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1 [The R.M.C. 803 session was called to order at 1306,
2 31 January 2018.]

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

6 At the conclusion of yesterday's session, counsel and
7 I had a brief R.M.C. 802 conference here in the courtroom.
8 The government informed the commission of a pending motion
9 from Mr. al Darbi. Mr. al Darbi's counsel subsequently filed
10 AE 096H, which I will address during the litigation of AE 096
11 later on this afternoon.

12 Counsel, let's start with the defense motion to
13 compel discovery. That is AE 099CC.

14 ADC [MR. THURSCHELL]: Judge, if I might, I need to make
15 a request and then I need to renew our motion to abate the
16 proceedings completely, if you don't mind, based on the filing
17 this morning, AE 099LL. I don't know if you've had the
18 opportunity to look at that yet.

19 MJ [Col RUBIN]: I have, Mr. Thurschwell. You wish to be
20 heard on that?

21 ADC [MR. THURSCHELL]: Yes, we do, Your Honor.

22 With respect to one, it's not a housekeeping matter,
23 but it's a clarification. There was a ruling that you made on

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1 AE 070AAAAA on the record in the 505(h) hearing. We are not
2 entirely clear about that and we have asked the court
3 reporters for the transcript. They said they hoped to get it
4 to us before they go home tonight.

5 There are really -- there are two possibilities. If
6 you would extend our deadline to file the required pleading,
7 amended notice, until tomorrow morning at 1000, then we could
8 at least have a chance of looking at the transcript.

9 Alternatively, and I am assuming you would rather not
10 do this, I believe you would have to go back into an AE --
11 505(h) hearing in order for us to address the issue and
12 discuss it and clarify it on the record today. Whichever is
13 preferable to you would be helpful, would be acceptable, but
14 we do need some clarification.

15 MJ [Col RUBIN]: Very well. I will extend the submission
16 until 1000 tomorrow so you can review the transcript.

17 ADC [MR. THURSCHELL]: Thank you, Your Honor.

18 Your Honor, we need to renew our motion to abate the
19 proceedings in their entirety. And I'd -- I'd refer you to, I
20 think the statement of trial counsel yesterday. It's at
21 page 1634 of the unauthenticated transcript. I will read it
22 to you so we are clear.

23 I think it was Mr. Spencer said: "I don't know that

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1 the commission has the authority to order the JTF to produce a
2 toilet seat. Certainly the commission would be within its
3 discretion to delay or abate proceedings depending upon what's
4 available here."

5 And without conceding that you do not have the power
6 to require JTF to provide the accommodations necessary to
7 carry on these proceedings as contemplated under the statute
8 and rules, I think you do have the power to abate based on the
9 problems with accommodations. And I need to go into this in
10 some detail.

11 If you don't mind, I would like to read into the
12 record the letter that was filed. I want to do that because I
13 need to make some comments along the way to clarify why this
14 now supports our renewed request to abate the proceedings
15 completely, and until he is medically competent, and until JTF
16 is able to actually accommodate his needs.

17 MJ [Col RUBIN]: Mr. Thurschwell, I have the letter; I
18 have read the letter. So your request to read the letter in
19 its entirety is denied. I will allow you to be heard on the
20 letter, but, no, you may not read the letter in its entirety,
21 some of which is not relevant to an abatement.

22 ADC [MR. THURSCWELL]: Very well, Your Honor, then I will
23 just highlight paragraphs by page number.

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1 In paragraph -- the second paragraph on page 1 --
2 well, I -- let me skip to the third paragraph. Mr. Al-Tamir
3 relates an event in which he was placed in handcuffs that were
4 too tight and were painful, and he complained to the SJA who
5 was present, who initially denied that there was a problem.
6 He -- Mr. Al-Tamir showed him that he was getting red marks
7 there and the SJA essentially agreed we have to -- at that
8 point, there was an argument about it and he finally agreed
9 that they had to change the handcuffs and they changed it.
10 That's never occurred before. This is the first time this
11 problem has arisen.

12 While that was happening, he, Mr. Al-Tamir, told
13 them, please "hurry up because I need to use the bathroom very
14 soon," and they said, "Okay."

15 At that point, the guards searched his papers and
16 clothes, put on the shackles, and then they seized papers from
17 him that were clearly marked RELEASABLE TO the ISN10026.
18 These were -- and they were in an attorney-client envelope, is
19 my understanding. They were clearly marked as RELEASABLE.
20 These were documents that were turned over belatedly by the
21 government prior to the last session at which Mr. al Darbi
22 testified. They were the prosecution exhibits.

23 Because of the timing of the -- and this is on the

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1 record, I think, for that hearing. Because of the timing, we
2 had not had a chance to go over it with him. We received them
3 at the hearing there. We gave him the copies, which were
4 projected on the screen, marked RELEASABLE to the detainee,
5 and we gave him those for him to review at the session.

6 He took them back to his cell to review. There was
7 no problem at that point with him doing that. They were
8 marked clearly. That was consistent with prior practice in
9 which clearly marked releasable documents can be turned over
10 at a hearing from the counsel to the detainee, to the accused,
11 as a way -- because they are -- so that he can, you know,
12 conduct his review of documents, communicate with counsel and
13 so on. So that happened last time.

14 This time, he's -- never happened before, he is
15 searched; those clearly marked documents are taken away from
16 him. That took time.

17 He argued. He pointed out the problem. It took
18 time. And as a result, and after the argument, he again asked
19 them to hurry because I have to use the bathroom. But then
20 they still had to search his walker, they had to do the rest
21 of the processing, and he lost control of his bladder while
22 sitting in his wheelchair and -- and soiled himself.

23 He had to go back, have a change of -- a change of

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1 clothing. He very candidly says in the letter, "In fact I
2 lost my temper with the guards" and "I screamed at the SJA,"
3 who was observing everything. And he notes, "I didn't use any
4 abuse words, but I was shouting," very understandably, at that
5 point.

6 And he was then able to return and change his clothes
7 and he was told that these issues would be resolved -- all
8 these issues would be resolved tomorrow. He was told -- he
9 asked to see us. He was told he couldn't; we were gone. I
10 believe we actually were still in the courtroom, but let's
11 leave that aside.

12 He goes on, in an addendum to the letter, on page --
13 the bottom of page 3, he says he -- when he got back to the
14 holding cell to change his clothes after soiling himself --
15 and, you know, he needed to use the bathroom -- he said he
16 found that they had brought the same rusty, ineffective toilet
17 seat that we had discussed yesterday, despite the fact that we
18 had requested and were -- understood that they were going to
19 bring the one that he had in the camp that actually worked.

20 So he explained to them again that this was not
21 something that he could use without pain and -- so the upshot
22 is -- and then I will add, we just learned today, yesterday
23 there was a problem with his holding cell. He needs to wash

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1 himself after he -- after he -- after he uses the facilities,
2 the bathroom, such as it is, and before he prays and after he
3 prays. There was no -- for the first time yesterday, there
4 was no running water. There is supposed to be a sink with
5 running water in the holding cell. He was told, "Don't worry,
6 we will take care of that." Today, again, there is no
7 accommodation for him for that.

8 And, Judge, we have been -- we have tried. You know,
9 we actually -- I now am -- you know -- well, I said we are
10 being punished for being reasonable. We have been reasonable.
11 We have been trying to proceed as we can with this, based on
12 his condition, to the extent we can, but we require certain
13 accommodations. They are not -- they have been promised; they
14 have not been delivered. And we now need to move to abate the
15 proceedings entirely.

16 I mean, there are simply -- JTF-GTMO apparently --
17 and we may have more to say about this later, but JTF-GTMO
18 clearly is not making any effort -- if anything, the
19 opposite -- to accommodate the needs of this commission to
20 move forward. And, as it was, we explained to the commission
21 yesterday that this was going to be a day-by-day process. We
22 were unclear about his medical fitness to proceed, but we were
23 going to give it a try, and we have given it a try.

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1 The -- the -- give me one moment.

2 MJ [Col RUBIN]: Mr. Thurschwell, if I could ask a
3 question.

4 ADC [MR. THURSCWELL]: Yes.

5 MJ [Col RUBIN]: Has the correct toilet seat been provided
6 today?

7 ADC [MR. THURSCWELL]: I think so.

8 MJ [Col RUBIN]: I understand there are some issues that
9 happened yesterday. Have those issues been communicated to
10 the JTF-GTMO appropriate individuals and this trial counsel
11 team? So I understand there may have been some issues.
12 Running water, I don't view as a medical issue. An individual
13 needs running water regardless if he's in great health or not.
14 So my question is, have the requisite changes been
15 made following yesterday, which was the first day of open
16 commission sessions?

17 DC [CDR COOPER]: Your Honor, if I may answer that
18 question. There is the actual appropriate toilet seat in
19 today. There is still no running water, but the actual toilet
20 seat itself has been brought over.

21 MJ [Col RUBIN]: All right. The running water is separate
22 and aside from any medical issues. We'd still have the
23 same issue -- if the accused was in perfect health, that would

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1 still be an issue.

2 DC [CDR COOPER]: Yes, Your Honor.

3 ADC [MR. THURSCHELL]: Judge, without the required
4 accommodations, this can't proceed. And let me be clear. I
5 mean, what we have had -- the significance of the repeated
6 promises and then the not following through is that now
7 Mr. Al-Tamir is going to be sitting here worried, instead of
8 paying attention or while he is trying to pay attention, or
9 while he is trying to communicate with counsel, while he is
10 also dealing with the pain associated with this --
11 participating in this proceeding, he is going to have to be
12 worrying about urinating on himself. He is going to have to
13 worry about whether the bathroom accommodations when he gets
14 there are adequate.

15 And there is -- there is no question, and this is
16 perhaps the key point, under these circumstances, in his
17 condition, with -- especially in light of the recent, you
18 know, events. But even before then, but for the government's
19 insistence on doing the al Darbi deposition next week or
20 whenever we can -- whenever it actually happens, I think it's
21 fair to say that this whole process would be abated until he
22 is truly medically ready.

23 And let me note, we are in Guantanamo. Under the

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1 MCA, he does not have speedy trial rights. He's not going
2 anywhere. He's -- I mean, there is no -- he has been -- he's
3 been incarcerated here since 2007.

4 There is absolutely no reason that an individual in
5 his current condition, faced with the current -- especially in
6 light of the refusal to provide the required accommodations,
7 should be going forward, other than the insistence that
8 Mr. al Darbi's -- frankly, his convenience and his, you know,
9 disappointment at delaying the deposition for a couple of
10 months -- maybe longer, we don't know -- but but for that
11 concern on Mr. al Darbi's part and the government's concern
12 for Mr. al Darbi's feelings, this would not be going on. We
13 would not be here. And we have now tried. We have ----

14 MJ [Col RUBIN]: I don't agree with that statement.

15 ADC [MR. THURSCHELL]: Okay, Judge. That is ----

16 MJ [Col RUBIN]: We would still be here.

17 ADC [MR. THURSCHELL]: That is -- okay, Judge. Our
18 position -- we believe that that would be the outcome. So
19 against that background, we again move to abate the
20 proceedings entirely until he is actually ready to go forward
21 in an orderly way without the kinds of worries about his
22 health and his, you know, his sanitary condition that we are
23 now facing.

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1 MJ [Col RUBIN]: Trial Counsel, do you wish to be heard on
2 this?

3 ATC [MR. SPENCER]: Thank you, Your Honor. The government
4 absolutely wishes to be heard on this issue.

5 The government is not suggesting that -- or not
6 questioning the integrity of defense counsel, so I want to
7 make that clear up front. But understand, for the commission
8 and for any observers, that the defense's information comes
9 from their client, by definition.

10 The government is prepared to call the staff judge
11 advocate that was present for this evolution yesterday. He is
12 in the courtroom. If the commission wishes to hear from him,
13 the government would request -- even if the commission doesn't
14 deem that information necessary for its decision on this
15 issue, that the government be allowed to present that evidence
16 in light of the seriousness of the allegations.

17 A number of things contained in the accused's letter
18 are absolutely false. And this is the problem with relying on
19 subjective, self-serving statements by an accused terrorist.

20 MJ [Col RUBIN]: If the government requests, I will grant
21 you the opportunity to present the testimony of the SJA.

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

23 MJ [Col RUBIN]: You can call the SJA as a witness.

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1 ATC [MR. SPENCER]: Thank you. Your Honor, the government
2 calls the Major, which is how we will refer to him because he
3 is here under protected identity. He was the staff judge
4 advocate yesterday.

