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1 [The R.M.C. 803 session was called to order at 0917,
2 4 February 2018.]

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

6 Counsel, I am going to summarize our three R.M.C. 802
7 conferences. On 1 February 2018 at approximately 0815,
8 counsel and I conducted a conference in my chambers pursuant
9 to Rule for Military Commissions 802. The accused was not
10 present.

11 I was informed that the counsel -- excuse me, I was
12 informed that the accused was not present for the hearing;
13 that he had refused to attend the session, asserting that he
14 was in too much pain and that he was refusing to meet with his
15 counsel. I was told a letter from the accused may be
16 forthcoming.

17 I informed the parties that I would not be proceeding
18 until I had an update on the accused's health from a
19 physician. The government informed me and defense counsel
20 that the results of the accused's MRI were complete. I
21 informed the parties that I intended to extend the session of
22 the commission beyond the scheduled 9 February 2018 end date
23 if necessary. Finally, we discussed the possible timing of

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1 the accused's upcoming appointment with his neurological
2 surgery team.

3 Counsel and I conducted a second R.M.C. 802
4 conference on 1 February 2018 at 1300 in AV-34. That
5 conference was held outside the presence of the accused.

6 We received an update from the government that the
7 senior medical officer had met with the accused, but that he
8 was unwilling to render an opinion at that time and preferred
9 to wait for the arrival of the neurologist. I was informed
10 that the neurologist would arrive mid-morning on 2 February
11 2018 and that he intended to meet with the accused as soon as
12 possible. The defense requested an opportunity to interview
13 anyone rendering a medical opinion on the accused.

14 We discussed the timing of pending filings from the
15 government related to Military Commission Rule of Evidence
16 505(h) and when it may be appropriate to conduct an additional
17 M.C.R.E. 505(h) hearing.

18 Finally, we agreed to conduct another R.M.C. 802
19 conference at 2230 on 2 February 2018. At 2230 on 2 February
20 2018 we did conduct another R.M.C. conference. This
21 conference was conducted in AV-34. The accused was not
22 present.

23 The counsel and I discussed the medical status of the

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1 accused. The government informed us that the neurologist had
2 met with the accused. That meeting took place sometime
3 immediately prior to our 802 conference.

4 I informed the parties that I intended to hold an
5 R.M.C. 803 session this morning, Sunday, 4 February 2018. The
6 defense indicated that they wished to speak with the
7 neurologist and senior medical officer. Finally, we briefly
8 discussed the mechanics for the accused waiving his presence.

9 Counsel, do you concur with my summation of our
10 various 802 conferences or have anything to add or correct?

11 TC [CDR SHORT]: Yes, Your Honor, we have something to
12 add.

13 ATC [MR. SPENCER]: Your Honor, we request the e-mail
14 communication on this issue, I believe it was yesterday
15 morning, be also appended to the record as an e-mail 802.
16 Additionally, to the extent that I in 802s may have referred
17 to the neurosurgeon incorrectly as a neurologist or just
18 shortened it to neuro and was unclear, there is a distinction
19 between neurologist and neurosurgeon. The doctor that met
20 with the accused Friday evening and is here for the court --
21 for the commission to hear testimony from is a neurosurgeon.

22 MJ [Col RUBIN]: Neurosurgeon. And yes, the e-mail
23 exchange will be appended to the record. Thank you, Trial

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1 Counsel.

2 Mr. Thurschwell.

3 ADC [MR. THURSCHELL]: The only thing we would add is
4 that at one of the 802s, the government reported the reported
5 view of the neurosurgeon that surgery might be imminent on
6 Sunday or Monday. And it's important to note that that was
7 initially stated; it was subsequently retracted, but for the
8 record.

9 MJ [Col RUBIN]: Yes, I believe that's accurate. I
10 believe that was in an e-mail from the government, an initial
11 e-mail indicated that surgery may be necessary. And that was
12 one of the updates we received on 2 February 2018 at 2230
13 indicating that that initial report was not accurate, and I
14 was informed that surgery was not necessary at that time.

15 Trial Counsel, is the neurosurgeon present this
16 morning?

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

18 MJ [Col RUBIN]: Is the government prepared to call the
19 neurosurgeon as a witness?

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

21 MJ [Col RUBIN]: You may proceed.

22 ATC [MR. SPENCER]: Good morning, Your Honor. Mr. Spencer
23 for the government. The government calls the individual that

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1 we will be identifying as Neuro 1, and I will refer to him as
2 Doctor or Neuro 1 on the stand. The government calls Neuro 1
3 to the stand.

4 MJ [Col RUBIN]: Very well. You may proceed.

5 NEURO 1, was called as a witness for the prosecution, was
6 sworn, and testified as follows:

7 **DIRECT EXAMINATION**

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

9 Q. Sir, as I previously informed the commission, I will
10 refer to you as Neuro 1 or Doctor only. I will not ask you
11 identifying information. If you would please explain to the
12 commission ----

13 ADC [MR. THURSCHELL]: Judge, I'm sorry. I have been
14 preoccupied. May I put, very briefly, a couple of objections
15 to the testimony on the record?

16 MJ [Col RUBIN]: I will allow you to do so after the
17 doctor testifies.

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

19 Q. Doctor, can you explain to the commission what your
20 specialty or subspecialty is as a -- as a physician?

21 A. Yes. I am a neurosurgeon.

22 Q. And how long have you been a neurosurgeon, sir?

23 A. For over two years.

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1 Q. What were you prior to being a neurosurgeon?

2 A. I was a neurosurgery resident for seven years, in
3 training.

4 Q. Thank you, sir. How did you come to know the accused
5 in this case?

6 A. I was asked to see the patient whenever I was called
7 by the SMO.

8 Q. Do you recall when that was?

9 A. Approximately September -- I'd have to look at the
10 date, but September 6, something like that.

11 Q. Have you performed surgical procedures on the
12 accused?

13 A. I have.

14 Q. How many?

15 A. Four.

16 Q. And are those the number of -- are those all of the
17 surgeries -- have you performed all of the surgeries or
18 participated in all of the surgeries on the accused since
19 September?

20 A. No, sir. The -- one surgery was performed by an
21 orthopedic surgeon after we had departed.

22 Q. Okay. So in terms of the neurology, the neurological
23 requirements for surgery, you have been involved in all of

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1 those surgeries; is that right?

2 A. That's correct.

3 Q. Did you meet with the accused this past Friday?

4 A. I did.

5 Q. Prior to coming down on this trip -- I believe you
6 arrived Friday, late morning or early afternoon; is that
7 correct?

8 A. That's correct.

9 Q. Prior to coming, did you discuss the accused's
10 medical condition with the senior medical officer?

11 A. I did.

12 Q. Are you aware that the accused had an MRI done late
13 Tuesday evening?

14 A. Yes, I was.

15 Q. Prior to coming down to Guantanamo, did you review
16 the results of that MRI?

17 A. I did.

18 Q. And did you have a discussion with the SMO at that --
19 on -- prior to coming down about the results of that MRI?

20 A. Yes, I did.

21 Q. And tell the commission, please, sir, what that
22 discussion entailed.

23 A. I discussed that the MRI was -- could indicate that

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1 he needs surgery, but that I would have to see the patient to
2 have a better idea what his symptoms were.

3 Q. So your plan, based on the MRI, was that surgery was
4 potential; is that accurate?

5 A. That's correct. Actually, initially whenever I
6 reviewed the MRI, I thought surgery was likely.

7 Q. Likely. Okay. Thank you, sir.

8 And had surgery been indicated, that surgery would
9 have been initially thought to be done which day?

10 A. It would have either been yesterday or today.

11 Q. The -- but you were coming down for -- for surgery on
12 a different individual; is that correct?

13 A. That's correct.

14 Q. Now, once you actually had the opportunity to meet
15 with the accused, did your opinion as to the likelihood of the
16 need for surgery change?

17 A. It did.

18 Q. Can you explain to the commission how that opinion
19 changed?

20 A. Sure. Some of the symptoms that I was looking for to
21 indicate that he had some instability in his back to indicate
22 that he needed surgery, I was expecting him to have difficulty
23 with walking, motor weakness, and other symptoms associated

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1 with increase in ambulation.

2 Q. So because he did not have those symptoms, what was
3 your opinion after speaking with him yesterday?

4 A. Well, based on -- based on the fact that his symptoms
5 were not exacerbated specifically by walking, his symptoms
6 could occur at rest and they could occur while he was laying
7 down, that this was likely not as amenable to improvement with
8 surgery.

9 Q. Thank you, sir. With respect to why we're here
10 today, you are aware that the accused is facing a military
11 commission and is part of a court process that's ongoing; is
12 that correct?

13 A. I am aware.

14 Q. In your opinion as his treating neurosurgeon, is his
15 presence here in the courtroom or his transport to and from
16 the courtroom likely to endanger his health?

17 A. I would say the likelihood of him having further
18 neurologic injury is -- it's unlikely.

19 Q. And in terms of his ability to participate from a
20 neurological standpoint, do you have any concerns with -- as
21 to that?

22 A. I can't speak to what his pain level is; that's an
23 individual assessment. And I don't know how much he can

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1 tolerate and how long of periods he can tolerate.

2 Q. Are there any remedial measures or allowances that
3 can be made that would help him with that pain level or help
4 him in that situation?

5 A. I'd be speculating, but I'm sure he could get a sense
6 for how much time he can tolerate sitting; if he needs to take
7 frequent breaks to get up, stand up, move around, but that
8 would be -- he would have to determine that on his own, what
9 his level was he could tolerate.

10 Q. What -- and you have communicated with him a number
11 of times over the course of this neurological condition. In
12 terms of his pain level, has there been a substantial change
13 in that pain level?

14 A. He relayed to me on Friday that his pain has worsened
15 over the last ten days.

16 Q. With respect to his -- the objective evidence of his
17 current condition, has there been a change in that since
18 you've been treating him?

19 A. Sure. I would say he's had significant neurologic
20 improvement in many areas. His strength in his arm has
21 improved since the last time I saw him. The strength in his
22 legs has improved since the initial surgery.

23 Q. So -- and it's also correct that he -- that the

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1 accused is participating in physical therapy?

2 A. That's correct.

3 Q. Is it your recommendation that he continue to be
4 afforded the opportunity to do that?

5 A. Absolutely.

6 Q. And that's irrespective of the court schedule?

7 A. Correct.

8 Q. Are you aware of when those physical therapy sessions
9 are scheduled?

10 A. The senior medical officer, I believe he told me it
11 was Monday and Thursday or Tuesday and Friday, something like
12 that.

13 Q. And how long would those sessions -- those types of
14 sessions typically last, do you know?

15 A. Usually about one to one and a half hours.

16 Q. Are there any other concerns with respect to
17 transport or accommodations with respect to transport that you
18 would recommend in your capacity as the neurosurgeon?

19 A. Sure. He did relay to us that, whenever he was
20 coming, his pain had gotten significantly worse. So we had
21 recommended that he be transported in a means that he is more
22 comfortable, such as laying down. I understand that it's
23 difficult to arrange something like that. Otherwise, you

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1 know, having him not bouncing around, jostling around, the
2 chair that he is in being secure so it's not moving, I think
3 would be helpful.

4 Q. So with respect to ----

5 A. It is purely speculation on my part.

6 Q. Yes, sir.

7 A. It's just based on what he tells me.

8 Q. Sure. With respect to the position in which he is
9 transported, is that a medical requirement or a sort of a
10 nice-to-have, as it were?

