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1 [The R.M.C. 803 session was called to order at 0906,
2 5 November 2014.]

3 MJ [Col SPATH]: Good morning, everybody. This commission
4 is called to order. I don't know if you want to mention that
5 it's ----

6 TC [MR. SHER]: Yes, Your Honor, the proceedings are being
7 transmitted by CONUS.

8 MJ [Col SPATH]: Thanks.

9 TC [MR. SHER]: They're -- your order in AE 028H permits
10 transmission to Bulkeley Hall here on Naval Station
11 Guantanamo. That site is not yet operational for this week.

12 MJ [Col SPATH]: All right, thank you. We had a brief 802
13 session yesterday, and I just wanted to put a couple of things
14 on the record. I know we recorded that one. One is we are
15 probably not going to record them in the future until some
16 need arises to record them, since they are just an informal
17 session so I can talk to you all and not make any decisions.
18 So with that said, the only purpose of yesterday's was to give
19 me an idea of what we were going to try to cover this week.
20 Both sides agreed we will not cover 049F, so we are not going
21 to talk about that; otherwise we will go pretty much in the
22 order of the docketing order as we move forward.

23 The other thing I disclosed yesterday was that I had

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1 read the appellate court decision, the Air Force appellate
2 court decision in United States v. Witt, which defense counsel
3 talked to me about during the first hearing when they were
4 questioning me regarding whether I would recuse myself or not.
5 And I told the defense counsel if that opportunity arose for
6 some reason, I would let you all know. I have let both sides
7 know.

8 Defense Counsel, do you have any additional questions
9 you want to ask?

10 LDC [MR. KAMMEN]: No. And to make the situation clear
11 for the public, you had advised us that you are military judge
12 in another, I guess, capital case pending at Warner Robins Air
13 Force Base and that you were asked by the defense counsel in
14 that case to read the Witt decision because it was the most
15 current iteration, at least of death penalty law, as it
16 pertains to the Air Force and perhaps the military. That's
17 certainly an appropriate request. We thank you for disclosing
18 that.

19 MJ [Col SPATH]: Absolutely. Trial Counsel, do you have
20 any questions you want to ask regarding that?

21 TC [MR. SHER]: No, Your Honor. We do need to put on the
22 record the government is represented by another attorney today
23 and we would like to put his qualifications on the record.

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1 MJ [Col SPATH]: Let's do that.

2 TC [MR. SHER]: It's Major Winston McMillan.

3 ATC [Maj McMILLAN]: Good morning Your Honor.

4 MJ [Col SPATH]: Good morning.

5 ATC [Maj McMILLAN]: I have been detailed by the Chief
6 Prosecutor of the Military Commissions. I'm detailed and
7 qualified under Rules For Military Commission 502 and 503. I
8 have been previously sworn under Rules For Military Commission
9 807. I have not acted in any manner that might tend to
10 disqualify me from participating in the military commissions.

11 MJ [Col SPATH]: Thank you very much.

12 LDC [MR. KAMMEN]: If I may, Your Honor, for the record,
13 prior to the hearing that was postponed, we had challenged
14 the, I guess, waiver purportedly instituted by the Secretary
15 of Defense concerning General Martins. That's not on the
16 calendar, and that's fine. I think Major McMillan's
17 appointment demonstrates the continuing inequality of arms.
18 And what most concerns us is the fact that the Army saw fit to
19 reappoint General Martins, we understand from the newspapers,
20 for three years, and at the same time involuntarily severed
21 the attorney-client relationship of an Army major in another
22 case.

23 So we just wanted to note our objection, and we will

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1 raise that in the future as events warrant, thank you.

2 MJ [Col SPATH]: And I know that motion may or may not
3 come back. My ruling regarding my own recusal remains the
4 same. I have no concerns based on reading the Air Force court
5 decision in United States v. Witt. I know I have no actual
6 bias; no real good test for that, except what I tell you all,
7 I know. Any member of the public who knows all of the facts
8 and is not connected to this proceeding would have no concerns
9 about my mindset.

10 Reading that decision, it didn't bother me, didn't
11 cause me any concern about who filed what or who might file
12 what. It is just the normal process that cases go through.
13 Having been the beneficiary of a number of cases that have
14 been overturned, my feelings are long since gone on that
15 matter.

16 LDC [MR. KAMMEN]: We agree. And frankly we are glad you
17 have read it because it is an issue that is going to come up,
18 certainly I think today, and the fact that you have read it is
19 helpful.

20 MJ [Col SPATH]: All right. The only other administrative
21 note is I just need to take a break today from noon to 1:00.
22 I have another commitment over the phone I need to make. So
23 I'm just going to take a little bit of an extended lunch break

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1 today. So we will leave here about 11:30, come back about
2 1:15, 1:20, but otherwise that is all that was covered in that
3 802 of any substance.

4 So I think our first order of business is 181G, and
5 it is whether or not we are going to reargue the substance of
6 181. So, Defense Counsel, I'm going to turn it over to you
7 first.

8 LDC [MR. KAMMEN]: We don't care one way or the other, but
9 part of the program here is to read the accused about his
10 right not to appear, if you want to do that later.

11 MJ [Col SPATH]: I will do that. He is here currently.
12 If he decides that he doesn't want to be here in the afternoon
13 session, we'll talk to him about it.

14 DDC [Maj DANELS]: I don't think it will be an issue
15 today. If you are comfortable, we are good.

16 MJ [Col SPATH]: That's good.

17 CP [BG MARTINS]: Your Honor, the government would request
18 that you do advise him. I mean, this is a long-developed,
19 through litigation, advisement. Are you planning ----

20 MJ [Col SPATH]: It is. I will do it. He is here now,
21 so ----

22 CP [BG MARTINS]: I understand.

23 MJ [Col SPATH]: If he wants to leave, I will deal with it

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1 and will talk to him about it again. We have him in person
2 right now so I don't want to do that right now.

3 CP [BG MARTINS]: I want to clarify: You will do it
4 before we adjourn for recess?

5 MJ [Col SPATH]: I will do it before we break.

6 CP [BG MARTINS]: Thank you.

7 MJ [Col SPATH]: All right. So let's take up 181. Who
8 has got that?

9 Just for people who are wondering about the numbers,
10 what we are talking about, this was a motion that has to do
11 with classified information being disclosed or shown to the
12 accused in the lead-up to the trial itself. I have got some
13 questions about that, but that is kind of the background for
14 it. It has already been ruled upon by the prior judge. All
15 right.

16 LDC [MR. KAMMEN]: I think it's been ruled on.

17 MJ [Col SPATH]: 181 I thought was ruled on. No, it has
18 not been ruled on. You are correct. It is one of the ones I
19 took and I'm working towards issuing a ruling on. And sorry,
20 we have gotten through quite a few since the last time we were
21 here. I didn't get to that one; with the reargue notice, I
22 stopped. All right. Captain Jackson.

23 ADDC [Capt JACKSON]: Good morning, Your Honor.

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1 MJ [Col SPATH]: Good morning.

2 ADDC [Capt JACKSON]: You stole some of my thunder with my
3 introduction, but I will start from there anyway. The issue
4 in AE 101 -- I mean 181, the defense is seeking reargument for
5 the defense motion to withdraw the death penalty based on the
6 fact that the accused will not be provided the classified
7 evidence that is presented against him in this case.

8 MJ [Col SPATH]: And to be fair, he will be provided any
9 classified information during the trial. I think the
10 government has indicated they are not planning on offering any
11 classified information currently during their case-in-chief,
12 but at least the Government's position is he will be provided
13 any classified information that is going to be offered during
14 the findings portion of the trial.