5 ADC [MR. THURSCHELL]: Judge, may I be heard momentarily?

6 MJ [Col RUBIN]: Yes.

7 ADC [MR. THURSCHELL]: A, we renew our objection based on
8 the same discussion -- arguments we made yesterday; and
9 second, if we could have a few minutes just to -- I don't even
10 know yet which judge advocate -- I'm sorry, which SMO we're
11 talking about and which statement --

12 I'm sorry, the SJA -- I'm sorry, I misunderstood
13 the ----

14 MJ [Col RUBIN]: This is the SJA. And I will give you --
15 Mr. Thurschwell, if you need some time after the Major has
16 testified, I will give you a recess just to collect your
17 thoughts and ----

18 ADC [MR. THURSCHELL]: I appreciate that, Judge. That's
19 all I ask.

20 MJ [Col RUBIN]: Trial Counsel, you may proceed.

21 ATC [MR. SPENCER]: Major, would you please stand by the
22 chair and raise your right hand.

23 [END OF PAGE]

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1 MAJOR, U.S. Army, was called as a witness for the prosecution,
2 was sworn, and testified as follows:

3 DIRECT EXAMINATION

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

5 Q. Thank you. Please have a seat.

6 Major, we will skip the identification portion that
7 would typically precede your testimony. Can you please give
8 your rank, title, and present duty location?

9 A. My rank, I am a Major in the United States Army,
10 assigned to JTF-GTMO, the SJA office, assigned specifically to
11 the Litigation Support Section.

12 Q. Do you have a title within the SJA's office?

13 A. It's just a litigation support attorney or
14 commissions attorney is the billet title.

15 Q. Thank you. Have you had an opportunity to review
16 what was submitted earlier today by the defense, specifically
17 a statement from the accused?

18 A. I have reviewed the statement that the accused
19 presented.

20 Q. Were you the staff judge advocate present to whom he
21 refers in that letter?

22 A. I was the SJA here yesterday, that's correct.

23 Q. Okay. Can you please tell us what occurred yesterday

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1 when the accused was removed from the courtroom for transport
2 back to the camp?

3 A. Okay. So as soon as we get outside the courtroom
4 doors, he stops us and he asks -- he starts asking for the
5 SJA, so I come over to find out what's going on, and he is
6 holding up his left wrist and he asks me if I can put my
7 finger between the handcuff and his wrist. So I take my
8 pointer finger, I place it in there, and I say yes.

9 And he says, "Can you move it?"

10 And I said, "I don't understand. What do you mean?"

11 He said, "Can you move the handcuff?" He goes, "Is
12 this normal?"

13 I said, "I am not a law enforcement officer, I am not
14 an MP, so I don't know what's normal and what's abnormal in
15 terms of handcuffs." And I tried to explain that to him and
16 he gets upset claiming that it's too tight, but keeps asking
17 me, "Can you put your finger in there?" So I did it again.

18 And then he asks, "Can we move it?" And it would not
19 move. So the MP that was there opened the handcuff and he
20 removed his arm or removed his wrist. I didn't see any
21 redness. There was a line there from the handcuff. And he
22 says, "This is torture. Is this normal? Is this the rule?"

23 I said, again, I don't -- I'm not an expert in

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1 handcuffs, I go, but people I know who have been in handcuffs,
2 this is a normal -- this is what I see for people who are in
3 handcuffs.

4 Then he holds up his right wrist, which has no
5 handcuff on it and he said, "There is no marks on this side."

6 I said, "I understand that; there's no handcuff on
7 that side."

8 He continued to say, "Is this normal? Is this the
9 way it's supposed to be?" And I'm the one who actually said,
10 "Do you want to argue about this or do you have to use the
11 restroom?" And I said, MPs, let's take him back to use the
12 restroom.

13 Q. When did you become aware that he needed to use the
14 restroom?

15 A. It was -- the defense counsel referenced that prior
16 to the defense making an argument and then the prosecution
17 making an argument and then us recessing for the day,
18 indicating that he had to use the restroom and needed to get
19 out of the courtroom to take care of that.

20 Q. Okay. What happened next?

21 A. So we go back to his pod. He goes in his pod, or his
22 cell, where there is a location to use the restroom. And he
23 is in there and that's when the guard force -- the MP was

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1 going through his legal bin. He asked him, do you need to use
2 the restroom, and there was no answer. He wanted to know what
3 was going on with the legal bin.

4 And then 26 says, "Just take me out. Take me out of
5 the cell and take me to camp."

6 Q. How long was he in the cell or the pod where the
7 restroom is located?

8 A. It was just a couple of minutes, long enough for him
9 to let us know if he needed to use the restroom inside the
10 pod.

11 Q. And you just testified that he requested to be taken
12 back to the cell, to the camp?

13 A. Yes. He said he wanted to be taken out of the cell
14 and go back to the camp.

15 Q. Are you aware if he used the restroom facility in the
16 pod in that intervening time?

17 A. The first time he went into the pod, he did not use
18 the restroom. He was given the opportunity and he didn't
19 indicate that he wanted to go there, he wanted to go back to
20 camp. So they started to wheel him out and then he wanted to
21 argue. He wanted to question why the papers that were handed
22 to him during the commission could not be taken back with him
23 to ----

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1 Q. Okay, Major, we will come back to the papers in just
2 a minute.

3 A. Okay.

4 Q. What happened after the discussion with the papers?

5 A. So we wheeled him back down to the sidewalk area, and
6 getting the van ready, going through the process of getting
7 him cleared to get into the van, he tells the linguist
8 something in a foreign language. I don't know if it was
9 Arabic. The linguist looks at me and says, "SJA, he needs to
10 use the restroom really bad."

11 And I said, "Okay. Well tell him if he wants to, we
12 will wheel him right back into the pod and he can use the
13 restroom."

14 The linguist then again said something to him in a
15 foreign language and 26 just sat there, he didn't answer. He
16 put his head down and sat there for three to four minutes and
17 then he got very upset and said he needed to change his
18 clothes and he started yelling at everybody, accusing us, it
19 was the JTF's fault that he urinated.

20 Q. During the intervening three to four minutes, was he
21 asked again whether he wanted to return to the pod to use the
22 restroom?

23 A. I asked the linguist, I kept saying -- I said, "26,

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1 if you need to use the restroom, let's go." I kept telling
2 him, "We are not going to make it back to camp. If you have
3 to go that bad, we are not going to make it back to camp."

4 Q. So how many times would you estimate that you
5 communicated through the linguist, understanding that you
6 don't speak Arabic ----

7 A. Correct.

8 Q. ---- the opportunity for him to use the restroom by
9 going back into the pod?

10 A. I would say a couple of times to the linguist and
11 then a couple of times in English to 26, because I know he
12 understands some English when I converse with him at camp or
13 whatnot.

14 Q. And during that three to four minutes of you
15 communicating that to him, did he respond to you or the
16 linguist in any way?

17 A. He did not. There was no response until he started
18 yelling that he needed to go back into the cell and then to
19 change his clothes.

20 Q. Stepping back to the papers, can you address that
21 issue briefly?

22 A. Yes. So the SOP requires anything that -- that
23 leaves the commission, if the defense teams want it to go back

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1 to camp, it has to go through the legal mail process, which
2 means it has to be sent up to the military commission's
3 Privilege Team and then mailed in to the detainee so they have
4 it at camp, so all of the PRT markings are on it. I
5 understand there are classification authority markings on the
6 documents, but it did not follow the SOP in terms of the mail
7 procedure. If the defense team wants it to go back to camp,
8 then it has to be cleared and they mail it in to the detainee
9 and then it can come and go and then it's properly marked.

10 Because I explained to him, I said, "As I am standing
11 here, I see the classification authority markings; but three
12 days from now, if an MP sees this at camp, there are no PRT
13 markings on this." I said, "I will give it back to your
14 defense attorneys," which I did the same day. That afternoon
15 we prepared a letter, we gave it to the defense courier, and
16 she took it to the -- she provided -- I assume that day
17 provided it to the defense team.

18 I explained to the defense courier, "If you just
19 print this off or if they have another copy and you get the
20 PRT to clear it today and you bring it to me, I will take it
21 up to him to camp today so he has it tonight to review." They
22 were in a meeting and couldn't make that happen.

23 Q. Major, just to clarify, the PRT is what exactly?

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1 A. The Privilege Review Team.

2 Q. Okay. So the Privilege Review Team reviews incoming
3 written communication to the detainee ----

4 A. That's correct.

5 Q. ---- is that right?

6 A. They are the ones that mark the documents and the
7 envelopes so that we know it is cleared for processing, for
8 the mail process to get to the detainees.

9 Q. So there is a distinction between information that's
10 cleared to be released to the detainee in terms of
11 classification that he is allowed to look at from a
12 classification standpoint, and what he is allowed to transport
13 to his cell or hold in his cell; is that correct?

14 A. Correct. If he wants -- if the defense team wants it
15 to leave the commission, it has to be marked by that Privilege
16 Review Team; otherwise, obviously he can view it here in the
17 commission. He can't leave with anything that's not been
18 properly marked by the Privilege Review Team.

19 Q. So his counsel can show it to him while he is here if
20 it is releasable to the detainee ----

21 A. Correct.

22 Q. ---- but unless it's been reviewed by the PRT, he
23 can't take it with him; is that correct?

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1 A. Can't go back to camp, that's correct.

2 Q. Do you know whether that's always been the policy?

3 A. That's been the SOP for a long time. I deployed here
4 in 2016, and that was the policy then.

5 Q. Okay.

6 ATC [MR. SPENCER]: Thank you, Major. I have no further
7 questions, subject to questions from the judge.

8 MJ [Col RUBIN]: Mr. Thurschwell, would you like a
9 ten-minute recess?

10 ADC [MR. THURSCWELL]: Yes, Judge. Thank you.

11 MJ [Col RUBIN]: The commission is in recess for ten
12 minutes.

13 [The R.M.C. 803 session recessed at 1334, 31 January 2018.]

14 [The R.M.C. 803 session was called to order at 1347,
15 31 January 2018.]

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

19 Major, if you could resume your spot on the stand,
20 please.

21 Mr. Thurschwell, you may proceed.

22 [The witness resumed his seat on the witness stand.]

23 ATC [MR. SPENCER]: Your Honor, I'd like to remind the

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1 witness that he's still under oath.

2 MJ [Col RUBIN]: Thank you.

3 ADC [MR. THURSCHELL]: Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 **Questions by the Assistant Defense Counsel [MR. THURSCHELL]:**

6 Q. Major, thank you for talking to me during the break.

7 I want to focus on two aspects of your testimony.

8 You testified that Mr. Al-Tamir waited three to four minutes,

9 I think was your testimony, outside the holding cell while you
10 asked if he wanted to use the toilet; is that your testimony?

11 A. Yes.

12 Q. Okay. He did not say why he was not taking up your
13 offer; is that correct?

14 A. [Microphone button not pushed; no audio.]

15 Q. Okay. And you don't actually know why he didn't take
16 up your offer?

17 A. [Microphone button not pushed; no audio.]

18 Q. Okay. Now, you are not familiar -- you were not
19 familiar and may still not be familiar with the actual toilet
20 seat that was provided in the cell that you were offering him
21 to use at that time?

22 MJ [Col RUBIN]: Trial Counsel?

23 ATC [MR. SPENCER]: Your Honor, I believe we are having a

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1 technical issue with the microphone not picking up the
2 witness' testimony.

3 MJ [Col RUBIN]: All right. Mr. Thurschwell, you may
4 proceed.

5 ADC [MR. THURSCWELL]: Thank you.

6 Q. The question was, you were not familiar with the
7 toilet that had been provided in the holding cell?

8 A. I had not seen the actual toilet that was brought
9 over by the JTF for him to use.

10 Q. Okay. So you would not know if it was a seat that
11 was appropriate for him to use without pain?

12 A. I would not know.

13 Q. Okay. Let me ask you about the seizure of the
14 papers. Now, I believe you testified that the -- pursuant to
15 the commissions SOP, these -- material that is brought back to
16 the camp after meetings with counsel have to be cleared before
17 they can be provided to the -- to the -- I'm sorry, strike
18 that.

19 That under the commissions SOP, the PRT has to sign
20 off on material that is turned over to the client, and it has
21 to be stamped appropriately by the PRT; is that correct?

22 A. Right. Nothing can leave the commission unless it's
23 been reviewed by the PRT if it's going to go back to camp.

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1 Q. Okay. And -- one moment.

2 ADC [MR. THURSCHELL]: Judge, I'd like to ask the
3 prosecution if we've been provided with that SOP in discovery.
4 We may well have been.

5 MJ [Col RUBIN]: Yes, you may.

6 ADC [MR. THURSCHELL]: If not, I'd ask for it.

7 MJ [Col RUBIN]: Trial Counsel, has the defense been
8 provided with this SOP?

9 ATC [MR. SPENCER]: Your Honor, I cannot answer that off
10 the top of my head. Help -- what I can answer, Your Honor,
11 which answers the question, is that this very procedure was
12 requested in AE 004A -- or ordered in AE 004A pursuant to a
13 defense request to amend the privileged handling procedures.
14 So the defense has this -- asked the court to sanction this
15 procedure, the commission did, and they should have been well
16 aware of that.

17 Q. Major, let me clarify another aspect of that
18 commissions SOP. You had -- you did an earlier tour as SJA;
19 is that correct?

20 A. I did.

21 Q. And when was that? What were the dates of the
22 earlier the tour?

23 A. We landed December 31st, 2015, and I left here

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1 14 October 2016.