11 A. I don't think it's a medical requirement. I think if
12 his symptoms are getting worse, then it would be -- it would
13 be nice to keep him from worsening his symptoms.

14 Q. And with respect to the reported pain levels or
15 symptoms from the accused, has there been a change that --
16 communicated to you about that?

17 A. There has. He is reporting an 8-out-of-10 severity
18 of pain frequently over the last two weeks or the last ten
19 days.

20 Q. Do you have an opinion as to the pain level, whether
21 that's an accurate depiction of his pain subjectively?

22 A. I can't speak to that.

23 ATC [MR. SPENCER]: Okay. Your Honor, just a moment,

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1 please.

2 MJ [Col RUBIN]: Yes.

3 [Pause.]

4 ATC [MR. SPENCER]: Thanks, Your Honor.

5 I have no more questions, sir. The defense may have
6 some questions for you, as may the commission as well.

7 MJ [Col RUBIN]: Mr. Thurschwell.

8 ADC [MR. THURSCHELL]: Thank you, Judge. And, Judge, as
9 noted, I appreciate your giving me the opportunity to put on
10 the record -- we object to the doctor's testimony on several
11 grounds that were raised earlier. One additional one, the
12 anonymous testimony makes it difficult to do the research we
13 need to adequately cross-examine him. We object on the basis
14 of not having our own expert, not having access to the
15 underlying bases of opinion in the forms of medical records
16 and so on.

17 So with that, I'd like to proceed, Judge.

18 MJ [Col RUBIN]: The objections are noted. You may
19 proceed.

20 ADC [MR. THURSCHELL]: Okay.

21 **CROSS-EXAMINATION**

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

23 Q. Doctor, my name is Adam Thurschwell. I represent

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1 Mr. Al-Tamir, your patient, the accused. Thank you again for
2 agreeing to meet with us prior to your testimony. It is
3 greatly appreciated.

4 The government asked you at the end of the questions
5 whether -- regarding Mr. Al-Tamir's reports of his pains and
6 your understanding of them. Do you have -- you have no basis,
7 is my understanding, for doubting at this point the honesty or
8 accuracy of his reports of his own pain; is that accurate?

9 A. No.

10 Q. Okay. And I want -- I'd like to first clarify the
11 scope of the opinion that you are providing the court with and
12 your view. You are not a lawyer, is my understanding.

13 A. That's correct.

14 Q. So -- and you have never stood trial for a criminal
15 charge?

16 A. No, I have not.

17 Q. So you are -- your expertise extends to
18 Mr. Al-Tamir's medical -- physical-medical condition and the
19 impact of participating in this proceeding on his
20 physical-medical condition, would that be an accurate
21 statement of your expertise?

22 A. Yes, it would.

23 Q. Okay. So while you may be able to opine and have

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1 opined on the impact of the proceedings and the physical
2 things Mr. Al-Tamir needs to do to participate in the
3 proceedings, the impact of that on his -- the condition of his
4 spine and his other neurological aspects of his condition, you
5 are not in a position to opine on his ability to participate
6 in his own defense?

7 A. That's correct.

8 Q. Okay. You are not qualified to testify to that; you
9 are not a lawyer, you have not studied that?

10 A. I have not studied law.

11 Q. Thank you. Now, just to clarify the scope of your
12 expertise and -- in this regard, I would like to show you a
13 declaration that the immediately prior SMO executed, if I may,
14 and ask you about an opinion that that SMO expresses.

15 ADC [MR. THURSCHELL]: Judge, this is Attachment B to
16 AE 099KK. I'm going to show it to the government; and, with
17 your permission, I will show it to the witness.

18 MJ [Col RUBIN]: You may. Counsel has presented the
19 document to the doctor. He is reviewing it right now.

20 Q. Sir, I am going to first of all direct your attention
21 to the signature line that is signed SMO.

22 A. I see that.

23 Q. Okay. And it's dated January 25 of this year.

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1 A. That's correct.

2 Q. I want to specifically direct your attention to the
3 first sentence of paragraph 7. Would you take a look at that?
4 And that states that "Based on his current status and
5 discussions with his surgeons, it is my medical opinion that
6 Defendant can be moved for attorney-client meetings while
7 wearing the CT0."

8 A. I see that.

9 Q. Is that what that says?

10 A. That is what that says.

11 Q. Just for the record, what is a CT0?

12 A. A CT0 is a brace called cervicothoracic orthotic,
13 Thane neck brace ----

14 Q. Okay.

15 A. ---- that supports his neck and his upper thoracic
16 spine.

17 Q. All right. Now, the -- that opinion that I just read
18 and you looked at, that opinion -- is it your understanding
19 that is limited to the medical impact of moving Mr. Al-Tamir
20 to and from his attorney-client meetings?

21 A. To my reading, this is just relating to the medical
22 facts.

23 Q. Okay. And it would -- so it would not actually --

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1 it's not a statement specifically that his current status and
2 discussions with the surgeons permit -- based -- an opinion
3 that he can adequately participate in the attorney-client
4 meetings held themselves?

5 A. No, there is no statement.

6 Q. And that is not an opinion that a medical doctor with
7 no other expertise would be qualified to make; is that
8 correct?

9 A. That would be extremely challenging.

10 Q. All right. Thank you, sir.

11 Now, I'd like to talk just briefly about the basis of
12 the opinions that you were advising the court of today. Would
13 it be fair to say that your opinions and expert opinions of
14 this type generally are based on medical records and medical
15 tests like MRIs, x-rays, and other medical testing
16 information ----

17 A. Yes.

18 Q. ---- you rely on that? Your past experience with the
19 patient?

20 A. In my past experience with the patient.

21 Q. Yes. And you have had -- you participated in four of
22 his five surgeries is my understanding?

23 A. That's correct.

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1 Q. The patient's own description of their current
2 symptoms?

3 A. Yes.

4 Q. Okay. And then consultation with other physicians or
5 medical experts who have also spoken to the patient about
6 their symptoms or done other tests?

7 A. That's correct.

8 Q. Okay. Now, you reviewed Mr. Al-Tamir's most recent
9 MRI, you testified?

10 A. That's correct.

11 Q. All right. Have you -- you have not, though,
12 reviewed his most recent medical records?

13 A. That's correct.

14 Q. And when was -- what was the last medical records
15 that you had the chance to actually physically examine
16 yourself? What was the date of them -- let me be more
17 specific -- if you recall?

18 A. I don't.

19 Q. Okay. But you were -- you were apprised of his other
20 medical information, including his medical records, in your
21 discussions with the senior medical officer?

22 A. That's correct.

23 Q. All right. So -- okay. Now, we -- you mentioned

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1 your own experience with Mr. Al-Tamir's prior surgeries.

2 Moving on to Mr. Al-Tamir's descriptions of his own symptoms
3 as the third basis for your expressing your opinion, it is --
4 would it be fair to say that, with respect to spine and
5 neurological issues, the patient's account of the location and
6 intensity of his pain and other symptoms is a very significant
7 element in a -- rendering a diagnostic opinion or reaching a
8 diagnosis?

9 A. It's important for diagnosis. It is also important
10 for determining therapeutic decisions.

11 Q. For determining ----

12 A. Therapeutic decisions.

13 Q. ---- therapeutic. Thank you. I am going to get to
14 that. Thank you.

15 And following up on that, the patient's own account
16 of his pain is a very, very -- is a key indicator of what
17 activities post-surgery are advisable or not, fair to say?

18 A. That's correct.

19 Q. All right. So if a post-operative patient of yours
20 with Mr. Al-Tamir's current medical profile -- and I am going
21 to disregard everything but his current medical profile that
22 you are familiar with -- were to report that a particular
23 activity causes increasingly severe pain in his extremities

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1 and spine, fair to say that you would advise him to stop that
2 activity until the pain subsides, correct?

3 A. Yes, that's correct.

4 Q. Okay. And similarly, if that same patient were to
5 report that performing that activity on a daily basis, even
6 after -- when he desisted on a day-by-day basis when the pain
7 became too great, if he reported that that daily repetition of
8 the limited activity resulted in increasing pain and
9 exhaustion overall, you would advise the patient to stop
10 performing the activity on a daily basis; is that ----

11 A. Yes. If at all possible.

12 Q. If at all possible, okay.

13 Now -- and you alluded to this in your testimony just
14 briefly -- pain itself is -- is -- is a medical problem; is
15 that correct?

16 A. That's correct.

17 Q. So -- but apart from its own problem as a medical
18 problem, pain can interfere with daily functioning, correct?

19 A. Oh, absolutely.

20 Q. All right. So -- and specifically, it can affect
21 one's ability to focus on intellectual tasks?

22 A. True.

23 Q. Focus on reading?

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1 A. Absolutely.

2 Q. Focus on listening to a conversation that's going on
3 in front of you?

4 A. It likely could interfere with all of those.

5 Q. Okay. Thank you. Now -- thank you.

6 And then finally, I'm going down my list of your --
7 the bases of your opinion. You consulted with the SMO, you
8 testified.

9 A. That's correct.

10 Q. Okay.

11 [Pause.]

12 ADC [MR. THURSCHELL]: Excuse me one moment, Your Honor.
13 I am trying to cut through the chaff at this point.

14 MJ [Col RUBIN]: Yes.

15 Q. Let me -- let me direct your attention to this past
16 Friday evening when you met with the patient, Mr. Al-Tamir,
17 sir. The people present were another neurosurgeon, the SMO
18 and an interpreter, and Mr. Al-Tamir; is that accurate?

19 A. That's correct.

20 Q. Okay. And did the other -- did -- did one of the
21 neurosurgeons, you or the other one, tell Mr. Al-Tamir that he
22 had been a good patient during the MRI, that he had been
23 able -- he had been cooperative and had managed the pain of

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1 doing it in a good way? Do you recall that?

2 A. I don't recall that. It sounds like something I
3 would say.

4 Q. Okay. Okay, fair enough. And you -- at some point,
5 you -- you told him that it now appeared he did not -- he
6 would not need surgery, as you had originally feared might be
7 the case?

8 A. That's correct.

9 Q. Okay. You also administered a number of tests to him
10 during that session; is that correct? And by tests ----

11 A. Define tests.

12 Q. Excuse my lay language. You poked him with a -- you
13 poked him, his legs, with a paperclip ----

14 A. That's correct.

15 Q. ---- to test his sensitivity?

16 A. That's correct.

17 Q. Okay. And you -- and you tested his strength?

18 A. That's correct.

19 Q. His arm strength, his leg strength, the sensitivity
20 of his -- the soles of his feet?

21 A. That's correct.

22 Q. Okay. And he described in some detail the pain and
23 other symptoms that he had been experiencing recently?

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1 A. That's correct, he did.

2 Q. Okay. Now, did you -- when you told him that you
3 would not need -- he would not need surgery after -- it
4 appeared he would not need surgery after all in this --
5 imminently, that was after your examination of him or before?

6 A. That was after the examination.

7 Q. Okay. And your conclusion that he did not need
8 surgery imminently was based on the specific -- the factor
9 that you mentioned in your direct testimony was that the pain
10 he was reporting did not -- was not exacerbated or increased
11 with walking; that it was constant, regardless of sitting or
12 walking; is that ----

13 A. That's correct.

14 Q. ---- more or less accurate?

15 A. Yes.

16 Q. Okay. What -- were there any other missing symptoms
17 that suggested he would not need surgery?

18 A. Sure. He's -- he does not have significant back
19 pain, which is frequently associated with instability.

20 Q. Okay. Now, you -- was part of your conclusion that
21 he didn't need surgery based on your -- the fact that the
22 MRI -- the specific stenosis or narrowing or problems with the
23 spine indicated in the MRI did not match up with his symptoms?

