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1 [The Military Commission was called to order at 1512, 27 April
2 2014.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present when the
5 commission recessed. Mr. Nashiri is still absent.

6 Trial Counsel, were you able to confirm whether or
7 not he has the availability of an audio feed in his holding
8 cell?

9 CP [BG MARTINS]: Your Honor, yes, he does.

10 MJ [COL POHL]: Thank you.

11 Mr. Kammen, did you have an opportunity to review
12 205T?

13 LDC [MR. KAMMEN]: Yes, we did. And if the government
14 wants to offer them, we have no objections.

15 MJ [COL POHL]: All right. Then I will consider the three
16 exhibits. Okay.

17 LDC [MR. KAMMEN]: Your Honor, let me be clear about the
18 relief that we want. We asked for that the proceedings be
19 abated until Mr. Nashiri receives adequate medical care for
20 his condition, and the condition that we believe he needs
21 adequate medical care for is what was diagnosed by Dr. Crosby
22 as being a -- suffering from PTSD as a result of physical,
23 emotional, and sexual torture.

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1 The source of that torture is classified. But I
2 want to refer by paragraph to 205L, which I believe is the way
3 we're doing this. And let me start with Specification A, and
4 I don't know if you have it in front of you.

5 MJ [COL POHL]: I don't.

6 LDC [MR. KAMMEN]: And we have an extra copy, if that
7 would help.

8 MJ [COL POHL]: Please. Thank you.

9 LDC [MR. KAMMEN]: It's on page 1, Specification A,
10 paragraph 3. And if you will recall Dr. Crosby's testimony,
11 she indicates that one of the ongoing themes of her review of
12 Mr. Nashiri's medical records was a series of colorectal
13 complaints that she believes is caused by Specification --
14 results in Specification A.

15 And if you look at the records that the government
16 just offered, you see reference after reference after
17 reference to the kinds of symptoms Dr. Crosby referred to.
18 And if we go through each of the records and we compare them
19 with the roughly 20 different classified references referred
20 to in 205L, you will see an incredibly tight match.

21 Dr. Crosby testified, for example, that there are
22 somatic complaints of back pain that relate to classified
23 stuff, and somatic complaints -- other complaints that relate

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1 to classified things. And what she described -- and she said
2 it best, and we saw it today -- this has been for however many
3 years he has been here the elephant in the room that nobody
4 wants to talk about. We'll just put on the blinders, the
5 medical blinders, and not ask the questions, and then we'll --
6 we'll treat.

7 And I -- you know, everyone was -- I'm not sitting
8 here saying these are horrible people, but competent, quality
9 medical care means you don't avoid the elephant in the room.
10 As Dr. Crosby said, it is like the woman who comes into the
11 emergency room and has bruises all over her face and a history
12 of emergency room visits and nobody asking, well, is
13 something -- are you in an abusive relationship, or nobody
14 approaching that. And you don't just ask somebody, hey, nice
15 to meet you, are you in an abusive relationship? You take
16 time and you take care and you develop a relationship of
17 trust, and you develop a place of safety.

18 Now, what we want is not to abate the proceedings
19 just indefinitely. That's not going to happen. We know that.
20 But what we would propose is this -- and this is a very
21 workable solution that I think would be of real benefit to
22 this process, not just to Mr. Nashiri, but to all the HVDs,
23 and that is that the commission do one of two things: Order

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1 that a physician trained in the effects of torture and trained
2 in the effects of treating PTSD caused by torture be assigned
3 at Guantanamo Bay as a psychiatrist or treatment ----

4 CP [BG MARTINS]: Apologize.

5 LDC [MR. KAMMEN]: Do you want to get it?

6 MJ [COL POHL]: Go ahead.

7 LDC [MR. KAMMEN]: ---- as a psychiatrist or treating
8 physician. Alternatively, and she has confirmed that she
9 would really like to do this because her goal is ----

10 MJ [COL POHL]: Go ahead, Mr. Kammen.

11 LDC [MR. KAMMEN]: I'm tired and I'm easily distracted. I
12 apologize.

13 ---- her goal is not to disrupt the proceedings but
14 to get people adequate care, she would be willing to come down
15 here and provide training to the medical staff, if the
16 commanders would allow that to, number one, happen, and allow
17 them to implement it.

18 I mean, she is concerned based upon some events in
19 the past that the commanders -- the nonmedical commanders just
20 don't -- they want to keep the blinders on. And there may be
21 reasons that's the case, but the solution to this and to the
22 medical component of this is to take the blinders off. And I
23 suggest, Your Honor, that if they took the blinders off, not

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1 just with Nashiri, but he's the only one we represent, an
2 awful lot of things that are disruptive both to this process
3 that make our work more difficult that have caused us to have
4 to come to you seeking relief might begin to evaporate.

