
14 as we sit here today, or stand here today, none of those  
15 normal requirements, prerequisites of a judicial determination  
16 of medical competence, have been satisfied. And even though  
17 GTMO is not a normal system in that respect, that does not  
18 change the legal requirements.

19 And it's on that basis that we object to your hearing  
20 the SMO's testimony and -- or in the alternative, if the court  
21 understandably wants to get some information to -- relying on  
22 that information, even if it's -- relying on that information  
23 in order to make a determination of medical competence that is

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1 inconsistent with essentially, Judge, what the defense puts  
2 forward as our account of the defendant's ability to go  
3 forward. And that is because we don't have the chance to  
4 contest it. We don't have the chance to rebut it. And so you  
5 will be relying on -- unfairly to the defense, relying on  
6 untested medical opinion.

7           Now, with respect to the defense's position,  
8 Mr. Al-Tamir is here today. Mr. Al-Tamir is not in good  
9 shape. Mr. Al-Tamir is a stoic. He may not show all the time  
10 what he's feeling, but I can tell you right now the pain  
11 begins in the morning when he gets up and is like -- rises  
12 from his sort of lying-back position, when he is sitting  
13 upright, the pain immediately starts developing in his legs.  
14 When he is wearing the brace when he is sitting upright -- the  
15 CT0, I should call it -- he has pain in his back. When he  
16 takes the CT0 off, he has pain in his neck. The longer he  
17 sits in that position with on, without, the pain increases.  
18 But he wants to be here. He is here. We have not moved to  
19 continue these hearings.

20           But that is the status. And his level of pain at  
21 certain point makes it impossible for him to -- I should say  
22 it substantially impairs his ability to present a proper  
23 defense, because he -- it is difficult for him to focus. We

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1 saw it happen in our attorney-client meetings, which lasted a  
2 maximum of two and a half, three hours over the past weekend;  
3 and went and declined over the three days because he became  
4 more and more exhausted. Exhaustion is another problem.

5           So we ask that these -- we go forward with these  
6 proceedings on the basis that he will make his good faith  
7 effort to be here -- and it is a major effort and he is here  
8 today -- but that when he needs to stop the proceedings, we  
9 get the chance to be heard, either because he needs a break to  
10 like accommodate the pain and for some brief period of time,  
11 15 minutes.

12           I should have said, another accommodation we may need  
13 is that he -- when he -- apparently, I'm told, lying back --  
14 and the chair reclines -- lying back somewhat for a period, a  
15 10-minute period may help restore him somewhat so we can keep  
16 going. So that would be our first line of defense, if you  
17 like, to when he becomes distracted or he can't focus.

18           But we need -- his own evaluation right now is the  
19 most valuable information that the commission has about his  
20 own ability to go forward. And so we would ask for -- that  
21 the commission respect his -- his wishes in regard to the  
22 length of the hearing, when it becomes too long he is  
23 committed to at least trying these half days, and just that

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1 that -- and we would object to a determination that he is  
2 medically fit to do more than he tells us in good faith and  
3 tells the commission in good faith he is capable of doing.  
4 You know, and that's an unusual request because it's saying --  
5 we are asking the commission to credit the defendant's ability  
6 to do that, but -- I mean, without more.

7 But we don't have the chance to contest any of the  
8 information that the government has that will, if they seek --  
9 should they seek to proceed at a rate or with hearings that he  
10 is not physically able to actually participate in his defense  
11 during.

12 Thank you, Judge. I have nothing else, unless you  
13 have questions.

14 MJ [Col RUBIN]: I do have questions, Mr. Thurschwell.  
15 I'm a bit confused in there's -- that the defense has moved to  
16 abate the proceedings, which in my view would mean we can go  
17 no further than that. You've also stated that you are willing  
18 to move forward in good faith and, you know, give it the old  
19 college try, as the saying goes, provided that the accused is  
20 physically capable of proceeding.

21 So I'm a bit confused between those two.

22 ADC [MR. THURSCHELL]: Allow me to clarify. When this --  
23 when the motion to abate was filed in early September, we

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1 had -- he had had the first of his many operations. It was a  
2 medical emergency that we don't need to get into the causes  
3 of, but it was -- he was suffering cauda equina syndrome,  
4 which is a desperate loss of bladder control and so on because  
5 he has not received the operation he needed earlier.

6 We were afraid, based on the medical information we  
7 were able to obtain, that he might be suffering permanent  
8 neurological damage; and I will say it's not entirely clear  
9 that he hasn't yet, but we are leaving that aside.

10 It is now January. There is a healing process. I  
11 mean, he's had three other operations, which have both helped  
12 and further impaired him, at least temporarily.

13 Medical competence, physical -- I will put it this  
14 way: Physical competence to proceed and participate in your  
15 own defense I think probably, unlike mental competence, is not  
16 a 0-1 issue. I mean, there are -- there are limits -- one can  
17 be capable of meeting with one's attorney for two and a half  
18 hours before the pain becomes too much to focus on the issues  
19 at hand, and you are actually participating to that extent.