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1 A. I'm not sure what you're asking.

2 Q. I am not -- I'm trying to do this the best I -- on
3 the fly without an expert advice myself, so let me -- let me
4 try to restate it, or maybe I'll move on. Okay. Let me --
5 let me move on.

6 Now, your -- your conclusion that he did not need
7 surgery imminently was not a conclusion that he was not
8 going -- no longer going to need surgery at some point in the
9 future, correct?

10 A. No.

11 Q. All right. And in fact, your opinion is not that he
12 doesn't need surgery, but that you're not sure what the
13 surgery should be if he -- I'm sorry, that you, you ----

14 ADC [MR. THURSCHELL]: Judge, give me one minute. I'm
15 sorry.

16 MJ [Col RUBIN]: Okay.

17 ADC [MR. THURSCHELL]: Let me just consult.

18 [Pause.]

19 Q. I'm sorry. So I believe your direct testimony was
20 that without further testing, it was -- it's impossible to
21 know at this point that -- whether surgery is actually
22 indicated?

23 A. That's correct.

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1 Q. Okay. And you recommended specifically that an EMG
2 be performed.

3 A. That's correct, with a nerve conduction velocity.

4 Q. Okay. All right. So -- and your conclusion that the
5 symptoms indicating ----

6 MJ [Col RUBIN]: Let me just interrupt. Let me just
7 interrupt, Mr. Thurschwell.

8 ADC [MR. THURSCHELL]: Sure.

9 MJ [Col RUBIN]: EMG?

10 WIT: Yes.

11 MJ [Col RUBIN]: What is that?

12 WIT: It's -- EMG is a test of the signals that are
13 received in the nerves, and a nerve conduction velocity tests
14 the return after you stimulate the nerves.

15 MJ [Col RUBIN]: So if I can just clarify to make sure I
16 understand the testimony, you will not know if further surgery
17 is necessary until the EMG is conducted?

18 WIT: That's correct.

19 MJ [Col RUBIN]: Thank you.

20 Mr. Thurschwell, I'm sorry. Continue, please.

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

22 Q. And your opinion about whether further surgery is
23 necessary will also be based on the progress or lack of

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1 progress of the patient's symptoms ----

2 A. Certainly.

3 Q. ---- correct? Okay.

4 So at this point, you're not in a position to know
5 whether he is going to need further surgery?

6 A. That's correct.

7 Q. Or when he'll need further surgery?

8 A. That's correct.

9 Q. But the -- you are familiar with the original plan
10 that was formulated by the surgical team that he would need,
11 at some point in the future, some kind of lumbar surgery; is
12 that correct?

13 A. That's correct. I formulated the plan.

14 Q. All right. And so this -- and are you in a position
15 now to say -- you're not -- I should say you're not in a
16 position to say whether his current symptoms reflect a
17 possible need for that surgery in the indefinite future or
18 some other -- other problem?

19 A. I would say it's indeterminate at this time without
20 further testing and without seeing how he does with physical
21 therapy.

22 Q. Okay. Now ----

23 ADC [MR. THURSCHELL]: One more moment, Judge. I'm

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1 almost done.

2 [Pause.]

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

4 Q. To clarify, you have not changed your original view
5 that surgery is going to be necessary in the future?

6 A. I'm sorry, could you just state that a little
7 clearer?

8 Q. Sure. That your -- the original view of the surgical
9 team following the earlier surgeries was that further lumbar
10 surgery would be required at some point in the future; is that
11 correct?

12 A. That's correct.

13 Q. That opinion has not changed?

14 A. As far as the need for surgery? Right now he does
15 not appear to need surgery.

16 Q. Okay. And -- but it's -- he may at some point in the
17 future ----

18 A. Certainly, he could.

19 Q. ---- that conclusion based on his ----

20 A. Yes.

21 Q. All right. Mr. Al-Tamir, what -- what -- if -- if
22 the patient and the medical team is looking for an indication
23 that surgery has become necessary imminently, what -- that

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1 indication would be his experiencing of an exacerbation of the
2 pain when he -- when he attempts to walk; is that correct?

3 A. Yes.

4 Q. What other symptoms would indicate an imminent need
5 for surgery?

6 A. Sure. If he had any focal motor weakness or if he
7 had bowel or bladder incontinence.

8 Q. Okay. And the first thing you said was?

9 A. Focal motor weakness.

10 Q. And can you tell us what that means.

11 A. If we test a certain nerve, if we test a certain
12 muscle group and he has weakness in a certain part.

13 Q. Okay. And is that a test -- or a symptom that the
14 EMG test would -- would reflect?

15 A. Sometimes the EMG can tell some of that information.

16 Q. Okay. Might the EMG test itself be sufficient to
17 indicate that surgery is needed imminently?

18 A. It can on occasion.

19 Q. Okay. Now, you told me in our interview that you
20 have not spoken to the prosecution -- members of the
21 prosecution team prior to your arrival in court today. Was
22 that accurate?

23 A. I met with them just before I met you.

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1 Q. You met with them just before you met me, okay. So
2 you had not met with them prior to that?

3 A. No, sir.

4 ADC [MR. THURSCHELL]: Okay. One moment, Judge, and I
5 think I'm done.

6 Q. Two more questions. You are not stationed in
7 Guantanamo Bay; is that correct?

8 A. That's correct.

9 Q. Okay. So in terms of updates about Mr. Nashwan's --
10 sorry, updates about the patient's medical progress or lack of
11 progress, you rely on the reports from the SMO; is that
12 accurate?

13 A. That's correct.

14 Q. Okay. And finally, sir, what is your medical
15 clearance? Sorry, what is your security clearance?

16 A. Secret.

17 Q. Secret? Okay.

18 And just to clarify, you do not have any reason to
19 doubt Mr. Al-Tamir's accounts of the pain and other symptoms
20 he is experiencing?

21 A. No, sir. He has always been very forthcoming.

22 Q. Thank you.

23 ADC [MR. THURSCHELL]: Judge, no further questions.

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1 MJ [Col RUBIN]: Trial Counsel, any additional questions?

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

3 **REDIRECT EXAMINATION**

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

5 Q. Doctor, there is no question that the accused
6 experiences pain and that's common with someone in his
7 condition; is that true?

8 A. Yes.

9 Q. What's important is the description of that pain or
10 the intensity of that pain as described by the accused because
11 it is subjective?

12 A. That's correct.

13 Q. Okay. Now, you have testified a couple of times and
14 you answered questions for both of us. I want to get to the
15 root of this with the -- specific to the intensity.

16 A. Sure.

17 Q. He has reported to you multiple times --
18 consistently, actually, that it's been 8 out of 10, 8 out of
19 10, 8 out of 10; is that accurate?

20 A. That's correct. In the last meeting.

21 Q. Right. And that meeting lasted how long on Friday?

22 A. I'd have to check. If I were to take a guess, half
23 an hour.

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1 Q. The -- when you spoke with us earlier, you indicated
2 that, based on your objective observations and interactions
3 with him during that meeting, you suspected he didn't really
4 mean 8 out of 10; do you recall telling us that?

5 A. I did.

6 Q. And that's because either he didn't fully understand
7 the scale or some other reason why what you were observing
8 didn't meet with what 8 out of 10 actually is per AMA
9 standards; is that right?

10 A. That's correct. Usually people are pretty
11 uncomfortable, and he appeared comfortable.

12 Q. So what you were observing didn't match with what he
13 was telling you in terms of intensity of symptoms?

14 A. You could say that.

15 Q. That's what you told us earlier, correct?

16 A. That's correct.

17 Q. Okay, so I could say that and you have also said
18 that?

19 A. I have.

20 Q. Now, with respect to the pain -- again, he clearly
21 has exhibited pain or experienced pain. What other causes of
22 increased pain over the last ten days, for example, that
23 aren't physiological or physical?

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1 A. Well, certainly the increased level of stress can
2 exacerbate pain.

3 Q. And what do you mean by that?

4 A. Well, if you have whatever stressors are going on in
5 your life, if you are going through a divorce or a move or
6 some stressful event, it can make your pain worse.

7 Q. So there might be psychological factors that would
8 affect his pain tolerance or pain levels ----

9 A. I'm sure that's possible.

10 Q. ---- that are independent of any physical or
11 physiological aspects; is that correct?

12 A. That's possible.

13 Q. And you previously testified -- and just to clarify
14 again, given the questions from the defense counsel, in terms
15 of his objective physical-medical condition, is there any
16 additional risk of harm by having him present in the courtroom
17 with, you know, accommodations such as breaks, et cetera, or
18 transport to and from the courtroom?

19 A. Based on my examination, reviewing the MRI, I don't
20 think that there is any indication that he could have further
21 neurologic injury.

22 Q. Now, with respect to the imminent or -- I'm sorry,
23 the pending need for surgery, that initial determination --

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1 the surgery that we are talking about is another lower back
2 surgery; is that right?

3 A. That's correct.

4 Q. Since when has the medical team known about the
5 pending need for additional back surgery?

6 A. You mean since we started planning to come back down
7 here?

8 Q. Since you personally started treating the accused.

9 A. Well, there was a potential he was going to need
10 another surgery, a low-back surgery from, I would have to
11 speculate, somewhere around October, whenever I got some
12 x-rays of his lumbar spine.

13 Q. In other words, this knowledge that he will
14 eventually need another lower back surgery is not new
15 information that you discovered upon this visit?

16 A. No.

17 Q. It's something that the medical team has known about
18 for three months, approximately?

19 A. It's a possibility, yes.

20 Q. With respect to the EMG, again, do you know when the
21 EMG is scheduled?

22 A. I was told, and this is just based on what other
23 people have told me, it's in a week or two, sometime in the

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1 next one to two weeks.

2 Q. And if the EMG will confirm what we already know,
3 which is that he potentially needs surgery, but it could give
4 you additional information as well, correct?

5 A. It could give additional information about how he --
6 how his neurologic function is improving or worsening.

7 Q. Do you have -- based on your observations and
8 interactions with him and based on the MRI, you see nothing
9 but neurological improvement; is that correct?

10 A. I have seen neurologic improvement.

11 Q. Have you seen any neurologic degradation?

12 A. No, I have not.

13 Q. Lastly, sir ----

14 A. Just to clarify, I have seen neurologic degradation
15 after one surgery where he had some weakness in his arm, but
16 since that time he has improved.

17 Q. Yes, sir. So -- "since that time," being
18 approximately mid-November?

19 A. That's correct.

20 Q. The last question, sir. I understood that you
21 haven't met with the prosecution prior to this morning. You
22 do interact with the senior medical officers, you have
23 testified, and other members of the JTF; is that accurate?

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1 A. That's correct.

2 Q. Is your opinion based on any external pressure from
3 any of those individuals?

4 A. No. I'm a physician. I just treat patients.

5 Q. Does the change in your opinion from Thursday to
6 Friday have anything to do with ----

7 A. Absolutely not.

8 Q. ---- other external issues as opposed ----

9 A. No, sir.

10 Q. ---- to the objective evidence?

11 A. No, sir. I wouldn't do that to a patient.

12 Q. Thank you, sir.

13 MJ [Col RUBIN]: Mr. Thurschwell?

14 **RECROSS-EXAMINATION**

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

16 Q. Doctor, Mr. Spencer referred to your earlier -- your
17 interview with him in which he asserted that you said that you
18 weren't sure that he really meant 8 out of 10 on the pain
19 scale when the patient reported that on your Friday night
20 meeting. Do you recall that?