2 Q. Was the same commissions SOP in place at that time?

3 A. It was.

4 Q. So this has been the commissions SOP that your guard
5 force is instructed to follow at least since your initial
6 tour?

7 A. That's correct.

8 Q. Okay. You most recently resumed your duties as SJA
9 on November 1 of this year?

10 A. I landed 2 November.

11 Q. 2 November, thank you. And so you would not be aware
12 whether the SOP was enforced in the same manner as it was
13 enforced yesterday prior to your November 1 tour? Let me
14 strike that.

15 Let me -- are you aware, between the end of your
16 first tour and the end of your second -- your beginning of
17 your second tour, whether the SOP was enforced strictly or not
18 strictly?

19 A. I obviously have no idea what happened -- what
20 happened when I wasn't here.

21 Q. Okay. So you would not know prior to November 2
22 whether there was some change of circumstances that led to a
23 stricter enforcement of the -- of the SOP?

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1 A. Again, I wouldn't have any knowledge of anything
2 prior to 2 November.

3 Q. All right. And because you were not then in the
4 position of SJA, you would not be aware whether the very same
5 material was transferred in the courtroom on the August
6 session, 2017 session, to the client, who brought it out of
7 his -- of the courtroom and took it back to his cell without
8 the enforcement of the SOP in the same strict manner?

9 A. Again, I have no idea if the guard force saw it. I
10 have no idea what the guard force saw on the August date that
11 you referenced. If this MP wouldn't have seen the documents,
12 he wouldn't have brought it to my attention, and I wouldn't
13 have been able to enforce the SOP.

14 Is it possible that something got out of the
15 courtroom that was not seen? Yes. Because they do a physical
16 contraband review, so they're not reviewing page, by page, by
17 page, by page every single document.

18 Q. But they did do that page, by page, by page yesterday
19 with respect to the material that he was -- he brought out?

20 A. The papers were handed to me. I don't know that they
21 were going through page, by page, by page, but there were 19
22 pages that didn't have the PRT markings, so it's altogether
23 possible he saw any one of those 19 and simply handed those to

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1 me.

2 Q. Are you aware that there were documents that lack the
3 PRT stamp that were in the package that was -- the
4 attorney-client package that was examined by your guard force
5 that are similarly marked RELEASE TO ISN10026 but were not
6 seized?

7 A. I am only aware of the documents that were handed to
8 me by the MP.

9 Q. So if I were to show you a document that, in fact,
10 was not seized, even though it is not marked -- PRT stamped,
11 from the very same package from which the other documents,
12 attorney-client communication documents were seized, you would
13 not be able to say whether this was, in fact, in that package
14 or not?

15 A. I would have no idea if it came from the same
16 package, if it was an envelope that was here yesterday,
17 because I didn't go through every single envelope or every
18 single page of any envelope.

19 ADC [MR. THURSCWELL]: One moment, Judge?

20 MJ [Col RUBIN]: Yes.

21 [Pause.]

22 Q. Last question, Major: Just to -- sorry. During the
23 three- or four-minute period that you referred to when he did

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1 not answer your question, you do not know why he delayed that
2 response, your invitation to use the toilet in the holding
3 cell; is that correct?

4 A. Like I said, I have no idea why he didn't answer and
5 simply come back into the pod and use the restroom.

6 ADC [MR. THURSCHELL]: Okay. That's all I have, Judge.

7 MJ [Col RUBIN]: Trial Counsel, any additional questions
8 for the witness?

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

10 **REDIRECT EXAMINATION**

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

12 Q. Major, briefly, during that three- to four-minute
13 time period, did -- or prior when he had been in the pod for
14 approximately one to two minutes, did the accused communicate
15 to you directly or through your translator why he was unable
16 or unwilling to use the restroom facility?

17 A. No, he didn't reference wanting to go to the restroom
18 at all at that point. He simply asked -- indicated that he
19 wanted to be removed from the cell and taken back to camp, and
20 then we had the discussion about the paperwork.

21 Q. Major, I asked you, you have reviewed the accused's
22 statement. We discussed that earlier. Prior to your
23 testimony, I asked you to go through that and highlight all

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1 false statements that were false based on your observation and
2 experience in this evolution. Could you please highlight
3 those for the court?

4 A. So I underlined several -- several sentences. Where
5 he indicates in bullet number 2 that I advised him that his
6 team -- that his defense team had left and I can't contact
7 them, I simply advised him that they were no longer in the
8 courtroom and I did not know where they were. My concern was
9 getting him to use the restroom, because I know that was the
10 issue that had been raised by the defense before they went on
11 the arguments and that they had made prior to us adjourning
12 yesterday.

13 I know that when I was in the courtroom, the only
14 thing here was my bag. There were no attorneys in here and
15 the internal security was still here.

16 ADC [MR. THURSCWELL]: Judge, I am going to object to the
17 narrative answer. I am having trouble following. The
18 question was, can you highlight the statements in the letter
19 itself. I will also note this is beyond the scope of cross.

20 MJ [Col RUBIN]: The objection is sustained. This is
21 beyond. I think you have covered this adequately, Trial
22 Counsel.

23 ATC [MR. SPENCER]: Your Honor, to the extent that

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1 presumably defense counsel's assertion will be that he didn't
2 lie about the inability to pee, that he was dissatisfied with
3 the toilet seat and that's why he chose not to, making the
4 declaration submitted not false, that was done on
5 cross-examination; so the government would like a brief
6 opportunity to demonstrate false statements in that statement.

7 MJ [Col RUBIN]: Ask questions and not just a narrative
8 form.

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

10 Q. What's the next false statement that the accused
11 submitted to the court?

12 ADC [MR. THURSCHELL]: Judge, I'm sorry, the same
13 objection. I am still not clear on what the first false
14 statement was, allegedly false statement. If you could just
15 highlight it, read the statement.

16 MJ [Col RUBIN]: Trial Counsel, go back and highlight it
17 again. I think we are reploting some of the same ground as on
18 direct.

19 ATC [MR. SPENCER]: Understood, sir.

20 MJ [Col RUBIN]: I understand the testimony, I understand
21 the cross-examination. We are replaying. So if there is new
22 highlights, that's helpful to me.

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

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1 MJ [Col RUBIN]: Replowing the same ground is not.

2 Q. Major, just the specific detail ----

3 A. I understand.

4 Q. ---- the actual false statement.

5 A. The first false statement where he says that I
6 advised him that they had left and I can't contact them, I
7 never indicated that I couldn't contact them ----

8 Q. So that's a false statement?

9 A. ---- they left. I don't know where they are.

10 Q. Understood. What was the next false statement?

11 A. The next one where he indicates that I said that the
12 handcuffs were -- he says good, and according to the rules,
13 that's a false statement. I advised him, "I am not an expert
14 on handcuffs. I don't know -- you are asking me to put my
15 finger in there." That's what I did.

16 Q. How many false statements, in your observation, are
17 contained in the statement that are incorrect or inaccurate
18 based on what happened yesterday?

19 A. I have nine to ten lines underlined.

20 Q. So that would be nine to ten false statements?

21 A. Yes.

22 ATC [MR. SPENCER]: Thank you. Your Honor, I have no
23 further questions.

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1 MJ [Col RUBIN]: Mr. Thurschwell, recross?

2 **RECROSS-EXAMINATION**

3 **Questions by the Assistant Defense Counsel [MR. THURSCHWELL]:**

4 Q. Major, when you were speaking to Mr. Al-Tamir, were
5 you speaking in Arabic?

6 A. I do not speak Arabic.

7 Q. So you were addressing him in English?

8 A. I was speaking to him in English, that's correct, and
9 he was replying.

10 Q. He was replying in English?

11 A. When we were talking about the mail or the paperwork,
12 he refused to respond when I asked him if he wanted to go back
13 inside the pod and use the restroom.

14 ADC [MR. THURSCHWELL]: Okay. Nothing further, Judge.

15 MJ [Col RUBIN]: Major, I have a question for you.
16 Regarding the water in the pod, based on the assertions from
17 defense counsel, which I take to be true, there was no water
18 in the pod yesterday and again today. Are the appropriate
19 individuals at JTF-GTM0, are they aware of that and taking
20 corrective action?

21 WIT: So when I arrived here yesterday, I was advised by
22 the guard force that there was no water to that, that pod. I
23 asked them would he be able to use the restroom and still

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1 flush. They said he could probably use the restroom a couple
2 times. I said, "What are we doing about it?"

3 And they said that the beef had been contacted, the
4 engineering, the engineers on base had been contacted. They
5 knew about it and they were working the issue.

6 MJ [Col RUBIN]: Counsel, any questions in light of mine?
7 Trial Counsel?

8 ATC [MR. SPENCER]: None from the government, Your Honor.

9 MJ [Col RUBIN]: Defense Counsel?

10 ADC [MR. THURSCHWELL]: None, Judge.

11 MJ [Col RUBIN]: Major, if you could, when you depart
12 today, just follow up on that.

13 WIT: I will see what I can find out, Judge.

14 MJ [Col RUBIN]: Or a work-around, whether it's a
15 sanitizer of some type ----

16 WIT: Sure.

17 MJ [Col RUBIN]: But the accused needs to be able to wash
18 after using the facilities.

19 WIT: I understand. And there are other cells that have
20 water running to them if he needs to go in there for those
21 purposes, if he is able to do so, just to let the commission
22 know.

23 MJ [Col RUBIN]: Thank you.

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1 WIT: Sure, Judge.

2 MJ [Col RUBIN]: Major, thank you for your testimony. You
3 may step down.

4 WIT: Thanks, Judge.

5 MJ [Col RUBIN]: Counsel, any additional argument on the
6 defense motion to abate? Mr. Thurschwell?

7 ADC [MR. THURSCHELL]: Very briefly, Judge, if I can have
8 three minutes. And I may have a couple of points following up
9 on the testimony.

10 MJ [Col RUBIN]: Would you like a recess, Mr. Thurschwell
11 or just an in-place recess?

12 ADC [MR. THURSCHELL]: Five minutes. Thank you.

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

14 [The R.M.C. 803 session recessed at 1403, 31 January 2018.]

15 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1415,
2 31 January 2018.]

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

6 Mr. Thurschwell, are you prepared to proceed?

7 ADC [MR. THURSCWELL]: Thank you, Judge. Just following
8 on the testimony of the Major, and I'm going to try to focus
9 on the issue at hand, which is the question of whether the
10 proceedings need to be abated based on the failure of
11 accommodations, to the extent that his testimony was proffered
12 to demonstrate that Mr. Al-Tamir's complaints in his letter
13 were either lies or not well-founded, his testimony did not
14 establish that in any way. And the key -- the key part of his
15 testimony was not what he did know, but what he did not know.

16 He did not know -- when Mr. Al-Tamir declined to use
17 the toilet in the holding cell, he was not aware what the
18 toilet was. He apparently was not aware that it was the
19 ineffective, broken toilet that causes him pain when he tries
20 to use it.

21 He was -- there was no indication that he was aware
22 that there had been a request for a urine bottle in lieu of
23 that; even though it wasn't the right toilet, he offered that,

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1 and he was told it would come, it did not, and -- which is
2 frustrating.

3 He did not know whether the commissions SOP -- he did
4 not know how it was enforced between the -- his last -- his
5 last term -- tour, and the current one, which started on
6 1 November. And so he does not know, for example, whether it
7 was -- how it was being enforced in August, when I will
8 proffer that -- that Mr. Al-Tamir was handed these same
9 documents, took them out of the courtroom, was not searched,
10 nothing was seized, and has had them in his cell since that
11 time.

12 He also does not know -- he testified, I think, how
13 cuffs are supposed to be put on. I think his testimony was he
14 is not a law enforcement officer, so he didn't know exactly
15 how they were supposed to work and whether his --
16 Mr. Al-Tamir's complaints were valid or not; although
17 ultimately, when he discovered that they would not move up and
18 down his arm, as I understand it, he was willing to make the
19 accommodation, suggesting that he recognized some legitimacy
20 to it.

21 And finally, you know, he doesn't even know exactly
22 what Mr. Al-Tamir was saying. And this is important because
23 of a number of issues, because he spoke to him in English and

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1 not Arabic. And there's no -- that's not a complaint, but
2 it's just a reality. You have an understandably upset
3 individual who is in both pain and in need of the use of the
4 facilities and was unable -- and was frustrated and was -- may
5 or may not have been communicating clearly, but it was not --
6 it wasn't clarified by the Major.

7 Again, I am not blaming him, but it's just -- there
8 isn't anything here that would support the notion that the
9 accommodations were adequate, that Mr. Al-Tamir was
10 deliberately doing anything. He testified he doesn't know why
11 Mr. Al-Tamir, you know, waited three to four minutes and was,
12 you know, understandably frustrated, angry, had already -- he
13 didn't know the reason, because he didn't know about the
14 toilet.

15 He didn't know that the -- and I will add one more.
16 He didn't know that the SOP that he referred to is still being
17 selectively enforced. And I will say, based on other
18 commission practice, not just at the August hearing but in
19 other commission cases and in -- and in this one, this notion
20 that documents that are handed to a client marked RELEASABLE
21 to the detainee at hearings that are then taken out of the
22 courtroom, it is selective in the extreme, over my experience
23 here and others', that those would be seized. It's unusual.