20 We are trying not to basically be realistic and be --  
21 move the process forward by recognizing that. So for the  
22 record, we are modifying our request for relief in AE 099  
23 to -- not to abate the proceedings entirely, but to proceed on

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1 the basis that neither impairs Mr. Al-Tamir's physical health  
2 in any further way and so long as and on a basis that he is  
3 able to meaningfully participate in his defense. And that is  
4 our requested relief.

5 MJ [Col RUBIN]: I understand. Thank you, sir.

6 Trial Counsel, does the government wish to be heard?

7 ATC [MR. SPENCER]: Good morning, Your Honor. Mr. Spencer  
8 for the United States.

9 Your Honor, thank you for clearing up the confusion.  
10 I was also confused. Virtually everything that

11 Mr. Thurschwell just said with respect to the law is dead  
12 wrong. However, I think all of those issues are moot at this  
13 point because the defense is now not asking for an abatement.

14 Now, I'm not sure whether I am to respond to AE 098,  
15 which was never docketed, or AE 103, which the defense skirted  
16 around but didn't give too much detail. So I want to ----

17 MJ [Col RUBIN]: If you could update the commission on the  
18 status of the discovery, the medical discovery.

19 ATC [MR. SPENCER]: Yes, sir, that's AE 098, which was not  
20 docketed. The medical records through 4 December have been  
21 produced to the defense. The medical records since then, from  
22 approximately 5 December to 14 January, are -- were provided  
23 to the prosecution and they are now undergoing equity review.

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1           So we get these records every couple of weeks from  
2 JTF. We then send them through equity review, as the  
3 commission is well aware. That process takes some time. We  
4 are attempting to expedite that as much as possible. So we  
5 are approximately 45 days stale in terms of what the -- what  
6 information the defense has through early December is what  
7 they have. If we could ----

8           MJ [Col RUBIN]: What is the anticipated date? Does it  
9 come in large blocks, for example, 4 December through 4  
10 January or ----

11          ATC [MR. SPENCER]: Yes, sir, it is 5 December through  
12 14 January is what is being processed right now.

13          MJ [Col RUBIN]: What is the anticipated date that those  
14 records will be disclosed?

15          ATC [MR. SPENCER]: Generally it's been taking between 30  
16 and 45 days to clear it through the equity partners that need  
17 to clear it.

18          MJ [Col RUBIN]: So 45 days from mid-January?

19          ATC [MR. SPENCER]: Yes, sir, correct.

20          DTC [CDR FLYNN]: Sir, if I may interject? Actually, it's  
21 my understanding that that -- those -- that range of medical  
22 records should be to the defense within approximately two to  
23 three weeks.

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1 ATC [MR. SPENCER]: From now, right?

2 DTC [CDR FLYNN]: From now.

3 MJ [Col RUBIN]: Thank you.

4 ATC [MR. SPENCER]: But it is still essentially a 30- to  
5 45-day process.

6 MJ [Col RUBIN]: And then the remaining records, obviously  
7 there is a continuing flow ----

8 ATC [MR. SPENCER]: Yes, sir, correct.

9 MJ [Col RUBIN]: ---- from 15 January to whenever?

10 ATC [MR. SPENCER]: Yes, sir, correct. We have continued  
11 to process those as quickly as we can. Under the  
12 circumstances, again, it would be nice if we could just hand  
13 them over every day. That doesn't even happen in a regular  
14 military case, and certainly can't happen in this context,  
15 Your Honor, for reasons that you are well aware of.

16 With respect to the toilet seat, my understanding  
17 from conversations with defense counsel this morning was that  
18 it was -- it was left back at Camp VII, but my understanding  
19 was that they were going to get it and bring it here. If  
20 that's changed since our conversation ----

21 DC [CDR COOPER]: That's my understanding as well, but I  
22 do not know that it has been brought here. I have not been  
23 informed of that at this time, no.

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1 MJ [Col RUBIN]: The question is which toilet seat is it,  
2 is it the one from Echo II that wasn't ----

3 DC [CDR COOPER]: No, sir, the one from the camp is what  
4 was supposed to have been brought.

5 ATC [MR. SPENCER]: Which goes to my next point, Your  
6 Honor, which is at least from a prima facie standpoint, the  
7 accused is capable to do what he is doing right now, capable  
8 and willing. The government doesn't object to reasonable  
9 accommodations, and obviously the commission, in its  
10 discretion, can choose what reasonable -- what accommodations  
11 are reasonable in a particular circumstance.

12 Today I believe we are scheduled for a half-day. The  
13 government did not object to that. The accused has an MRI  
14 late tonight. I believe it is scheduled for 2200. That  
15 process will take 90 minutes or more, so all told, I am sure  
16 it will be a very late night for the accused. I anticipate  
17 the defense asking for a half-day tomorrow, but later in the  
18 day based on the accused's schedule and level of fatigue as a  
19 result of the late procedure tonight.