21 A. Yes.

22 Q. Okay. Now, were you aware that when he saw you, he
23 had been -- not been in court or attorney-client meetings for

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1 two and a half days?

2 A. No.

3 Q. Okay. You discussed that question of whether he
4 really meant 8 out of 10 with Mr. Spencer before court, I take
5 it?

6 A. Yes.

7 Q. Okay. And was the upshot of the questioning that
8 Mr. Spencer was directing at you testing to see if you thought
9 that, in fact, Mr. Al-Tamir was malingering?

10 A. I could speculate that's what he was looking for.

11 Q. Okay. So it sounded to you like he was looking for
12 evidence that he was making up his pain symptoms?

13 A. I don't -- I don't know that he's saying he's making
14 it up, but maybe ----

15 Q. Exaggerating them?

16 A. Exaggerating, maybe.

17 ADC [MR. THURSCHELL]: Okay. Thank you, Judge. That's
18 all I've got.

19 MJ [Col RUBIN]: Trial Counsel, any additional questions?

20 ATC [MR. SPENCER]: Your Honor, just one question.

21 **REDIRECT EXAMINATION**

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

23 Q. Doctor, you may recall from our conversation this

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1 morning with respect to the 8 out of 10 and your opinion on
2 that, I didn't ask you questions in response to that; you
3 actually volunteered that information. Do you recall that?

4 A. Yes. Yes.

5 ATC [MR. SPENCER]: Okay. Thank you.

6 MJ [Col RUBIN]: Doctor, just a few follow-up questions to
7 make sure that I understand your testimony here.

8 **EXAMINATION BY THE MILITARY COMMISSION**

9 **Questions by the Military Judge [Col RUBIN]:**

10 Q. Is the accused medically cleared to travel to and
11 from this courtroom for commissions sessions?

12 A. Yes, he is.

13 Q. By having the accused travel to and from this
14 courtroom over the next week, or even two weeks, does that
15 substantially increase the risk of his -- risk to his life or
16 health?

17 A. I don't believe so.

18 Q. Having him attend commissions settings and sitting in
19 that chair, orthopedic chair, does that substantially increase
20 the risk to his life or health?

21 A. Depending on the length of time.

22 Q. Tell me more about that.

23 A. Well, if his -- it would be based on his symptoms.

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1 If he's sitting for a prolonged amount of time and his
2 symptoms are worsening, then I would say he would have to be
3 the judge of that and he would have to, with his counsel and
4 with the prosecution, discuss what -- the length of time he
5 needs before he needs a break.

6 Q. Would anything mitigate the pain or discomfort? For
7 example, wearing the CTO or not wearing the CTO?

8 A. The pain that is bothering him the most right now is
9 not related to the cervical, other than there is a possibility
10 that there is some constellation of exacerbation from his
11 cervical -- cervical spine. But wearing the brace isn't going
12 to change that.

13 Q. What is the least painful position for him to be? Is
14 it sitting, is it lying down, a combination, or none of the
15 above?

16 A. I believe, and I'm having -- I will have to go by my
17 recollection of our discussion -- that it's a combination of
18 the above. My understanding is laying down at night, he --
19 his pain gets significantly worse, but changing positions
20 certainly helps him.

21 Q. Is he currently taking pain medication?

22 A. He is.

23 Q. Can he prescribe that or take it himself, or does

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1 someone need to be standing by to dispense it to him?

2 A. I have no idea.

3 Q. Would taking pain medication reduce discomfort and
4 pain?

5 A. It certainly could.

6 Q. Other than traveling to and from the commission, this
7 courtroom, what's the difference between what he would be
8 doing here or back at his camp?

9 A. I don't think there is much, but I don't know what he
10 does at his camp.

11 MJ [Col RUBIN]: Counsel, any additional questions in
12 light of the commission's?

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

14 MJ [Col RUBIN]: Defense?

15 ADC [MR. THURSCHELL]: One quick follow-up, Judge.

16 **RECROSS-EXAMINATION**

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

18 Q. Doctor, you mentioned that he is on pain medication.

19 A. That's correct.

20 Q. That pain medication is Percocet; is that correct?

21 A. That's correct.

22 Q. And if -- Percocet causes drowsiness and sleepiness
23 in most people; is that fair to say?

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1 A. Yes.

2 Q. Okay. So that if he were to take -- the more
3 Percocet he takes, the drowsier he is likely to be?

4 A. Sure. He is particularly susceptible to pain
5 medications, as we saw before.

6 Q. So he is particularly susceptible?

7 A. Correct, because he's ----

8 Q. That's fine.

9 A. He doesn't take a lot of pain medications, so when he
10 takes them, they are pretty sedating.

11 ADC [MR. THURSCHELL]: Okay. Nothing further, Judge.

12 MJ [Col RUBIN]: Trial Counsel?

13 ATC [MR. SPENCER]: Yes, Your Honor, just one quick
14 follow-up question.

15 **REDIRECT EXAMINATION**

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

17 Q. To your knowledge, the accused has only been taking
18 that medication at night prior to bedtime; is that correct?

19 A. That's correct.

20 Q. So he has chosen not to take pain medication during
21 the day regardless of what his activities may have been?

22 A. Sure. He relates that he doesn't like the way it
23 makes him feels -- feel.

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1 Q. And that's irrespective of whether he's in court or
2 at -- in his cell; is that accurate?

3 A. As far as I know.

4 MJ [Col RUBIN]: Counsel, any additional questions?

5 ADC [MR. THURSCHELL]: Nothing further, Judge.

6 MJ [Col RUBIN]: I would like to take a recess now.

7 Mr. Thurschwell, I would like to afford the accused
8 an opportunity to use the facilities. How much time would you
9 recommend?

10 DC [CDR COOPER]: Sir, Your Honor, at least a half an
11 hour.

12 MJ [Col RUBIN]: All right, very well. The commission is
13 in recess until 1040.

14 [The R.M.C. 803 session recessed at 1010, 4 February 2018.]

15 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1055,
2 4 February 2018.]

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

6 Counsel, I'm going to give you an opportunity to be
7 heard on the doctor's testimony, but for now I'm going to
8 press forward and pick up where we left off on the litigation
9 of AE 096. Is Mr. al Darbi and counsel present?

10 ADC [MR. THURSCHELL]: Judge, we request -- consistent
11 with the neurosurgeon's testimony, Mr. Al-Tamir requests that
12 we adjourn for the day at noon or as close thereto as we can.
13 I think prayer time is 1215?

14 DC [CDR COOPER]: Prayer time is 1215 today, Your Honor.

15 MJ [Col RUBIN]: Mr. Thurschwell, I think that's
16 reasonable, yes.

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

18 MJ [Col RUBIN]: Do we have Mr. al Darbi and counsel
19 present?

20 TC [CDR SHORT]: Your Honor, I believe Mr. al Darbi is out
21 in the pod and his counsel is present.

22 MJ [Col RUBIN]: All right. So let's -- we'll hold off.
23 I'd like to get them in the -- in the courtroom. For

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1 expediency's sake, let's push on to 090J.

2 In AE 090J, the defense requests the commission order
3 the convening authority to supply funding for Professor
4 Richard Leo to provide expert assistance regarding the effects
5 of interrogation tactics on the veracity of witness testimony
6 and prior statements in connection with the deposition of
7 Ahmed al Darbi. The government responded in AE 090K, and the
8 defense replied in AE 090L.

9 Does the defense want to present oral argument?

10 ADC [MR. THURSCHELL]: We do, Your Honor.

11 Judge, just as background, first, Professor Richard
12 Leo's credentials are in the record. I don't think it's an
13 exaggeration to say he is the -- certainly one of and probably
14 the leading expert on manipulative police interrogation
15 techniques, and so I don't believe that his qualifications as
16 such are at issue here. There are other grounds that the
17 convening authority and the government has relied on in
18 arguing against his appointment.

19 The -- the -- the background of the need for him is
20 the unprecedented nature of the length of detention and the
21 variety of techniques used to obtain that -- Mr. al Darbi's
22 testimony. They began with what Mr. al Darbi characterized as
23 torture early in his -- in his tenure in the -- in government

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1 custody, and some 15 years later have culminated with a
2 genuinely extraordinary treatment for a detainee, and
3 including its really unprecedented transfer, under extremely
4 favorable terms, to the -- his country of choice, his home
5 country; and in between, a vast array of -- of different
6 techniques used by interrogators in order to obtain his
7 cooperation, obtain his statements, that again ranged from
8 threats to inducing love, as used in -- you know, love for his
9 interrogators, fear. I won't go down the range; they'll be
10 explored to some extent in cross-examination.

11 But there's -- this is -- there's -- I think it's
12 fair to say no government witness, cooperating government
13 witness, has ever been subjected to the number and partic- --
14 intensity and duration of interrogation techniques that
15 Mr. al Darbi underwent, and this is -- this is a science.
16 There is a reason that Dr. Leo has a Ph.D. as well as a J.D.
17 There is a scientific -- social scientific literature on how
18 these techniques are manipulated, how they can lead to false
19 confessions, how they can lead -- induce people to say things
20 they would not ordinarily say. The -- the proof is in the
21 pudding, so to speak. Dr. Leo has been appointed in numerous
22 other cases for precisely these kinds of purposes. Others
23 have been appointed for similar purposes.

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1 And so if there was ever a case on the facts in which
2 defense attorney un -- unassisted, was not able to deal with
3 a -- you know, to delve into the effect of the government's
4 interrogation practices on a witness's willingness to testify
5 and his -- the veracity of his testimony, that -- this is it.
6 There is no other case like it.

7 And so our -- our position, just from the outset
8 is -- unless one rejects the whole proposition that an expert
9 like Professor Leo is ever needed, then this would be the case
10 where he is needed, unarguably.

11 So against that background, let me address the -- the
12 convening authority's denials of grounds for denial and then
13 say a few words about the government's position. The
14 convening authority denied the request for Dr. Leo on two
15 grounds. The first was, and I will quote from Attachment G to
16 AE 090J, which is the convening authority's rejection --
17 initial rejection -- or I should say rejection on the merits
18 of the request. This is at page 2.

19 The convening authority says, and I quote, The
20 purpose of Dr. Leo's consultation is to opine as to the
21 veracity or truthfulness of Mr. al Darbi's deposition
22 testimony, end quote. And that would constitute, and I quote
23 again from his response to us, human lie detector, end quote,

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1 evidence that invades the province of the jury.

2 I mean, I would like just to put that aside for the
3 moment. We are not requesting him at this point to testify.
4 The jury panel will never hear from him, either via video
5 deposition or any other way with respect to Mr. al Darbi, and
6 so that simply misstates the factual basis and the -- what we
7 are -- the request itself.

8 And so I would like to -- I'd like to just say that
9 that is not different and -- and it's an entirely different
10 nature -- request. And the standards are different when you
11 are asking for a consulting expert, which is what we are
12 asking for, and a testifying expert. And I -- I just refer
13 the commission to the case of United States v. McGinnis, which
14 is cited at footnote 47 of our brief, AE 090J. It is an
15 unpublished opinion. It is not binding authority, but it is
16 very helpful -- the analysis, I think, is very helpful and
17 clear on this point, that distinction.