5 But, you know, it's been 13 or however many years,
6 2006 to 2007 -- years. And it's really clear, Your Honor,
7 that from the very beginning, whether it was institutional
8 or -- I think it had to have started institutionally. And,
9 again, we asked for the SOPs and we asked for the changes in
10 the SOPs, because one of the things we'd like to know, is
11 there an SOP that basically says don't talk to them about what
12 happened to him before they got to Guantanamo. But what kind
13 of medical system is it where in September of 2006 somebody
14 purports to take an adult history, has looked presumably at
15 the transfer papers, whatever those are and whatever those
16 say, and doesn't ask, "anything happen in the last four years?
17 Where you been? How did you get here? Anything unusual
18 happen that maybe we ought to know about?" And really, that's
19 what's happened since then.

20 You can see the references in some of the stuff that
21 they've offered, and certainly it's -- and we're coming back
22 to it's the elephant in the room. Nobody wanted to ever sit
23 down and either by design or, you know, to take the detailed

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1 trauma history that's necessary -- to develop the relationship
2 and to take the detailed trauma history that's necessary, and
3 then to say, okay, given the magnitude of this, what have we
4 got.

5 And, again, here's how simple this all maybe is, and
6 I just use this as an example. Dr. Redact testified ----

7 MJ [COL POHL]: Actually, it was Dr. 97 who testified.

8 LDC [MR. KAMMEN]: Dr. 97, my ----

9 MJ [COL POHL]: We have got to keep our pseudonyms
10 correct -- or straight there. But go ahead, Mr. Kammen.

11 LDC [MR. KAMMEN]: Dr. 97 testified that family support
12 for a person with PTSD would be helpful, and he said it may be
13 therapeutic to let Nashiri call his family and have a -- they
14 can monitor it, the conversation with his family. How many
15 times have we asked for that?

16 MJ [COL POHL]: But ----

17 LDC [MR. KAMMEN]: And I understand, but the point is,
18 Your Honor, this: The government has been opposing things
19 based on bizarre constructs of security that get in the way of
20 mental health, of the treatment.

21 MJ [COL POHL]: Mr. Kammen, let me ask you this: Let's
22 assume that an individual -- properly trained individual,
23 military psychiatrist, assigned to Guantanamo Bay for this

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1 thing, and let's assume that happens. And let's say, for
2 example, he wants certain treatment plans to ----

3 LDC [MR. KAMMEN]: The psychiatrist or he ----

4 MJ [COL POHL]: The psychiatrist says I think it would
5 help Mr. Nashiri if he were to phone home or this or that, and
6 the security people say no. So now am I going to be in the
7 position where I'm going to be monitoring the health -- the
8 medical health care again and again on each of these type of
9 issues?

10 LDC [MR. KAMMEN]: Well, I can understand your concern,
11 and I think not.

12 MJ [COL POHL]: Do you think that the ----

13 LDC [MR. KAMMEN]: I can see that there might be some
14 circumstances that would be, again, so arbitrary ----

15 MJ [COL POHL]: Would you consider the phoning home
16 arbitrary?

17 LDC [MR. KAMMEN]: In the context of this case, given what
18 we know now, absolutely.

19 MJ [COL POHL]: Okay.

20 LDC [MR. KAMMEN]: And, again, we understand their
21 perceived need for security. What we don't understand are the
22 fact that they really do invent reasons that are not
23 justifiable.

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1 MJ [COL POHL]: But would that get me in the business of
2 monitoring the quality of his medical care? Let's say, for
3 example -- another example, the doctor comes up, he's a
4 military doctor wearing a uniform, for whatever reason cannot
5 establish rapport with Mr. Nashiri, then do you come back and
6 say, well, now, we've got to have another one?

7 LDC [MR. KAMMEN]: Well, no, but if it's a properly
8 trained doctor -- and I'm just -- this is -- I am not a
9 doctor, but a properly trained doctor who is trained in
10 dealing with victims of torture who take -- who wants to take
11 an adequate history may say, given what's publicly known or
12 what's known through classified stuff -- and I presume they
13 all have the clearance -- the best thing for me to do is not
14 wear a uniform, you know ----

15 MJ [COL POHL]: And then the facility comes back and says,
16 no, we can't do that for security reasons.

17 LDC [MR. KAMMEN]: Well, if -- I mean, yeah, at the end of
18 the day if the nonmedical people don't want adequate medical
19 care, then there's nothing that can be done about it, but the
20 point is to let's at least try.

21 The other piece is this -- you've always said the
22 things that affect the quality of representation come to you.
23 Well, I hope you're, maybe my word, connecting the dots,

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1 because some of the things that we've had to come to you about
2 relate back to this. And when they have been addressed, and
3 there have been times either -- I think that you have
4 addressed it, or they've been addressed through the
5 bureaucracy, things have improved.

6 I don't know quite what's classified, so there's one
7 example ----

8 MJ [COL POHL]: Then ----

9 LDC [MR. KAMMEN]: ---- that really comes to mind, and had
10 that not been improved, I'm not sure we would have a client
11 sitting in court. I think he would just have opted out.