15 ADDC [Capt JACKSON]: Correct, Your Honor. The
16 Government's position is that their case is wholly
17 unclassified and that any information that is used in the
18 government's case-in-chief will not be classified if it is
19 used against him in trial, correct.

20 So, Your Honor, we just want to orient the commission
21 beforehand about the history and the procedural posture of
22 what brought us to this request for reargument in 181, but the
23 bottom line up front is the litigation landscape that we are

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1 in right now is wholly different from what it was when we
2 argued 181 in February of this year.

3 MJ [Col SPATH]: You have already gotten to what I was
4 going to ask you. What new, either fact or law -- what has
5 changed? Because I did read the pleadings, and then I have
6 gone through the motions from 181 down through, I think,
7 181 -- past Golf already. But at any rate, I'm looking at
8 them up here.

9 ADDC [Capt JACKSON]: I'm not sure what ----

10 MJ [Col SPATH]: Hotel was the government's response. So
11 I have read all the pleadings. I'm trying to figure out what
12 new facts.

13 ADDC [Capt JACKSON]: Your Honor, most notably the
14 government's position from February to today has changed.
15 Originally when the defense made the request that the
16 classified evidence be presented to the accused, the
17 government's response was, one, our case is unclassified which
18 is still their position; however, the second part of that was
19 that "and it's classified, so there is no mechanism for your
20 client to get classified information. So sorry, it's -- he
21 doesn't get classified information." That has changed through
22 the advent of 281, Your Honor.

23 281, as we are very familiar, is, the Government's

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1 term, the creative solution to a classification issue in this
2 case.

3 MJ [Col SPATH]: DISPLAY ONLY.

4 ADDC [Capt JACKSON]: The DISPLAY ONLY banner, whereby we
5 can show classified information to Mr. al Nashiri, who is not
6 a cleared person.

7 Was there a question there?

8 MJ [Col SPATH]: Not yet. There is many, but what I'm
9 really focused in on, so we have had a change in the landscape
10 in that the government has conceded, or at least decided, that
11 they, working with the classification authorities, will
12 institute this DISPLAY ONLY, and I have seen lots of things
13 marked DISPLAY ONLY recently as I have been doing the 505
14 review. But that seems to be -- although the government was
15 opposed to your motion, the government seems to be working to
16 help alleviate some of the concerns that came forth in 181.

17 ADDC [Capt JACKSON]: And I'm -- Your Honor, that is
18 actually one of our next points, is that the government is now
19 working to say, oh, by the way, there are these mechanisms to
20 release classified information. But 281 has actually unveiled
21 more problems than solutions in this case. And if anything,
22 it has brought up more questions that should be asked and
23 answered in terms of the application of the DISPLAY ONLY

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1 banner and questions that should have been asked even when we
2 were arguing 181, a totally different position; where if we
3 would have known then what we know now or had this information
4 then, it would have made for a starkly different argument, and
5 different witnesses and different evidence would have been
6 presented in arguing 181.

7 MJ [Col SPATH]: I assume the law -- the landscape of the
8 law has not changed.

9 ADDC [Capt JACKSON]: Your Honor, we believe that 281 is
10 actually a very big distinction as to the information we were
11 going into 181 with. Originally there was no way you can show
12 classified information to your client and now the government
13 says, under certain circumstances and in the right case, sure,
14 we can make it so you can show this information to your
15 client, which is wholly different from what their position was
16 back in February.

17 MJ [Col SPATH]: It is. But I'm not speaking for them.
18 I'm sure we are going to hear something like this: But it can
19 feel like no good deed goes unpunished, because they have
20 worked to come up with a solution where your client can see
21 more information than he would have otherwise, despite a
22 response in 181 that said, not going to do it.

23 And despite the landscape that was kind of moving

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1 forward with 181, they came forward and said, you know, we
2 understand and we want to help. And so how about we will make
3 an effort, and we will allow your client to see classified
4 information if it is marked as DISPLAY ONLY.

5 I mean, they are trying to help, and then it is being
6 suggested that they are changing the landscape or they are
7 doing something -- it just appears for this they are trying to
8 assist you all to show your client more information than
9 otherwise would have been possible. And I'm in a position
10 better than you all, quite frankly, just because I'm doing the
11 505 review, I can see how much is marked DISPLAY ONLY. But
12 there is a good bit of information marked DISPLAY ONLY at,
13 frankly, every classification level.

14 ADDC [Capt JACKSON]: So, Your Honor, I actually have two
15 responses to that. The first is the display-only information
16 right now is only limited to discovery that's responsive to
17 AE 120. And the defense's position in 181 is there is so much
18 more information that is not subsumed in the 120 that we
19 really still need to be able to discuss with our client. We
20 have an ethical obligation for some of these issues, and many
21 of them, they are classified, so if you would review the
22 classified portion, the closed hearing for the previous
23 argument of 181, because I can't get into those things here,

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1 of course, but there are very specific things that need to be
2 discussed in this death penalty case with our client that we
3 have an obligation to be able to discuss with him.

4 And right now the government has given us a partial
5 of a workaround saying, oh, this subset of information we will
6 make certain exceptions for, but they haven't opened that up
7 to the broad spectrum of evidence that is against Mr. Nashiri
8 in this case.

9 MJ [Col SPATH]: They haven't, but there seems to be at
10 least some case law out there, and it's -- see how developed
11 it is. There seems to be some case law out there. Moussaoui
12 was a capital case, didn't end up with a verdict that was
13 capital, but there they allowed the government to assert these
14 national security issues and prevent Mr. Moussaoui from seeing
15 classified information in the run-up to trial, and the Supreme
16 Court understood that.

17 ADDC [Capt JACKSON]: Your Honor, I don't want to get into
18 the merits, because this is exactly why we would want the
19 reargument, to be able to address specific things in there.

20 MJ [Col SPATH]: But that law was in place during your
21 original argument. That's what I'm trying to figure out is,
22 the landscape has changed, in that the government has tried to
23 come up with a workaround to help, but I don't understand how

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1 the landscape has changed with what I read in 181 in that the
2 government in large part is asserting cases like Moussaoui and
3 cases like In re Terror Bombings, suggesting it's fairly
4 standard to keep classified information away from people in
5 the lead up to trial. Different issue when we're heading
6 towards trial, when we are in the findings portion, I
7 understand. But that is the state of the law and that hasn't
8 changed since we argued 181.

9 ADDC [Capt JACKSON]: And, Your Honor, the other thing,
10 what we don't want to happen is, when you are going through
11 what the argument is in 181, to consider 281 to be a solution.
12 And right now I think that's what -- please correct me if I'm
13 wrong, Your Honor, but what we are hearing is that the
14 government is working for this solution and I'm hearing this
15 word "solution."

16 And it is the defense's position 281 is not a
17 solution, if anything, caused more problems, more questions.
18 And it is our fear that, in making the ruling in 181, that
19 this pseudo-workaround for display-only is going to play into
20 that justification that there is some sort of ----

21 MJ [Col SPATH]: That is not how I'm looking at it. What
22 I'm looking at is 181 is a stand-alone motion where the
23 defense asks that their client have access to classified

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1 information, and all of the arguments in that, the defense
2 counsel suggested and cited some case law that I was reading
3 through.

4 The government cited some case law, and the 281 is a
5 separate issue tied in with 205. I think what I'm saying,
6 though, is that the government appears to be trying to assist
7 you in -- we can call them novel ways, we can call them
8 workarounds, we can call them whatever, but they seem to be
9 trying to help your client have more information than less.
10 But I don't think it has changed how I view 181, which is a
11 pretty standard motion about access to classified information
12 in any case involving national security.