20 MJ [Col RUBIN]: It sounds like the government and the  
21 defense, that the accommodations are not fixed; they may  
22 depend on the current situation, it may change day-to-day.

23 ATC [MR. SPENCER]: Yes, sir, absolutely. And again, as

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1 the government indicated yesterday, the government doesn't  
2 object to frequent breaks and other accommodations to ease the  
3 accused's pain in a particular situation.

4 Now, I understand that his state of mind is also a  
5 function of his physical state, but his physical state here in  
6 the courtroom is no different than his physical state in  
7 Camp VII. In fact, given that he does not have access to the  
8 chair in which he is sitting in in Camp VII, his physical  
9 state might be slightly improved here. We are hopeful.  
10 Understood that the other effects of his condition may have  
11 impact on his fatigue level and things such as that nature.

12 With respect to whether an adversarial hearing is  
13 required at this stage, Your Honor, the defense has all of  
14 that completely wrong, as laid out in the government's reply.  
15 The defense consistently confuses standing trial with  
16 participating in a pretrial process. And even if we were  
17 talking about standing trial, Your Honor, what would happen in  
18 the military context -- and the defense interestingly  
19 analogized with 706, 706 then bringing in 909.

20 In a 706 context, as Your Honor is well aware, if the  
21 706 doctor says he is good to go, then at trial on the merits  
22 the defense gets to contest that and fight whether he is  
23 legally culpable for his actions or gets to fight it later.

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1 But in terms of initial assertation by the medical or the  
2 psychiatric provider, the judge is not required by rule to  
3 have an adversarial hearing. Now, the judge may under 909.  
4 Only when the accused is deemed to be unfit mentally under 706  
5 is then the judge required to have an adversarial hearing.

6 And so the defense is confusing -- first, the defense  
7 is ignoring military rules, but they are confusing the cases  
8 in which they are talking about actually bringing him into  
9 court for trial on the merits. We are not talking about that,  
10 Your Honor; we are not even scheduled for that in 2018. We're  
11 going to -- the accused will continue to receive ongoing  
12 medical care and evaluations and hopefully, from the  
13 government's perspective, continue to improve.

14 The last that he was evaluated by the prior SM0, you  
15 have the results of that declaration, Your Honor, where he was  
16 cleared to move. Now, I understand that doesn't answer the  
17 question of whether he was cleared to sit in court, which is  
18 why the commission wanted to hear from the current SM0.  
19 The -- I think it's not unreasonable to extrapolate from all  
20 of the previous SM0s' declarations, who obviously had much  
21 more contact with the accused than the current SM0, had much  
22 more opportunity to both consult with the surgeons with whom  
23 she was working, surgeons that actually operated on the

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1 accused multiple times. It's not difficult to extrapolate  
2 from the declarations that he is moveable, for sure, and then  
3 aware or cognizant at least enough to participate.

4 And I say that because the accused -- as I said,  
5 number one, the accused is here. The accused is willing and  
6 appears to be able and is averred by the defense counsel be  
7 able to do what we're asking to be done. So there is no  
8 issue -- or there's no evidence before the court that the  
9 accused is unable to do that; in fact, the opposite is true.

10 Now, the accused will have another MRI tonight. He  
11 will have ongoing evaluation as before. The commission is  
12 aware from the declarations that the accused will require an  
13 additional surgery; whether that's imminently required or  
14 urgently required or emergently required remains to be seen.  
15 As of now, from the government's position, it is not emergent  
16 or urgent, based on prior declarations from the senior medical  
17 officer, which the government has, but that certainly will  
18 impact in the future the accused's ability to participate in  
19 his own defense, either pretrial or by communicating with  
20 counsel.

21 So the government is not suggesting that the issue is  
22 settled, that he's good to go, let's press forward. The issue  
23 is settled for now. The accused is apparently capable of

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1 doing what the government seeks to do, which is have pretrial  
2 hearings with reasonable accommodations and proceed in both  
3 the pretrial hearings and the dep -- the remainder of the  
4 deposition with Mr. al Darbi.

5 MJ [Col RUBIN]: What's the government's position on the  
6 expert consultant? That's AE 103.

7 ATC [MR. SPENCER]: Your Honor, the government's position  
8 on AE 103 -- excuse me, let me turn to that -- is the same  
9 position that the government had in AE 086A and AE 089K in  
10 terms of what standard applies. The AE 086A was decided by  
11 this commission without reaching or without needing to reach  
12 that question; but at some point, and I believe we're at this  
13 point now, the commission will have to decide, is the defense  
14 correct or is the government and the other two military  
15 commissions that have addressed this issue multiple times, are  
16 they correct.