18 So I want to -- unless the commission has questions
19 about that, we -- we simply are not asking for a human lie
20 detector.

21 MJ [Col RUBIN]: Mr. Thurschwell, I completely understand,
22 you are asking for the expert consultant; that consultant
23 request may flow into an expert witness, but right now I

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1 understand the defense's request to be solely for a
2 consultancy.

3 ADC [MR. THURSCHELL]: That's is exactly right, Judge.

4 MJ [Col RUBIN]: Two different standards, as you state.

5 ADC [MR. THURSCHELL]: Thank you. The other ground for
6 rejection was the convening authority's application of the
7 three-part Gunkle-Bresnahan test, which is drawn from military
8 law with respect to requests for -- for consulting expert
9 testimony. And I -- there is a -- I would call it an ongoing
10 dispute. It was raised with respect to the discussion of
11 AE 103. What I say now is also relevant to that discussion,
12 because the basic dispute with the government with respect to
13 these requests for expert consultancies is whether the federal
14 reasonable attorney test applies or the Gunkle-Bresnahan test
15 applies.

16 And the federal courts apply a test in which, and I
17 will quote from the D.C. Circuit case, United States
18 v. Anderson, the necessity for an expert -- and I'm quoting
19 the case here -- is made out where the defense attorney makes
20 a timely request in circumstances in which a reasonable
21 attorney would engage such services for a client having the
22 independent financial means to pay for them. And that is
23 United States v. Anderson, 39 F.3d. The quote is on page 343.

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1 I think -- the -- the -- boiled down, the test -- the
2 federal test is designed to recognize that, like a
3 reasonable -- an indigent defendant who cannot afford their
4 own expert should not be -- should not be prejudiced by their
5 indigence when it comes to making their defense. And so it --
6 this is not a -- there is a threshold. It doesn't mean you
7 get whatever you want. But if there is a reasonable need and
8 a reasonable attorney would say I can afford it, so I'm not --
9 it is not going to be wasting my time, it is going to
10 contribute significantly to the case, I would hire this
11 expert. That is the standard that -- for the appointment of
12 assistance to indigent defendants, that's the standard that
13 the judge should apply.

14 Now, the Bresnahan test, I am going to come back to
15 that because our position is that this satisfies both tests.
16 But I think it's important going forward and for 103 to talk a
17 little bit about this standard and be clearer, because I don't
18 think we have argued it thoroughly yet. And it has come up in
19 one other context, which I will address in a moment, that the
20 commission has ruled on, and I think the commission's ruling
21 in that case actually supports our interpretation here that
22 the federal test is really the appropriate one.

23 So the -- the -- the 2009 Military Commissions Act

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1 expressly added to Section 949j(a)(1) the following language:
2 Quote, The opportunity to obtain witnesses and evidence shall
3 be comparable to the opportunity available to a criminal
4 defendant in a court of the United States under Article III of
5 the Constitution.

6 That language did not appear in the 2006 Act, and
7 it -- it has -- but basic principles of statutory
8 interpretation, that statutory change, which is aimed directly
9 at the issue of the standards that should be applied in cases
10 like this, where defense is seeking evidence -- the
11 opportunity to produce witnesses and evidence, that that
12 language has to be given effect. It means something.

13 In promulgating the new R.M.C. following the 2009
14 Act, the Secretary of Defense relegated this significant
15 legislative change not to -- he did not include it in the
16 operational rule itself, which remained essentially, I think,
17 identical -- that was R.M.C. 703(a), but instead relegated it
18 to the discussion section, which, as the commission is aware,
19 does not have binding effect on a court. So that already was,
20 I think, a misinterpretation of the significance, the
21 legislative significance of that change.

22 Now, Judge Pohl, in the 9/11 case, and -- ruled that
23 and found that the -- that change from the 2006 Act to the

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1 2009 Act, the additional language -- and I'm going to quote
2 and then I am going to pull the cite for you; I had left it on
3 the side -- that that -- that that change, quote, expresses
4 congressional recognition the standard expressed in MCA 2006
5 was deficient and rectified this failure by providing language
6 by which to gauge the reasonable standard within
7 R.M.C. 703(a). And that, I believe, is
8 United States v. Mohammad, AE 036C. I can get the cite, the
9 page cite if you'd like, Judge, or I can supply it later. So
10 it's been recognized by other commissions that this change has
11 to mean something. It has to mean something.

12 Now, this commission -- and I am going to grab this
13 because this is important. This commission addressed the
14 significance of that comparable-to-Article-III language in one
15 ruling, to my knowledge today -- and correct me if I'm
16 wrong -- and that is in AE 086C in connection with its holding
17 regarding the ex parte procedural treatment of requests for
18 resources with the CA.

19 And if you'll indulge me for one moment, I would like
20 to get your opinion so I can quote it and talk about it.

21 [Pause.]

22 ADC [MR. THURSCWELL]: And what the commission said --
23 and I'm going to pull out my glasses for my old-man eyes.

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1 What the commission said about the significance of this change
2 in connection with the ex parte procedure was -- on page 3 of
3 the opinion, the commission said, "The right to ex parte
4 expert requests is procedural in nature and even varies in
5 Article III courts, depending on the nature of the case.

6 "As" -- and I emphasize -- "As a procedural right, it
7 is within the authority of the Secretary of Defense under
8 Section 949a(a) to prescribe the appropriate regulation."

9 And I think, while we disputed that, the holding --
10 other parts of the holding, I mean, I think, at a bare
11 minimum, the distinction that the commission makes there
12 between procedural rights -- that is to say, how the
13 comparable standard of -- of obtaining evidence should be
14 effected by the Secretary is one that is properly laid within
15 the discretion of the Secretary in issuing -- issuing rulings.

16 But that distinction clearly, in this case, cuts
17 towards treating the -- the -- the substantive -- substantive
18 standard for obtaining evidence, which is what is at, excuse
19 me, issue here today, to tilt it in the direction of the
20 federal standard. Because, again, it's one thing to say the
21 Secretary can figure out how to effectively implement the
22 mandate of Congress that the same kind of evidence --
23 comparable ability to get evidence should be available in

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1 military commissions procedurally, but that is not license to
2 say but the evidence itself that you get, right, the
3 substantive standard for what evidence you get can be
4 inconsistent with the very clear congressional mandate that
5 it's the federal standard that applies.

6 And so we -- so -- and under that -- so our position,
7 as we have stated in a couple of other pleadings, is that it
8 is at least, putting aside the procedural rights of like the
9 ex parte -- well, not ex parte -- the substantive standard for
10 obtaining witnesses and evidence is meant to be what Congress
11 said it meant, which was comparable to federal court. The
12 federal standard is the appropriate one.

13 Now -- and under that standard, for reasons I've
14 already suggested, I think, the extraordinary complexity of
15 the record in this case, of the record of interrogations, the
16 extraordinary changes over the 15 years of incarceration in
17 the detainee's, you know, treatment, his attitudes, it's
18 all -- and the thousands of pages that reflect, not just in
19 discovery, statements, but also interrogation plans, I mean,
20 there is -- there is -- we have, you know, struggled to
21 understand how to formulate not just a cross-examination, but
22 like at base, the effect of these things without the benefit
23 of the kind of expert testimony that there is no question a

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1 reasonable attorney who could afford Professor Leo or someone
2 like him would have -- would have availed themselves of. So
3 that is -- and that would be under the federal standard, which
4 we believe is the correct one.

5 But turning to the Bresnahan test, however, we
6 believe that we more than satisfy the Bresnahan test in these
7 circumstances as well. And it's a three-factor test, the
8 first of which is why the expert assistance is needed. And I
9 really feel -- everything I just said, I think I've explained
10 that. It's needed because, you know, we can like try to read,
11 you know, up on the literature, but we don't have Ph.D.s and
12 we don't have time to get Ph.D.s to make sure we're getting it
13 right, in this case above all.

14 The government response -- main response in their
15 brief, at least, and I'm not sure what they'll say on here,
16 but is that the -- essentially they say that the assistance is
17 not needed because the defense has failed to show that
18 Mr. al Darbi's testimony is false, and I -- that's a quote --
19 which is, to say the least, putting the cart before the horse.

20 The -- the actual -- the falsity of his or truth of
21 his testimony is one of the issues that we are seeking to, you
22 know, impeach him for. But the falsity, factual falsity, is
23 not even necessarily the main purpose of impeachment.

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1 Impeachment serves many, many -- there are many other angles
2 of attack other than sort of proving what he said was false.

3 Typically, you know, the witness says what he says,
4 you impeach his credibility; here's the reasons why an
5 individual in the position of a panel member would not believe
6 this witness, whatever he's saying, or -- and under the
7 circumstances. I mean, demonstrating falsehood is one way of
8 attacking credibility, but explain -- you know, showing that
9 coercive and manipulative forces brought to bear on the
10 detainee, the witness, before he took the stand is another way
11 that doesn't go to falsehood.

12 Apart from that -- thank you. Apart from that,
13 false -- you know, part of the purpose of the deposition under
14 the court's ruling on the motion, the original request to
15 treat the deposition as also going to the issue of
16 voluntariness is -- is voluntariness, and falsehood is not
17 part of the standard for suppression. Blackburn v. Alabama,
18 361 U.S. at 206, says that, you know, "The Fourteenth
19 Amendment," I'm quoting, "forbids fundamental unfairness in
20 the use of evidence, whether true or false."

21 And so leaving aside everything else, to the extent
22 that this question goes to voluntariness, the
23 cross-examination, we're -- you know, the -- the -- the

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1 statement that we haven't shown that the statements are false
2 is -- is simply irrelevant. And I'm not even -- I'm not even
3 mentioning how we're supposed to show that it's false until we
4 have the means we need to show that it's false.

5 Okay. The second -- the second Bresnahan factor is
6 what the expert assistance would accomplish for the accused.
7 In a case like this, I mean, we -- we are certainly -- you
8 know, we're going to -- we're prepared to do the best we can
9 with the strategies, the cross-examination strategies that we
10 have come up with. But again, we really -- we do not know
11 what we do not know. And in a case of this, you know,
12 incredibly complex interrogation record, it is highly likely
13 that an expert would give us new lines of attack and insight
14 about how to attack Mr. al Darbi's credibility given his
15 traumatic experiences after his capture and given everything
16 that followed.

17 And there is -- the government's claim here in
18 response in their brief is that there has been no showing, and
19 I'm quoting the government, no -- why an expert on police
20 interrogation tactics would accomplish more than a reasonable
21 defense team could with some further research on the issue.

22 The answer to that in part is contained in footnote
23 44 of our initial brief, AE 090J, the lengthy, more than

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1 half-page footnote listing a small fraction of the academic
2 literature that's been devoted to this. You know, we -- it is
3 an academic specialty; it is a recognized area of expertise.
4 We have other things to do than obtain Ph.D.s in the interim
5 in order to conduct the cross-examination. It will accomplish
6 an enormous saving of time, you know, vis-a-vis our ability to
7 actually prepare ourselves. So I think it's clear under the
8 second factor what the expert assistance would accomplish for
9 the accused.

10 And the third standard is -- the third element of the
11 test is why the defense counsel were unable to gather and
12 present the evidence that the expert assistance would be able
13 to develop. And again, the response to this is very much
14 along the lines that I just said. The government sort of
15 boldly asserts that we haven't made the required showing. The
16 required showing I think is clear on the record and in our
17 brief and in the -- in the level of expertise that is
18 appropriate in order to effectively cross-examine
19 Mr. al Darbi.