13 ADDC [Capt JACKSON]: Your Honor, more information -- even
14 if it is more information rather than less, it is still not
15 all of the information, and still puts the defense in the same
16 ethical binds ----

17 MJ [Col SPATH]: Do you have any case that came out since
18 we argued 181 that would suggest that your client gets all the
19 classified information that the government has access to in
20 the run-up to a case involving classified information?

21 ADDC [Capt JACKSON]: May I have one moment, Your Honor?

22 MJ [Col SPATH]: You may.

23 ADDC [Capt JACKSON]: Thank you, Your Honor. No, Your

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1 Honor, there is no new case law specific to answer your
2 question. However, we will still say that this case is
3 starkly different from the case of Moussaoui because the
4 government has conceded that there is at least 15 percent of
5 information that is discoverable in this case that will not be
6 turned over, that will not be shown to Mr. al Nashiri, but
7 that doesn't include any of the information that's been
8 previously marked in any type of way and it doesn't include
9 the information that is responsive to AE 120.

10 But, Your Honor, really there are huge ramifications
11 and, you know, ethical collateral consequences about the
12 application of 281 to the underlying issues of 181. And the
13 defense would be able to present more evidence. We have
14 information -- our defense security officers have told us that
15 there is no way to practically implement the procedures that
16 the prosecution has offered in 281. So these things, it is
17 not a solution for us.

18 And it is still just our fear that the record at this
19 point is contradictory and incomplete at best, and it is our
20 responsibility to make sure that you have the entire universe
21 of information and be able to address these things and reargue
22 the information in 181.

23 MJ [Col SPATH]: All right. Thank you.

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1 ADDC [Capt JACKSON]: Okay.

2 MJ [Col SPATH]: Do you have more?

3 ADDC [Capt JACKSON]: Yes, Your Honor. One additional
4 thing, Your Honor, is the other venue to be able to address
5 this would be a motion for reconsideration if there were new
6 facts or new law or a supplement to our previous motion. And
7 it was the defense's intention to make this more clean,
8 expedite this litigation a little bit better by not waiting
9 until a ruling came out, to then say, oh, well, now we want to
10 seek reconsideration of this motion. But we want to be able
11 to reargue it while it is still pending, while it is still
12 fresh, so that you can have all the information before you as
13 you go into your decision-making process for the ruling on
14 181.

15 MJ [Col SPATH]: Thank you.

16 ADDC [Capt JACKSON]: Thank you, Your Honor.

17 TC [MR. SHER]: Good morning, Your Honor.

18 MJ [Col SPATH]: Good morning.

19 TC [MR. SHER]: Your Honor, nothing has changed with the
20 one exception of display-only. The defense has been given
21 clear authority by the United States government, both on
22 papers filed with this commission and stated several times
23 during several arguments in this open court and transcribed by

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1 these exceptional reporters, that the defense may display
2 certain classified information to the accused where it is
3 marked DISPLAY ONLY. The defense can choose to use that tool
4 or not. That's their choice.

5 That the accused may not access any and all
6 classified information produced in discovery is not unique to
7 this case, it is not unique to military commissions. The same
8 rule applies in federal civil courts in capital cases like
9 Moussaoui. If the defense seems to be concerned that there is
10 other information out there that it -- unrelated to some of
11 the discovery issues we have been discussing that it needs to
12 display to the accused, it can identify some of that
13 information. It can request from the government something
14 specific, and the government will make its best efforts, the
15 government will see what it can do.

16 MJ [Col SPATH]: And your position I know in the original
17 motion and then there was a comment about it in the 181H, and
18 your position is the same, if your case goes into classified
19 information, there is no doubt there that the accused has
20 access to that; we agree on that, correct?

21 TC [MR. SHER]: If the government presents classified
22 information or seeks to admit classified information during
23 the trial, the statute is clear.

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1 MJ [Col SPATH]: And then if -- if the defense attempts to
2 admit and it is relevant and ends up coming in, it seems to me
3 the accused would have access to that because it would be
4 something going on in the findings case; I want to be clear
5 which portion of the trial we are talking about too.

6 TC [MR. SHER]: Your Honor, if defense seeks to admit
7 classified information, we go through the process. They have
8 to demonstrate it is relevant, admissible, Your Honor has to
9 agree. The government then has an opportunity to consider its
10 options to include substitutions, stipulations, other options.
11 And, of course, those substitutions would have to place the
12 accused in substantially the same position. And when we get
13 to that point, we get to that point.

14 But it is not -- there is no rule. Certainly the
15 defense can't just choose what information, classified or not,
16 admit it and the accused gets to see it. We have to go
17 through the process, and it is a long, long hypothetical we
18 have to go down. But we are not there.

19 As Your Honor identified, the defense didn't identify
20 any new facts, with the exception of display-only. During the
21 February argument, the government made clear, as we just
22 discussed, that it will not seek to admit classified
23 information during its case-in-chief on the merits or at

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1 sentencing. Nevertheless, defense continues to argue this
2 point about 14 percent of the evidence in this case is
3 classified. Of course that's not what the government's
4 position was. The defense is confusing the terms "evidence"
5 and "discovery." Between the accused's statutory right to
6 access classified information and the government's statement
7 that it won't seek to admit classified evidence, zero percent
8 of the evidence is classified, not 14 percent.

9 And, of course, not only did the defense not identify
10 any new facts, but it identified no change in the law. And
11 again as we discussed, just as in federal civilian courts,
12 Your Honor, it remains true MCA requires accused be provided
13 with information admitted against him to include classified
14 evidence, Your Honor.

15 Quite simply, the accused has access to all
16 unclassified discovery, significant amounts of the classified
17 discovery given the DISPLAY ONLY, to include information
18 marked DISPLAY ONLY and relating to his treatment and
19 confinement. He will have access to all classified evidence
20 presented against him at trial. He is represented by five
21 attorneys, all of whom can access all the discovery and all
22 the evidence. Your Honor, this issue has been fully briefed,
23 it has been fully argued, it has been fully litigated dating

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1 back to November of 2013, all the way back.

2 Following Your Honor's prior ruling, Your Honor said
3 the commission would base the decisions on the record as it
4 exists, and the parties will not reargue motions unless Your
5 Honor sought clarification. Your Honor hasn't sought
6 clarification, and there is no need to. Thank you.

7 MJ [Col SPATH]: Thank you.

8 ADDC [Capt JACKSON]: Very briefly, Your Honor. Part of
9 the prosecution's argument is that we are not there yet, that
10 we are not down the road where we need to answer these
11 questions on what specific discovery needs to be used in
12 trial, what specific discovery needs to be shown to the --
13 shown to Mr. al Nashiri. But we are there. We are there
14 because we are constantly preparing for that day in court.
15 And in order to even prepare for it, we need to be able to
16 ethically -- we need to be able to discuss certain information
17 with our client.

18 Now, what we are hearing now is that if there is
19 additional information, we can go to the government with that
20 information and see if they can mark that DISPLAY ONLY as
21 well. That position is also different from the government's
22 position when the defense argued 181 back in February. It's
23 different from the government's position that was fully

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1 briefed back in November of 2013.

2 MJ [Col SPATH]: I get that. Part of that was in response
3 to one of my questions. It wasn't really their argument until
4 I went off into the future, if we ever get to trial.

5 My question really is -- and I know it has been
6 referred to as a no-trust zone. I know we talked about it.
7 281 is not on the docket, but the government appears to be
8 trying what they can do to give your client access to
9 information he would otherwise never have had access to before
10 trial, a separate issue from 181. That is how it appears.

11 They have said you can use the DISPLAY ONLY markings.
12 They have said it in here. They have said it in front of the
13 press. I can't imagine what would happen if you take
14 advantage of the display-only and then something happens where
15 they tried to remove Mr. Kammen or remove you. I just -- I
16 can imagine. I can imagine the motions, I can imagine the
17 outcry, and I can imagine what it would look like.