17 Your Honor, I'm sorry, the prosecution.

18 DC [CDR COOPER]: I'm sorry, Your Honor, there's no  
19 translation coming through the headsets.

20 It's working, Your Honor.

21 MJ [Col RUBIN]: It's working? Thank you.

22 ATC [MR. SPENCER]: So as I was saying, Your Honor, the  
23 commission must now decide, does it agree with the other two

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1 commissions and the government's position as to the  
2 interpretation of the statute or does it agree with the  
3 defense's interpretation. And I submit to Your Honor that the  
4 defense's interpretation is a non sequitur. The defense's  
5 interpretation changes the definition entirely of the word  
6 comparable. And the defense's argument -- the only way the  
7 defense argument will prevail is if comparable equals equal or  
8 identical, and that's simply not the case, Your Honor.

9           When the statute was amended in 2009 from the 2006  
10 version of the Military Commissions Act, it did add the  
11 "comparable" language that previously didn't exist. If you  
12 look at 701 and you look at the original version of the MCA in  
13 2006, it seems reasonable that the reason for that is there is  
14 a difference in what the defense is entitled to or what the  
15 accused is entitled to in a military commission versus a  
16 court-martial, and that entitlement is a lesser entitlement.

17           In the Rule for Court-Martial 701 and in the  
18 Article 46 of the Uniform Code of Military Justice, the rule  
19 states and the statute states that the accused entitled -- is  
20 entitled to equal access as the prosecution; that the defense  
21 and the prosecution are on equal footing. That's the military  
22 court-martial system.

23           When the military commissions process was initiated

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1 by statute in 2006, it was dialed back from that. And instead  
2 of the language being deliberately changed or explicitly  
3 changed, instead of saying equal, it didn't even reference the  
4 prosecution at all in that rule; it simply said that the  
5 defense shall have a reasonable opportunity.

6           So to -- it seems clear that to explain the  
7 differences, in 2009 Congress adopted or migrated the same  
8 language that Article 46 used in terms of process of obtaining  
9 witnesses and evidence, processes and procedures are virtually  
10 the same -- they are certainly analogous -- that they adopted  
11 Article 46 language that's been around since 1969 and applied  
12 it to the 2009.

13           So what that means is, that in conjunction with  
14 703(d) in both R.C.M. and R.M.C. being identical except for  
15 one comma, makes clear that what the accused has in a military  
16 commission is the same -- in terms of expert consultant, is  
17 the same opportunity that the military accused has in a  
18 military court-martial, which is comparable in both systems to  
19 what the -- what an accused or a defendant would have in an  
20 Article III court.

21           Now, the procedures are different. The procedures  
22 are different by definition. The statute states, in the  
23 sentence immediately preceding the sentence that the defense

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1 keeps pointing to, that the Secretary of Defense shall  
2 establish procedures, which he did in 703(d), adopting the  
3 military commission -- the military court-martial rule of  
4 703(d). So the procedures are comparable, but they are not  
5 identical. And it was never intended by Congress, clearly,  
6 that they be identical.

7           As previously stated in argument on 086A, if the  
8 defense really wants identical procedures, then they are  
9 limited to \$2500 in terms of funding for their expert  
10 consultant. I'm assuming that would not be a tenable scenario  
11 for the defense, but the procedures are put in place for a  
12 reason. We are a different system; we have a convening  
13 authority. All of those procedures, like the federal court,  
14 or like Article III courts, are subject to judicial review.

15           So in this case, if the military commission decides  
16 that they have established necessity under the Garries  
17 standard, or the Gonzalez test under the Garries standard,  
18 then they do, in fact, get their expert consultant. So that's  
19 what's -- that's specific to what standard applies, Your  
20 Honor. The 703(d) standard applies. The military  
21 courts-martial and the commission rules are the same with  
22 respect to expert consultants.

23           Moving on to the actual Garries test and the

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1 actual -- or the actual Garries analysis in the Gonzalez test,  
2 Your Honor, again the defense is confusing pretrial with  
3 trial. There is no question that at some point the defense is  
4 entitled to an expert to put on sentencing evidence or if they  
5 were to raise it in some other form, which they have not, as  
6 to -- that would potentially require an expert consultant on  
7 Mr. Hadi -- the accused's physical condition. We are not at  
8 that stage yet, Your Honor.

9           We have, just like in the military system, military  
10 doctors examining him, making -- giving opinions as to whether  
11 he can proceed at this stage. The commission could order a  
12 hearing; not required to under the rule. Certainly the  
13 commission can use averments made by the defense, which the  
14 government didn't object to this morning. The fact that  
15 Mr. Thurschwell was testifying was helpful to the commission,  
16 hopefully, in reaching a decision.

17           An adversarial hearing is not required at this stage.  
18 We are not talking about standing trial now. And even if we  
19 were, we would still be under the military 706/909 at least  
20 analogy that's different from how it would work in the Fifth  
21 Circuit case that the defense cites.

22           Coming back to Gonzalez, Your Honor, why -- the  
23 defense first needs to establish why they need the expert

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1 assistance. They haven't done that specific to this stage of  
2 the proceedings. They have tried. They have tried to confuse  
3 the issue, they have tried to, you know, mix -- well, we're  
4 talking 103, we're talking 099, we're talking 098. It is easy  
5 to throw up a bunch of chaff and hope the actual scenario gets  
6 lost in the mix, but the defense has not established why they  
7 needed a defense expert at this stage.