20 And finally, because of the late hour and because of
21 the commission's scheduling of the deposition for --
22 presumptively for this session, I have to speak to the timing
23 of -- of our request for assistance. We -- we submitted a --

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1 our original expedited request to the convening authority on
2 24 May 2017, some seven, eight months ago. Now, because the
3 convening authority staff failed to notify the defense of the
4 denial, which occurred within 30 days or so, we did not learn
5 of that denial until six weeks later, on 7 July 2017.

6 Immediately thereafter, five days later, 12 July, we filed our
7 ex parte motion to compel funding, believing that ex parte
8 treatment was -- was appropriate under the circumstances.

9 On 21 July, the commission ordered the convening
10 authority to entertain the request on an ex parte basis.
11 There was a little bit of additional delay caused by more
12 confusion in the convening authority's office, and on 1 August
13 the convening authority denied the request on the merits.
14 Three days later, 4 August, we filed our second ex parte
15 motion to compel funding, AE 090F. And on 9 August, the
16 commission denied AE 090F on the grounds we needed to file it,
17 the procedural grounds that I mentioned earlier, that we
18 needed to file in the commission a non-ex parte pleading,
19 which we promptly did within a couple of weeks.

20 So in August 20 -- on August 30, 2017, we filed the
21 motion that's at issue here, AE 090J.

22 We have -- in short, we have been requesting
23 expedited funding based on the enormous number of discovery

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1 documents that have continued to trickle in from the
2 government, in order to get this deposition done right,
3 expedited funding for Professor Leo, and we now find ourself
4 arguing this motion, presumptively based on the court's
5 scheduling order, a few days prior to the deposition itself.

6 We -- we strongly request -- in fact, we insist, if I
7 may, that the decision on Mr. Al-Tamir's entitlement to
8 Professor Leo's assistance not be driven by the currently
9 scheduled date of the cross-examination. I mean, this --
10 this -- if this were a last-minute request, perhaps there
11 would be an argument about waiver. This is the opposite of a
12 last-minute request. And while the timing is -- you know,
13 makes it difficult, the timing should not be a part of the --
14 of either the federal test or the Bresnahan test where the
15 request was made eight months ago. Unless you have any
16 questions ----

17 MJ [Col RUBIN]: No questions. Thank you,
18 Mr. Thurschwell, that was very clear. Thank you, sir.

19 Trial Counsel, government wish to be heard?

20 ATC [MR. SPENCER]: Yes, Your Honor. Mr. Spencer for the
21 government.

22 Your Honor, nothing that the defense just argued was
23 outside of what was already before the commission in the form

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1 of their motion, our -- and their reply. I won't belabor the
2 law analysis, which I argued at length on Monday, and actually
3 addressed every single one of the points that Mr. Thurschwell
4 just made with respect to the law. I incorporate my argument
5 in that session for the commission's consideration.

6 I just want to say a couple of very brief things with
7 respect to what Mr. Thurschwell just said. The preamble that
8 Mr. Thurschwell delivered claiming that this is somehow an
9 incredible situation or remarkable -- "extraordinary," I
10 think, were the words that he used -- is simply not the case,
11 Your Honor. There is nothing unusual about the possibility of
12 coerced testimony from a witness that was coerced by law
13 enforcement or other entities questioning.

14 And there is nothing unusual or remarkable about the
15 government offering a deal to one co-actor in order to testify
16 and obtain valuable evidence against other co-actor or
17 co-actors in this case since, as the commission is aware,
18 Mr. al Darbi has already provided deposition testimony both in
19 this case as well as the case of United States v. Nashiri.

20 So there is nothing unusual about that situation,
21 Your Honor, where the -- you know, it takes a bad guy to catch
22 a bad guy is one way to phrase it. But in this case there is
23 certainly vast disparities between the criminal culpabilities

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1 of Mr. al Darbi versus the witnesses against which he is
2 testifying. There is nothing unusual about that at all,
3 Your Honor.

4 Mr. al Darbi has been represented by counsel since
5 2008. All of that was part of the ongoing negotiations. This
6 is not in any way relevant to whether the defense needs an
7 expert or doesn't need an expert.

8 I'll briefly touch on it, even though I did it more
9 in detail with the 2009 change, Your Honor, strictly to say
10 that the government agrees with the 9/11 Commission's ruling
11 that it was to correct deficiencies in the due process
12 afforded to accused in military commissions. That was the
13 basis. It's fairly common knowledge, we have acknowledged
14 that many times, that the basis for the 2009 change was to
15 improve the system and afford the accused in a military
16 commission more due process rights than they previously had.

17 That doesn't change the underlying analysis. And in
18 fact, if anything, it bolsters the government's position that
19 the purpose of that addition was to clarify or augment and
20 explain what still exists under both the statute and the rule
21 as the rule implemented in 703, 703(a), mirrors the 2009
22 versions of the statute exactly, in that the defense, unlike
23 the military courts-martial system, does not have the

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1 identical or equal opportunity with the prosecution.

2 In the military courts-martial system, as Your Honor
3 is well aware, the rule states that there's equal opportunity
4 for defense and the prosecution. That was retained in the
5 2009 statute. And the clarification, if anything, is to adopt
6 the military courts-martial comparison to show that, yes, it's
7 more due process than he has before, it's comparable with what
8 the military courts-martial system offers in terms of
9 comparable or substantially similar due process rights. It
10 has nothing to do with procedure, Your Honor. And that's all
11 I will belabor on the law point.

12 With respect to what I have termed on Monday as the
13 Gonzalez test, the Gonzalez test, as the commission knows, was
14 the seminal original explanation of what equals necessity
15 under Garries. Now, subsequent courts have -- have
16 readdressed the issue or adopted the Gonzalez test. The
17 convening authority in his response and Mr. Thurschwell in his
18 argument refers to Bresnahan and others. I will continue to
19 call it the Gonzalez test for the sake of this discussion,
20 Your Honor, because that's the -- that was the seminal case in
21 this line of cases.

22 So specific to the question of whether for this
23 expert -- different from what we argued on Monday, whether

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1 this expert meets the prong -- the three prongs of the
2 Gonzalez test, Your Honor, the defense has still failed to
3 present any evidence of what he -- what drives the need for
4 this expert. The only attachments in their motion are CVs and
5 e-mails.

6 Now, if the defense had asked the commission to
7 incorporate knowledge that the commission or that the military
8 judge has obtained -- had obtained as part of his duties as
9 the deposition officer, that would be an interesting request,
10 to say the least. But certainly, as you know, having acted as
11 the deposition officer for the first phase of Mr. Darbi's
12 testimony, Mr. Darbi testified in some detail about his
13 mistreatment at the hands of the U.S. Government, as he
14 characterized -- I don't know that he characterized it in our
15 deposition as torture; he certainly has previously
16 characterized it as torture or as mistreatment or other ways
17 of saying that he was not treated as he had wished to be
18 treated.

19 Now, whether that's true or not doesn't really matter
20 for the sake of this discussion, Your Honor. However, the --
21 and the government hasn't -- has conceded that there was
22 certainly allegations of mistreatment. As we know, there was
23 a guard that was court-martialed over it.

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1 The issue is, does -- was his will to -- or was he
2 influenced, such that he would give false testimony as a
3 result of that alleged mistreatment. So the defense can say
4 all day long that, well, this is not about the falsity or the
5 truthfulness of his testimony. That's exactly what it's
6 about. Testing his credibility, suggesting that he's lying
7 because he was mistreated by the U.S. Government, is precisely
8 what the defense hopes to achieve by questioning the
9 accused -- the witness, Mr. Darbi, on this matter.

10 That in and of itself, as the convening authority
11 made clear, that's not a novel argument either; that's not a
12 novel line of questioning. The defense does not need a Ph.D.
13 in cross-examination to explore at length, as I am sure
14 they'll have the opportunity to do, any mistreatment or
15 coercion that may have resulted in Mr. Darbi testifying to
16 what he testifies either on direct or in cross-examination.

17 Mr. Darbi, as you may recall on direct examination,
18 made clear multiple times that, yes, he gave less information
19 at some point, and I'm sure this will be explored further --
20 explored further in cross and redirect. I will be careful
21 what I say since I am aware that Mr. Darbi is in the room, so
22 I don't want to put words in his mouth. But that issue as to
23 how his testimony changed, what -- why that testimony changed,

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1 or why the testimony was even given in the first place, the
2 defense will have ample opportunity to explore that.

3 That is not, again, a novel line of questioning.
4 Your average third-year law student could probably make the
5 same -- the same questions. The defense has all the facts
6 that they need to ask those questions. So nothing that --
7 that the -- that Dr. Leo could offer would assist them as a
8 practical matter in formulating questions about mistreatment
9 and how that impacted.

10 Now, might Dr. Leo's testimony be desired by the
11 defense on a motion for suppression? Possibly. The
12 government doesn't concede that it's necessary, and this is
13 not a motion to compel a witness for a suppression motion.
14 This is a motion by the defense to compel a government --
15 a defense -- I'm sorry, a consultant, Dr. Leo, to consult with
16 them prior to their ability to cross-examination --
17 cross-examine the witness. And, Your Honor, that's -- that's
18 just simply an absurd argument.

19 They can cross-examine him. They have all the facts.
20 They have his testimony from the Nashiri case where he
21 testified in even more detail about his mal -- mistreatment at
22 the hands of the government and how that -- and they can
23 explore fully with him how that impacted his testimony, if at

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1 all. Again, I'm being cautious, given that Mr. Darbi is
2 observing.

3 Nothing that Dr. Leo could offer would assist them
4 beyond what they should already be capable of doing with
5 minimal competency levels and minimal research. Would his
6 assistance or testimony be helpful in the context of
7 suppression? Potentially. Again, the government doesn't see
8 that it's -- it meets that standard either, and we can
9 certainly argue that at a later date when we file a
10 suppression.

11 Coming back to the truthfulness question, though,
12 that ultimately is what the defense wants to say, that it's --
13 you can't accept what he's saying is truthful because he was
14 coerced. And we'll get -- we'll flesh that out in far more
15 detail in the suppression motion, I'm sure. Other than, at
16 this point, to remind the commission that much of what
17 Mr. Darbi testified to corroborates other evidence in this
18 case -- I won't describe what that other evidence is -- we can
19 certainly talk about the reliability of his testimony in a
20 suppression context.

21 The defense is trying to confuse the two for --
22 because it obviously helps them make their argument. But this
23 is completely separate from the suppression. The commission

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1 has already recognized that issue in ruling that their
2 questions that are only suppression specific for Mr. Darbi
3 will be done separately from the testimony preservation piece
4 of it of the deposition.

5 Your Honor, subject to your questions, I won't
6 belabor the point. I'm happy to answer questions.

7 MJ [Col RUBIN]: No additional questions.

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

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

10 Mr. Thurschwell, I'll give you the last word on this
11 one.

12 ADC [MR. THURSCHELL]: Thank you, Judge. Quickly, I'm
13 confused -- I mean, well, I don't think I am confused, I think
14 the government is confused. This is a -- this is related to a
15 motion to compel -- I'm sorry, a motion to suppress testimony.
16 I mean, we -- the request for Mr. -- Professor Leo's
17 assistance is for the whole purposes of the deposition.

18 The -- the -- the question of the cross-examination
19 is immediately relevant to the suppression aspect, too, and
20 the voluntariness and the effect of the interrogation
21 techniques goes to voluntariness at the end of the day also.

