

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 277O</p> <p>Government Response To Defense Motion For Appropriate Relief: Order Appropriate Protocols In Administering Court-Ordered Magnetic Resonance Image</p> <p>2 October 2015</p>
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1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The government respectfully requests the Commission deny the relief requested in AE 277N.

3. Overview

The defense motion is not necessary. This Commission—in fact, all judicial bodies—should consider matters that are both ripe and require intervention. Neither applies to the present motion. Following an order by this Commission for the Convening Authority to provide the accused with a magnetic resonance image (“MRI”), the defense submitted a recommendation memorandum to the Convening Authority suggesting different MRI machines and protocols. Prior to the Convening Authority taking action, the defense contacted the government to conference the present motion. The government has confirmed with the Convening Authority that the Convening Authority is treating the memorandum as a request for resources, is addressing the request, and plans to respond. Rather than wait for the Convening Authority to

respond, the defense filed the present motion requesting the Commission order the defense-proposed recommendations, which only vaguely describe a range of MRI machines and protocols. The Commission should decline to intervene, and allow the process to run its course, specifically to allow the Convening Authority to provide an MRI machine and protocol, akin to providing any other competent expert assistance.

The defense also prematurely requests the Commission preemptively order Commander, Joint Task Force-Guantanamo (“JTF-GTMO”) to follow a set protocol for administering the MRI. However, the defense failed to even submit a proper request to Commander, JTF-GTMO regarding the procedure for the MRI, thus pre-empting Commander, JTF-GTMO, from evaluating the request in accordance with his mission and responsibilities. The Commission should decline to intervene in these requests as the appropriate procedural steps have not been followed; the defense requests are premature; and there are no relevant facts such that the Commission should entertain entering the province of Commander, JTF-GTMO.

Accordingly, the Commission should deny the defense motion in its entirety.

4. Burden of Proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) with multiple offenses under the Military Commissions Act of 2009, 10 U.S.C. §§ 948a *et seq.*, relating to terrorist attacks against the United States and its allies. The accused is charged with the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and the French supertanker MV *Limburg* on

6 October 2002. These attacks resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.¹

On 4 June 2014, the accused filed a motion asking the Commission to order an MRI of the accused's brain. AE 277. On 18 June 2014, the government filed its response opposing the defense request. AE 277A. On 25 June 2014, the defense filed its reply. AE 277C. The motion was argued before the Commission on 6 August 2014. Unofficial/Unauthenticated Transcript ("Tr.") at 5042-75 (Aug. 6, 2014). During oral argument, the Commission suggested, and counsel for the accused conceded, that a necessary step in the process would be for the defense to request expert assistance from the Convening Authority prior to the Commission ruling on the merits of the motion. *Id.* at 5060-62; 5067-69; 5071-73 (Aug. 6, 2014). The Commission then filed its Ruling, AE 277H, on 29 September 2014, formalizing its 6 August 2014 statements from

¹ The Commission dismissed the separate charges relating to the accused's alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, and Charges VII-IX). AE 168G; AE 241C. The government moved for reconsideration of the Commission's order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government's requested relief while modifying the initial Order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. The Order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the attack on MV *Limburg*. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review ("U.S.C.M.C.R."), causing AE 168K/241G to be stayed automatically pending disposition by the U.S.C.M.C.R. On 12 November 2014, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") granted the defense request to stay the proceedings before the U.S.C.M.C.R. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014). On 10 February 2015, the D.C. Circuit heard oral argument on the defense petition for a writ of mandamus and prohibition to the U.S.C.M.C.R. On 23 June 2015, the D.C. Circuit denied the petition and dissolved the stay. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015). On 26 June 2015, the U.S.C.M.C.R. granted the government's unopposed motion to stay the proceedings—suspending oral argument in the first interlocutory appeal and suspending the briefing schedule in the second interlocutory appeal—while the government explores options for re-nomination and re-confirmation of the military judges as U.S.C.M.C.R. judges. Order, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. June 26, 2015). The U.S.C.M.C.R. also ordered the government to keep the Court apprised of "efforts to change the appointment of the military judges" and to "file a motion every 30 days, providing the status of this action and whether the parties request continuation of the suspension of litigation." *Id.* On 18 September 2015, the government filed its third 30-day notice in accordance with the Court's 26 June 2015 and 25 August 2015 Orders and requested the Court maintain the stay to permit the re-nomination and re-confirmation process that is underway to continue. Appellant Motion to Continue the Stay of the Proceedings, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. September 18, 2015).