18 The government has said you can take advantage of
19 this. So if you are not going to take advantage of it, you
20 certainly can come back to the court with another motion. I
21 have indicated -- I asked you all last time to work together
22 to see if you can come to some read-aheads, talk to the
23 classification authorities. 281 is completely separate from

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1 181.

2 What I'm trying to do with 181 is, in a case that is
3 involving classified information that can impact national
4 security, it is the common state of affairs, not just in the
5 commissions, but in courts-martial and in federal practice, I
6 assume in state practice -- I don't know how much classified
7 information a state would ever run into and I haven't looked
8 into it frankly, but it is a common state of affairs that the
9 accused doesn't have access to this information in the lead-up
10 to trial. That is the common state of affairs, and that's
11 what the case law says.

12 So that is why I keep asking you about, is there any
13 case law that counters the Terror Bombing case that I talked
14 about from the Second Circuit, or Moussaoui, where it says
15 your client has a right to have access to this information
16 wholesale, which is what you are asking for.

17 ADDC [Capt JACKSON]: And, Your Honor, again since you
18 brought up the word "wholesale," I would say the defense's
19 argument originally and our brief probably in 181 would have
20 been different had we had this information at that time.

21 MJ [Col SPATH]: Why would the government have ever given
22 you all that information at the time? The government is
23 relying on these cases that say you don't have a right to it.

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1 And, again ----

2 ADDC [Capt JACKSON]: Your Honor, then the government
3 comes back and says, oh, by the way, we found that in the
4 right type of circumstance, yes, you do have a right to it,
5 you do need this information, this is relevant and necessary
6 to assist your client in its capital defense.

7 MJ [Col SPATH]: And that is why I said no good deed goes
8 unpunished. There is a lesson. I mean, they are trying on
9 the one hand to work around some of these solutions, and then
10 it is being argued that they are not either doing it in good
11 faith or that something bad is going to happen if you take
12 advantage of those options.

13 ADDC [Capt JACKSON]: Well, Your Honor, we would like to
14 be able to flesh this out, and that is why we are requesting
15 the reargument. Because right now I ----

16 MJ [Col SPATH]: But 181 -- the law in 181, there is no
17 change to the law. There is no change to the law from when we
18 argued 181. And that is what I'm trying to figure out is
19 what -- so the changed circumstance, at least according for
20 you all, is because of 281, there has been a change that
21 should cause me to go back and look at kind of the landscape
22 of 181 that we haven't ruled on. Does that kind of sum it up?

23 ADDC [Capt JACKSON]: Yes, Your Honor. Because it is not

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1 only a change in the law, it is a change in the facts -- or
2 the law and the facts that exist right now. The landscape
3 that we are operating in and what remedies and options are
4 available to us are different from what they were in November
5 of 2013 and different from what they were in February of 2014.
6 And that's the defense position, Your Honor.

7 MJ [Col SPATH]: Thank you.

8 ADDC [Capt JACKSON]: Any additional questions?

9 MJ [Col SPATH]: No, thank you.

10 ADDC [Capt JACKSON]: Thank you.

11 MJ [Col SPATH]: Government, any final comments?

12 TC [MR. SHER]: No.

13 MJ [Col SPATH]: Thank you. Just give me a second to pull
14 out some things for 205.

15 In 205, as we move into that argument, that is again
16 a reargument motion. 205 was briefed, argued, now there has
17 been a request to reargue with 205BB, Bravo-Bravo. That is a
18 motion to abate the proceedings until adequate medical care
19 was given to your client. I think that kind of gives at least
20 the landscape of what this is about to cover.

21 Defense Counsel?

22 ADDC [MAJ HURLEY]: Yes, sir. Administrative question
23 first: This little panel indicates "operation restricted."

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1 That doesn't stop me from speaking; is that correct?

2 MJ [Col SPATH]: Correct.

3 ADDC [MAJ HURLEY]: I wanted to make sure.

4 Sir, based on your colloquy with Captain Jackson, I'm
5 doing this particular argument a bit out of order to respond
6 to your initial question to her, which, as I recall, was with
7 respect to what's changed. And we would identify a few
8 matters that have changed, how the landscape of 205 has
9 changed, and why it is necessary to not only reargue that
10 particular motion but why this commission should hear
11 additional evidence on this particular topic.

12 MJ [Col SPATH]: All right. So what has changed?

13 ADDC [MAJ HURLEY]: What has changed? The first thing,
14 sir, that has explicitly changed is President Obama's
15 acknowledgement, and I quote, that we have tortured some
16 folks. So that is a fact. And obviously the chief executive
17 of this government has acknowledged that some folks,
18 ostensibly to include Mr. Nashiri, who was a guest of the
19 Rendition Detention & Interrogation program, have been
20 tortured and ----

21 MJ [Col SPATH]: I have some questions about that, but
22 keep going.

23 ADDC [MAJ HURLEY]: All right, sir. The second thing that

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1 was changed, and it was a discussion you had with Colonel
2 Moscati in August of this year about Hatim v. Obama and how
3 the legal landscape has developed, not necessarily changed,
4 but developed in a way that you have an opinion from the
5 D.C. Circuit, a superior court to this commission, to guide
6 you through the process of determining what, if any, deference
7 a detention facility is going to get as it treats the
8 detainees that are incarcerated there or kept there.

9 MJ [Col SPATH]: Is that the same, though, as the medical
10 care -- did it impact the medical care analysis? Do you think
11 Hatim or Hatami did?

12 ADDC [MAJ HURLEY]: Sir, we think -- obviously we put in
13 our brief, sir, that those are separate issues. Those are
14 separate concepts.

15 MJ [Col SPATH]: Because that one that seemed to tell me,
16 Turner, for how they deal with prisoners or detainees, it is
17 good law and deference certainly should be given when you are
18 dealing -- separate from medical, when you are dealing with
19 kind of the care and feeding ----

20 ADDC [MAJ HURLEY]: Yes, sir.

21 MJ [Col SPATH]: ---- and the administrative processing of
22 detainees, that I do give them deference and Turner is the
23 standard.

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [Col SPATH]: We agree that is kind of the state of the
3 law right now.

4 ADDC [MAJ HURLEY]: Yes, sir. It's hard to argue with
5 that, the opinion from the D.C. Circuit.

6 MJ [Col SPATH]: Then the follow-on question is how does
7 that opinion affect how I deal with medical care issues?

8 ADDC [MAJ HURLEY]: Sir, what we would say is, first off,
9 the amount of information that -- as you look at Hatim, and
10 the pronunciation I will go with -- as you look at Hatim, that
11 is a fairly rigorous factual analysis, and it is a similar
12 factual analysis to what you would have to go through if you
13 were using deliberate indifference standard of Estelle v.
14 Gamble, and that guidance you got from the D.C. Circuit Court
15 you would use together to determine, it is a complementary
16 analysis. You would use that information to flesh out whether
17 or not, under these facts, there was a deliberate indifference
18 to ----

19 MJ [Col SPATH]: Okay. So that is then my next question
20 for medical care issues: Do we agree Estelle v. Gamble,
21 whether or not we say it is an Eighth Amendment issue, which I
22 know we don't say down here necessarily, or we use the
23 standard cruel and unusual punishment and in this case

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1 deliberate indifference in relation to medical care, do we
2 agree that's the right standard?

3 ADDC [MAJ HURLEY]: Sir, yes, the deliberate indifference
4 standard is the appropriate standard. But, sir, what we
5 would -- what the defense submits to you is the information
6 that was received by this commission during the hearings with
7 respect to 205 was insufficient for you to make that very
8 detailed factual determination.