12 MJ [COL POHL]: Yeah, I think I know what you are
13 referring to. I'm not sure it's classified.

14 LDC [MR. KAMMEN]: And that is referred to in some of this
15 stuff.

16 So all of this really intertwines in ways that
17 absolutely are unique, but we have an absolutely unique
18 situation. It's not like Nashiri just walked in to
19 Guantanamo. It's not like we don't know and it's not public
20 that he was in CIA custody for four years.

21 The government, the CIA, acknowledges that he was
22 waterboarded. They acknowledge that he was subjected to a
23 mock execution. They acknowledge some other things, and

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1 because I'm not quite sure what's acknowledged, I don't want
2 to go any further.

3 MJ [COL POHL]: Don't go there, but I know what you are
4 saying.

5 LDC [MR. KAMMEN]: Okay. So, you know, this -- we start
6 from the premise this is an unusual situation in an unusual
7 place, where we're operating under unusual rules, so people
8 have to, you know, be flexible. You have been, we understand
9 that. The medical staff probably is doing their best, I
10 suspect, under a framework that we don't know about that if we
11 could fully explore, we would find they've been essentially
12 told don't go there.

13 Well, that's wildly inappropriate, but if they
14 didn't go there intentionally or they didn't go there because,
15 you know, it was just sort of word of mouth, you don't want to
16 go there, that's just not quality care in this circumstance.
17 So everybody has to, if we're serious about this, do something
18 that's different and do something that is unique and is
19 different because this is a unique and different situation.

20 And so that's why we've come to you and that's why
21 we've raised this, because, again, I think the evidence is
22 clear, this is the elephant in the room. And they can spend
23 all of the time they want treating psychosomatic back pain,

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1 but if you don't know why he has the back pain, you're just --
2 you're accomplishing nothing.

3 You know, okay, they give him warm milk. You see
4 that. That's fine. But if they don't understand why certain
5 behaviors that they may do may act as triggers, warm milk
6 doesn't solve a problem. The starting point in all of this,
7 Your Honor, is the doctors have to know what the triggers are.
8 They have to have some idea of what the -- what the truth is.
9 And they don't. And until they do, this is just not adequate
10 care.

11 So, you know, the way to start -- the starting point
12 is let's get them to either the right guy, somebody who's
13 trained in torture, not just PTSD, but it is a different
14 construct. As Dr. Crosby said, PTSD from torture is
15 different, not minimizing other forms of PTSD, not minimizing
16 anything else, but it is different than PTSD as a result of
17 combat or something else. It's not the same. And there are
18 different -- you need different skills and you need different
19 training.

20 If the military's got such a guy or woman, great.
21 If they don't, let Dr. Crosby or someone like her -- and she's
22 not the only person, there's plenty -- but somebody who's
23 legitimately an expert order that they be trained, and then

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1 let's see where we're at. My suggestion is it would make a
2 huge, huge improvement if the command is supportive. If the
3 command and -- and let's be honest, if the prosecutor tells
4 the command to be supportive, they'll be supportive. If the
5 prosecutor tells the command make this crash and burn, it will
6 crash and burn.

7 So, you know, if the -- if folks want this to be
8 a -- to work, it can work. And people of reasonable --
9 reasonable people can find a way to address this problem. But
10 the first thing we have to do is acknowledge that a problem
11 exists, and evidence clearly proves that the problem exists
12 and it's an elephant in the room that for seven years the
13 doctors at Guantanamo Bay have simply refused to acknowledge,
14 and that is that Nashiri is the victim and suffers from
15 physical, mental, and sexual torture. Thank you.

16 MJ [COL POHL]: Thank you, Mr. Kammen.

17 Trial Counsel.

18 CP [BG MARTINS]: Your Honor, I just want to apologize to
19 learned counsel for having knocked over that book, and I'm
20 going to take remedial leg control training.

21 ATC [LT DAVIS]: Your Honor, the government sees that
22 there's really two issues before you. First, whether the
23 commission should involve itself in the day-to-day medical

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1 treatment being provided at JTF-GTMO; and, two, whether the
2 level of care is adequate provided by the medical
3 professionals at JTF-GTMO. Both of those issues, Your Honor,
4 should be answered in the negative, but certainly if you
5 answer the first question in the negative, we don't even need
6 to reach the second.

7 Plain and simple, Your Honor, the issue of
8 Mr. Nashiri's medical care has no connection whatsoever to
9 what goes on inside of this courtroom. The defense has not
10 brought a motion under 909 challenging his competence. In
11 fact, quite to the contrary, the defense has regularly stated
12 that Mr. Nashiri is competent. And to be competent, one needs
13 to be able to intelligently cooperate in his own defense. So
14 the defense has acknowledged on several occasions that the
15 accused can intelligently cooperate in his own defense.

16 And it's not just the defense that's saying that.
17 The 706 board is also saying Mr. Nashiri can intelligently
18 cooperate in his own defense. And if that's the case, then
19 all we're talking about is the day-to-day operations of the
20 medical treatment facilities at JTF-GTMO.