the bench, specifically finding, “[T]he Defense did not establish the care provided to the Accused is inadequate, nor has it established the Government, as the detaining power has shown a ‘deliberate indifference’ to his medical needs. As such, the request is DENIED.” AE 277H at 2. The Commission further held that because the defense had framed the request as one of discovery, the Commission viewed the request to be for expert assistance, and as such, it was “not properly before the Commission and [was] not ripe for decision.” *Id.* at 2-3.

On 20 August 2014, the defense sent a request to the Convening Authority to “arrange for an MRI of the brain of the accused.” AE 277K, Attach. A at 1. The defense recognized that “providing this resource is quite difficult and probably hugely expensive,” but asked that the Convening Authority “rent an MRI and have it transported to Guantanamo along with a technician to administer the MRI.” *Id.* at 3. No further details describing the particulars of the MRI machine or its capability was provided. On 8 October 2014, the Convening Authority denied the defense request stating that the defense had not demonstrated the necessity for expert assistance. AE 277K, Attach. B at 1. The Convening Authority stated that the accused had access to suitable alternative testing through a computed tomography (“CT”) scan. *Id.* Additionally, the Convening Authority stated that it had funded expert assistance since March 2012 to help the defense perform a comprehensive psychological examination of the accused. Based on the Convening Authority’s denial, the defense filed AE 277K seeking reconsideration of the Commission’s ruling—AE 277H. The government opposed the defense request for reconsideration. AE 277L. On 9 April 2015, the Commission ruled on the issue without requiring additional oral arguments. AE 277M at 2. The Commission stated that while it was “unqualified to determine appropriate testing methods for brain injuries,” it found that the defense had carried its burden of demonstrating the necessity of expert assistance with regard to

use of an MRI machine. *Id.* at 2-4. The Commission ruled that “[t]he Convening Authority will provide the Accused an MRI of his brain for mitigation purposes.” *Id.* at 4.

Following this ruling, on 27 May 2015, the defense submitted a recommendation memorandum to the Convening Authority on its suggestions regarding “the appropriate conditions and circumstances of the MRI that is to be administered to Mr. Al-Nashiri.” AE 277N, Attach. B at 1. The defense stated that it “would be helpful if counsel would be given prior notice to the MRI so that they could advise Mr. Al-Nashiri and alleviate concerns he might have, thereby insuring the process goes smoothly. This is especially important if the United States is going to use a closed rather than an open MRI.” *Id.* The defense also stated that it had “consulted with MRI experts concerning the appropriate images that should be obtained and the type of machine that should be used” and that this action was taken because the defense had “no confidence that the Convening Authority” would provide the appropriate MRI machine or personnel to operate the machine. *Id.* The defense then recommended a range of machines to the Convening Authority. *Id.* (“Ideally the images would be collected on a Siemens 3T (tesla) MRI machine. If a 3T is not available a minimum of a 1.5T machine would be acceptable as well.”). The defense also recommended the specific types of images it desired, in order of importance and ease of collection. *Id.* At the bottom of this list, presumably the least important, and most difficult to obtain, the defense requested a functional MRI, describing it as “not something an average MRI tech would probably be familiar with and [would] requires ancillary equipment that may not be available on a standard, nor-research based, 1.5 or 3T system.” *Id.* The defense then attached thirteen pages of recommended sequence images, but acknowledged that the sequences would be dependent on the specific machine. *Id.* (“These sequences are

specific to a Siemens 3T scanner. If it turns out the scanner being used is a Siemens 1.5T the sequence parameters may need to be slightly modified.”).