9 MJ [Col SPATH]: How so? As best we can do ----

10 ADDC [MAJ HURLEY]: Yes, sir.

11 MJ [Col SPATH]: ---- the last five ----

12 ADDC [MAJ HURLEY]: Obviously, I will keep that in mind as
13 I respond to this question. Sir, with respect to Dr. Crosby,
14 the witness who testified -- and I will just ask you, sir,
15 have you gotten to that portion of the record where Dr. Crosby
16 testified?

17 MJ [Col SPATH]: Yes.

18 ADDC [MAJ HURLEY]: You also got to the portion of the
19 record where we asked to have the court closed to receive
20 other information from Dr. Crosby and that request was denied?

21 MJ [Col SPATH]: Yes, there was an order entered by Judge
22 Pohl denying.

23 ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [Col SPATH]: Yes.

2 ADDC [MAJ HURLEY]: And his determination was that -- it
3 was that the testimony that he would have received would have
4 been relevant but not necessary for the determination of 205.
5 And, sir, we believe that and the defense believes it
6 attempted to articulate at the time, and whether it would be
7 you or Colonel Pohl sitting in this chair sitting in that
8 chair, sir, we would ask that that particular order that it
9 was relevant but not necessary be superseded by an order that
10 Dr. Crosby's testimony is relevant and necessary and should be
11 taken.

12 So that information that we sought to have this
13 commission consider with respect to Dr. Crosby and the
14 testimony that she would provide, we would want that, all of
15 that information to be considered by this commission in
16 determining whether or not there is any deliberate
17 indifference.

18 MJ [Col SPATH]: Right, 205V was the order -- I'm looking
19 at it -- where he, Judge Pohl, declines to close the
20 proceeding for any kind of classified information and said
21 there was enough information based on what was in the public.

22 Dr. Crosby had access to classified information,
23 correct?

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1 ADDC [MAJ HURLEY]: She did.

2 MJ [Col SPATH]: Including medical care. In a general
3 sense, she had access to medical care records, things like
4 that. Am I correct?

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [Col SPATH]: I guess here is my question: Reading her
7 testimony, the public testimony, I didn't -- why didn't anyone
8 ask her, based on her experience and all, if the care your
9 client was receiving rose to that level that it was
10 deliberately indifferent?

11 Because we have experts rely on things that aren't
12 admissible in court all the time, I mean, pretty standard
13 hearsay, not admissible hearsay. But they can always give an
14 expert opinion.

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [Col SPATH]: And I guess just, why not ask that
17 question?

18 ADDC [MAJ HURLEY]: Sir, what -- I guess that's a great
19 question, sir. And as you recall from your review of her
20 testimony in the public record, in the unclassified record,
21 what would have been unclassified record, there was a great
22 deal of discussion between myself and Colonel Pohl as to the
23 extent of her expertise and what opinion she could offer.

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1 MJ [Col SPATH]: There was, that's true.

2 ADDC [MAJ HURLEY]: Sir, I would ask you to take another
3 look at that. And that's another reason, sir, if it comes to
4 calling Dr. Crosby again and other witnesses, then with that
5 issue in mind, whether that testimony was unclassified or, as
6 the defense would suggest and hope, that it would also be
7 classified, that we would make sure that the terrain was
8 clear, what questions could be asked, what opinions -- what
9 expert opinions she could offer. And that is with respect to
10 Dr. Crosby.

11 And with respect to the other witnesses, sir, we
12 believe that, because of the factual nature, whether you are
13 talking about the Turner standards again, sir, you seem to
14 indicate that you don't know whether the Turner standards
15 necessarily apply to medical care.

16 MJ [Col SPATH]: I think it is a great question. This is
17 not a critique. As I read 205, and it bleeds over as we get
18 into 284 and the Skype issue, the standard, the deliberate
19 indifference standard isn't always what people are saying.
20 And I'm using the Skype so I can maybe explain to you what I'm
21 trying to ask and maybe you can help me ask it in a way that
22 makes sense.

23 ADDC [MAJ HURLEY]: Yes, sir.

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1 MJ [Col SPATH]: There is a lot of talk about the Skype
2 call would be medically beneficial, and, by the way, said by
3 multiple people, okay, fair enough. But did not granting it
4 demonstrate indifference?

5 And that is what I'm struggling with in 205 as well,
6 is there is discussions about the medical care could have been
7 better in the motions itself. The medical care could be more
8 beneficial, and it just seems that we are not using the
9 standard very cleanly, and that is for me -- it appears for me
10 to do something, if we are dealing with Estelle v. Gamble, I
11 need to see evidence of deliberate indifference or cruel and
12 unusual punishment. I think either of those are
13 interchangeable. Does that make sense?

14 ADDC [MAJ HURLEY]: It does, sir. What part of that would
15 you like me to respond to?

16 MJ [Col SPATH]: Do you believe you were prevented from
17 demonstrating your client suffered from a medical staff who
18 were deliberately indifferent to his medical care?

19 ADDC [MAJ HURLEY]: Yes, sir. And we believe that to be
20 the case because of, first, the ruling that was -- that
21 prohibited us from adducing classified evidence, and then we
22 also believe that the back and forth that we had with Colonel
23 Pohl left the record unclear, obviously ----

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1 MJ [Col SPATH]: And that was what was going to be allowed
2 be asked, I believe that was Dr. 97 and Dr. Crosby.

3 ADDC [MAJ HURLEY]: Sir, in my mind as I'm talking to you
4 now, I'm talking about the testimony of Dr. Crosby.

5 MJ [Col SPATH]: Okay.

6 ADDC [MAJ HURLEY]: Because as I recall -- this is my
7 memory -- that we had a discussion, a candid discussion about
8 to what extent Dr. Crosby could say, took a lunch break.
9 After the lunch break Colonel Pohl came back and reconsidered
10 his ruling, limiting what she could say in the unclassified
11 session.

12 MJ [Col SPATH]: That is a good memory. That is pretty
13 close to what happened.

14 ADDC [MAJ HURLEY]: And, sir, to that extent, and if the
15 record is unclear, this is why we are before you today, to ask
16 factually to make the record clear, acknowledging the
17 factually intensive standard of Estelle v. Gamble as well as,
18 if the court is inclined, to closely read Hatim, as I'm sure
19 you have already, sir; and considering all the facts, if you
20 believe somehow that the government is correct and the
21 deference allowed -- that's allowed to the detention facility
22 should come over into a consideration of medical care and you
23 find some of that language persuasive, then we would also like

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1 to be able to present now, present all of our evidence based
2 on what is a fairly clear ruling from the D.C. Circuit,
3 applying the Turner standards.

4 MJ [Col SPATH]: I understand and that may be another
5 motion, frankly, and that is maybe there is or isn't
6 deliberate indifference to medical care. Maybe we reargue or
7 we don't. But given the change in the law with Hatimi ----

8 ADDC [MAJ HURLEY]: Let's just go with that.

9 MJ [Col SPATH]: I will work with you. Given the change,
10 given that that has said yes, deference, but deference doesn't
11 mean blindly following ----

12 ADDC [MAJ HURLEY]: Yes, sir.

13 MJ [Col SPATH]: ---- maybe there's -- that particular
14 decision didn't deal with medical care, so that's the
15 question, I think, for you all to figure out. Is it a bridge
16 too far to argue it deals with medical care or is it not, I
17 mean ----

18 ADDC [MAJ HURLEY]: Yes, sir.

19 MJ [Col SPATH]: Maybe I bought myself another motion. I
20 don't know the answer.

21 ADDC [MAJ HURLEY]: Sir, congratulations.

22 MJ [Col SPATH]: But for here, I think we do agree,
23 though, if we are dealing with what was argued under 205, it

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1 is Estelle v. Gamble and there needs to be evidence of a
2 deliberate indifference?