8           What would the defense -- what would it accomplish  
9 for the defense? The same analysis, Your Honor.

10           Now, the defense -- the government concedes that --  
11 like the military judge said this morning, we are not doctors,  
12 so at some point a doctor may be needed to accomplish what  
13 counsel cannot accomplish because we are -- it's a juris  
14 doctor not a medical doctor. So the government does not  
15 contest the third prong of Gonzalez would apply if the other  
16 two were met. It's the government's strong position that the  
17 other two prongs of Gonzalez have not been met and the defense  
18 has presented no evidence in support of that. They have  
19 indicated from their client that he is feeling pain.

20           The government doesn't dispute that he is feeling  
21 pain. Again, that would be true whether he is sitting in  
22 Camp VII or here. There is no evidence that the accused is on  
23 any kind of mind-altering medical or pharmaceutical substance

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1 that would interfere. There is no evidence that the accused  
2 isn't capable of doing exactly what he is doing right now even  
3 if certain reasonable accommodations are required, which again  
4 is in the commission's discretion and which the government  
5 does not object to generally.

6 The government does object to the defense dictating  
7 the docket, adding things last minute, you know, now adding an  
8 argument 098 that wasn't even scheduled for today at all.  
9 That's the type of defense meddling that the government  
10 objects to. We don't object to reasonable accommodations for  
11 the accused ongoing as we have conceded many times,  
12 understandably serious medical condition for which he is  
13 receiving daily treatment, constant medical supervision.

14 Your Honor, subject to any questions, that's all I  
15 have.

16 MJ [Col RUBIN]: No questions. Thank you, Mr. Spencer.

17 Mr. Thurschwell.

18 ADC [MR. THURSCHELL]: Judge, before we respond, can we  
19 get a 15-minute break to talk to our client? He is not  
20 feeling well right now and I would like to evaluate that and  
21 give him a chance to ----

22 [END OF PAGE]

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1 MJ [Col RUBIN]: Let's take a -- the commission is in  
2 recess for 15 minutes.

3 [The R.M.C. 803 session recessed at 1027, 30 January 2018.]

4 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1048,  
2 30 January 2018.]

3 MJ [Col RUBIN]: The commission is called to order. All  
4 parties present when the commission recessed are again  
5 present.

6 Mr. Thurschwell, is the defense ready to proceed?

7 ADC [MR. THURSCWELL]: We are, Judge, and I want to  
8 briefly respond to the argument. We -- we -- I was prepared  
9 to tell the commission that Mr. Al-Tamir is fading. He was  
10 prepared -- we were prepared to say -- request 45 minutes to  
11 an hour more. However, we learned in the break that his  
12 request for the hospital plastic bottle to accommodate the  
13 problem with the toilet so he could urinate was simply denied  
14 by the camp, and so it's not here. They didn't bring it.

15 And so I'm going to ask to briefly respond. If the  
16 government wants to respond to that briefly, that would be  
17 great, and then we would ask to end the session for the day.  
18 That's our request.

19 Very quickly, Judge, I don't want to relitigate  
20 whether this is a federal court or a court-martial or  
21 something in between. I mean, I think it's something in  
22 between. I think you have recognized that in other hearings.  
23 It doesn't matter for purposes of AE 103, and I'll come back

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1 to that in a second.

2           The -- with respect to AE 099 and the abatement  
3 versus accommodations issue and the government's suggestion we  
4 have waived, I mean, to the extent that we -- Mr. Al-Tamir's  
5 needs, you know, can't be accommodated, then we are asking for  
6 an abatement until the proceedings are -- you know, are  
7 established on terms that do accommodate them so that he can  
8 meaningfully participate in his defense. To the extent we can  
9 accommodate them, and we are trying, then we are willing to go  
10 forward. And there is another instance of being, you know,  
11 being reasonable and being punished for it. We are trying to  
12 move the proceedings to the extent that it's possible,  
13 consistent with his right to make a defense.

14           The issue that his physical conditions here in court  
15 are now better than they are in Camp VII, what I just said  
16 about the accommodation about the urinary -- the urination  
17 bottle I think answers that to a certain extent. But I will  
18 say in Camp VII, it is true that he does not have a chair like  
19 this. What he has is a bed where he can recline with his back  
20 up with pillows under it, which is, under the circumstances --  
21 and he doesn't need to wear the brace, which causes other  
22 problems -- that's the most comfortable thing he can do.

23           There are numerous issues regarding his

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1 accommodations in Camp VII which we don't need to get into  
2 now, but I will say the absence of the chair -- which he has  
3 here -- there means there is no place where he can sit without  
4 significant pain and do any of his work related to the case:  
5 Look at the pleadings we give him, look at the other material  
6 we are able to give him or mail to him, write letters and so  
7 on.