6. Law and Argument

The defense fails to provide the Commission with any legal basis to proceed. Tellingly, case law and relevant facts are entirely omitted from the defense motion. And yet, the defense requests the Commission intervene not simply as a military judge, but as a prison warden and an MRI technician. Only one of these responsibilities is attendant to this Commission, but only when an issue is ripe, and when provided with sufficient facts that warrant intervention. No such intervention is required here.

The defense requests four rulings from the Commission: (1) order that specific MRI images be taken in accordance with a defense recommendation memorandum to the Convening Authority; (2) order JTF-GTMO to permit the defense counsel and Dr. Sondra Crosby to meet with the accused prior to and during the MRI to prepare him for the procedure; (3) order JTF-GTMO to permit the defense counsel and Dr. Sondra Crosby to be present with the accused during the MRI; and (4) order that the MRI images be provided only to the defense. AE 277N at 1. The first three requests are premature. While the government does not oppose the fourth defense request, its inclusion by the defense in its motion highlights its deficiency in meaningful motion-conferencing.

I. As Ordered by the Commission, the Defense Is Entitled to a Competent MRI Examination for Mitigation Purposes Only

The government’s original response to the defense request for an MRI scan was that the resources afforded and available to the accused were sufficient for both providing adequate medical care as well as providing mitigation evidence. AE 277A at 3. In its ruling, the Commission agreed with the government that, “[t]he Defense did not establish the care provided

to the Accused is inadequate, nor has it established the Government, as the detaining power has shown a ‘deliberate indifference’ to his medical needs.” AE 277H at 2; AE 277M at 4. The Commission, however, determined that while it was “unqualified to determine appropriate testing methods for brain injuries,” an MRI was warranted, and ordered the Convening Authority to “provide the Accused an MRI of his brain for mitigation purposes.” AE 277M at 4.

The request and order to provide an MRI has been and should continue to be handled in a manner akin to a request and ruling for expert assistance. The Commission has established this approach as the appropriate legal framework throughout this litigation. AE 277H. In directing the defense to first approach the Convening Authority to request an MRI, the Commission stated, “[y]ou are probably not going to get from me any response on the mitigation side of this in a ruling because I think that the process in place is the request for assistance, for expert assistance, technical assistance, confidential assistance, that side of this has to go to the convening authority first.” Tr. at 5072 (Aug. 6, 2014). The Commission ruled similarly: “The Commission [finds] AE 277 to be equivalent to a request for expert assistance” AE 277M at 1-2.

Now that an MRI has been ordered by the Commission in April 2015, and the Convening Authority is actively pursuing providing JTF-GTMO with an MRI, this matter should continue to be evaluated as akin to providing expert assistance to the defense and should be addressed first with the Convening Authority. Under the expert assistance framework, the defense is entitled to a competent MRI scan. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (stating that the defense is entitled only to an expert who is properly qualified, not the expert with the best qualifications). Notably, the right to necessary expert assistance does not include the right to an expert of the accused’s choosing. *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990); *see also United States v. Tornowski*, 29 M.J. 578, 579 (A.F.C.M.R. 1989) (stating that when the defense requests

the government provide a consultant, it has no right to demand that a particular individual be detailed).

The defense now seeks to derail the process for providing MRI expert assistance and asks that the Commission intervene not only prematurely, but unnecessarily. The defense, even before receiving assistance, is already dissatisfied. The defense gives two reasons as the basis for its dissatisfaction: (1) the “constructive denial” of its post-order recommendation memorandum to the Convening Authority; and (2) the opinion of an anonymous medical officer at JTF-GTMO on an issue wholly unrelated to the Commission’s Order. The first reason turns the process of requesting expert assistance on its head. And the second—the opinion of an anonymous medical officer—is irrelevant.