3 ADDC [MAJ HURLEY]: Yes, sir.

4 MJ [Col SPATH]: And how do you think you can cross that
5 bridge? What do I need to do or what changed? And I think
6 what you are telling me is 205V, the order closing the court
7 that was not granted ultimately ----

8 ADDC [MAJ HURLEY]: Yes, sir.

9 MJ [Col SPATH]: ---- that evidence would have been
10 helpful.

11 ADDC [MAJ HURLEY]: Yes, sir.

12 MJ [Col SPATH]: And Dr. Crosby's testimony that was
13 limited in a way that kind of changed through that process,
14 that testimony would have been helpful.

15 ADDC [MAJ HURLEY]: Yes, sir.

16 MJ [Col SPATH]: Any other pieces in that?

17 ADDC [MAJ HURLEY]: Sir, I'm just going to refer to, sir,
18 I direct the court's attention to page 8 of Appellate
19 Exhibit 205BB.

20 MJ [Col SPATH]: Give me one second. You said page 8?

21 ADDC [MAJ HURLEY]: Page 8, yes, sir.

22 MJ [Col SPATH]: I'm there.

23 ADDC [MAJ HURLEY]: Numbered paragraph 9, "Witnesses."

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1 Sir, tell me when you get there.

2 MJ [Col SPATH]: I'm there.

3 ADDC [MAJ HURLEY]: All right, sir. First a disclaimer
4 of, if you grant 205BB, if you let us, if you will, consider
5 new evidence and you will consider additional argument, we
6 believe this is the framework that we are going to use, but we
7 are not -- there may be other things that we would ask this
8 commission to consider. This isn't -- this isn't a contract
9 in that sense.

10 MJ [Col SPATH]: Understand.

11 ADDC [MAJ HURLEY]: Obviously, sir, we would call the
12 attending physician for our client, Mr. al Nashiri;
13 Colonel Bogdan, who is a former commander, former commander of
14 the detention facility -- as I understand it, that may be an
15 error of omission; Admiral Cozad, commander of JTF-GTMO; and
16 Emily Keram, who is -- who would be another witness to testify
17 about the deliberate -- to testify on the deliberate --
18 potential deliberate indifference standard.

19 So that -- again not limiting ourselves necessarily
20 to that and obviously whatever we seek to have produced in
21 front of this commission would be subject to the normal
22 procedures, and frankly, the normal litigation that would flow
23 from us attempting to produce additional evidence. But, sir,

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1 that's -- that generally is the layout.

2 MJ [Col SPATH]: I understand. Does the focus of the --
3 and I'm not saying I am granting it. I really am working
4 through in my brain 205. You can probably tell which ones I
5 was able to rule on reasonably easily and which ones I wasn't
6 just based on the flow of the rulings, frankly. So 205 I have
7 spent a lot of time with, I'm happy to tell you.

8 Let's say there was deliberate indifference at one
9 point but it has changed and there no longer is. Is that
10 still a motion to abate the proceedings because of poor
11 treatment earlier in time, or is that a motion for appropriate
12 relief if and when you ever get to sentencing or something
13 like that?

14 ADDC [MAJ HURLEY]: Sir, I think we are right now still at
15 the motion. This is a motion to abate. In your hypothetical
16 scenario, if there was deliberate indifference for a time,
17 that time -- that discrete period of time has come and gone,
18 and we wouldn't -- you know, if that became somehow factually
19 clear, it isn't that we would withdraw the motion and we would
20 obviously seek ----

21 MJ [Col SPATH]: I would just have a host of remedies?

22 ADDC [MAJ HURLEY]: Right. If you were just ruling on the
23 matter that was in front of you to say, all right, well I'm

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1 going to -- I haven't made a ruling yet overall on the 205
2 series with this in mind -- and again we are staying within
3 your factual scenario ----

4 MJ [Col SPATH]: That's a hypothetical. I'm certainly not
5 conceding any of it. I just ----

6 ADDC [MAJ HURLEY]: In that hypothetical scenario and you
7 were to deny us, then we would, based on the evidence adduced
8 in, ultimately, your order, we would, I can assure you,
9 fashion another motion or series of motions for appropriate
10 relief.

11 Sir, before I'm going to get into my prepared
12 argument, I started off by saying that President Obama's
13 acknowledgement was a new fact we needed to discuss and you
14 indicated you had some questions on that.

15 MJ [Col SPATH]: I think my only question would be -- I
16 appreciate he said that. I guess my question is, is that
17 really a fact? Is that a statement of a politician, albeit
18 the Commander in Chief? What do I do with that? Everybody
19 has opinions.

20 ADDC [MAJ HURLEY]: Yes, sir.

21 MJ [Col SPATH]: Frankly, I don't think the issue is
22 whether I call it enhanced interrogation or torture, I think
23 that is all words that you all will use. It doesn't matter.

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1 My issue is the facts, frankly.

2 ADDC [MAJ HURLEY]: Right.

3 MJ [Col SPATH]: And here are we talking about medical
4 care at Guantanamo as opposed to ----

5 ADDC [MAJ HURLEY]: Yes, sir.

6 MJ [Col SPATH]: ---- the rendition program.

7 ADDC [MAJ HURLEY]: And, sir, I'm taking this opportunity
8 as a door that has been opened for me to get into a
9 reargument ----

10 MJ [Col SPATH]: I understand.

11 ADDC [MAJ HURLEY]: ---- and for this particular fact, I
12 will. With respect to that fact, it is an acknowledgment by a
13 politician, yes, a very important politician, yes, someone who
14 has occasion to understand all of the -- a lot of the facts
15 and circumstances, no doors are barred to him. No arbitrary
16 distinctions about legislative facts or Executive Branch facts
17 are closed to President Obama. Having reviewed all that, he
18 has acknowledged and he has used the word "torture."

19 Now, with respect to the medical care that our client
20 received, he can look at it, acknowledge it as an adult, and
21 move on with the rest of his day and the important decisions
22 that he has to make. Why we say this is deliberately
23 indifferent is that the medical care that Mr. al Nashiri

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1 received, they didn't look at it, acknowledge it, ask him
2 about what happened, take that information from him, what
3 Dr. Crosby, as you have read, no doubt, sir, called a torture
4 history or just a history. What happened, the sort of
5 question that we answer every day when we go see a physician,
6 that wasn't done.

7 And we would submit to you that the fact that
8 President Obama can make it his business to know and a
9 treating physician cannot and will not make it his business to
10 know, that is -- takes a long stride towards meeting
11 Estelle v. Gamble's standard of deliberate indifference.

12 Sir, does that answer your question?

13 MJ [Col SPATH]: It does, thank you.

14 ADDC [MAJ HURLEY]: I'm just going to take a second and
15 review my notes to make sure that our conversation touched on
16 everything.

17 Sir, obviously it's -- and this will be the last
18 substantive point I would make. Obviously it is our business
19 collectively, our business of those of us who are involved
20 with the commissions, to know that there is a lot of
21 litigation that happens back and forth on the subject of
22 treatment of Guantanamo detainees. And we, the defense,
23 became aware of litigation in a D.C. courtroom with respect to

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1 the deliberate indifference standard, it was in Judge
2 Kessler's court, that there was a good deal of testimony with
3 respect to whether or not the treatment, the medical treatment
4 that detainees get here either meets that standard or does
5 not.

6 And now with the benefit of being able to see that,
7 that's the sort of evidence that we would want to be able to
8 propound here, and not only do that, but make a reargument for
9 this commission to ultimately sustain our motion or grant our
10 motion 205.