21 Now, we understand, Your Honor -- and in your ruling
22 on the motion to compel witnesses for this motion you stated
23 that his medical conditions could potentially be a condition

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1 of confinement that may affect the accused's ability to
2 participate in the preparation of his own defense. May.

3 What that seems to establish is that perhaps there
4 is a lower bar than competence that while he may be competent,
5 that there may still be some barriers to his ability to
6 communicate with his counsel, discuss his case, and move his
7 defense forward. So now we have had an evidentiary hearing --
8 the government disagreed that one was necessary, but we had
9 that evidentiary hearing, and the defense got to call
10 Dr. Crosby, the witness that they wanted, and what testimony
11 did we hear about the impact that his medical care or his
12 medical situation has on his ability to participate in his
13 case? The defense had the opportunity to ask that question
14 and didn't.

15 So as we sit here right now, Your Honor, there is no
16 evidence before this commission that anything having to do
17 with his medical care or his medical treatment is impacting
18 his ability to participate in his own defense. Whether we're
19 using a higher standard of intelligently cooperating or
20 whether we're using some other lower standard, there is no
21 evidence before this commission. And because there is no
22 evidence before this commission, this is something that is
23 purely in the lane of JTF-GTMO. There is no nexus, Your

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1 Honor, and because there is no nexus, we should answer that
2 first question in the negative, and we don't even need to get
3 to the second question as to whether the medical care is
4 adequate.

5 Even in the habeas cases, Your Honor, that the
6 defense cited in their motion, never -- and this is in a
7 habeas context -- never did the courts step in and say,
8 JTF-GTMO, you need to change this aspect of your medical care.
9 They might have granted access to records, but they recognize
10 that there is a general reluctance to second-guess the
11 decisions of medical professionals.

12 We're lawyers here. That is not -- that is not the
13 place, that is not the role to second-guess, unless as Your
14 Honor said, there really is a connection to what's going on
15 here and the defense simply has not made that connection. We
16 talked about connecting the dots. They have not connected
17 those dots. I would invite Your Honor's attention to a
18 case -- it's not cited in our brief, but I did provide it to
19 the defense on Monday, United States v. Al Ghizzawi, it's a
20 2000 D.C. District Court case. And for the court reporters,
21 G-H-I-Z-Z-A-W-I, Ghizzawi.

22 MJ [COL POHL]: What's the cite?

23 ATC [LT DAVIS]: It's a 2008 U.S. District Lexis 27988.

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1 MJ [COL POHL]: This is a District Court opinion?

2 ATC [LT DAVIS]: Yes, Your Honor.

3 MJ [COL POHL]: Go ahead.

4 ATC [LT DAVIS]: And if you had the opportunity to review
5 that, Your Honor, what you will see is a situation very
6 similar to the one at hand. There were affidavits provided by
7 outside experts suggesting that a particular detainee needed
8 to receive a particular type of care. And the courts restated
9 the standard principle that courts should be reluctant to step
10 in. Courts should defer to the decisions of the medical care
11 providers that are seeing the accused every single day.
12 Again, Your Honor, without that nexus, that is exactly what
13 this commission should do.

14 That being said, Your Honor, if, despite the fact
15 that this isn't an issue of competence, and there is no
16 evidence that's been presented about his ability to
17 participate in his own defense, if the commission determines
18 that there is some relationship between his treatment and this
19 commission, then it is necessary to take a look at the
20 adequacy of care that's been provided.

21 In one of Your Honor's orders, you did cite to
22 Estelle v. Gamble. And Estelle v. Gamble lays out a standard
23 that we can use to take a look at situations like this related

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1 to the adequacy of the standard of treatment, and this is
2 deliberate indifference. It's an Eighth Amendment construct,
3 but courts have found it helpful in cases such as this to
4 evaluate the medical care.

5 And courts define deliberate indifference, Your
6 Honor, as not negligence, not mistake, and not difference of
7 opinion. And what we have heard over these past couple of
8 days, Your Honor, is that at worst what we have here is a
9 difference of opinion. We have Dr. Crosby's opinion, and then
10 we have the opinion of the other medical doctors that have
11 testified. The opinion that we did hear from the senior
12 medical officer is that he believed that they're providing
13 more than adequate care. The opinion that we did hear from
14 the psychiatrist was that they're providing more than adequate
15 care in adhering to certain standards and guidelines that are
16 regularly applied.

17 So if we're looking at this difference of opinion,
18 Your Honor, it is necessary to take a look at the source of
19 the defense's opinion, Dr. Crosby, and as it was revealed to
20 us, Your Honor, this is not somebody who is an expert in
21 psychology, not an expert in psychiatry. Yes, the defense
22 does have an expert in psychiatry, but the defense chose not
23 to call that person.