The Commission ruled that a defense-requested MRI was necessary for mitigation purposes. AE 277M. Following this ruling, the defense on 27 May 2015 proactively delivered a memorandum to the Convening Authority. The defense provided its unsolicited opinions, suggestions, and recommendations on the best way for the Convening Authority to fulfill the Commission’s ruling. The defense offered the following explanation to the Convening Authority for why it sent this recommendation memorandum: “[w]e did this because we have no confidence that the Convening Authority has any insight into what kind of MRI machine to obtain and that the Medical personnel at Guantanamo have the Medical personnel at Guantanamo have the necessary training to obtain the necessary training.” AE 277N, Attach. B at 2. The defense now approaches the Commission on the basis of a “constructive denial,” hoping that the Commission will revise its prior order and implement the defense’s suggestions without having received any response from the Convening Authority. The defense’s rationale is problematic on at least four grounds.

First, as stated *supra*, the defense's recommendation memorandum to the Convening Authority and the present motion presume that the defense is entitled to an MRI of its choice. While the defense may have preferences for a specific MRI machine, or for specific images, it does not have a right to demand its preferences within its request for expert assistance. *Tornowski*, 29 M.J. at 579. The Commission should allow the Convening Authority to provide an MRI machine and personnel to produce a standard set of MRI imaging, as described in the original defense request. AE 277.

Second, the request is wholly premature. MRI assistance has yet to be provided by the Convening Authority. The defense cannot assert that what they have received is inadequate MRI assistance when the assistance has not been rendered. Instead, the defense is essentially stating that whatever assistance they obtain will *de facto* prove unsatisfactory. The Commission has ordered that, on top of all of the other neuropsychological mitigation evidence afforded to the accused—to include access to a CT scan and assistance for testing from Dr. Crosby and Dr. Rosenfeld—that an MRI scan be conducted of the accused's brain. The individual that provides this MRI scan will not belong to the prosecution or the defense. The defense will be free to analyze and present the MRI results in a manner it sees fit. If, however, the defense wishes to argue that the MRI scan received does not provide them with the mitigation evidence ordered by the Commission, they can raise such concerns if and when the issue becomes ripe. At this stage of the litigation, however, the government should be permitted to complete its court-ordered obligation to provide the defense with a competent MRI examination.

Third, the defense recommendation memorandum to the Convening Authority is filled with a range of suggestions and recommendations that cannot be “constructively denied.” The defense states, “[i]deally the images would be collected on a Siemens 3T (tesla) MRI machine.

If a 3T is not available a minimum of a 1.5T machine would be acceptable as well. There are four types of imaging we'd recommend collecting, listed both in importance and in ease of collecting." AE 277N, Attach. B at 2. For the specific image sequences, the defense states that "[t]hese sequences are specific to a Siemens 3T scanner. If it turns out the scanner being used is a Siemens 1.5T the sequence parameters may need to be slightly modified." *Id.* at 1. Ultimately, the defense has provided the Convening Authority with its recommendations and opinions on what constitutes an acceptable machine. A fair reading of the defense suggestions appears to indicate that a 1.5T MRI machine is satisfactory. This suggestion, however, is not a specific request which compels the Convening Authority to respond. While an exact machine has not been provided to JTF-GTMO, it is clear that the defense did not originally seek a specific MRI machine, or testing protocols, from the Commission. *See* AE 277; AE 277C; AE 277K.

Circumventing the Convening Authority's role in providing expert assistance and requesting the Commission to preemptively intervene on the Convening Authority's behalf, ignores and pre-empts the well-established process for requesting expert assistance in these Military Commission trials. Further, any recommendations the Commission might seek to implement may need additional modifications at a later date.

Finally, even though the defense recommendation memorandum is filled with suggestions to the Convening Authority, the government confirmed and informed the defense that the Convening Authority intended to provide a response to its recommendation memorandum. Attachment B. In as much as the defense's recommendation memorandum to the Convening Authority can be interpreted as requesting additional resources, the defense counsel should properly wait for a response from the Convening Authority.² Though aware that the

² The defense stated that it recommended collecting four types of images "listed both in importance and in ease of collecting." AE 277N, Attach. B at 2. Listed at the bottom, presumably the

Convening Authority intended to provide a response to its recommendation memorandum, the defense filed the present motion alleging a “constructive denial.” AE 227N. From the beginning, all parties acknowledged that bringing an MRI to JTF-GTMO involved considerable time and resources.