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1 It didn't happen in August.

2 And so Mr. Al-Tamir's frustration at the very same
3 documents that were not seized once before that are now being
4 seized, is understandable.

5 More -- oh, and let me just say with regard to the
6 selective enforcement of -- of the SOP, he testified that he
7 would not -- he was not aware that one of the documents that
8 was marked identically to the ones that were seized yesterday
9 was in fact not seized. Presumably it was in the same
10 stack of -- it was in the same envelope, and it was not
11 seized.

12 So even now, it's not completely clear to anyone,
13 apparently, you know, what you are allowed to take out with
14 you, what you are not allowed to take out with you. And was
15 it a mistake? Maybe. Who knows? But, I mean, the point is
16 that Mr. Al-Tamir's frustration is not -- is not -- is
17 well-founded.

18 And I would just -- I would proffer and ask to have
19 marked what is a -- is the document that was provided to the
20 defense at the August session as an exhibit to be used in the
21 deposition of Mr. al Darbi, like the other documents that were
22 seized yesterday. It is Bates-stamped Hadi-1-035658. I am
23 going to show it to the prosecution, with the commission's

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1 consent, and would ask to have it marked as a document that
2 was the same status as the ones that were seized and yet this
3 one was not.

4 So the -- all of this is -- well, let me -- with your
5 consent, Judge, can I hand this up to the reporter for a mark?

6 MJ [Col RUBIN]: Yes, you may.

7 ATC [MR. SPENCER]: Your Honor, may I inquire as to this
8 document? Was this actually taken by the accused to his cell,
9 or is it a copy of a document that was provided? Is it the
10 actual document?

11 DC [CDR COOPER]: Your Honor, if I may?

12 MJ [Col RUBIN]: Yes, please.

13 DC [CDR COOPER]: The document was taken by Mr. Al-Tamir
14 out of the courtroom on August 15 after the deposition of
15 Mr. al Darbi. It was taken back to the holding cell behind
16 the courtroom and then it was taken to his camp, where he has
17 had it since August 15, 2018 [sic]. The document was brought
18 back yesterday because he believed we were doing
19 Mr. al Darbi's cross, so he brought those documents back with
20 him.

21 We didn't get to the cross. He took the documents
22 back out, like he always does after court, and then some of
23 the documents in his envelope were seized, others were left in

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1 the package, Your Honor, and he brought them back today.

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

3 ADC [MR. THURSCHELL]: And in short, yes, it is the very
4 document that was removed.

5 MJ [Col RUBIN]: And we'll get that marked.

6 ADC [MR. THURSCHELL]: It's the original.

7 MJ [Col RUBIN]: For the record, the defense counsel was
8 referring to a document already marked. This is Prosecution
9 Exhibit 035 for Identification.

10 ADC [MR. THURSCHELL]: Thank you, Judge.

11 Leaving aside the effort to impugn Mr. Al-Tamir's
12 credibility and so on, I mean, the significance, to the extent
13 it has significance, of the Major's testimony is that the SJA
14 was not aware of what had happened in court; that JTF was
15 asked for help. He didn't -- as the complaint that he stood
16 by and watched was undoubtedly a function of the client's
17 frustration at yet another JTF-GTMO official who wasn't
18 providing the help he had asked for on multiple occasions,
19 that he said he needed, that had been promised, and now they
20 were trying to make him use the very toilet that he said, "I
21 can't -- I can't use that one," while his -- you know, while
22 he is having this frustration related to the documents.

23 And so it -- it simply confirms that JTF really has

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1 exhibited recently -- and beginning, frankly, from the day he
2 arrived at GTMO -- a deliberate indifference to his medical
3 needs. And that is evident in the record. We filed it in
4 connection with AE 099, the history, their awareness at the
5 time he arrived that he had had an MRI and was told that he
6 needed an operation when he arrived at GTMO. He is -- last
7 night he received the MRI, the first MRI since then. He has
8 had four operations since then.

9 The fact that these minimal accommodations that are
10 promised and not delivered, what it exhibits is a deliberate
11 indifference to his medical needs. And under these
12 circumstances, and given his current medical condition, we
13 again request abatement pending his actual competence to go
14 forward.

15 And, Judge, I would just ask, if I can consult with
16 my client briefly, I think he's -- may need a break in the
17 near future. I can come right -- step away and come back.

18 MJ [Col RUBIN]: I do intend to take a break. I know the
19 prayer time today is 1528, so ----

20 ADC [MR. THURSCHELL]: Okay.

21 MJ [Col RUBIN]: ---- if we could proceed.

22 ADC [MR. THURSCHELL]: 1528, let me -- I'm not sure. I
23 was told 20 to 30 minutes. Let me -- if I might consult.

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1 MJ [Col RUBIN]: Yes, you may.

2 [Pause.]

3 ADC [MR. THURSCHELL]: Judge, if we could proceed for 20
4 minutes, he is going to need to use the bathroom and he's --
5 the pain is building up, so that's what I would request.

6 MJ [Col RUBIN]: Very well.

7 Trial Counsel, do you wish to be heard?

8 DC [CDR COOPER]: Your Honor, before trial counsel starts
9 argument, I just want to make one correction to the record.
10 When I was discussing the document, counsel stated that it was
11 August 15, 2018, and it was really August 15, 2017.

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

13 ATC [MR. SPENCER]: Thank you, Your Honor. Your Honor,
14 it's time to stop the abatement yo-yo that we have witnessed
15 in the last two days. I'm hopeful -- I hope, but I am not
16 hopeful, that this is the end of the abatement discussion.

17 Your Honor, there is no evidence whatsoever of
18 deliberate indifference. In fact, the opposite is true. JTF
19 has gone to great lengths to make accommodations in multiple
20 facilities across multiple spectrums for the accused's
21 condition, the accused's condition that the government has
22 recognized over the last several months was serious and he has
23 been under constant care for those conditions. The allegation

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1 of deliberate indifference is without merit, Your Honor.

2 Now, with respect to the abatement itself, the whole
3 documentary issue of whether documents were seized or whether
4 SOP was followed or it wasn't followed, all of that is
5 entirely irrelevant to the abatement question, Your Honor. I
6 would only point out for the commission's awareness and the
7 defense's reminder that this was decided by 084A. 084A was in
8 response to a motion by the defense, which the government did
9 not oppose, to migrate the proceeding -- or the procedures
10 that had been in use since 9/11 -- or since the 9/11 cases to
11 the Hadi case because there had not been, at that point, a
12 court order in this commission detailing how the documents
13 should be handled.

14 Previously the JTF had been following the 9/11
15 procedures. JTF was concerned that there was no order in
16 Hadi. Therefore, the defense filed 084; the government did
17 not oppose it. And the 084, on page 11, directly discusses
18 material from the defense counsel to the accused as being
19 required, whether it's mailed or not, to go through PRT so
20 that he can possess it in his cell.

21 Was that done 100 percent of the time? The SJA
22 testified that it possibly was not. But that has nothing to
23 do with the abatement, and these procedures are -- obviously

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1 should be followed. I am quite certain after today the JTF
2 will be more diligent in following the procedures that the
3 defense asked for, Your Honor.

4 Specific to the staff judge advocate's testimony, I
5 don't know how defense can say with a straight face that it
6 had nothing to do with the veracity of the accused's
7 statements. The witness testified that there were nine to ten
8 false statements in the documents submitted to the commission.
9 Additionally, Your Honor, the defense tried to make much of
10 what the staff judge advocate did not know, suggested there
11 was a communication issue, suggested a lack of awareness on
12 the staff judge advocate's part because he wasn't in court to
13 observe what had previously gone on.

14 Your Honor, you may recognize that the staff judge
15 advocate is still in this courtroom, was in this courtroom in
16 the same exact position yesterday. He testified that he
17 observed in the courtroom the issues and was aware of the
18 accused's desire to go to the bathroom. The accused never
19 communicated, either through his interpreter or to any of the
20 guard force or to the staff judge advocate, as to why he was
21 unwilling to use the restroom facilities.

22 There is no indication from the defense, even, that
23 the accused, who is able to stand, would not have been able to

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1 stand and use the facilities. He had requested a urine bottle
2 or a bottle to urinate in; there is no indication that that
3 would have required his doing so in a seated position.

4 This is all smoke and mirrors, Your Honor. This is
5 an attempt by the accused -- again, not on the defense
6 counsel; they are accepting their client's word at face value.
7 This is an attempt by the accused to delay this proceeding,
8 which he has now successfully done. We have now delayed an
9 hour and a half on an ancillary issue that has relatively no
10 bearing and has no merit, given that it's accusing the
11 government of punishing him or torturing him, in his words,
12 over the restroom facility issue and the handcuff issue.

13 Your Honor, I urge the commission to reject the
14 defense's motion for an abatement for the final time. Thank
15 you, Your Honor.

16 MJ [Col RUBIN]: Yes, sir. Mr. Thurschwell.

17 ADC [MR. THURSCHELL]: Judge, we introduced
18 Mr. Al-Tamir's letter because it was directly relevant to the
19 question of the sufficiency of the accommodations, which go,
20 as I think we all recognized, to the need for an abatement
21 versus a -- accommodations that would allow the proceedings to
22 proceed somehow.

23 The government called the SJA -- and let me correct

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1 the record. I believe he is an assistant SJA; is that
2 accurate?

3 ATC [MR. SPENCER]: He is an assistant SJA; he is also an
4 SJA. He is titled as the assistant SJA, but he is also an
5 SJA.

6 ADC [MR. THURSCHELL]: Fine. Just so we are clear.

7 They called the witness. I mean, we -- we -- and
8 they did so in order to impugn the credibility of the letter.
9 That's their right. We cross-examined him because that's our
10 right and because we needed to restore -- if there's been a
11 delay, it wasn't on our behalf.

12 You know, I think at the end of the day, the
13 probative value of the testimony to the issues that are
14 actually in front of the court in AE 099 are -- is slim of the
15 SJA's -- assistant SJA's testimony. But the notion that we
16 are delaying the proceedings is, I think, clearly belied by
17 the record.

18 And I will just say, the government is now putting
19 the burden of proof on us to show, saying that there is no
20 evidence that he could not have actually used the toilet that
21 was in the cell. Judge, to return to the issues we discussed
22 yesterday, the most recent discovery we've received is, I
23 believe, maybe 5 December 2017 related to his medical

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1 condition. We do not have a medical expert.

2 Under these circumstances, putting the burden of
3 proof on us is -- is absurd, frankly. And we have done the
4 best we could, providing the information that we have, which
5 is from our sole source, essentially, our client, as to his
6 current abilities, and so I'm -- the government can't have it
7 both ways. If they want to put the burden of proof on us for
8 these issues, it would be good to have the evidence that they
9 are obligated to provide so we can actually make a case and
10 the expert assistance that we require in a medical case like
11 this.

12 That's all I have, Judge.

13 MJ [Col RUBIN]: Counsel, the commission is in recess for
14 ten minutes.

15 [The R.M.C. 803 session recessed at 1436, 31 January 2018.]

16 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1505,
2 31 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 I considered the evidence presented and the arguments
7 of counsel. The commission finds that the defense's assertion
8 that there has been deliberate indifference to the medical of
9 the -- medical needs of the accused is without merit. The
10 commission further finds that abatement is not warranted based
11 on the facts and circumstances presented. Accordingly, the
12 defense motion to abate the proceedings is denied.

13 The commission will continue to accommodate the
14 medical needs of the accused, to include shorter commission
15 sessions, delayed start times, longer bathroom breaks, and
16 other necessary accommodations that may be requested.

17 The requested toilet seat has been provided. As
18 such, there is no need for the commission to order this
19 accommodation.

20 With respect to the water in the holding cell,
21 referred to as the pod, the commission trusts that the
22 engineers will remedy this issue expeditiously or that a
23 work-around will be implemented. Counsel are directed to

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1 alert the commission if this issue persists.

2 Counsel, in light of the prayer time at 1528, the
3 commission is prepared to take a recess until 1600, at which
4 time the commission intends to litigate AEs 070XXX and AE 096.

5 Trial Counsel?

6 TC [CDR SHORT]: Your Honor, I'm just hoping that if there
7 is any way the defense would waive the presence of the accused
8 or if the accused would waive his presence for any of the
9 motions that we could hear, there are a couple that --
10 Mr. al Darbi is waiting in the pod right now for the motion
11 under AE 096 series. And also, we have a witness standing by
12 that would have to fly out under the motion that was filed
13 under AE 101F, Your Honor.

14 And I think we will be brief on both of those, and I
15 don't know if -- we could probably argue those shortly.

16 MJ [Col RUBIN]: I don't intend to litigate AE 101F today
17 based on potential 505(h) issues. I do intend to litigate
18 070XXX and 096.