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1 So this opinion that she is giving should be given
2 less weight, because, as Dr. Crosby acknowledged, in a complex
3 case to farm that case out to a psychiatrist because she
4 doesn't have that expertise, she would either work in
5 conjunction and that she wouldn't evaluate or treat in a
6 complicated case. So I would ask Your Honor to consider that
7 in terms of the weight that you actually give to the opinion
8 that was provided.

9 Two, this field of torture victims. According to
10 Dr. Crosby, this is a field that she is pioneering. She
11 referred to it, quote, as an "emerging field," understanding
12 that, Your Honor, the weight that we can give to this area of
13 expertise is questionable, questionable at best.

14 And then, Your Honor, we ask you to take a look at
15 the bias that comes along with a witness like Dr. Crosby. She
16 talks about how she represents human rights organizations.
17 She is clearly a paid consultant, paid to come down here and
18 give her opinion, and she clearly has an agenda. She came
19 into court and she wanted to talk about issues like
20 force-feeding and other things that had absolutely nothing to
21 do with what was going on or the issue that was before her --
22 the issue that was before her. She had her mind up, Your
23 Honor. She had her mind up before she ever stepped foot

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1 inside of a room to examine Mr. Nashiri.

2 But where did she say there are shortfalls? She
3 says there is a lack of trauma history, and we hear that from
4 Mr. Kammen. But, Your Honor, if you have the opportunity to
5 review the documents that the government has provided you
6 with, the medical records, and the psych records, you see that
7 this is not an elephant in the room. You will see significant
8 references to the fact that he has PTSD, and the PTSD is
9 likely the result of things that have happened to him in the
10 past, and there's reference to what some of those things may
11 have been, and that's consistent throughout the record. So
12 it's not that these medical professionals were not on notice
13 or that they weren't taking these things into consideration or
14 that they weren't documenting it. It is throughout the
15 record, and we invite the court to review those records and to
16 see that.

17 Another shortfall that Dr. Crosby brings up is this
18 psychosomatic issue. As we heard from the two -- the doctor,
19 the psychiatrist that testified today, he regularly consults
20 with the physician. They understand that there is a
21 connection between those two things. They understand that
22 certain psychological conditions may be causing the physical
23 pain that he has, and they're working together to develop a

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1 plan to address that. And it was the psychiatrist, Dr. 97,
2 who testified today that if Mr. Nashiri would cooperate in his
3 care, if he would take the prescribed medications, if he would
4 use the psychotherapy sessions and the access that he has to
5 that kind of quality medical care, that that would grant him
6 relief for the physical pain that he is feeling. But that's
7 Mr. Nashiri's choice.

8 Finally, Your Honor, the other shortfall that the --
9 that Dr. Crosby referred to is the fact that the -- that the
10 experts aren't here in GTMO, that we need to bring people from
11 all over the world to come here to bring this expertise. Your
12 Honor, that's not the standard of care. Having the world's
13 top experts on a particular issue, that is not the standard of
14 care. What has been provided to Mr. Nashiri is the standard
15 of care, as we heard in the testimony that was provided today.

16 Not having the top experts in the world, that
17 doesn't equal negligence, and that certainly doesn't equal
18 deliberate indifference. To the contrary, Your Honor, the
19 accused has had access to more than competent care. We heard
20 from the senior medical officer, who is a board-certified
21 physician. We heard from the psychiatrist, a board-certified
22 psychiatrist, who had experience dealing with people who have
23 experienced combat -- have experienced trauma, whether it's

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1 related to combat, whether it's related to sexual assault or
2 other kinds of trauma. These people are qualified to provide
3 the care at the level of the standard of care.

4 And if you will take a look in the records, Your
5 Honor, in the psych records, you will see that these are
6 people that are available 24 hours a day, seven days a week.
7 They are constantly available to Mr. Nashiri to address -- to
8 address any issues that he may have.

9 To just briefly invite your attention, Your Honor,
10 to 205S, this is a medical note from 2 June 2011, and this
11 isn't in reference to the hemorrhoid issues that Mr. Nashiri
12 was having. And you will read under 1(b) that in
13 two-thousand -- again, in 2011 Mr. Nashiri states that his
14 symptoms began 15 years ago, fifteen years ago, after an
15 extreme episode of constipation. The government brings this
16 to your attention, Your Honor, not because hemorrhoids are a
17 particularly significant issue. The government brings this to
18 your attention to show the bias of Dr. Crosby who attributes
19 these types of issues to trauma, to treatment that he may have
20 received when, in fact ----

21 MJ [COL POHL]: Couldn't they be connected?

22 ATC [LT DAVIS]: Excuse me, Your Honor?

23 MJ [COL POHL]: Couldn't they be connected? Couldn't he

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1 have had this medical condition 15 years ago that was
2 exacerbated by treatment while in confinement?