You know, first—and I suspect it can be done, I don’t know how—you have to locate some company that has portable MRIs. I assume—I am told that such things exist. I don’t know that—I don’t know. Then we have to talk to them, figure out how to get it here. Do you get it here by ship? Do you get it here by plane? How much does that cost? What are the mechanics of all of that? I have got no idea. Again, I suspect it is not an easy process.

Tr. at 5049 (Aug. 6, 2014) (Learned Defense Counsel recognizing the complexities of providing the requested MRI). That defense now demands a quick response to a highly technical recommendation memorandum to the Convening Authority that follows the Commission’s ruling is simply premature.

The defense also argues that its “lack of confidence” in the quality of the eventual MRI serves as a basis for the Commission to intervene in the process. The defense assumption is based on an anonymous opinion of a medical officer at JTF-GTMO. “When reached for interview in July, the anonymous Senior Medical Officer at the facility disclaimed any knowledge of the MRI machine’s purpose, saying publicly that there was no medical need for the machine.” AE 277N at 4. The defense attempts to distort a medical opinion from a medical doctor into a legal opinion on what constitutes necessary mitigation evidence. Ironically, the defense is now seeking a medical opinion [on what constitutes a competent MRI examination] from the Commission. The defense, however, in the next sentence acknowledges the difference between a medical and legal opinion, thereby diminishing its own position. *Id.* at 4 (“However, a

least important and the hardest image to collect is, a “[f]unctional MRI, not something an average MRI tech would probably be familiar with and requires ancillary equipment that may not be available on a standard, non-research-based 1.5 or 3T system.” *Id.*

SOUTHCOM spokesperson stated that the machine was being sought in order to comply with the Commission's [O]rder." The defense still, however, lacks confidence and on this basis asks for intervention. The defense states that this unrelated medical opinion "does not bolster the defense's confidence in the qualifications of the personnel operating the equipment, the quality of the scans to be taken, whether useful images will be obtained or sequences run, or whether appropriate and knowledgeable staff will take those images" and requests that a specific MRI image selection be preemptively ordered by the Commission. *Id.* at 8. The defense's subjective confidence level is not a cognizable legal basis for the Commission's action at this time.

The defense also fails to explain how this medical opinion is related to the legal determination reached by the Commission in AE 277M. The quality of the medical care of the accused is decidedly not at issue in this motion. The Commission clearly stated this in two separate rulings. AE 277H at 2; AE 277M at 4 ("The Defense did not establish the care provided to the Accused is inadequate, nor has it established the Government, as the detaining power has shown a 'deliberate indifference' to his medical needs."). In spite of this ruling, the defense asks the Commission to intervene based on its unfounded crisis of confidence. Again, the Commission ordered that the accused be provided an "MRI of his brain for mitigation purposes." AE 277M at 4. The defense will receive a competent MRI examination, which encompasses both the machinery and the personnel necessary to operate the machinery.³ The Commission should not preemptively involve itself in determining the specifics of what constitutes a competent MRI scan, particularly with no evidence indicating that anything to the contrary will be provided.

³ This is consistent with the original defense request to the Convening Authority for an MRI. "[Y]ou, as Convening Authority can rent an MRI and have it transported to Guantanamo along with a technician to administer the MRI." AE 277K, Attach. A at 3.

In short, the defense fails to explain how its dissatisfaction and lack of confidence in the outcome, legally warrant intervention by the Commission.

II. Commander, JTF-GTMO Should First Be Permitted To Exercise His Due Discretion on Matters Affecting the Administration of the Detention Facility

In the instant motion, the defense neglects to follow proper protocol and ignores its obligation to, at the appropriate time, present its request to Commander, JTF-GTMO. Instead, the defense has asked the Commission to intervene and preemptively order Commander, JTF-GTMO to permit the defense counsel and Dr. Sondra Crosby to meet with the accused prior to the MRI, and to be present with the accused during the MRI. AE 277N at 1. Even more perplexing, the defense requests the Commission order Commander, JTF-GTMO to permit the defense to be able to do something that it has always been permitted to do—meet with the accused. The facts demonstrate that Dr. Crosby has consistently been given access to the accused. *See* AE 277K, Attach. A (Declaration by Dr. Crosby stating, “I have seen Mr. al-Nashiri on three occasions, totaling over 30 hours.”). Thus the defense request is not only premature, but is also unsupported by the facts.