11 MJ [Col SPATH]: All right. Thank you.

12 ADDC [MAJ HURLEY]: Thanks.

13 MJ [Col SPATH]: Lieutenant Davis, right?

14 ATC [LT DAVIS]: Yes, sir, Lieutenant Davis for the United
15 States Government.

16 Your Honor, the government sees this issue no
17 differently than it did in April of 2014. And especially in
18 your discussion about AE 181 and to some degree with regard to
19 this motion, Your Honor asked what has changed. That really
20 does need to be the focus here when we are talking about a
21 motion to reargue. As it is the government's position,
22 nothing -- frankly, nothing has changed. There is no new law
23 and there are no new facts.

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1 On the other hand, Your Honor has before him ----

2 MJ [Col SPATH]: You don't think that the D.C. Circuit
3 opinion in Hatim has anything to do with this?

4 ATC [LT DAVIS]: Your Honor, to begin with, to take the
5 defense at its word on page 7 of their motion, they say Hatim
6 is largely, if not wholly, irrelevant. And the government
7 agrees. Hatim additionally doesn't do anything to -- it's
8 really just an affirmation of past case law. It law says
9 Turner v. Safley is still the law. Bell v. Wolfish, these are
10 cases from the '80s, from the 1970s, this is not new law
11 whatsoever. So that really is not a new fact, not new law for
12 the commission to consider. Beyond that, the government
13 didn't even raise Hatim in this context; it was raised with
14 regard to a separate motion. The government has not argued
15 Hatim with regard to AE 205 ----

16 MJ [Col SPATH]: I think the -- it appears to me -- again,
17 it is an interesting discussion with Hatim. Maybe we will see
18 motions forthcoming because of it, but it appears to me the
19 law that applies in Estelle v. Gamble. And the follow-on
20 discussion -- again, I'm not suggesting the Eighth Amendment
21 does or doesn't apply, we haven't had to cross those
22 bridges -- the bridge we have had to cross is, does that
23 standard apply here.

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1 And everybody seems to be saying yes, deliberate
2 indifference or cruel and unusual punishment seems to be the
3 correct standard for what the medical care has to -- the
4 medical care has to demonstrate cruel and unusual punishment
5 or deliberate indifference. That has not changed, correct?

6 ATC [LT DAVIS]: Absolutely. The government agrees
7 Estelle v. Gamble is the standard, the standard is deliberate
8 indifference. As Your Honor pointed out, this is not --
9 deliberate indifference is a far cry from could something be
10 better, could something be improved. Your Honor has a full
11 record; probably the most extensive litigation in this case
12 was done with regard to this particular motion. The number of
13 sessions, the number of pages that it eats up in the
14 transcript, the number of pleadings that we've had, the
15 records that were submitted, there is truly a robust, full
16 record for Your Honor to make a determination as to whether
17 there has been deliberate indifference in this case or not.
18 The government's position in evidence before the commission is
19 that there was not deliberate indifference.

20 You had the testimony from senior medical officer,
21 you had the testimony from the treating psychiatrist. Both
22 answered that they believed the treatment that they were
23 giving were adequate. And probably the best evidence Your

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1 Honor has is the medical records themselves. The government
2 was not running from this issue. It was the government that
3 put the records in front of Your Honor so that you could see
4 the type of care, the type of treatment that the accused was
5 receiving. And that is around-the-clock care, that there were
6 steps that were taken to address what Dr. Crosby and the 706
7 board diagnosed as PTSD.

8 MJ [Col SPATH]: It was PTSD and depression.

9 ATC [LT DAVIS]: Yes, Your Honor. Of course those two can
10 be linked as ----

11 MJ [Col SPATH]: Correct.

12 ATC [LT DAVIS]: ---- as we are all aware.

13 But I think some of the important testimony Your
14 Honor does have in front of him was the testimony of the
15 psychiatrist. I walked him through what the standard of care
16 is that is dictated by the VA and whether those steps had been
17 taken care of, whether those steps had been followed with
18 regard to the type of medication that gets prescribed and the
19 various steps that are taken. It was the psychiatrist's
20 testimony that, indeed, that is what happened, that was the
21 standard of care, that is what was followed. The record is
22 robust. You have the information that you need before you.
23 No additional information is required in order for you to find

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1 whether or not there was deliberate indifference in this case.

2 Now, to address the defense argument that there might
3 have been some limitations on their testimony, that is not a
4 new fact, and that's not a change in the law. But to address
5 that head on, yes, indeed, there was a back and forth between
6 defense counsel and the judge as to the extent that Dr. Crosby
7 could testify. But Judge Pohl took the prudent step to allow
8 Dr. Crosby to come back in, testify, and answer the questions
9 that the defense had for her.

10 There were objections that were lodged when
11 Dr. Crosby was brought back in, but if Your Honor reviews the
12 record, you will see that every one of those objections was
13 overruled. The defense had their opportunity, had their
14 opportunity to ask the questions, and now they are simply
15 looking for another bite at the apple. And that is not the
16 standard that we are working from here.

17 The facts are sufficient for Your Honor to make the
18 determination. The defense was not significantly limited in
19 any way. They had the opportunity to ask the questions.
20 Perhaps they want to do it over. Now they have discussed they
21 want to call additional witnesses. That's not the posture
22 that we are in in a motion to reargue. The defense had their
23 opportunity to make their record, and they did make a record;

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1 they made a significant record that Your Honor can review.

2 Your Honor ruled previously that if you were going to
3 seek clarification, you would ask. Your Honor has not sought
4 clarification, none is required in this instance, and we ask
5 that the defense motion be denied.

6 MJ [Col SPATH]: Thank you.

7 Major Hurley.

8 ADDC [MAJ HURLEY]: Sir, with respect to Hatim, we
9 recognize -- you went through the conversation with me, you
10 went through the conversation with the government counsel.
11 Estelle v. Gamble, deliberate indifference, that is the
12 appropriate standard. But there is information in the opinion
13 in Hatim which you may find persuasive, and that's law that
14 this court, this commission is bound to follow. So we ask to
15 be able to put on evidence that satisfies -- that not only
16 addresses Estelle v. Gamble but also has the potential to
17 address any information, any concerns that you would have
18 based on our presentation, those concerns coming from that
19 particular case.

20 We accept that, and, yes, it's the government's
21 position that you should focus -- not the government, I do not
22 speak for the United States Government. It is the defense's
23 position you should focus on Estelle v. Gamble and the

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1 deliberate indifference, and we believe that is the factually
2 intensive standard that you should use.

3 And one fact that is important is in the conversation
4 and the review of the medical records with the government's
5 employee, Dr. 97, is that he changed his diagnosis during the
6 course of that litigation. That is something you have seen,
7 no doubt, in your review of the record, and it is those sorts
8 of facts that open the door for the additional production of
9 witnesses and consideration of reargument.

10 Finally, sir, we would end with this concept: Was
11 this extensively litigated, was 205 extensively litigated?
12 Yes. More is needed and required. Dr. Crosby needs to give
13 evidence in a classified session so that you have that
14 complete picture in order to base the findings that you have
15 to make, the important and factually extensive findings that
16 are required for AE 205. Not only that, but also the
17 testimony of those other witnesses.

18 Sir, do you have any other questions?

19 MJ [Col SPATH]: I don't, thank you.

20 Any further comments from the government?

21 ATC [LT DAVIS]: Nothing further from the government, Your
22 Honor.

23 MJ [Col SPATH]: All right. Give you an idea where we are

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1 heading, I know we are moving on to the argument regarding the
2 Skype, so 284 and 284L. Before we do that, take a break and
3 make sure -- I know there is an exhibit coming. I just want
4 to make sure there aren't any issues.