19 ATC [MR. SPENCER]: Understood, Your Honor. I was going
20 to give the commission an update on the water issue.

21 MJ [Col RUBIN]: Please.

22 ATC [MR. SPENCER]: During the break, I was informed that
23 currently there is a case of water that's available for him to

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1 use to wash, and there was also yesterday. The work-around
2 for now, the guard force sought permission from the security
3 director -- as you know, the guard force doesn't control this
4 facility, so they sought permission and obtained permission
5 from the security director to install -- to move the handrails
6 from his current pod to a new pod that does have running
7 water. That will be completed today.

8 MJ [Col RUBIN]: Thank you, Trial Counsel.

9 TC [CDR SHORT]: And, sir, if I may just correct what I
10 said just a few minutes ago, I said 101F, I meant E. E has to
11 do with Lieutenant Colonel Thrash, and he is standing by.

12 MJ [Col RUBIN]: Understood, Trial Counsel.

13 Defense, is 1600 a sufficient break? That should
14 allow sufficient time for prayer time. I understand Mr. Hadi
15 had a bathroom break. 1600, defense, be prepared to litigate
16 070XXX and 096.

17 ADC [MR. THURSCHELL]: Thank you, Judge. That will be
18 sufficient, I believe, for prayer time and we will just -- I
19 have to say this. We have to revisit his state when we come
20 back. The exigency of sitting in the chair and so on does
21 affect his level of pain, his level of attention; but I think
22 we will, in good faith, intend to go forward, subject to those
23 caveats, and which I will bring to your attention if

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1 necessary.

2 MJ [Col RUBIN]: Thank you, sir. Very well. The court is
3 in recess until 1600.

4 [The R.M.C. 803 session recessed at 1511, 31 January 2018.]

5 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1610,
2 31 January 2018.]

3 MJ [Col RUBIN]: The commission is called to order. All
4 parties present when the commission recessed are again
5 present. Lieutenant Commander Lincoln is absent. He has the
6 commission's permission to be absent.

7 Counsel, let's move to AE 070XXX. In AE 070XXX, the
8 defense requests that the commission compel production of
9 discovery related to Ahmed al Darbi. The government opposes
10 the defense motion as set forth in AE 070EEEE. The defense
11 replied in AE 070GGGG.

12 Does the defense desire to present oral argument?

13 ADC [MR. THURSCHELL]: We will, Your Honor. Major Miller
14 will be providing that, but if I might briefly inform the
15 commission about the client's current medical status and
16 briefly say something about tomorrow's session.

17 MJ [Col RUBIN]: You may.

18 ADC [MR. THURSCHELL]: Thank you, Judge. Our client has
19 about no more than an hour left in him for today, so that's --
20 our request is that we keep this to an hour. I don't have any
21 reason to think it will take more than an hour, based on my
22 understanding of the motions, but that is our request.

23 We also request another half day tomorrow starting in

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1 the morning. It's easier for him in the morning and he's --
2 so that's our request.

3 And finally, he is having progressively more
4 symptoms -- pain, discomfort, swelling of the feet,
5 numbness -- as we do this day by day, and so I would like to
6 be able to revisit the timing and the -- whether the hearing,
7 if there is a hearing, a public hearing that he is entitled to
8 attend on Friday, revisit the accommodations and the need for
9 that and how we negotiate that.

10 MJ [Col RUBIN]: Thank you, Mr. Thurschwell.

11 Trial Counsel.

12 ATC [MR. SPENCER]: Your Honor, the government would
13 request that if we are going to do just a half day in the
14 morning at the commission's discretion, that maybe we start
15 slightly earlier to accommodate the accused's prayer schedule.
16 Perhaps we can be completed by then rather than have to span
17 that. It might be more convenient for the accused.

18 MJ [Col RUBIN]: What start time do you propose, Trial
19 Counsel?

20 ATC [MR. SPENCER]: 0-8, for example, Your Honor.

21 MJ [Col RUBIN]: Mr. Thurschwell, would 0-8, and then I
22 think we would break around the noontime, which would be
23 around prayer time as well.

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1 ADC [MR. THURSCHELL]: Judge, we agree to that.

2 MJ [Col RUBIN]: Very well. We will start tomorrow at
3 0-8. I anticipate a half day, breaking roughly at 1200.

4 ATC [MR. SPENCER]: Thank you, Your Honor. Additionally,
5 we have another update on the running water issue. The
6 accused has now been moved, after the handrails were moved, to
7 the new pod that does have running water. So that issue has
8 been resolved, sir.

9 MJ [Col RUBIN]: Thank you, Trial Counsel.

10 Major Miller, are you prepared to proceed with oral
11 argument on 070XXX?

12 ADDC [Maj MILLER]: I am, Your Honor.

13 MJ [Col RUBIN]: Very well.

14 ADDC [Maj MILLER]: Good afternoon, Your Honor.

15 MJ [Col RUBIN]: Good afternoon.

16 ADDC [Maj MILLER]: Your Honor, given the fact that there
17 is a principal disagreement between what is an HCR, SDR, and
18 an Eval, I think the best point to start with for oral
19 argument is an explanation of what these three items are as
20 well as an explanation of the intelligence cycle, after which
21 we'll discuss why this information is discoverable specific in
22 this case.

23 With respect to an HCR, that stands for a HUMINT

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1 Collection Requirement. These are long-term DoD-wide
2 collection requirements which support DoD ops planning policy
3 and decision making. Specifically, another way to put it is
4 that these items are a strategic overlook of the requirements
5 of the DoD. For example, where is al Qaeda leadership hiding?
6 It's an overarching requirement.

7 IIRs are -- stands for Intelligence Information
8 Report. There are many ways to document intelligence, but
9 this is a principal method of doing so. And it's particularly
10 relevant in this case because we have received several IIRs.
11 And it's actually the primary way to document this
12 information.

13 If you look at Attachment E to the defense's original
14 motion, not its reply but its motion, you will see an example
15 of an IIR that's been provided with respect to Mr. al Darbi.
16 This IIR is particularly important for what it says in
17 paragraph 5, which I will be explaining a little bit later.

18 The IIR is then put into an intelligence database,
19 and consumers are able to access this database, review the
20 IIR, and then proceed from there with intelligence gathering.
21 After a consumer reviews an IIR, if more specific information
22 is required or additional follow-up is required -- actually,
23 if I can back up, Your Honor.

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1 So with respect to an IIR, if an individual is
2 captured, for example, and provides statements, an IIR is
3 generated, which documents their statements. This IIR is then
4 filed in a database and a consumer will access this database
5 to review this IIR.

6 And if after reviewing this IIR, there is additional
7 information that needs to be gathered from the specific
8 individual who is captured, an SDR is created. And an SDR
9 stands for Source Directed Requirement. It is a specific
10 request or a tasking for a collector or an interrogator, for
11 example, to question a source on a particular collection
12 requirement. SDRs are specific in nature, whereas the HCRs
13 are more broad.

14 For example, an individual who is detained, specific
15 questions are levied against that individual based on the
16 information they would know. So if the overarching HCR is the
17 location of al Qaeda leadership, then a specific individual is
18 captured who has information about al Qaeda in Iraq, for
19 example, then you would direct specific questions to them
20 about al Qaeda in that location.

21 After the SDR is answered, another IIR will be
22 created. And an IIR evaluation, Your Honor, is when a
23 consumer would review the IIR and then submit feedback.

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1 So, for example, if an IIR is contradicted by other
2 intelligence that's being gathered worldwide, a consumer can
3 submit an evaluation providing feedback and requesting further
4 clarification. For example, they can say, this information is
5 contradicted by other information; please ask for additional
6 clarification.

7 MJ [Col RUBIN]: Let me ask a question, Major Miller.

8 ADDC [Maj MILLER]: Yes, Your Honor.

9 MJ [Col RUBIN]: Is the IIR Eval ----

10 ADDC [Maj MILLER]: Yes, Your Honor.

11 MJ [Col RUBIN]: ---- is that a subjective analysis or is
12 it an objective fact analysis? Meaning, in that Eval, does it
13 state, here is specific facts, specific information that
14 contradicts or corroborates the IIR?

15 ADDC [Maj MILLER]: Yes, Your Honor. May I have a moment?

16 MJ [Col RUBIN]: Yes.

17 [Pause.]

18 ADDC [Maj MILLER]: Your Honor, in specific case, it could
19 be either/or. You can have subjective comments or you can
20 have objective statements of fact that will refute a specific
21 IIR.

22 Your Honor, now, unless you have any other questions
23 about definitions in the overall intelligence cycle, I will

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1 turn to, specifically in Mr. al Darbi's case, why the
2 information is relevant.

3 MJ [Col RUBIN]: Yes, I understand. Thank you.

4 ADDC [Maj MILLER]: Thank you.

5 Your Honor, during direct examination, the government
6 itself made HCRs and SDRs an issue. During the direct
7 examination, they questioned Mr. al Darbi several times about
8 whether or not he was asked about Abd al Hadi al-Iraqi. The
9 government presumably did this to somehow explain why
10 Mr. al Darbi was providing new information at such a late hour
11 or such a late date regarding Abd al Hadi al-Iraqi, and asking
12 him -- or basically confirming that he was not asked about Abd
13 al Hadi al-Iraqi; they basically put the questions that he was
14 asked at issue. And we could get the questions that he was
15 asked by the specific HCRs and the SDRs, which are the
16 collection requirements.

17 The HCRs and the SDRs will inform the defense how
18 often he was questioned about al Qaeda leadership, his time on
19 the front lines, his knowledge of the guesthouses, and his
20 knowledge of al Qaeda's commanders. It's the government's
21 position that Abd al Hadi al-Iraqi was an al Qaeda commander
22 who supposedly ran a guesthouse. So basically the knowledge
23 that we would obtain from an SDR and an HCR is whether or not

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1 Mr. al Darbi was asked about those questions.

2 MJ [Col RUBIN]: One second. Trial Counsel?

3 TC [CDR SHORT]: Your Honor, may we take a quick recess in
4 place?

5 MJ [Col RUBIN]: How long do you need?

6 TC [CDR SHORT]: Probably five minutes.

7 MJ [Col RUBIN]: Very well. Let's take a five-minute
8 recess. I apologize, Major Miller.

9 ADDC [Maj MILLER]: Thank you, Your Honor.

10 MJ [Col RUBIN]: The commission is in recess for five
11 minutes.

12 [The R.M.C. 803 session recessed at 1621, 31 January 2018.]

13 [The R.M.C. 803 session was called to order at 1624,
14 31 January 2018.]

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

18 TC [CDR SHORT]: Your Honor, we apologize for the
19 interruption.

20 MJ [Col RUBIN]: Thank you, Trial Counsel.

21 Major Miller, I apologize as well. You may continue.

22 ADDC [Maj MILLER]: Thank you, Your Honor. I am not sure
23 exactly where I left off, but I will get started at the next

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1 logical point.

2 Your Honor, we know for a fact that the HCRs were
3 levied against Mr. al Darbi. We know for a fact that SDRs
4 were levied against Mr. al Darbi. If you see Attachment D,
5 paragraph 4 of the defense's motion, you will also see where
6 information -- I guess titles are listed out for this
7 information that the defense is requesting.

8 And as mentioned, at least I believe I mentioned that
9 this information will inform the defense whether or not
10 Mr. al Darbi was asked these specific questions. The
11 government cannot be allowed to deny the defense's request for
12 this information but then paint the picture on direct
13 examination that Mr. al Darbi was never asked about Abd al
14 Hadi al-Iraqi, and therefore, that is why new information is
15 coming to light at this late date.

16 Your Honor, IIR evaluations are also relevant and we
17 also know for a fact those were submitted. And the IIRs are
18 specifically relevant when it comes down to the credibility of
19 Mr. al Darbi. There are specific references in the defense's
20 filings, its motion, as well as its reply, which is GGGG,
21 070GGGG, where an interrogator submits a request for an
22 evaluation. And if you will allow me one minute, Your Honor,
23 I will make sure I read the appropriate version.

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1 And actually, if I can just direct your attention to
2 Attachment D, paragraph F, you will see a consumer IIR
3 evaluation is listed, which means that was submitted in
4 response to an -- information that Mr. al Darbi supplied.

5 Also, with respect to Attachment E of the defense's
6 motion, if you turn to paragraph 5, it says -- this is an IIR,
7 Your Honor -- it says, "Request evaluation of this IIR to
8 confirm or refute the above information from this detainee so
9 we can assess him and to obtain follow-up questions to focus
10 further interrogation efforts," and then it says, "where this
11 evaluation is supposed to be submitted."

12 So in this particular case, in response to your
13 question about whether information is subjective or objective,
14 that request is specifically asking for objective information
15 for the interrogators to assess whether or not Mr. al Darbi is
16 telling them the truth.

17 The defense has not been provided any information
18 regarding any evaluation in discovery, Your Honor, and this
19 IIR specifically addresses if there is discovery that is out
20 there, and that information will go directly to his
21 credibility. It will directly provide facts, objective facts,
22 as to whether or not Mr. al Darbi was telling the truth to
23 interrogators that will then allow the defense to be able to

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1 use that information during cross-examination.