Regarding the defense request for counsel and Dr. Crosby to be present during the MRI, the defense similarly needs to present this request, at the appropriate time, to Commander, JTF-GTMO. If, after proper presentment, it is denied, the defense will need to articulate to the Commission why this decision by Commander, JTF-GTMO does not warrant substantial deference. The Commander is charged with the responsibility of maintaining the security of the facility and protecting national security interests, while ensuring the humanitarian needs of the detainees are met in accordance with national policy and international law. Balancing these factors is a weighty responsibility, requiring particularized knowledge of the strategic and security implications of each decision. Allowing the defense counsel and Dr. Crosby to be

present with the accused during an MRI requires such balancing, and is best left to the discretion of the JTF-GTMO Commander.

The defense posits one unsubstantiated and unconnected assertion for why it believes that extraordinary relief in way of a preemptive ruling is required by the Commission. “[R]ecent reports and circumstances have indicated there is a need to raise this issue now to ensure Mr. Al-Nashiri is not re-traumatized and the Commission’s MRI order does not create a punitive result.” AE 277N at 8. In support of its position, the defense boldly asserts that “the fact that medical staff are approaching represented detainees and asking them to either submit to a medical procedure or else waive it forever is alarming . . .” *Id.* Putting aside that this assertion is unfounded, the defense fails to demonstrate how this alleged fact is related to the accused or to the Commission’s ruling in AE 277M. The Commission should not intervene prematurely in JTF-GTMO’s security protocol, much less when completely unsupported factually. Only in the event that the decisions of Commander, JTF-GTMO are unsatisfactory to the defense, can the defense then request the Commission to intervene on its behalf. In such circumstances, however, the Commission should give substantial deference to Commander, JTF-GTMO’s judgment.

As the government has previously briefed and argued, detention authorities, absent extraordinary circumstances, are owed deference in determining the appropriate safeguards to maintain security and meet the needs of detainees under their care. *See, e.g.*, AE 026A, AE 026D, AE 062A, and AE 284A. The Supreme Court has admonished courts to “heed our warning that [considerations in maintaining security and order in the facility] are peculiarly within the province and professional expertise of corrections officials,” and advised that “courts should ordinarily defer to their expert judgment in such matters.” *Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979) (internal quotation marks and citations omitted). *See also Florence v. Board of*

Chosen Freeholders of County of Burlington, 132 S.Ct. 1510 (2012); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987); *Block v. Rutherford*, 468 U.S. 576, 583 (1984). The Commission has consistently recognized this principle and given due deference to Commander, JTF-GTMO on issues affecting the administration of the detention facility. *See* Tr. at 368 (Jan. 17, 2012) (Military Judge stating that the day-to-day running of a detention facility is beyond the expertise of the Commission); 369 (Jan. 17, 2012) (Military Judge questioning the substitution of the Commission's judgment for that of the detention administrator); 372 (Jan. 17, 2012) (holding that the Commission will not interfere with the running of a confinement facility absent a showing of exceptional circumstances).⁴ Here, a similar approach should be adopted, but only if, and when, Commander, JTF-GTMO is permitted to exercise his proper and due discretion in running the detention facility.

III. The Defense Is Requesting Relief that the Government Does Not Oppose

The defense sent the prosecution its intent to file a motion requesting, among other things, that “the results of any MRI testing be shared only with the defense.” Attachment B. In its response to this request, the government stated that it was, “unopposed, unless and until the rules of discovery dictate otherwise.”⁵ *Id.* Ignoring the government's response, the defense asks the Commission to intervene and order “that the results of any MRI administered pursuant to the Commission's order be shared *only* with the defense.” AE 277N at 1.