5 Let me do this, though: I don't mind doing -- I
6 guess my question, General Martins, I don't mind; why do you
7 think we should go through the advisement each session?

8 CP [BG MARTINS]: Your Honor, may I approach the bench?

9 MJ [Col SPATH]: Of course. Of course.

10 CP [BG MARTINS]: I will give you a copy of the order we
11 are construing.

12 MJ [Col SPATH]: Thank you.

13 CP [BG MARTINS]: Your Honor, we had extensive litigation
14 in Appellate Exhibit 099, I'm giving you order 099F ----

15 MJ [Col SPATH]: Yep.

16 CP [BG MARTINS]: ---- this is Judge Pohl's order, still
17 in force, 6 December 2012, extensive litigation over it. We
18 have had -- we have motions relating to absence of the accused
19 at key junctures. This is not an idle issue. There are lots
20 of cases on appeal where you have cooperation at the trial
21 level seemingly and later on you have something in the record.
22 So this isn't an idle issue.

23 If you go to page 7, we are at subparagraph 9(d),

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1 there is a discussion of renewing rights advisements waiver in
2 person. In that, Judge Pohl was relying in this order upon
3 D.C. Circuit case law that is very strong about the preference
4 for in-court waivers.

5 MJ [Col SPATH]: Absolutely, no doubt about that.

6 CP [BG MARTINS]: So the procedure we have developed has
7 been on the first day, that's when you do it. We haven't had
8 a session since August. This is an appropriate time to do it.
9 He is here. Rather than have to bring him in to do it, this
10 is the appropriate time to do it. And that advisement just
11 ensures he understands his right to presence and has to be
12 knowingly, voluntarily and intelligently waived and the way in
13 which he could exercise it. So we would request that we stick
14 with the procedure that we've got.

15 MJ [Col SPATH]: I think that was my question to you, just
16 as we go forward, I have this vision we may be here often at
17 some point, and do you envision this being before the start of
18 every session? Because this order just says that the military
19 judge is going to figure out when he has to be physically
20 present for sure to go through this rights advisement. Or
21 should I put out an order where it is clear that at the start
22 of every session when we have had a break, we will go through
23 the advisement at the start of voir dire and then trial

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1 session?

2 CP [BG MARTINS]: Judge Pohl had been making clear in his
3 docketing orders on the first day the accused will be there
4 and that was the opportunity then to do this. And he was
5 doing it, frankly, right after the very initial things in the
6 opening, so that when you have a recess, even if he were to
7 decide upon leaving the courtroom that he doesn't want to come
8 back, then you don't have to bring him in to do it.

9 MJ [Col SPATH]: Sure.

10 CP [BG MARTINS]: Your Honor, I think this is a sound
11 order based on a lot of litigation. We should depart from it
12 with care -- only with care, and that we would request that
13 you not.

14 MJ [Col SPATH]: All right. Any comments, Mr. Kammen?

15 LDC [MR. KAMMEN]: [Microphone button not pushed; no
16 audio]

17 MJ [Col SPATH]: No, I know the concern. The concern is
18 in capital litigation, the appellate courts, as they should
19 be.

20 LDC [MR. KAMMEN]: Your Honor, let me be real blunt. What
21 he is saying is we are concerned two years from now, five
22 years from now, Nashiri will claim ineffective assistance of
23 counsel.

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1 Believe me, there is so much ineffective assistance
2 of counsel going on right now because of the system and the
3 systemic problems, that the least of General Martins' problems
4 is Nashiri claiming that he didn't come to court. There is --
5 this system makes us ineffective, period, no new paragraph.
6 So that's coming, but it is coming in ways far more persuasive
7 and far more powerful than Nashiri's -- than this other issue.

8 MJ [Col SPATH]: Well, I would be surprised if there was
9 an appellate process in a capital case where ineffective
10 assistance wasn't raised. It is the standard.

11 LDC [MR. KAMMEN]: When it is conceded to because of the
12 system we operate under, that is a different situation.

13 MJ [Col SPATH]: It is. I don't -- I don't want to get
14 into the politics of the commissions. I find the protections
15 in the commissions in some ways may be somewhat different.
16 They are very much in line with military practice, and,
17 frankly, they are very much in line with District Court.

18 You all -- I know you are understaffed according to
19 your side, I do. And recognize the government has more
20 resources, I do. But that's fairly standard as well. You
21 know that because you have done this, frankly, more often than
22 I have; not based on age, just based on experience. Just
23 based on experience, you have done it more often than I have.

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1 And you know the government has the burden, so it is not odd
2 they have control over and a significant benefit with the
3 resourcing at times.

4 But they have balanced that here with experts and
5 expert hours and a civilian counsel who is learned.

6 LDC [MR. KAMMEN]: All evidence to the contrary, I'm happy
7 to have this discussion about resources. I mean ----

8 MJ [Col SPATH]: I know we will over some motions.

9 LDC [MR. KAMMEN]: I have to admit there is a lot that's
10 been going on this morning that makes me kind of crazy, which
11 I will address. But the double standard where the government
12 says oh, you get -- you don't get to present new evidence, but
13 if the judge rules against us, we want to reconsider and
14 present new evidence, next week in the CMCR, he is going to be
15 making an exactly different opposite argument than
16 Lieutenant Davis made to you this morning.

17 So the fact is, Your Honor -- and we will be getting
18 into this in a little bit -- there's a lot that is similar,
19 you are absolutely correct. But I don't have to go to a
20 federal prosecutor on bended knee to call a witness. I don't
21 have to go to a federal bureaucrat on bended knee to try to
22 get resources. So those differences are profound.

23 MJ [Col SPATH]: Absolutely. Those are the ones more

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1 similar obviously to military practice, whether positive or
2 negative.

3 General Martins?

4 CP [BG MARTINS]: Your Honor, without acknowledging the
5 factual basis of any of that, I do want to draw attention to
6 the court's order, docketing order of 22 October, amended
7 docketing order, which has become a common incorporation into
8 docketing orders that he would be reminded of his option
9 under, and it cites to that 099F. So in compliance with this
10 court's own order, we request that he be advised.

11 MJ [Col SPATH]: It does, credit given. I will tell you,
12 given the hundreds of thousands of pages I'm trying to catch
13 up on ----

14 CP [BG MARTINS]: I understand.

15 MJ [Col SPATH]: ---- I read the docketing order closely
16 for what we would be covering in motions. I have been
17 studying motions. Believe me, you are far more familiar with
18 things than I am, both of you; again, not based on age, just
19 experience.

20 CP [BG MARTINS]: Definitely not.

21 LDC [MR. KAMMEN]: Can we drop the whole age thing for a
22 moment?

23 MJ [Col SPATH]: Let me talk to Mr. Nashiri for a moment.

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1 Can you hear me, Mr. Nashiri? I will go through -- I
2 think you have heard these. I want to make sure we cover them
3 before we take a recess.

4 As we have done at the start of each previous
5 session, I want to go over your right to be present, your
6 right to waive said presence. You have the right to be
7 present at all sessions of the commission. If you request to
8 absent yourself from any session, such absence may be
9 voluntary and of your own free will. Your voluntary absence
10 from any session of the commission is an unequivocal waiver of
11 your right to be present during that session.

12 Your absence from any session may negatively affect
13 the presentation of the defense in your case. Your failure to
14 meet and cooperate with your defense counsel may also
15 negatively affect the presentation of your case. And under
16 certain circumstances, your attendance at a session can be
17 compelled regardless of your personal desire not to be
18 present.

19 Regardless of your voluntary waiver to attend a
20 particular session of the commission, you have the right at
21 any time to decide to attend any subsequent session. If you
22 decide not to attend the morning session but you wish to
23 attend the afternoon session, you must notify the guard force

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