8           So it is nice and we appreciate and he appreciates  
9 the government's accommodation of providing the chair here,  
10 but at Camp VII it's a different situation. It's no -- he's  
11 not better off here; in fact, he still experiences and is  
12 experiencing pain, which is what I was going to ask about.

13           The government -- with respect to AE 103, our  
14 position is that we don't need and the commission does not  
15 need to decide, again, which relevant standard applies,  
16 because under either it is clear that he is entitled to a  
17 medical expert at this time.

18           With respect to the question of the Rule 706 and  
19 whether 706 applies and whether we are entitled to something,  
20 it is perfect -- even under military law, and I will cite you  
21 to page -- footnote -- let me just find this. In AE 103,  
22 page 6, note 37, there is some military law for the  
23 proposition that at the end of the day, Rule 70 -- whatever

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1 the 706 board comes back with, it is the responsibility of the  
2 commission to determine competency to stand trial. And that  
3 is obviously oriented towards mental competency, but the  
4 principle applies here.

5           The government asks what would a doctor accomplish.  
6 Well, I think the commission answered that question at the  
7 outset, saying he needs information about the medical  
8 condition to make decisions about the determinations required  
9 for a competency decision. Without -- the doctor that we are  
10 requesting would be able to provide additional insight into  
11 the condition; they would be able to, where appropriate,  
12 contest, provide an alternative view to the government's SMO.

13           And the notion that we have provided no evidence in  
14 support of our need, I mean, Judge, how about four operations  
15 in three months? I mean, that's -- he hasn't been allowed to  
16 meet for -- meet with us at all for months. There is no, you  
17 know, universe of reason in which an individual who has gone  
18 through what Mr. Al-Tamir has gone through doesn't -- you  
19 know, who is in the midst of litigation about his medical  
20 condition doesn't need a medical expert, whether it's under  
21 Garries or under the federal authority that we have cited.

22           And finally, the other legal distinction that the  
23 government relies on, pretrial versus trial, whatever its

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1 merits at some other -- in some other posture, we are here  
2 with the government trying to press forward with a deposition  
3 that we have been unable to meet with our client to discuss  
4 for their star witness that they intend to use at trial to be  
5 conducted next week.

6           So if there was ever a moment when the pretrial/trial  
7 distinction is meaningless with respect to the need for all  
8 the, you know, appropriate trial-level assistance that a  
9 defendant is entitled to, this is that moment. And so that's  
10 just a -- it's ironic that the government on one hand says,  
11 oh, it's only a deposition, you don't have any rights; and on  
12 the other hand says, you know, but we're going to play it --  
13 we intend to play it at trial because we are arranging for  
14 Mr. al Darbi to be sent away shortly.

15           So that's all I have. I'm happy to answer further  
16 questions. I do request that we terminate as soon as the  
17 commission is -- feels that it's satisfied itself on these  
18 issues so that Mr. Al-Tamir can get to a place where he will  
19 be able to urinate without pain.

20           MJ [Col RUBIN]: Thank you, sir.

21           Trial Counsel, any additional argument from the  
22 government?

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

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1           Your Honor, the government is back to being confused.  
2 Are we asking for an abatement or are we not asking for an  
3 abatement? Now Mr. Thurschwell just said, if our terms aren't  
4 met, we're asking for an abatement. Well, the defense doesn't  
5 get to dictate the terms of the commission, Your Honor. And  
6 that's what they're attempting to do and that's what they've  
7 done at some level thus far with this particular session of  
8 the commission, as I alluded to earlier.

9           Your Honor, there is a distinction between the  
10 subjective complaints of the accused and the objective medical  
11 evidence. The objective medical evidence, much of which you  
12 have, at least in the form of the declaration, much of  
13 which -- most of which the defense has, certainly dating back  
14 for the majority of this -- the time period since August. So  
15 the objective medical evidence supports the ongoing recovery  
16 of the accused, the ongoing care of the accused, and his  
17 ability, since 5 December, when defense was notified that he's  
18 been able to be moved for meetings with defense counsel.

19           As I am sure Commander Flynn will talk later in a  
20 different motion, they waited for over a month to even request  
21 a meeting with their client, Your Honor. So the fact that the  
22 defense is now saying, well, now we can't prepare for a  
23 deposition next week, despite the fact that they had a month

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1 after the deposition to talk to their client about what  
2 happened in that deposition at which their client was present,  
3 and they've had what will be close to two months since the  
4 accused was cleared by multiple doctors, surgeons that  
5 operated on him, to be moved and meet with counsel, two months  
6 between the time that happened and the time of the deposition,  
7 that's three months in which they would have had to prepare.

8           The government has never said that the accused has no  
9 rights with respect to this deposition. That's a gross  
10 mischaracterization by defense counsel. What the government  
11 has said, there is a distinction between pretrial and trial,  
12 and the case law is clear on that.