22 I mean, and -- so I'm confused why the government
23 thinks that this is not about the suppression motion; it very

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1 much is. It's going to be too late for us to employ his
2 expertise as a consultant in eliciting the most relevant
3 testimony about suppression if the witness has left the
4 country by the time we get Professor Leo's services. So the
5 government is confused about that.

6 On three more hopefully quick points, the government
7 argues again, essentially with respect to Section 949j(a)(1)
8 and the addition of the comparable-to-Article-III-courts
9 language, I'm still -- I don't understand how they get from
10 comparable to Article III courts, which is what Congress said
11 in the statute, to what Congress meant was comparable to
12 military courts under the Uniform Code of Military Justice.
13 That is what Mr. Spencer just argued to you, and it's flatly
14 inconsistent with the statutory language. I mean, if the
15 statutory language means something, and it has to, then it's
16 talking about federal court practice, not military court
17 practice in the UC -- under the UCMJ.

18 Second, there was a statement that we have failed to
19 attach exhibits and otherwise document the -- our need for the
20 assistance. And, Judge, I just -- I refer you to the
21 exhaustive documentation of the number of pages, the number of
22 interrogations, the other kinds of statements that we have
23 either attached or referred to or explained in the vast number

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1 of AE 070-related discovery litigation and other kinds of
2 litigation. To say that we haven't shown on the record that
3 this is an enormously complex case unlike any other, I think
4 just -- it blinks reality.

5 And finally, I just want to say again, the
6 government's -- this is a consistent pattern on the
7 government's part. The government is asking the commission to
8 assume that Mr. al Darbi is telling the truth, then say we
9 have not shown that he's not telling the truth or he's not
10 unworthy of belief, and using that as an argument for denying
11 us the resources we need to make the showing that they say we
12 haven't made. And this sort of consistent "take our word for
13 it, we're the government" approach to litigation, this is one
14 more aspect of that.

15 And I just -- it can't mean what -- the right to
16 expert assistance under the rules, under the statute, can't
17 mean that the fact that you haven't yet shown what you could
18 show with an expert is a reason to deny you -- giving you the
19 expert.

20 And that's all I have unless you have questions,
21 Judge.

22 MJ [Col RUBIN]: No additional questions. Thank you,
23 Mr. Thurschwell.

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1 Mr. al Darbi and counsel, are they present?

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

3 MJ [Col RUBIN]: All right. Counsel, I'd like to pick up
4 where we left off Wednesday afternoon regarding oral argument
5 on AE 096. Lieutenant Commander Young, if you would step
6 forward.

7 Counsel, the time I have is 11:40. I believe I
8 understand the defense's position, the government's position,
9 and Mr. al Darbi's position. Otherwise, I am going to give
10 you a few minutes. I am going to end today's session at noon
11 as requested by the defense. So Lieutenant Commander Young, I
12 am going to give you a few minutes, but I still want to give
13 the defense an opportunity to have the last word on this. So
14 if you would be brief, and pick up as you deem appropriate.

15 ADC [LCDR YOUNG]: Thank you, Your Honor. Your Honor, on
16 Wednesday, for the first time in oral argument, the defense
17 raised the possibility of waiver of the privilege because
18 Mr. al Darbi had entered a declaration of Dr. Porterfield.

19 Because we weren't on notice of that argument, we
20 didn't have evidence available at that moment, but I do have
21 two documents that I would like to submit to the commission
22 for consideration. One is AE 369KKK in U.S. v. Nashiri. It's
23 the order of that commission releasing Mr. al Darbi's mental

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1 health records to us on the 22nd of August.

2 Dr. Porterfield's declaration was signed on the 9th
3 and then the second document is a declaration of our lead
4 paralegal certifying that, prior to that order and the
5 subsequent receipt of those records, we did not have
6 possession of any of Mr. al Darbi's mental health records.
7 Just to make sure we put that issue to the bed.

8 MJ [Col RUBIN]: Thank you.

9 ADC [LCDR YOUNG]: May I provide these to the court
10 reporter, Your Honor?

11 MJ [Col RUBIN]: Yes. After we conclude with today's
12 session, you may, yes.

13 ADC [LCDR YOUNG]: Thank you, sir.

14 Your Honor, as we discussed on Wednesday, the records
15 are privileged, the defense has conceded that. This means
16 that the burden of justifying in camera review and disclosure
17 rests on the defense. The defense has not met that burden
18 because they have not shown you any evidence, no specific
19 factual basis that demonstrates a reasonable likelihood that
20 the privileged records would yield relevant evidence that is
21 releasable under a specific exception to the M.C.R.E. 513, nor
22 have they shown that any such evidence, even if present, would
23 not be cumulative of evidence already available to them and in

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1 their possession, or that they have made reasonable efforts to
2 obtain the same or substantially similar information from
3 unprivileged sources. That's the Klemick standard.

4 Zolin tells us that the evidentiary showing necessary
5 to justify disclosure is higher than that necessary to justify
6 in camera review. It therefore follows that if the defense
7 has not met their burden to justify in camera review, they
8 have not met the burden for disclosure.

9 Your Honor, should, after all this hearing, the court
10 disagree with our position and believe that some disclosure is
11 necessary, we would request that the commission carefully
12 consider Rule 513(e)(4) and (5). Those sections taken
13 together clearly signify the intent that the disclosure made
14 shall be the narrowest possible disclosure.

15 Your Honor, also on Wednesday, while we were in
16 session, we filed AE 096I, requesting that if the commission
17 order any disclosure of Mr. al Darbi's privileged mental
18 health records, that because of the unique circumstances that
19 we find ourselves in here, where we have no independent access
20 to those records, an exact copy be provided to us so that we
21 are aware of the extent to which Mr. al Darbi's privilege has
22 been invaded.

23 Finally, Your Honor, obviously there has been a

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1 significant break between when we left off on Wednesday and
2 today, and we certainly believe that the defense, as zealous
3 advocates for the client, may have, hearing my argument, come
4 up with certain new arguments. If there is anything new
5 advanced in their rebuttal or subsequent filings, we would
6 request the opportunity to respond.

7 Your Honor, I have nothing further, but we would
8 welcome the opportunity to address any questions you may have
9 on this issue.

10 MJ [Col RUBIN]: No questions. Thank you, Lieutenant
11 Commander Young.

12 ADC [LCDR YOUNG]: Thank you, sir.

13 MJ [Col RUBIN]: Major Miller, any additional comments
14 from the defense?

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

16 Your Honor, first I will address some of the comments
17 that the government made in its original argument and then I
18 will address the comments from Mr. al Darbi's counsel.

19 With respect to the government's arguments,
20 Your Honor, first the government asserts that a walled-off
21 attorney conducted a review of the records; however, the
22 government, in answer to your question, could not say whether
23 that walled-off attorney determined that the information is

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1 privileged.

2 Nor can the government explain how a walled-off
3 attorney can effectively determine what is and what is not
4 discoverable in a case in which he or she is not intimately
5 involved.

6 The defense has filed several motions to compel over
7 the last year regarding Mr. al Darbi. The military commission
8 has determined that some of that information had to be turned
9 over to the defense despite the government's arguments that it
10 wasn't relevant and discoverable. I specifically mention this
11 to highlight that if the prosecutors, who are intimately
12 familiar with this case, can get it wrong with regards to
13 what's discoverable and what's relevant, then surely a
14 walled-off attorney is not in the best position to make that
15 determination either.

16 Therefore, an in camera review -- first of all,
17 production, but, at the very least, an in camera review is
18 warranted in this case, Your Honor.

19 Now, with respect to -- and, I'm sorry, before I go
20 on to Mr. al Darbi's counsel's arguments, I would like to
21 point out that the government agrees that an in camera review
22 is appropriate in this case. They have different rationale,
23 but they do agree that an in camera review is appropriate.

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1 Now, with respect to Mr. al Darbi's counsel's
2 arguments, Your Honor, I am not sure exactly what I stated
3 with respect to the privilege before we ended. Our client was
4 not feeling well and I did cut down some of my argument to get
5 him out of here, but let me clear up a couple of things for
6 Mr. al Darbi's counsel.

7 It is the defense's position that M.C.R.E. 513
8 applies to detainees. There is a privilege for detainees to
9 exercise with regards to psychotherapy patient privileged
10 records. However, the defense has not seen those records,
11 Your Honor, so there is no way that the defense can say those
12 precise records are privileged. So when Mr. al Darbi's
13 counsel stood up here and said that the defense has already
14 admitted that those records are privileged, that's a factual
15 impossibility. We have not seen them.

16 Not only that, Your Honor, but I believe Commander
17 Young just referred to an order handed down in the Nashiri
18 case in which the military -- excuse me, let me just cite to
19 it. It's AE 369KKK, in which Colonel Spath, the military
20 judge in that case, conducted an in camera review of the
21 mental health records related to Mr. al Darbi. And while
22 conducting that review ----

23 MJ [Col RUBIN]: Just let me interrupt you. That's not

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1 going to influence how I view this case, what another military
2 judge did in a separate case.

3 ADDC [Maj MILLER]: And that's okay, Your Honor. I just
4 wanted to point out that, with regards to that case, he
5 determined that some of the records contain psychotherapy
6 patient privileged records and some didn't.

7 MJ [Col RUBIN]: Defense Counsel, again, I am not going to
8 consider what was done in a different case, so don't give me
9 information from that case unless it's in front of me
10 factually here.

11 ADDC [Maj MILLER]: Yes, Your Honor. I apologize. I
12 thought -- Commander Young handed that to me, so I thought he
13 had specifically addressed it for the commission. But with
14 respect to whether or not the defense has claimed a privilege,
15 has said that those records are privileged, we obviously could
16 not because we have not seen them. As it stands right now,
17 the only person who has seen those records is the walled-off
18 attorney who has not made that determination himself or
19 herself.

20 During the -- Mr. al Darbi's counsel's main argument,
21 they also said that these records are not in the possession of
22 the government and, therefore, are not discoverable. However,
23 that's also incorrect, given that a walled-off attorney has

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1 possession of these records and has supposedly reviewed them.
2 They are, therefore, in the possession of the government.

3 And, Your Honor, even assuming that the privilege
4 does apply to these specific records, counsel for Mr. al Darbi
5 would have this commission believe the SECDEF did not change
6 the M.C.R.E.s to reflect Klemick without a shred of proof.
7 Your Honor, as they mentioned during their original argument,
8 that yes, the President of the United States changed the
9 Military Rules of Evidence 513 to reflect the Klemick
10 standard. However, the Secretary of Defense specifically did
11 not change the Rules for Military Commission with respect to
12 513.

13 It is Mr. al Darbi's counsel's position that, oh, we
14 are just supposed to assume that the Secretary of Defense
15 wanted Klemick to apply and just didn't change the rule.
16 However, that's illogical, one, because they didn't provide
17 evidence of that; and two, the court-martial -- military
18 court-martial rules do not necessarily apply to the military
19 commissions. They're instructive, but there are differences
20 in the military commissions standards and the Military Rules
21 of Evidence in a court-martial.

22 So the fact that the Secretary of Defense
23 specifically mirrored M.R.E. 513 word for word with the

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1 exception of the Klemick standards, this commission should
2 take that to mean that the Klemick standards do not apply in
3 the military commissions.

4 Even assuming that the Klemick standards apply,
5 Your Honor, the defense has met all -- excuse me, all the
6 standards with regards to that. Specifically, the first
7 factor is did the moving party set forth the specific factual
8 basis demonstrating that -- a reasonable likelihood that the
9 information would yield admissible evidence under 513, and
10 we've put forth that we did do that under number 8,
11 Your Honor.