2 MJ [Col RUBIN]: Does the defense believe there is a
3 difference between an objective analysis as opposed to a
4 subjective analysis; meaning an IIR Eval, it says it is my
5 belief that this individual is truthful or not truthful is
6 different than this individual is truthful for the following
7 factual reasons or untruthful for the following factual
8 reasons?

9 ADDC [Maj MILLER]: That is correct, Your Honor.
10 Specifically, the defense is looking for objective
11 information. And I know that there is an issue whether or not
12 human lie detector evidence, and all that such -- that's
13 specifically why we are looking for objective facts to be able
14 to cross-examine Mr. al Darbi with, Your Honor.

15 Your Honor, the defense also attached to its reply
16 Attachment B, which is another IIR, which basically asks for
17 this same objective information as well. And I won't go
18 through each attachment, Your Honor, but we specifically
19 attached them either because it shows that an HCR and SDR was
20 levied against Mr. al Darbi or it shows an evaluation was
21 requested with regard to this information.

22 And although not every time will an evaluation
23 actually be submitted, these documents show that one was

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1 requested and that it would provide potentially relevant
2 information that's discoverable, especially in light of the
3 fact that the government on direct has made an issue as to
4 what questions Mr. al Darbi was asked.

5 Your Honor, pending any questions.

6 MJ [Col RUBIN]: Thank you. You have answered my
7 questions. Thank you.

8 ADDC [Maj MILLER]: Thank you, Your Honor.

9 MJ [Col RUBIN]: Trial Counsel, does the government wish
10 to be heard?

11 ATC [Capt DEPUE]: Good afternoon, Your Honor.

12 MJ [Col RUBIN]: Good afternoon.

13 ATC [Capt DEPUE]: Captain Depue for the government. IIR
14 Evals, HCRs, and SCRs [sic] are not discoverable. The
15 government has reviewed, in the exercise of due diligence, the
16 documents and determined that they are not relevant. The
17 defense's argument to compel is based upon speculation and
18 assumptions. The government has previously briefed the
19 standards regarding this issue.

20 But to reiterate, there are certain circumstances
21 where the military judge can circumvent the prosecutor's
22 responsibility to review evidence or information and determine
23 its relevance and discoverability. A couple of examples would

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1 be under M.C.R.E. 513 and R.M.C. 914. This is not one of
2 those situations. This is standard R.M.C. 701 discovery and
3 it's the prosecutor's responsibility.

4 Under -- the government has briefed these cases, but
5 United States v. Brooks, United States v. Briggs and United
6 States v. Simmons all show and hold that it's the
7 responsibility of government trial counsel to review
8 information and determine its relevance and discoverability.

9 Under Pennsylvania v. Ritchie, this determination is
10 final unless and until the defense requests a specific item
11 directly from the court and argues in favor of its
12 materiality.

13 The defense has not met its burden of materiality
14 under Pennsylvania v. Ritchie. The defense has only provided
15 speculation and assumption about documents that may exist and
16 that -- that may exist, Your Honor.

17 Again, the government has reviewed each and every
18 document that was requested by the defense and determined that
19 they are not discoverable under R.M.C. 701 or any other rule.

20 MJ [Col RUBIN]: Trial Counsel, let me just interrupt. Is
21 it the government's position that IIR Evals are never
22 discoverable?

23 ATC [Capt DEPUE]: No, I would not. I think that there --

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1 I think that there could potentially be a situation where
2 there may be some information -- limited information in some
3 of these documents that could be discoverable.

4 MJ [Col RUBIN]: Is that a correct statement from Major
5 Miller when I asked, do the IIR Evals contain subjective and
6 objective fact-based analysis?

7 ATC [Capt DEPUE]: To answer that question, Your Honor,
8 the government's reviewed each one, and there is no instance
9 of objective facts being laid out. It's a subjective human
10 lie detector test information or simply saying we find this
11 information to be credible or not credible, and then -- so if
12 it's not credible, then it may generate an additional HCR or
13 SDR.

14 In addition, Your Honor, even if it was objective
15 facts, that's cumulative information that the defense would
16 have and it would be their job and responsibility to review
17 that information anyways.

18 MJ [Col RUBIN]: All right. If I can state what I believe
19 the government's position is, you're not stating to me that
20 IIRs, SDRs, HCRs are never discoverable; it depends on the
21 information contained therein. For the IIR Evals, there are
22 subjective and objective analysis. The objective analysis in
23 which the evaluation states, this report is corroborated with

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1 the following information or not corroborated with the
2 following information, that potentially could be discoverable,
3 correct?

4 ATC [Capt DEPUE]: The government does not know of an
5 instance where it lists out information and relying on that
6 information to say this is why this report is relevant or
7 not -- or reliable or not.

8 MJ [Col RUBIN]: Reliable. If that were the case, that --
9 those objective facts -- so an individual makes a statement,
10 the IIR Eval evaluates whether that statement is accurate or
11 not accurate; and if it lists out objective facts stating why
12 it is accurate or not accurate, you are saying the government
13 has evaluated all the IIR Evals and none of them do that?

14 ATC [Capt DEPUE]: That's correct. May I have a moment,
15 Your Honor?

16 MJ [Col RUBIN]: Yes.

17 [Pause.]

18 MJ [Col RUBIN]: And let me add, Trial Counsel, because I
19 believe you stated this, in those IIR Evals in which there may
20 be objective facts, the government has provided that objective
21 information in other discovery?

22 ATC [Capt DEPUE]: Correct, Your Honor. Even if there
23 were objective facts laid out, the defense has all the

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1 underlying source documents and it would be cumulative with
2 those. But the government does not know of one instance where
3 it does do that. The defense has all IIRs from al Darbi and
4 those documents would have that information.

5 MJ [Col RUBIN]: Please address the SDRs and HCRs.

6 ATC [Capt DEPUE]: It's -- again, those documents are not
7 discoverable. As Major Miller said in her argument, when an
8 HCR, I believe, is levied or an Eval is requested, then, based
9 upon that, an IIR is generated; and that's the document that
10 they are entitled to, not the HCR or SDR.

11 MJ [Col RUBIN]: Would the HCR or SDR ever document
12 whether or not a specific question was asked -- in this case,
13 of Mr. al Darbi -- or would it be a roadmap or suggestive
14 questions that could be or should be asked?

15 ATC [Capt DEPUE]: It would be a roadmap -- that's a very
16 good term to describe it, Your Honor. It would be a roadmap.
17 And even in the documents that the defense has, they don't --
18 as far as my understanding of it, they don't receive documents
19 with, al Darbi was asked this exact question, and then, this
20 is his exact answer. It's in the form of summaries for the
21 most part, as I understand it, Your Honor.

22 So even if there were a list of questions, and
23 whatever they were, you are not going to -- from the generated

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1 document, the generated IIR, you're not going to know exactly
2 what questions were ever posed to a detainee. You have a
3 summary of information that that detainee provided, and that
4 is what the defense is entitled to.

5 MJ [Col RUBIN]: Trial Counsel, anything further?

6 ATC [Capt DEPUE]: Pending any questions from you,
7 Your Honor, that's all I have.

8 MJ [Col RUBIN]: I think you've answered my questions.
9 Thank you.

10 Major Miller?

11 ADDC [Maj MILLER]: Thank you, Your Honor. Just briefly
12 in rebuttal. You asked the government -- well, I should say
13 the government said that every Eval they have reviewed was
14 only a human lie detector type information, subjective
15 information; however, again turning the commission's attention
16 to Attachment D of the defense's reply, paragraph 6, the
17 fourth sentence, if the commission were to review that, the
18 commission will realize that there were objective information
19 provided, as well as Attachment F as well.

20 This is also an evaluation that says that --
21 actually, Your Honor, I will just direct your attention to
22 that as opposed to reading that portion out loud. But you
23 will see that there were specific questions regarding this

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1 individual levied against Mr. al Darbi, Your Honor, and that
2 is not subjective in nature. That's not a human lie detector.
3 That's not specifically or generally saying that Mr. al Darbi
4 is providing false information. No, these are specific,
5 objective questions that are then posed for the interrogator
6 to ask Mr. al Darbi.

7 The defense does not have any information, to its
8 knowledge, where there are specific questions that were
9 provided in discovery. So when the government argues that
10 this information would be cumulative, we have no questions,
11 Your Honor. As it stands right now, the government stood on
12 direct examination and said, you were never asked about Abd al
13 Hadi al-Iraqi; isn't that correct? Or they asked it in a less
14 leading way. But the fact remains that we have no questions.

15 So yes, we have the IIR evaluations with his answers,
16 but we do not have -- excuse me, I said "evaluations"; I meant
17 IIRs with his answer. But we do not have the HCRs and the
18 SDRs or the evaluations that then sent questions back for
19 follow-up.

20 And with respect to the first point that the
21 government mentioned, yes, it is their responsibility to
22 disclose discoverable information. That is not up for
23 dispute. However, the government wishes to cut the commission

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1 entirely out of the process, which is completely
2 inappropriate. If the government's word was the final say,
3 there would be no purpose for a motion to compel.

4 And in this case, at the very least, the defense
5 requests that the commission review these documents in camera,
6 especially in light of the additional information regarding
7 the defense's theories of the cross that the commission has,
8 to determine whether or not there is discoverable information
9 contained within, and especially in light of the government's
10 assertion that there was no objective information contained in
11 what they reviewed, Your Honor.

12 And that's all I have.

13 MJ [Col RUBIN]: Thank you.

14 Trial Counsel, any additional argument? Captain
15 Depue.

16 ATC [Capt DEPUE]: Just a couple of points to begin to
17 correct Major Miller. It's never been the government's
18 position that al Darbi was never asked questions about al Hadi
19 and in the direct examination that never came out that way.
20 In fact, it came out that he was asked limited questions about
21 Hadi.

22 Major Miller in her rebuttal also referenced two
23 attachments, and she is referring to situations where al Darbi

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1 refused to answer questions in an interrogation, but the
2 defense is not recognizing the distinction between refusing to
3 answer questions and giving an answer to a question. So there
4 is no instance of any question being posed and al Darbi saying
5 no to the question, yes to the question, or giving any other
6 answer, and then referring back to that question, not
7 listening to the question, but referring back to it, to an HCR
8 and an SCR. There's no instances of that. The only instances
9 there are is al Darbi refused to answer questions.

10 Whatever the questions are is irrelevant at that
11 point. He refused to talk and we don't know what questions at
12 all, if any were posed to al Darbi. He just refused to talk,
13 period.

14 There is no -- and I think you were going to this
15 earlier a little bit, but there is no such thing as objective
16 questions. There is subjective questions based on objective
17 facts.

18 And again, I'd just like to just reiterate that it's
19 the government's position to review these documents, under
20 Pennsylvania v. Ritchie, the defense must put forth evidence
21 showing their materiality. And they have not done that other
22 than saying a document might exist in speculation and
23 assumptions, Your Honor.

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1 Pending your questions.

2 MJ [Col RUBIN]: No questions. Thank you.

3 Major Miller, if desired, I will give you the last
4 word.

5 ADDC [Maj MILLER]: Yes, Your Honor. With respect to the
6 transcript, the defense will let the record stand for itself.
7 With respect to the government's argument that if a question
8 was unanswered, that it's not relevant, the defense strongly
9 disagrees with that. If a question was posed to Mr. al Darbi
10 and he refused to answer or was otherwise uncooperative, that
11 is information that the defense can use during
12 cross-examination with respect to his credibility as well,
13 Your Honor.

14 And that's all I have.

15 MJ [Col RUBIN]: Thank you. Counsel, I would like to move
16 forward with AE 096. Do counsel for either side request that
17 the proceeding be closed? And if so, for what cause?

18 Trial Counsel?

19 TC [CDR SHORT]: Your Honor, before we get into 096,
20 Mr. al Darbi is out in the holding cell if you want to bring
21 him in or at least alert the guard force to bring him in ----

22 MJ [Col RUBIN]: We will in a moment.

23 TC [CDR SHORT]: ---- talking about the closure. I -- the

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1 government is aware of no rule that would allow the closure of
2 this hearing for that, for that purpose, Your Honor.

3 MJ [Col RUBIN]: Trial Counsel, I disagree. In M.R.E.
4 513, it states that, upon request of either party for good
5 cause shown, the military judge may close the proceeding. So
6 I'm asking, does the government request that the ----

7 TC [CDR SHORT]: Yes, Your Honor.

8 MJ [Col RUBIN]: ---- hearing be closed?

9 TC [CDR SHORT]: I know of no good cause, Your Honor. The
10 government has no good cause to show.

11 MJ [Col RUBIN]: Defense Counsel?

12 ADDC [Maj MILLER]: The defense is not requesting closure,
13 Your Honor.

14 MJ [Col RUBIN]: Counsel, let's take a five-minute recess
15 to allow Mr. al Darbi and counsel to attend this proceeding.

16 TC [CDR SHORT]: Yes, Your Honor.

17 MJ [Col RUBIN]: The commission is in recess, five
18 minutes.

19 [The R.M.C. 803 session recessed at 1648, 31 January 2018.]