⁴ The United States Court of Appeals for the District of Columbia Circuit recently applied the deferential *Turner* test to JTF-GTMO's search and detainee-movement procedures, holding that the *Turner* “deferential standard applies to military detainees as well as prisoners.” *Hatim v. Obama*, 760 F.3d 54, 58 (D.C. Cir. 2014).

⁵ This position extends only to the Office of the Chief Prosecutor in Commission litigation, and only until the rules of discovery require disclosure or the defendant files notice or otherwise discloses an intent to use or rely on the materials at a hearing, or, if applicable, in the guilt phase or penalty phase of any trial, or in any post-conviction litigation.

Rule of Court 3.5.k requires a moving party to confer with the non-moving party on the substance of its motion prior to filing. The purpose of Rule 3.5.k is to promote judicial economy by resolving as many issues as possible prior to requesting relief from the Commission. To accomplish this purpose, the defense must actually and meaningfully confer with the government. In this case, the defense engaged in limited *pro forma* conferencing and thereafter failed to adjust its motion to the Commission based on its conference with the government. This is also seen in the defense's failure to wait for a response from the Convening Authority to its recommendation memorandum. As stated above, the defense was informed that the Convening Authority was going to respond to its recommendation memorandum. Despite this notice, the defense proceeded to file its motion on the basis of "constructive denial." The defense proceeded to file this motion, completely unaffected by the government's conference. As a result, the Commission has before it a request for relief that is: in part, unopposed by the government; in part, not ripe for consideration; and, as a whole, unsupported by relevant facts. Accordingly, the defense motion does not warrant the Commission's intervention and should be denied in its entirety.

7. Conclusion

This Commission should deny the defense request to order the government to enforce a recommendation memorandum to the Convening Authority. Not only is this intervention premature, the Convening Authority should be permitted to proceed, and provide and a competent MRI examination for the accused. Further the Commission should deny the defense request to order Commander, JTF-GTMO, at a future date, to permit specific defense accommodation requests. This is also premature, and asks this Commission to reach a decision best suited and legally required of Commander, JTF-GTMO.

8. Oral Argument

The defense requests oral argument. The Commission can decide this matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). If the Commission grants the defense an opportunity to present oral argument, however, the government requests an opportunity to do the same.

9. Witnesses and Evidence

The government does not intend to rely on witnesses or evidence in support of this response. The defense lists two witnesses in support of its motion, but the defense has not requested those witnesses as required by R.M.C. 703(c)(2)(B)(i).

10. Additional Information

The government has no additional information.

ATTACHMENT A

Filed with TJ
2 October 2015

Appellate Exhibit 2770 (Al-Nashiri)
Page 19 of 24

CERTIFICATE OF SERVICE

I certify that on the 2nd day of October 2015, I filed AE277O, **Government Response** to AE 277N, Defense Motion for Appropriate Relief: Order Appropriate Protocols in Administering Court-Ordered Magnetic Resonance Image, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Robert C. Moscati
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

Filed with TJ
2 October 2015

Appellate Exhibit 2770 (Al-Nashiri)
Page 21 of 24

GEOFFRET

From: PAULBM
Sent: Thursday, October 01, 2015 3:22 PM
To: GEOFFRET
Subject: FW: Position of Counsel - AE 277N Defense MFAR MRI Protocols