12 The admission or disclosure is required to advise --
13 to avoid an adverse effect on the integrity and fairness of
14 the proceeding. The military judge has already authorized the
15 defense to question Mr. al Darbi with regards to the treatment
16 that he has -- excuse me, the treatment that he went through
17 with regards to his interrogation. It goes directly towards
18 the voluntariness of his statement, as Mr. Thurschwell has
19 already stated in his previous argument, as well as the
20 veracity of the testimony and the weight that the members
21 should give that testimony.

22 As it stands right now, the defense has no way of
23 assessing the impact of the torture, as Mr. al Darbi has

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1 described it, because we have no records of the psychological
2 trauma that he endured.

3 Your Honor, from unprivileged sources, we know that
4 Mr. al Darbi was prescribed psychological or psychiatric
5 medications, so it's reasonably likely, under number 8 of 513,
6 that he was prescribed that medication as a direct result of
7 the torture he endured.

8 Also, Mr. al Darbi's counsel made it a point of
9 saying that the defense has not shown that the psychological
10 records are somehow connected to the treatment that he
11 sustained. However, as Mr. al Darbi's counsel has argued in
12 his own case, they submitted a motion to suppress statements.
13 And in that motion to suppress statements, they connected the
14 interrogations to his mental health outcome, I guess the
15 mental health situation that he suffered as a result of the
16 treatment. So I think it's very evident that the psychiatric
17 trauma, the psychological trauma that Mr. al Darbi has
18 endured, is a direct result of the torture.

19 Your Honor, with respect to the second Klemick
20 factor, the psychological records or the psychiatric records
21 are not cumulative in nature, contrary to what Mr. al Darbi's
22 counsel would have this commission believe. Yes, Mr. al Darbi
23 has made statements with regards to his torture. He has made

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1 a declaration, Your Honor. He says he feels anxious,
2 depressed, and worried. But it's one thing for a layperson to
3 say they feel anxious; it's another thing for a psychiatrist
4 to say that they have an anxiety issue.

5 Mr. al Darbi also says he suffers personality
6 changes. It is one thing for a layperson to say they have
7 mood swings or suffer personality changes; it is another thing
8 for a psychiatrist to say they have a personality issue with
9 respect to the actual educational background that a
10 psychiatrist would have, Your Honor. So it's not cumulative
11 to get the actual psychotherapy notes, psychotherapy records,
12 even though Mr. al Darbi has made statements about how he
13 feels as a result of the torture.

14 And with respect to the third factor under Klemick,
15 whether or not the defense has attempted to gather this
16 information from nonprivileged sources, Your Honor, we have.
17 We have pharmaceutical records; however, in the pharmaceutical
18 records that the defense has, those records conflict with what
19 Mr. al Darbi has said. Specifically, those records say that
20 there are no psychiatric records. The pharmaceutical records
21 say there are no psychiatric records. We know for a fact that
22 there are psychiatric records.

23 So now, based on our nonprivileged information that

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1 we have, there is a direct conflict with what's actually the
2 case and what's actually a factor. So, yes, the defense has
3 tried to get nonprivileged information regarding this
4 situation, and the nonprivileged information that the defense
5 has in its possession contradicts the fact that there even are
6 records that exist.

7 So in conclusion, Your Honor, there are eight primary
8 reasons -- and I'll just run through them -- as to why
9 production or, at the very least, in camera review are
10 warranted, the first one being no one has determined whether
11 these specific records are even privileged. No one is in a
12 better position to do that than the military judge. Third,
13 the ongoing effects of the treatment Mr. al Darbi endured is
14 discoverable with respect to his voluntariness of his
15 statements, as well as his motivations to fabricate and the
16 veracity of his statements. Four, the government, although
17 disagreeing with the defense's rationale, supports in camera
18 review. Five, even if the records are privileged, the defense
19 has met the Klemick standards. And six, SECDEF intentionally
20 excluded the Klemick standards from 513, even though he had a
21 chance to revise them, just as the President revised the
22 Military Rules of Evidence. And seven, Mr. al Darbi's counsel
23 has not presented any evidence that the Klemick standards

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1 should be applied or that that was Secretary of Defense's
2 intent. And even if it was, the defense has met all the
3 standards, Your Honor.

4 And pending any questions from you, that's all I
5 have.

6 MJ [Col RUBIN]: No additional questions from me.

7 Lieutenant Commander Young, I'm going to give you two
8 minutes if you want to respond.

9 ADC [LCDR YOUNG]: Your Honor, that wasn't exactly a
10 rebuttal argument. That's a significant shift of position
11 from the defense's pleadings and their oral argument on
12 Wednesday. I will do the best I can with two minutes, but let
13 me start by pointing to page 6 of AE 096D, at which it says,
14 at the very beginning of paragraph 3, "The defense
15 acknowledges that Mr. al Darbi's psychiatric records are
16 privileged," period.

17 So I'm not clear on whether or not the defense has
18 just completely shifted its position or not. But it sounds as
19 if they are now raising, for the first time, the issue -- the
20 threshold issue of whether or not these records are
21 privileged.

22 Now, when we filed our initial response back in
23 August, in a footnote we stated, "It does not appear that

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1 anyone is challenging the existence or applicability of the
2 privilege at this point; however, if that becomes an issue, we
3 request the opportunity to further develop that." We said
4 that in August, Your Honor. The defense filed this response
5 acknowledging that the records are privileged; and now, today,
6 it appears that they're shifting their ground.

7 And if that burden is going to be placed on
8 Mr. al Darbi to demonstrate that his privilege even exists and
9 applies, it's only fair to give him the opportunity to further
10 develop that by briefing and evidence.

11 However, Your Honor, we would note that the defense's
12 request was specifically for the mental health or
13 psychotherapy records of Mr. al Darbi. And if you look at
14 M.C.R.E. 513, it actually defines what you are supposed to be
15 considering for production or admission. In 513(b),
16 subparagraph 5, it says, quote, Evidence of a patient's
17 records or communications is, among other things, patient
18 records that pertain to communications by a patient to a
19 psychotherapist, or assistant to the same, for the purposes of
20 diagnosis or treatment of the patient's mental or emotional
21 condition. And when you read the procedures set forth in
22 Rule 513(e), it makes it clear that the procedures for
23 disclosure govern this evidence of records or communications.

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1 Your Honor, with regard to the Klemick standard, it's
2 not evidence; it's a rule of statutory construction: Where
3 the legislature or the regulatory authority has issued a rule
4 and court decisions have already interpreted that rule in a
5 similar setting or subsequently interpret that rule and the
6 regulatory authority does not change the rule, the issuing
7 authority is presumed to be aware of the court decision and to
8 approve its result.

9 Military commission -- the Manual for Military
10 Commissions was first issued in 2007, one year after the
11 decision in United States v. Klemick. And M.C.R.E. 513 has
12 remained substantially unchanged ever since, through revisions
13 in 2010, 2012, and 2016. The fact that the Klemick standard
14 was incorporated verbatim into the Military Rule of Evidence
15 should only add weight to its applicability, showing that the
16 President found it particularly appropriate to apply to these
17 situations. That should not be read to deprecate its
18 application here.

19 Your Honor, I would point out that in connection with
20 the motion to suppress in Mr. al Darbi's previous ----

21 MJ [Col RUBIN]: Just a second.

22 Commander Cooper.

23 DC [CDR COOPER]: I'm sorry, Your Honor. I don't mean to

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1 interrupt, but Mr. Al-Tamir is almost past his breaking point.

2 MJ [Col RUBIN]: Okay. Lieutenant Commander Young, I'm
3 going to cut you off at this time.

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

5 MJ [Col RUBIN]: I understand the position from
6 Mr. al Darbi.

7 Counsel, we are going to wrap it up. Just a few
8 matters. Trial Counsel, by close of business tomorrow, I want
9 a declaration filed as to why the doctor needed to testify
10 anonymously today. Just file that declaration.

11 Trial Counsel, where are we from the government's
12 perspective on a 505(h) hearing? Can we do one this
13 afternoon? Sometime tomorrow? Where are we at, Lieutenant
14 Commander Lincoln?

15 ATC [LCDR LINCOLN]: Your Honor, one today would not -- we
16 would not want today. Perhaps I think tomorrow is looking
17 better, but maybe we could have a brief 802 after this to
18 discuss the way ahead all over.

19 MJ [Col RUBIN]: All right, very well, we will.

20 Counsel, I propose we are back on the record
21 tomorrow. I am open to whether 0-8 or 0-9 is better.

22 DC [CDR COOPER]: One moment, Your Honor. 0-9,
23 Your Honor.

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1 MJ [Col RUBIN]: 0-9. Trial Counsel, 0-9?

2 ATC [MR. SPENCER]: Your Honor, the government would
3 request that we begin at 0-8. I believe that four hours is
4 still a sufficient length of time and would get us out before
5 the prayer time so as to not cause any conflict.

6 MJ [Col RUBIN]: Very well. I tend to concur, 0-8 seems
7 to work better for the schedule, so I am going to put the
8 commission in recess until 0-8 tomorrow afternoon [sic],
9 that's Monday, 5 February.

10 ATC [MR. SPENCER]: Your Honor, may I briefly be heard, 30
11 seconds on one issue?

12 MJ [Col RUBIN]: Yes.

13 ATC [MR. SPENCER]: In the event that the accused is not
14 feeling well tomorrow morning, it will be the government's
15 position that, in light of the doctor's testimony today, that
16 that decision not to come to court would be a voluntary one
17 and that we would proceed forward without his presence.

18 MJ [Col RUBIN]: I would say, before I even make that
19 decision, I am going to want to hear from the SJA and from the
20 SMO. It's a bit day by day, isn't it?

21 ATC [MR. SPENCER]: Yes, sir, potentially. I mean, that's
22 true if the facts change dramatically.

23 MJ [Col RUBIN]: Exactly. I don't know if there is an

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1 accident, an incident that changed, so be prepared, if the
2 accused does not show up tomorrow, I am going to want to hear
3 from the SMO -- first of all, the SJA that he was aware of
4 today's session, which I believe.

5 Sir, you understand there is a session of the
6 commission tomorrow? I am addressing the accused right now.

7 ACC [MR. HADI]: I will do my best to come, hopefully.

8 MJ [Col RUBIN]: Very well. Mr. Hadi, there is a session
9 tomorrow at 0-8. I expect you to be here tomorrow. I
10 understand situations may change, but you are expected to be
11 here. Do you understand?

12 ACC [MR. HADI]: [In English] I understand, sir.

13 MJ [Col RUBIN]: Thank you.

14 ADC [MR. THURSCHELL]: Judge, we will want an opportunity
15 to be heard about accommodations in light of the
16 neurosurgeon's testimony, and we will have -- there will be
17 argument and objection to any treatment of a -- Mr. Al-Tamir's
18 inability to come to court tomorrow, should that happen, and
19 we don't anticipate it, as a voluntary waiver. That would be
20 inconsistent with not only the rules and the Constitution, but
21 I think also the specific order addressing waiver in this
22 case. But we can discuss that if and when it comes up.

23 MJ [Col RUBIN]: Agreed.

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1 Counsel, everyone, the commission is in recess until
2 0800 on 5 February.

3 [The R.M.C. 803 session recessed at 1204, 4 February 2018.]

4 [END OF PAGE]

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