20 [END OF PAGE]

21

22

23

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1 [The R.M.C. 803 session was called to order at 1657,
2 31 January 2018.]

3 [The original verbal order to seal this section was rescinded
4 on the record during the 5 February 2018 session. See page
5 1823.]

6 MJ [Col RUBIN]: The commission is called to order. All
7 parties present when the commission recessed are again
8 present. Lieutenant Commander Lincoln is present as well.

9 During the recess, Major Miller and Commander Short,
10 trial counsel, defense counsel, and I had a brief 802
11 conference. The accused was not present. We briefly
12 discussed whether this proceeding would be open or closed.
13 Right now, the commission has not received a request to close
14 the proceeding from either the trial or defense counsel.
15 Additionally, we discussed some matters that had been filed by
16 the defense under seal.

17 Counsel, does that adequately capture our discussion?

18 TC [CDR SHORT]: Yes, Your Honor.

19 ADDC [Maj MILLER]: Yes, Your Honor.

20 MJ [Col RUBIN]: Thank you. I do note that Mr. al Darbi
21 and his counsel are present.

22 In AE 096H, Mr. al Darbi requested to be present at
23 this hearing and for the opportunity to be heard pursuant to

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1 Military Commission Rule of Evidence 5 -- excuse me --
2 513(e)(2). As I just previously stated, Mr. al Darbi and
3 counsel are present; I obviously grant that request.

4 The motions, related papers, and the record of this
5 hearing shall be sealed and shall remain under seal in
6 accordance with M.C.R.E. 513(e)(5). The record will be under
7 seal, yes, even though we're not closed.

8 Let me read the rule quickly. One moment.

9 [Pause.]

10 MJ [Col RUBIN]: All right. Counsel, M.C.R.E. 513(e)(5)
11 states, "The motion, related papers, and record of the hearing
12 shall be sealed and shall remain under seal unless the
13 military judge or an appellate court orders otherwise." I
14 don't believe that's contingent upon whether the proceeding is
15 open or closed.

16 In AE 096, the defense requested the commission
17 compel the production of discovery requested in their 25th
18 supplemental discovery request. The government opposes the
19 defense motion as set forth in AE 096B. Additionally, counsel
20 for Mr. al Darbi opposed the defense motion in AE 096C. The
21 defense replied in AE 096D.

22 Subsequently in AE 096E, the commission ordered the
23 government to provide the discovery in question for an

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1 ex parte in camera review. The government subsequently
2 provided this discovery to the commission in AE 096F. In
3 AE 096G, counsel for Mr. al Darbi requested the commission
4 reconsider its ruling in AE 096E. While the documents have
5 been provided to the commission, they have not been
6 substantively reviewed pending the resolution of this motion.

7 I will give counsel for Mr. al Darbi an opportunity
8 to be heard after hearing from the parties.

9 Mr. Thurschwell?

10 ADC [MR. THURSCWELL]: Yes. Judge, I have to request on
11 behalf of Mr. Al-Tamir if -- that the argument be -- we hear
12 the initial argument from the defense, I gather, and then
13 continue it until 8:00 a.m. tomorrow morning. He was -- it
14 was about an hour ago that I said he had at most another hour
15 in him. He can last a little bit longer. His pain levels
16 are -- on a 0-to-10 scale right now are at 6, neck and back
17 and legs, is what he told me. So I would request that we get
18 in one argument and then continue tomorrow morning.

19 MJ [Col RUBIN]: Trial Counsel?

20 TC [CDR SHORT]: Your Honor, the government would like to
21 push forward as best we can. We understand the defense's
22 position. I don't know if -- you know, I know Mr. -- the
23 accused has not reclined at all, but I think yesterday when we

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1 were discussing that he could actually recline, if necessary,
2 to relieve some of the strain of sitting up, and I ----

3 MJ [Col RUBIN]: Mr. Thurschwell, would that assist to
4 alleviate? I would like to push forward a little bit, again,
5 not knowing how long this will take. We have been going for
6 about 50 minutes now. I would like to push, if we can, to
7 litigate this motion if we can; I may cut it off at some
8 point. But would it assist if the accused ----

9 ADC [MR. THURSCWELL]: Judge, it might assist. But right
10 now, we're asking -- we are asking that we limit this hearing
11 to at least one more -- argument, I'm thinking, 15 minutes, 20
12 minutes at most more, and then continue it.

13 MJ [Col RUBIN]: Commander?

14 ADDC [Maj MILLER]: Your Honor, I have consulted with
15 Mr. Al-Tamir and he says at this juncture that it wouldn't
16 help to lie back there; it would actually make him more
17 uncomfortable. So he is willing to go, as Mr. Thurschwell
18 says, a bit further, but then he is going to have a breaking
19 point.

20 MJ [Col RUBIN]: All right, very well. Since I don't know
21 how long the arguments will take, I will play it by ear, and I
22 understand the defense concerns and we may cut things off
23 short tonight.

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1 Does the defense desire to present oral argument on
2 AE 096?

3 ADDC [Maj MILLER]: Yes, Your Honor.

4 Thank you, Your Honor. As I am sure you are familiar
5 with, we have filed several motions to compel, so the defense
6 will not reiterate or re-explain the standards under 701 other
7 than to say that documents are discoverable if they are
8 material to the preparation of the defense or reasonably tend
9 to negate his guilt or the degree of the guilt, Your Honor.

10 And the specific psychological records that the
11 defense is requesting are -- meet the discovery standard for
12 four primary reasons: First, the government must prove that
13 Mr. Al-Tamir is Abd al Hadi al-Iraqi and that Abd al Hadi
14 al-Iraqi committed the crimes that the government has charged.
15 As it stands right now, Mr. al Darbi is the government's
16 principal witness. That was actually part of the
17 justification for holding this deposition in the first place.

18 With -- the mental health records will potentially
19 alter the credibility of the testimony provided by
20 Mr. al Darbi.

21 MJ [Col RUBIN]: How so?

22 ADDC [Maj MILLER]: Specifically, Your Honor, and just to
23 be general with respect to some of the information that the

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1 defense supplied in its motion, if we turn to page 4 of the
2 defense's motion to compel the discovery, paragraphs E and F,
3 Your Honor, one, they highlight issues that Mr. al Darbi will
4 have in testifying publicly in an open session, Your Honor.

5 Mr. al Darbi's counsel submitted an affidavit from
6 his principal psychologist that specifically went through very
7 detailed description of some of his psychological symptoms
8 that might be affected when he is testifying.

9 Also, it affects, Your Honor -- or I should say, it
10 impacts the effects that his torture had on him or his
11 treatment had on him, Your Honor. As stated in paragraph 4,
12 on page 4 of the motion, he reported recurring nightmares from
13 the interrogations, and the commission has already granted the
14 defense an opportunity to get into this kind of information.

15 Also, it is relevant with regard to his motivation to
16 fabricate and his interests in the outcome of this proceeding.
17 For example, if he is truly suffering from such psychological
18 trauma, he has a very direct interest in the outcome of this
19 proceeding in his testimony and participating with the
20 government in order to be freed under his pretrial agreement.

21 The defense would also point out that this
22 information is discoverable because other discovery that the
23 defense has contradicts the information provided by

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1 Mr. al Darbi's psychologist. Specifically, I will direct the
2 commission's attention to AE 070, and the commission might not
3 have this one in front of him, but it is AE 070DDDD, tab 124.
4 That document has since been declassified and the page numbers
5 are Hadi-1-035038 as well as Hadi-1-035040.

6 And in that document it says that Mr. al Darbi has no
7 psychological issues, although he is reportedly taking
8 psychological medication -- I should say psychiatric
9 medication. And so the discovery that the defense has
10 directly contradicts what Mr. al Darbi's psychologist is
11 saying and, therefore, that information is also relevant in
12 order to -- how do I say -- in order to basically make sense
13 of what is actually the truth in this case.

14 As a final point -- well, not final point,
15 Your Honor, but specifically under the rules, M.C.R.E. -- if I
16 can pull it up here -- 510, one could argue that under
17 paragraph (a), Mr. al Darbi has waived the privilege by
18 voluntary disclosure. It says, a person upon whom these rules
19 confer a privilege could voluntarily -- involuntarily
20 discloses or consents to the disclosure of a significant part
21 of that communication, under the circumstances it would be
22 inappropriate to allow the claim of privilege, a waiver could
23 be deemed to have occurred. And that's a minor point,

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1 Your Honor, but it's an important point as well.

2 In this specific case, Mr. al Darbi and his counsel
3 submitted a filing where they argued that he is unable to
4 testify publicly. As a result of that, this commission has
5 limited the openness of the deposition. To then use his -- to
6 use his psychological condition in that way, but then the
7 defense be prevented from actually getting the psychiatric
8 records that the psychiatrist relied upon, is a specific
9 circumstance where it is inappropriate to allow the claim of
10 privilege, Your Honor.

11 But even if the commission doesn't determine that the
12 privilege is waived, which I believe I got ahead of myself
13 because the defense does believe, contrary to the government's
14 position, that there is a psychotherapy --
15 psychotherapist-patient privilege. However, Mr. al Darbi's
16 counsel seems to be a little bit confused on the procedures
17 for a military commission.

18 Yes, under the Military Rules of Evidence for
19 Court-Martial, there are standards that the commission must
20 come to a determination on before reviewing psychiatric
21 records in camera, but that is not put into the Military
22 Commission Rules of Evidence 513.

23 In a respect, the Military Commission's Rules of

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1 Evidence 513 precisely mirrors the Military Rule of Evidence
2 with exception to that point. So Congress -- or, excuse me,
3 so the rules specifically allow for in camera review even if
4 the individual determinations aren't made. So the defense
5 mentions that, Your Honor, specifically because it's proper
6 for the commission to now review these documents in camera.

7 The only thing that has to be had -- excuse me. The
8 only thing that a hearing has to be had for -- that's an
9 ineloquent way to put it. The only reason we have to have a
10 hearing is before you actually disclose the documents,
11 Your Honor.

12 And if there is no further questions, that concludes
13 the arguments that we have.

14 MJ [Col RUBIN]: I do have a question. Does the defense
15 believe that the Klemick standard applies?

16 ADDC [Maj MILLER]: No, Your Honor. The defense believes
17 that that is specifically with regard to the Military Rules of
18 Evidence, and the Military Rules of Evidence even I guess in
19 some way incorporates that standard into the rule. That
20 standard has specifically been removed from the Military
21 Commission's Rules of Evidence 513.

22 MJ [Col RUBIN]: Thank you, Major.

23 ADDC [Maj MILLER]: Thank you, Your Honor.

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1 MJ [Col RUBIN]: Trial Counsel.

2 TC [CDR SHORT]: Your Honor, I will be very, very brief,
3 because I think this is really an issue for Mr. al Darbi's
4 counsel, but I do want to address a couple of issues that
5 Major Miller brought up.

6 Regarding the paragraphs E and F that she discussed,
7 the deposition did go forward and those are basically mooted
8 by that. So whatever arguments they have, we have to have
9 these records because the government took a position at one
10 time to protect the -- and close the deposition, therefore,
11 these -- therefore, these records are relevant is mooted by
12 the fact that the deposition actually did take place and
13 Mr. al Darbi did sit in the seat.

14 Additionally, Your Honor, that deposition was open,
15 so I think that waiver of privilege because it was open -- I'm
16 not exactly sure, I couldn't really follow the argument, the
17 510 argument, but I do believe again that's for Mr. al Darbi's
18 counsel to argue, but it -- I think that also plays into that.

19 Your Honor, the government, out of an abundance of
20 caution under 513, you know, looking at the 513 rule, did have
21 an attorney review the records, but that attorney was walled
22 off from the trial team. We discussed walling off the other
23 day in another session, and the government is well aware of

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1 how to wall somebody off, and that person produces records,
2 and found no relevance whatsoever in those records.

3 There is one thing I would like to address which was
4 not addressed in Major Miller's argument, and that is this
5 morning's filing. And Mr. Thurschwell responded to
6 Mr. Darbi's counsel, that if one record is to be produced,
7 then they all should be produced. And I think that's --
8 whether 513 applies or 513 doesn't, I think that contravenes
9 the rule and the intent of what the rule is in an in camera
10 review, Your Honor.

11 MJ [Col RUBIN]: Trial Counsel, let me just go back a
12 moment. There was an attorney who reviewed the records; that
13 attorney was walled off. Did that attorney determine that
14 these were privileged psychotherapist-patient records ----

15 TC [CDR SHORT]: No, Your Honor ----

16 MJ [Col RUBIN]: ---- communications?

17 TC [CDR SHORT]: No, no. He didn't do that, Your Honor.
18 He walled off and just as an abundance of caution so we didn't
19 see the records as a trial team.

20 MJ [Col RUBIN]: Yeah, I understand that. But did the --
21 did this attorney make a determination whether, in fact, these
22 were privileged communications which would fall under 513 as
23 opposed to, I'll call them, the normal rules of discovery? So

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1 let's not conflate discovery and privilege.