From: PAULBM
Sent: Friday, September 18, 2015 1:40 PM
To: 'Pollio, Jennifer L LCDR USN OSD OMC (US)' <[REDACTED]>; Cantil, Jonathan P LT USN OSD OMC OCP (US) <[REDACTED]>; [REDACTED] Maj USMC (US) <[REDACTED]>; Jolly, Cherie E LT USN OSD OMC OCP (US) <[REDACTED]>; Strommen, Deanna L SFC USARMY (US) <[REDACTED]>; [REDACTED] <[REDACTED]>; McMillan, Winston G LtCol USMC OSD OMC OCP (US) <[REDACTED]>; [REDACTED] <[REDACTED]>; Morris, Paul B LT USN (US) <[REDACTED]>; Moscati, Robert C COL USARMY (US) <[REDACTED]>; ROBERCM4 <[REDACTED]>; WINSTONM <[REDACTED]>; [REDACTED] <[REDACTED]>; MARKAM9 <[REDACTED]>; MARKSM <[REDACTED]>; Miller, Mark A CIV (US) <[REDACTED]>
Cc: 'Rick Kammen' <[REDACTED]>; Mizer, Brian L CIV (US) <[REDACTED]>
Subject: RE: Position of Counsel - AE 277N Defense MFAR MRI Protocols

LCDR Pollio,

On 27 May 2015, we received your request to the Office of the Convening Authority (MEMORANDUM FOR THE CONVENING AUTHORITY ICO US. V. AL-NASHIRI REGARDING THE APPROPRIATE CONDITIONS AND CIRCUMSTANCES OF THE MRI THAT IS TO BE ADMINISTERED TO MR. AL-NASHIRI). This request, following the Commission's Order for "an MRI of [the accused's] brain for mitigation purposes" (AE 277M), requested additional, highly technical, and specific MRI testing. This included requesting, "ancillary equipment that may not be available on a standard, non-research-based, 1.5 or 3T system." We have confirmed with the Office of the Convening Authority that in addition to working towards compliance with the Commission's Order, the Convening Authority's office is researching your specific request and will be providing you a response accordingly. As such, filing this motion and requesting the Commission to intervene is premature, as this action by the Convening Authority is outstanding.

Additionally, your requested relief that the "government be ordered to administer the Commission-ordered MRI of Mr. Al-Nashiri in defense counsel's presence, and only after both defense counsel and Dr. Sondra S. Crosby have had an opportunity to meet with him regarding the procedure," is unwarranted. The defense is not prohibited from making a request to meet with the accused presently, or in the future. The defense may also request to be present during the administering of a future MRI.

Lastly, the government does not oppose your requested relief, "that the results of any MRI testing be shared only with the defense," provided that the results are not used during trial. If the defense intends to use the results of the MRI at trial, then the rules of discovery require disclosure to the government."

Should the defense decide to proceed with filing its motion as contemplated regardless of the discussion, *supra*, please note our position with respect to the 3 specific areas of relief as follows:

1. Defense counsel's presence, and meeting prior thereto – Opposed, as outside the province of the Commission, and unnecessary, respectively.

- 2. Procedure to be IAW the 27 May 2015 defense request – Opposed, as unripe, and outside the province of the Commission.
- 3. MRI results to the defense only – Unopposed, unless and until the rules of discovery dictate otherwise.

V/R,

PAUL B. MORRIS
 LT, JAGC, USN
 Assistant Trial Counsel

Office of the Chief Prosecutor of Military Commissions

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From: Pollio, Jennifer L LCDR USN OSD OMC (US) [mailto:[Redacted]]
Sent: Thursday, September 17, 2015 3:21 PM
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Cc: 'Rick Kammen' <[Redacted]>; Mizer, Brian L CIV (US) <[Redacted]>; Pollio, Jennifer L LCDR USN OSD OMC (US) <[Redacted]>
Subject: Position of Counsel - AE 277N Defense MFAR MRI Protocols

COL Moscati, et al.

The defense intends to file the following motion:

AE 277N Defense MFAR: Order Appropriate Protocols in Administering Commission Ordered Magnetic Resonance Image

Relief Requested: The defense requests that the government be ordered to administer the Commission-ordered MRI of Mr. Al-Nashiri in defense counsel's presence, and only after both defense counsel and Dr. Sondra S. Crosby have had an opportunity to meet with him regarding the procedure. The defense also requests that images taken be those recommended by defense experts. Finally, the defense requests that the results of any MRI testing be shared only with the defense.

What is the government's position on the filing of this motion?

v/r

Jennifer Pollio
 LCDR, JAGC, USN
 Office of Military Commissions
 Office of the Chief Defense Counsel