3 ATC [LT DAVIS]: The point is, Your Honor, that there is a
4 suggestion to the contrary. There is an alternate source, and
5 Dr. Crosby didn't even bring it up, didn't even mention it.
6 Sometimes, Your Honor, issues are exactly as they appear ----

7 MJ [COL POHL]: But you chose not to ask her that?

8 ATC [LT DAVIS]: That's correct, Your Honor.

9 MJ [COL POHL]: Okay. Got it.

10 ATC [LT DAVIS]: So yes, Your Honor, sure. They have
11 treated his symptoms as doctors do, they have lessened his
12 pain as doctors do, but they have also gone to lengths,
13 lengths to engage Mr. Nashiri in psychotherapy and prescribe
14 medications that would assist with PTSD.

15 I think the most important testimony that we heard
16 this morning is when I walked the psychiatrist through the DoD
17 VA guidelines for the clinical treatment of PTSD. Step one,
18 use an SSRI or an antidepressant with some psychotherapy.
19 Testimony was that, yes, indeed, they did that. So we checked
20 that box. Step two, if that's not working, try a different
21 one along with some psychotherapy. Checked that box. Move on
22 to the next step, prescribe Remeron. That was done in this
23 case. Move on to the next step, which was to provide a drug

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1 like Elavil, and do that in conjunction with some
2 psychotherapy. Again, that was done. That is the standard of
3 care. That is what these medical professionals were doing.
4 There is no indication that that falls short or is inadequate.

5 These medical professionals are not acting with
6 deliberate indifference. I asked the psychiatrist whether he
7 actually advocates on behalf of Mr. Nashiri, and he talked
8 about all of the lengths that he goes to to bring up issues,
9 issues that might make Mr. Nashiri more comfortable. So
10 they've advocated.

11 They deliberate on the psychosomatic issues, but
12 they can't force him to comply with medications. The
13 medications that they prescribe are the course of treatment
14 that they feel is most appropriate. And they can't help it
15 if -- as Your Honor will see in the psychiatric records, they
16 can't help it if every time they try to address a
17 psychotherapy issue, that Mr. Nashiri turns that session into
18 a discussion or a speech about policies that he disagrees with
19 at the camp.

20 If the accused refuses help that's offered, Your
21 Honor, the government cannot be held accountable for that.
22 There is not deliberate indifference. They diagnosed the
23 issue, they treated the issue, they advocated for him, and

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1 while he resisted to it, they have persisted.

2 They have persisted in attempting to treat
3 Mr. Nashiri, and, Your Honor, the government is not running
4 from this medical care. That's why the government has asked
5 you to consider -- has provided all of the medical records for
6 the past year and a half so that you can see that these are
7 not medical professionals to be -- to be criticized or to be
8 called out. These are medical professionals that are involved
9 in an extremely difficult job, with extremely difficult
10 patients who have applied the appropriate standards and done
11 everything in their power to treat Mr. Nashiri. This is not a
12 situation of deliberate indifference. It's quite the
13 opposite.

14 So to sum up, Your Honor, one, we don't even get to
15 this issue of inadequate medical care because there is no
16 connection. There's been no evidence, and we had an
17 evidentiary hearing, the defense had the opportunity. There
18 is no connection because this is not an issue of competence,
19 and there's no evidence to suggest that this is impacting
20 Mr. Nashiri's ability to work with his defense counsel.

21 And if Your Honor does get to that second question,
22 the government is confident that it demonstrates both through
23 the medical records and the testimony of the witnesses that

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1 have come before you that the care that has been provided is
2 not just adequate, it's better than that.

3 MJ [COL POHL]: Thank you.

4 Mr. Kammen, anything further?

5 LDC [MR. KAMMEN]: We might -- ordinarily we agree that it
6 is really not the Court's job to look into medical care until
7 it begins to affect proceedings. And, you know, the doctor
8 took some -- well, he says, oh, Nashiri's got issues with his
9 lawyers, doesn't trust his lawyers. And as you recall when we
10 were here last time, you know, we were delayed two days
11 because of some trust issues. And so these things do manifest
12 themselves into these proceedings virtually every time we have
13 been here in one way or another.

14 So the notion that somehow what ends -- what happens
15 at the camp doesn't affect these proceedings is just an
16 example of the government, the prosecution, being blind to
17 what's happening in front of them.

18 Having said that, we -- why aren't these steps
19 working? You know, they've got this protocol, you do this,
20 you do this, you do this. Nothing's working. Well, why won't
21 he cooperate? All of this is because they forgot the very
22 first step. He didn't want to say it, but what Dr. Crosby
23 said, and what essentially to anybody who's listening knows,

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1 is you can't really know what you're dealing with if you don't
2 do the complete trauma history.

3 And so because in six or seven years nobody's taken
4 this first step, presumably, with anybody here, but in our
5 case with Mr. Nashiri, you know, we just have this morass of
6 medicine that's not bad people, but it's people who either
7 because of circumstances or situations or orders or
8 whatever -- don't want to go there, have not taken the
9 fundamental first step in this case, and that is what the
10 courts are talking about. That's the kind of indifference.
11 This is the step. You don't do this -- if you are indifferent
12 to the first step, you can be as concerned as you want about
13 the rest of it.