2 So what I'm asking is, if these are privileged
3 communications, there is 513 analysis. If that attorney
4 determined these are not even -- they don't even fall under
5 513, they are not privileged communications, we're operating
6 under, you know, materiality.

7 TC [CDR SHORT]: I agree, Your Honor. And he did not make
8 a determination whether they were attorney -- I mean, a
9 patient privileged communications. So -- and I think that
10 would be for -- again, for Mr. al Darbi's counsel to address
11 the communications and the types of communications.

12 I am unaware of the types of communications that are
13 in there. I do know that he was -- you know, he did become
14 familiar with the facts of these cases and did a 701 analysis
15 on those and then packaged them up, Your Honor ----

16 MJ [Col RUBIN]: Thank you.

17 TC [CDR SHORT]: ---- for delivery. But the fact that if
18 one is -- Mr. Thurschwell, I believe, asserted in the e-mail
19 and then was put into the filing this morning, whether one
20 record is disclosed -- or if you disclose any records, then
21 they all should, I just don't -- I don't see the reasoning in
22 that, Your Honor. And I can imagine, whether they are 513 and
23 whether they are the privileged type of communications, they

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1 are certainly communications that are going to be not meant
2 for public view. And that -- that, I think -- I don't
3 think -- if you're going to do an in camera review, I think
4 you should limit the amount of records to what is relevant
5 and -- to the case, Your Honor.

6 That's all, pending your questions, Your Honor.

7 MJ [Col RUBIN]: No questions. Thank you, Trial Counsel.

8 ADC [MR. THURSCHELL]: Judge, we again request a break
9 until tomorrow morning.

10 MJ [Col RUBIN]: Is Mr. al Darbi's counsel here?

11 TC [CDR SHORT]: They are, Your Honor.

12 ADC [LCDR YOUNG]: Yes, sir.

13 MJ [Col RUBIN]: Gentlemen, if you would step forward. If
14 you could just give me an approximation, how long do you
15 intend to argue?

16 ADC [LCDR YOUNG]: I would say 15 minutes, Your Honor.

17 MJ [Col RUBIN]: All right. Mr. Thurschwell, I am going
18 to limit this to no longer than 15 minutes. I would like to
19 press forward for an additional 15 minutes while Mr. al Darbi
20 and counsel are present, and I will go no further than 1730.

21 ADC [MR. THURSCHELL]: Judge, we object to going forward,
22 for the record.

23 MJ [Col RUBIN]: Understood.

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1 ADC [LCDR YOUNG]: Your Honor, I am Lieutenant Commander
2 Greg Young and, along with Major Scott Medlyn, we are the
3 military defense counsel for Mr. al Darbi.

4 Thank you for considering our filing in AE 096G and
5 deferring in camera review pending this hearing. I would like
6 to begin by addressing some of the points that the defense
7 made in their argument. First, as the Army Court of Criminal
8 Appeals noted in Acosta, disclosure of privileged records is a
9 completely separate analysis from discovery. And the Rule for
10 Military Commissions 701(c) states that "nothing in this rule
11 is meant to compel disclosure of information that is protected
12 by the Military Commissions Rules of Evidence."

13 So we can just throw R.M.C. 701 out the window.
14 We're dealing with privileged information here. As ----

15 MJ [Col RUBIN]: Provided that these communications are
16 privileged.

17 ADC [LCDR YOUNG]: Yes, Your Honor.

18 MJ [Col RUBIN]: So do you concur with me that, if these
19 are not privileged communications, then 701 is applicable?

20 ADC [LCDR YOUNG]: Yes, Your Honor. If they were
21 unprivileged and in the possession of the government and part
22 of their investigative files, then they would be discoverable.
23 However, the defense has conceded the privilege applies. And

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1 unless we have not been concluded [sic] on a filing, there has
2 only been one potential reason advanced why that might not be
3 true, and that was at oral argument just now by Major Miller.
4 So I would like to address that next.

5 The defense appears to point to the declaration of
6 Dr. Katherine Porterfield, dated 9 August 2017, as evidence
7 that Mr. al Darbi has potentially waived his privilege.

8 So it's important to be clear about exactly what
9 we're talking about. Dr. Katherine Porterfield is not a
10 government-employed mental health provider for JTF-GTMO or the
11 Joint Medical Group. She has not created a single page of the
12 mental health records that the defense is seeking in
13 discovery. She is an expert consultant provided to
14 Mr. al Darbi's defense team. And at the time that she made
15 that declaration, we had not received a single page of those
16 mental health records, and she did not base any of her
17 conclusions in that declaration on his mental health records.

18 Moreover, contrary to the way that they were
19 represented, she does not, in fact, testify that he has
20 serious mental health issues or that he cannot testify
21 publicly. She merely stated that it would be difficult for
22 him to talk about some of the things that he had experienced
23 and that it might cause him shame and humiliation.

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1 Finally, the commission denied the motion that that
2 declaration supported. So to the extent that Mr. al Darbi
3 has, as they might argue, put his mental status at issue, that
4 issue is closed and it is no longer at issue. And he did come
5 in and he did testify, in spite of the fact that members of
6 the public and the media were able to watch the proceedings.

7 But Dr. Porterfield's declaration and her
8 evaluation -- which we were prepared to put her on the stand
9 in support of that motion, had it not been denied on the
10 pleadings -- are completely separate from the mental health
11 records that have been created by the Joint Medical Group here
12 at GTMO.

13 Your Honor, the defense also advanced the contention
14 that the Klemick standard does not apply in these proceedings
15 because, quote, it was removed from Military Commissions Rule
16 of Evidence 513. This is incorrect based on the history of
17 the rule. As we briefed in AE 096C, Military Commissions Rule
18 of Evidence 513 was taken nearly verbatim from then-current
19 Military Rule of Evidence 513 found in the 2008 edition of the
20 Manual for Courts-Martial.

21 Klemick had already been decided in 2006. Presumably
22 the Secretary of Defense was aware of this. There were only
23 minor alterations made to the rule necessary to suit it to the

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1 conditions at GTMO, notably the change to exception (d)(8) and
2 referencing the Chapter 47A of the Uniform Code of Military
3 Justice.

4 Subsequently, the Klemick standard received noted
5 approval when the President incorporated it into the text of a
6 revised Military Rule of Evidence 513. This occurred, to the
7 best of my memory, in approximately 2015 by the executive
8 order that amended the Military Rules of Evidence in the 2012
9 edition.

10 However, the Secretary of Defense, aware of the
11 Klemick standard and the fact that courts were likely to apply
12 it as the seminal -- in fact, one of the only appellate cases
13 on point in applying this rule of evidence, did not change the
14 text of M.C.R.E. 513 when he revised the Manual for Military
15 Commissions in 2016.

16 So similar to the way that we deal with statutory
17 construction, where we presume that Congress is aware of court
18 decisions interpreting their law, and if they do not act to
19 overrule those decisions they must accept them, we should
20 treat the Secretary of Defense's actions the same way. He's
21 been aware of Klemick. He was aware at the time that he
22 published this rule that it would probably be interpreted
23 using the Klemick standard, and he has not made any changes to

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1 it. But it is inaccurate to say that the Klemick standard was
2 removed from the Military Rules of Evidence 513.

3 Your Honor, these are privileged records, and the
4 defense has explicitly conceded that. The other important
5 point from which we should start this analysis is that
6 Rule 513 makes no distinction. If the government sought to
7 put on the testimony of a surviving victim of one of the
8 alleged offenses about what he had seen and heard and his
9 mental health records were sought, the exact same analysis
10 that the commission would apply to determine whether his
11 mental health records should be released should also be
12 applied to Mr. al Darbi's. There is no distinction in 513
13 that would justify treating those two parties differently.

14 Here, the defense has not met the Klemick standard
15 even to justify in camera review, let alone actual disclosure.
16 We have laid this out pretty thoroughly in our filings on this
17 point, but I would like to point to the U.S. Supreme Court
18 opinion in Zolin where they said evidence is what you must put
19 forward to get in camera review. Klemick phrases it as some
20 factual basis.

21 Now, the defense cites Klemick in their filing, but
22 the fact pattern in Klemick is very instructive here. In
23 Klemick, the trial counsel sought disclosure of a wife's

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1 mental health records on the grounds that they were admissible
2 under a specific exception, that for evidence of child or
3 spousal abuse. In support of this, the trial counsel brought
4 the court evidence that those records were likely to contain
5 relevant information that would be admissible under that
6 exception.

7 He brought that evidence in the form of a statement
8 to law enforcement indicating that the wife was aware of
9 statements her husband had made regarding the recent death of
10 one son and injury to another, and then insurance bills
11 showing that within two months she had been to see a
12 psychotherapist. And the Klemick court explicitly approved
13 the reasonable inference that a child dies, another child is
14 injured, your husband is implicated, you talk to law
15 enforcement about it, and you are in a psychotherapist's
16 office shortly thereafter, it is reasonable to assume those
17 things are connected.

18 Here the defense can't even show, or at least has
19 advanced no evidence to show, that the mental health records
20 that they seek are close in time to the alleged torture that
21 occurred to Mr. al Darbi in 2002 at Bagram and in 2003 at
22 Guantanamo Bay. They have produced no evidence to show the
23 court that there is even a close connection in time. So at

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1 this point, Your Honor, there is no specific factual basis
2 that's been presented to you that would lead a reasonable
3 person to believe that it is likely that relevant information
4 is contained in those records; and, even if there is, the
5 defense has not identified any specific exception to Rule 513
6 that would permit that information to be disclosed.

7 As the Supreme Court stated in Jaffee v. Redmond,
8 when recognizing a federal psychotherapist-patient privilege,
9 the fact that a privilege exists, the bottom line of a
10 privilege is that it will mean that sometimes relevant
11 evidence is withheld. So even if there is relevance in there,
12 the defense has to show you how they get it out. What's the
13 door to get that evidence out and into their hands? There has
14 to be some exception.

15 And the defense has also accepted, as they should,
16 that it is their burden to prove the disclosure appropriate,
17 and they haven't even pointed the court to any enumerated
18 exception under Rule 513 that would permit disclosure.

19 Your Honor, even if the defense could or had met that
20 first prong of the Klemick standard, they would still have to
21 get past the remaining two. They would have to show you,
22 again, before in camera review, that the evidence that they
23 are looking for is not cumulative with other evidence already

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1 available to them.

2 This is an unusual case. Most of the time the moving
3 party would be in the position of not yet having heard the
4 witness testify. They would be doing this, to some extent, in
5 the blind. Here the defense has not one, but two
6 depositions -- because we are under the understanding that the
7 transcript of the Nashiri deposition, which was even longer
8 than Mr. al Darbi's testimony in this case, has also been
9 provided to the defense.

10 So two separate depositions, in both of which
11 Mr. al Darbi was questioned in extensive detail about his
12 treatment at Bagram and Guantanamo. Not only that, but as the
13 defense has pointed out in their filings, they have access to
14 a 2009 declaration of Mr. al Darbi's where he describes his
15 treatment at Bagram and Guantanamo in detail, and they have
16 also cited to other evidence in their motions that they have.

17 So the question is: What could they get out of these
18 mental health records that would not be cumulative of what
19 they already have?

20 And if they could get over that bar, they would still
21 be required to show the commission that they have made
22 reasonable efforts to obtain the same or substantially similar
23 evidence from nonprivileged sources. And they have

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1 advanced -- they have not said that they have done this. But
2 given the wealth of information that is already available to
3 them and to their expert, if the court provides one or the
4 convening authority provides one, it's hard to imagine what
5 else could be in these mental health records that would not be
6 cumulative.

7 So, Your Honor, obviously our position is that the
8 defense has not even met its burden to justify in camera
9 review. But it follows that, as Zolin said, the evidentiary
10 standard should be even higher to justify actual disclosure.
11 So if they haven't met the standards for in camera review,
12 they definitely haven't met the standard for disclosure.

13 The standard for actual disclosure is within the
14 discretion of the trial court. It's not very clearly defined,
15 but we argue that Klemick is at least persuasive. You have to
16 change it a little bit, because obviously at this point you
17 are no longer worried about whether there is a reasonable
18 likelihood that the evidence is there; you know if it is there
19 or not.

20 But the point is, even if you were to do an in camera
21 review, even if you were to find relevant evidence, the
22 defense would still need to show you that it wasn't
23 cumulative, that they have made reasonable efforts to obtain

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1 the same or substantially similar evidence from other sources,
2 and they would need to point you to a specific exception that
3 would justify disclosure.

4 ADC [MR. THURSCHELL]: Judge, I apologize for
5 interrupting, but Mr. Al-Tamir really, really needs a break.

6 MJ [Col RUBIN]: All right, Counsel, I agree. I agreed to
7 go to 1730, try to go a little bit further trying to ensure
8 that we don't go too long. So I am going to recess the
9 commission. I tend to think there is additional litigation
10 that will take place. If I thought it could be resolved in
11 the next couple of minutes we may push, but it is clear it is
12 going to go substantially longer. So the commission is in
13 recess until 0800 tomorrow morning.

14 [The R.M.C. 803 session recessed at 1730, 31 January 2018.]

15 [END OF PAGE]

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