13           Your Honor, if the commission wishes, as I indicated  
14 yesterday in the 802, the government is attempting to make  
15 available the most recent senior medical officer, we will call  
16 her Senior Medical Officer Number Two, as opposed to the  
17 present SMO, who has obviously less information. Subject to  
18 the commission's order, we will produce whomever you order us  
19 to produce, Your Honor. Understood, if you need additional  
20 objective evidence ----

21           MJ [Col RUBIN]: Right now I am not going to issue -- I'm  
22 not going to issue that order right now. I may in time, but  
23 right now I am not going to issue that order.

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

2           Counsel, I would like you to consider if we can  
3 cover -- again, I don't know how long your oral argument -- in  
4 an attempt to maybe minimize the transportation for  
5 Mr. al Hadi, 099HH, that's the FCE issue; 099CC, which is  
6 another discovery issue; and I don't know if 102E is moot or  
7 not, I think it's still ripe.

8           Mr. Thurschwell, if you could consult with Mr. Hadi  
9 and your team, maybe we take a break, come back, but I think  
10 those three motions may be able to be covered in a fairly  
11 short amount of time.

12          ADC [MR. THURSCWELL]: I will, if I can have five minutes  
13 to ----

14          MJ [Col RUBIN]: Let's take a ----

15          ATC [MR. SPENCER]: Your Honor, may I be heard on that  
16 issue before we recess?

17          MJ [Col RUBIN]: Yes.

18          ATC [MR. SPENCER]: It is the government's position, the  
19 accused is present; he can voluntarily waive his presence if  
20 he's not feeling well. 9/11 accused do that frequently where  
21 they're not feeling well, they voluntarily waive their  
22 presence. That would allow us to proceed. The court can  
23 certainly identify whether that decision is made voluntarily

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1 on the accused's part. Whatever his rationale, whether he is  
2 tired, whether he doesn't feel well, whether he just doesn't  
3 feel like being here, if it's voluntary, then the commission  
4 can proceed and that's what the government would request, Your  
5 Honor.

6 ADC [MR. THURSCHELL]: Mr. Al-Tamir does not waive his  
7 right to be present.

8 MJ [Col RUBIN]: Let's take an in-place five-minute  
9 recess. Mr. Thurschwell, if you can consult with your team  
10 and Mr. Hadi and determine if we can take some period of  
11 break, come back, and address those three issues. It may  
12 facilitate shorter sessions for the remainder.

13 The commission is in recess.

14 [The R.M.C. 803 session recessed at 1101, 30 January 2018.]

15 [The R.M.C. 803 session was called to order at 1106,  
16 30 January 2018.]

17 MJ [Col RUBIN]: The commission is called to order. All  
18 parties present when the commission recessed are again  
19 present.

20 Mr. Thurschwell, did you have an opportunity to  
21 discuss the matter?

22 ADC [MR. THURSCHELL]: I did, Judge. Judge,  
23 unfortunately, I don't -- I think we have to ask at this point

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1 for the session to end for the day. I talked to Mr. Al-Tamir.  
2 We actually considered requesting that you order the JTF to  
3 deliver the bottle, and it's humiliating to even have to talk  
4 about it. But the truth is, the timing of that, even on the  
5 best-case scenario, is not -- is not good for him. He's --  
6 you know, it's embarrassing for him to be in this situation  
7 and we don't want it to get more embarrassing. And so we  
8 request that we terminate and address this first thing in the  
9 morning.

10 We also request that you order JTF to bring the  
11 toilet seat and to bring the bottle tomorrow with him. And I  
12 just -- for the record, we requested the right toilet seat  
13 yesterday. We were told it would be delivered. It was not  
14 here when he got here. The guard force apologized, said we're  
15 going to go get it. That has not happened. He requested, as  
16 an accommodation on his part, he said, okay, just bring me the  
17 bottle. And we got the response, no, we won't do that.

18 And so we're going to -- we request that you order  
19 JTF to make -- to bring the equipment he needs for the court  
20 accommodations required for these proceedings to continue in  
21 somewhat as orderly a way as possible.

22 MJ [Col RUBIN]: Mr. Thurschwell, if Mr. Hadi had the  
23 bottle, would that allow us to continue this session and

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1 potentially other sessions?

2 ADC [MR. THURSCHELL]: It would. But at this stage, not  
3 for long. We were going to ask for 45 minutes depending -- to  
4 an hour, depending upon how he was feeling. That was -- I'm  
5 not sure when that was, maybe 25 minutes ago. So if he had  
6 it, if we could -- if he had that option right now, I think he  
7 would -- I mean, I would ask if he wanted to use it now and  
8 that would take some time. But if he doesn't, and -- but it's  
9 an option, so what if he needs to use it, he can do it right  
10 away, then I think we could probably proceed on that basis;  
11 but that's -- those are several ifs.

12 MJ [Col RUBIN]: Very well. I am going to recess the  
13 commission at this point. We will cover 099CC, 099HH, 102E,  
14 along with motions related to the deposition, specifically  
15 070XXX, 090J, and 096 tomorrow morning. Counsel should be  
16 prepared to present oral argument.