14 Now, since the government cited habeas cases, and
15 it's been a while since I've read it, and so I'd like to take
16 a look at it again, but the more recent case of Aamer v. Obama
17 I think may put a little gloss on all of this in terms of what
18 the Court's power is.

19 Now, you know, we can go on and on and on. You
20 know, the prosecutor says, oh, we can't be having world class
21 experts come from all over the world. And that's true.
22 Nobody's asking for that. We may be asking in the most
23 efficient way is probably asking for one person from Boston to

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1 come and provide training to doctors here like she provides
2 training to doctors all over the world. That doesn't seem
3 like an unusually difficult request, and well within the
4 budget of the United States. That doesn't seem to be unusual.
5 Maybe they got a guy out there who really has done the work
6 and is skilled in treating victims of torture. Great. If
7 they've got such a guy who really has those skills, bring him
8 here. But it does seem to me that you do have the authority
9 to order the training, and frankly, it would seem to me in any
10 rational world, they would be saying, yes, Your Honor, if
11 there's an issue, let's get these folks trained up. How does
12 it hurt? It's not like how we get here is some responsibility
13 of the United States of America, and I won't go any further
14 than that, but again, this is not a situation where all of
15 this happens due to some outside force. This is something we
16 did.

17 The final thought, Your Honor, is, you know, they
18 say these doctors are available 24/7, these -- and absolutely
19 that's all true. But a doctor who's available 24/7 to a
20 battered woman who never asks how'd you get those bruises,
21 isn't really doing the job. He or she is available 24/7 but
22 they're not taking the first step. You, Your Honor, as a
23 result of other things, in 205L, know way more about the

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1 causes of Mr. Nashiri's trauma than all of the doctors who
2 have treated him since 2006. And that's the problem. If they
3 knew it, if they had gone into it, we wouldn't have had to.

4 So that's the relief we want. We would like to
5 review the Shakir -- the Obama case to see if that bears on
6 this.

7 MJ [COL POHL]: Okay. If you want to file a supplemental
8 pleading on this, you have seven days to do that.

9 LDC [MR. KAMMEN]: Fine. Thank you.

10 MJ [COL POHL]: Trial Counsel, anything further?

11 ATC [LT DAVIS]: No, Your Honor.

12 MJ [COL POHL]: That brings us to the scheduling orders.
13 Now, there's two of them out there, only one that was
14 requested for oral argument, 045AA.

15 TC [CDR LOCKHART]: Yes, sir. I'm sorry, can we close up
16 one thing before this? You wanted follow-up from the
17 government on 223A, the letters rogatory, sir.

18 MJ [COL POHL]: Yes.

19 TC [CDR LOCKHART]: Can we just -- it will take, I think,
20 two minutes.

21 MJ [COL POHL]: Okay. You've got two minutes.

22 TC [CDR LOCKHART]: I understand that this is contrary to
23 our standard position, but as an exception the government

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1 doesn't object to the letters rogatory being offered for an
2 interview of the two individuals. We would object to any
3 documentation that was classified that would be provided to
4 the defense outside of the normal discovery process. And I
5 think those were the two questions you wanted answered, sir.

6 MJ [COL POHL]: Hold on. Just so I'm clear, this was the
7 one we discussed earlier today, is that right, Commander? I
8 believe this was yours.

9 DDC [CDR MIZER]: It was, Your Honor.

10 MJ [COL POHL]: So as drafted, you don't oppose it, with
11 the understanding that I was going to change the one thing
12 that says?

13 TC [CDR LOCKHART]: We haven't seen a draft, sir.

14 MJ [COL POHL]: Do you have objection to them seeing your
15 draft letters rogatory?

16 DDC [CDR MIZER]: No, Your Honor.

17 MJ [COL POHL]: Okay. Show it to them. Take a look at
18 it. Again, the one -- I can't make commitment for other
19 cases. That was my concern. Submit it to the -- as a
20 concept, you don't he oppose to it?

21 TC [CDR LOCKHART]: Well, in the ----

22 MJ [COL POHL]: In this particular case.

23 TC [CDR LOCKHART]: No, we absolutely do oppose to it as a

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1 concept. You asked if we object to them having the assistance
2 of two other individuals. Our brief still stands and we have
3 not changed. We absolutely oppose letters rogatory ex parte
4 for this purpose. You asked if we would be okay on this
5 limited circumstance for them interviewing two witnesses, and
6 we see that more as an access to witness issue and we don't
7 object to that.

8 MJ [COL POHL]: Do it this way: Defense, give them a copy
9 of the letters rogatory. You have seven days to see if you
10 have any objection to it. After seven days, if they're silent
11 on it, send it back to me. If they're not, you send it to me.
12 And, again, we have to make that one adjustment on the
13 cooperation issue that we discussed earlier, because I can't
14 commit other -- other fora on the cooperation, but with that
15 change, that was the only thing that caught my eye.

16 TC [CDR LOCKHART]: Well, we had the issue, too, about the
17 financial obligation.

18 MJ [COL POHL]: I believe we discussed that with the
19 commander and he realizes that he cannot commit the United
20 States to pay anything without prior authorization.