17 Trial Counsel, what's the government's position on  
18 the toilet seat and the bottle? Is that helpful from the  
19 government's perspective for the commission to order those  
20 accommodations?

21 ATC [MR. SPENCER]: Your Honor -- sorry, Your Honor. I  
22 was just passed a note which is now OBE.

23 From the government's perspective, I don't think that

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1 an order would be required. I believe the concern with  
2 respect to the bottle -- and not that the accused has done  
3 this or would do this -- but it's not uncommon for detainees  
4 to use bodily fluids against security personnel. So that may  
5 be the concern. We will attempt to address this with JTF. I  
6 don't know that the commission has the authority to order the  
7 JTF to produce a toilet seat. Certainly the commission would  
8 be within its discretion to delay or abate proceedings  
9 depending upon what's available here.

10 The government is fully conscious of that discretion,  
11 Your Honor, and will make every effort to obtain mechanisms by  
12 which the accused can comfortably relieve himself.

13 MJ [Col RUBIN]: All right. I'll take this matter under  
14 advisement. What I would like the counsel to do between the  
15 defense and the government, get together and discuss  
16 accommodations. I think we have a joint interest of, A,  
17 ensuring that Mr. al Hadi is comfortable, able to proceed  
18 without delay. So with some accommodations I think will help  
19 his comfort and also allow us to proceed potentially further  
20 than ordinarily.

21 ADC [MR. THURSCWELL]: Agreed, Judge. And one more  
22 request for accommodation that I forgot. He does have an MRI  
23 scheduled for tonight. If we could delay the start of the

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1 hearing until 1200 or 1300, that would take account of the  
2 possibility -- these things tend to go much longer than they  
3 originally plan and I don't know how much it's going to  
4 interrupt his sleep.

5 MJ [Col RUBIN]: Do you know if there is a 12 -- roughly  
6 1215 prayer schedule for tomorrow?

7 Trial Counsel, what's the government's position  
8 regarding tomorrow's session?

9 ATC [MR. SPENCER]: Your Honor, as I alluded to earlier,  
10 the government has no objection to starting later tomorrow  
11 morning, given that it's likely the accused will not be  
12 finished with his procedure tonight until well into the early  
13 morning hours.

14 MJ [Col RUBIN]: All right. So why don't we make it 1300  
15 tomorrow.

16 ADC [MR. THURSCHELL]: That's fine. I'm informed that  
17 there is a 1215 prayer, so thank you, Judge.

18 MJ [Col RUBIN]: So starting time tomorrow 1300. Anything  
19 further?

20 ATC [LCDR LINCOLN]: Your Honor?

21 MJ [Col RUBIN]: Yes.

22 ATC [LCDR LINCOLN]: Just briefly, I'm not sure if Your  
23 Honor has given any thought to any of the motions that would

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1 have to be heard in closed session. We alluded to this  
2 yesterday. If you think there are any and are prepared to --  
3 you'd obviously have to make rulings on the record that they'd  
4 have to be closed to make efficient use of our time. We  
5 just -- the government puts that out as an option.

6 MJ [Col RUBIN]: What issues or motions does the  
7 government believe may be able to be addressed in a closed  
8 session?

9 ATC [LCDR LINCOLN]: Your Honor, it would be 101, which  
10 was subject -- 101C was subject of the 505(h) yesterday, as  
11 I'm sure you recall. So the motion, the original motion 101,  
12 you know, if Your Honor believes that that would need to be  
13 argued in closed session; 106, which is the motion to compel  
14 an expert; and also the two motions to compel the witnesses.

15 Related to 101, they are both -- I mean, from the  
16 government's perspective, you are aware of the declarations  
17 they've filed and the content of at least what they would  
18 testify to on the government's side.

19 MJ [Col RUBIN]: All right.

20 ADC [MR. THURSCHELL]: Two things. One, I think those  
21 require preliminary rulings on the 101C amended request for  
22 notice; and two, that would -- it's somewhat of a lengthy  
23 discussion about what -- which parts of those hearings should

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1 be closed and, if they are closed, which parts under AE 083C  
2 the -- Mr. Al-Tamir is entitled to attend. And he needs to  
3 get out of here, I mean, with respect.

4 MJ [Col RUBIN]: Trial Counsel, right now I am not  
5 prepared to order any closed sessions. I'll give it some  
6 thought as we move forward. But for this afternoon, I think  
7 we're done for the day. We will commence -- absent word  
8 otherwise from the commission, we are going to pick things up  
9 tomorrow at 1300 with, I believe, the six motions that I  
10 indicated.

11 ADC [MR. THURSCHELL]: Thank you, Judge. We appreciate  
12 your accommodations.

13 MJ [Col RUBIN]: The commission is in recess.

14 [The R.M.C. 803 session recessed at 1114, 30 January 2018.]

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