21 DDC [CDR MIZER]: I say again, yes, Judge.

22 MJ [COL POHL]: Okay. Great. Thank you.

23 TC [CDR LOCKHART]: Thank you, sir.

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1 MJ [COL POHL]: Okay. Now, 045AA addresses delaying the
2 law motions.

3 LDC [MR. KAMMEN]: Did you want to just address that or
4 more global?

5 MJ [COL POHL]: Well, the problem is, and I'm going to let
6 you guys handle this, is 45W talks about another trial
7 adjustment for which no oral argument was requested. Okay. I
8 can read both documents. I understand what they're saying. I
9 understand everybody's position. If you want to be heard on
10 it, you certainly can. I think I know where we're at. I do
11 have kind of one question on 45C is that just that is this
12 event is going to occur? By that I mean, is there a request
13 for a delay for a member of the defense team to leave active
14 duty and come back on active duty, how do we know when we will
15 come back on active duty? Other than -- Commander?

16 DDC [CDR MIZER]: 1 November 2014, Your Honor.

17 MJ [COL POHL]: Okay. Thank you. Okay. You're satisfied
18 on the two scheduling, and, again, 45W and 045AA to rely on
19 your pleadings?

20 LDC [MR. KAMMEN]: Well, [Microphone button not pushed; no
21 audio] I think Major Hurley's prepared to address the one that
22 requested oral argument, if you want to hear it. I think it's
23 pretty obvious, and it does seem to me, in light of all of

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1 this may be OBE, is that ----

2 MJ [COL POHL]: Very good Mr. Kammen.

3 LDC [MR. KAMMEN]: ---- because of the government's filing
4 of 120 ----

5 MJ [COL POHL]: Okay.

6 LDC [MR. KAMMEN]: ---- B.

7 MJ [COL POHL]: Let me do this, it appears to me at this
8 point, you guys have pretty much articulated your position.

9 Trial Counsel, do you want to be heard at all on
10 this?

11 TC [CDR LOCKHART]: The only thing that I would add, and
12 that's just because Mr. Kammen brought it up, is that one
13 should have nothing to do with the other. The briefs are
14 obviously briefed completely. It should not factor in what
15 may or may not happen on 120.

16 MJ [COL POHL]: But if reconsideration is granted on 120,
17 that will necessarily slow the 120 discovery. If there was no
18 request for reconsideration, 120 discovery would have started,
19 and I'm not -- understand, I get requests for reconsideration
20 from both sides all the time. I'm not making a comment on it
21 one way or the other. I'm simply saying that the government's
22 requested reconsideration. By doing that, you naturally are
23 going to delay a final decision on 120 discovery. True?

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1 TC [CDR LOCKHART]: Yes, sir.

2 MJ [COL POHL]: Okay.

3 TC [CDR LOCKHART]: But this is a motion for extending the
4 deadline for purely law motions.

5 MJ [COL POHL]: I got it. Okay. Thank you.

6 CP [BG MARTINS]: Your Honor, since I've got 120, it's a
7 request for reconsideration in part. We continue to try to
8 move out with portions of that order that are clearly
9 regulation of discovery that the court -- the commission has
10 undertaken. And so we note that the -- another 45, another
11 45V, which is the scheduling order, I believe in late
12 February, talked about discovery in 120 being complete by
13 27 May. So there was was already contemplated in that
14 process, which we see as a process -- I mean, we are moving
15 out on portions of that order that we're not asking
16 reconsideration of.

17 MJ [COL POHL]: Okay. Okay. I got ----

18 LDC [MR. KAMMEN]: Pretty clear discovery on 120 is not
19 going to be completed by 27 May.

20 MJ [COL POHL]: We'll see where we're at at that time,
21 Mr. Kammen. Okay. Okay. Both sides are good with what I
22 have on 45WW and -- or 45W and 045AA. Defense?

23 LDC [MR. KAMMEN]: Yes. Yes on behalf of the defense.

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1 MJ [COL POHL]: Trial Counsel?

2 TC [CDR LOCKHART]: I think we're good, sir.

3 MJ [COL POHL]: Okay. Good. Defense, I'm going to return
4 your document back to you. What I will do is issue a
5 docketing order relatively -- relatively shortly, I'm saying
6 for me, that's within a week or so, of what I think is
7 actually briefed and ready to be argued for the May session.
8 If that appears and we want to adjust one way or the other and
9 talk to each other and do it. Again, my inclination is it's
10 always much easier to take away days than to add days. Right
11 now I think we got it started on a Wednesday going through the
12 following Tuesday with the weekend off. If it makes sense to
13 go Wednesday through Saturday, whatever, I'm going to rely on
14 you guys to talk to each other and to adjust it in that time
15 frame. That being said, the commission is in recess.

16 [The Military Commission recessed at 1609, 27 April 2014.]

17 [END OF PAGE]

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