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1 [The R.M.C. 803 session was called to order at 1036,  
2 5 November 2014.]

3 MJ [Col SPATH]: All right. These commissions are called  
4 back to order. All right.

5 Mr. Kammen, I think we can probably take up 184 and  
6 184 -- is it Kilo?

7 LDC [MR. KAMMEN]: Yes.

8 MJ [Col SPATH]: Or is it Lima, L? Yes, 284 and 284L, we  
9 can probably take those up together.

10 LDC [MR. KAMMEN]: Before we do, Your Honor, at the  
11 recess, Mr. al Nashiri advised that he is having some stomach  
12 problems as a result of his transportation and requested first  
13 of the staff, as has happened in the past, that a corpsman  
14 come and give him medicine apparently the corpsman is familiar  
15 with, something that is dissolvable, similar to what you have,  
16 and they've refused. They say that somehow they can't bring a  
17 corpsman here.

18 So we think they can. He wants to stay. He would  
19 just like this dissolvable medicine, which apparently the  
20 corps people are familiar with, and it dissolves in water and  
21 settles his stomach and what have you. So I don't know who we  
22 talk to to make that happen, but we told him we would resolve  
23 that with you since there seems to be some resistance today.

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1 And again, in the past when this has come up, it hasn't been  
2 an issue.

3 MJ [Col SPATH]: Let me just see if the government has any  
4 comments. Who wants to talk?

5 TC [MR. SHER]: Your Honor, this is the first we are  
6 hearing of it. We can make an inquiry and see what can be  
7 done.

8 MJ [Col SPATH]: Let's do that. Before we start  
9 discussing whether or not I can issue an order or not, let's  
10 first just see if we can work it out amenable while we are  
11 here.

12 Do you want to take a break to do that, or do you  
13 want to send somebody to do it and give me an update while we  
14 are talking?

15 TC [MR. SHER]: We are happy to send somebody to do it, if  
16 defense feels they can ----

17 LDC [MR. KAMMEN]: Whatever is easiest.

18 MJ [Col SPATH]: Do that and give me an update, and we  
19 will go from there. That would be very helpful. All right.

20 With regard to 284 and 284L, you will offer another  
21 exhibit; am I correct?

22 LDC [MR. KAMMEN]: Yes. But it seems to me, Your Honor,  
23 that where we are -- well, first, let me say this: According

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1 to Mr. al Nashiri, he was advised a couple of weeks ago by  
2 what he describes as a camp administrator, a woman, that  
3 beginning in the next 30 days or so, they are going to  
4 institute a policy wherein he will be allowed to have a  
5 telephone conversation with his family.

6 He has been told that the way this conversation will  
7 work initially is that he will be allowed to talk for a period  
8 of time, then he will stop. It will be reviewed, then once it  
9 is cleared, it will go on to his family. They will be allowed  
10 to talk, that will be reviewed. So it will be sort of a  
11 minute on, a minute off. And that he is under -- he has been  
12 told that if that is successful, after a period of time, that  
13 will escalate to video telephone conferences. If that's the  
14 case, this is pretty much moot.

15 Now, I spoke with trial counsel this morning, and he  
16 said he's not sure that's the case. If that's not the case,  
17 then it's -- well, it strikes me that we have two problems,  
18 because it is almost extraordinarily cruel to have told him  
19 that this is going to happen and then that not be correct.

20 So, you know, I mean, that's the starting point of  
21 this, is what's the current state of the prison's position  
22 because I think that does affect who the witnesses would be if  
23 we are allowed to call witnesses. Because if on the one hand

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1 Admiral Cozad has told his staff or somebody has told the  
2 staff this is okay, but now to support the government's  
3 litigation needs that's being changed, that's really unfair to  
4 us.

5           If somebody went off the reservation and made a  
6 promise or representations to Mr. al Nashiri, that would be  
7 important to know. You know, we just -- so that's -- events,  
8 like everything here, are fluid. That's at least our current  
9 understanding of what he has been told.

10           So I don't know how you want to proceed, where we are  
11 on that. But I do think it affects the discussions. And it  
12 would make sense, quite candidly, because the Department of  
13 Defense directive that we provided to the commission  
14 contemplates phone calls between detainees and their families.  
15 So frankly, when this came out, we were kind of expecting  
16 that, well, okay, the Department of Defense is beginning to  
17 show some humanity in this situation, and, you know, maybe  
18 this will become moot. And, you know, instead of what it was  
19 was not no, but heck no, the government sort of doubling down,  
20 and, you know, frankly, we are not clear precisely where we  
21 are right now.

22           MJ [Col SPATH]: I don't know if we are going to have an  
23 update on that or not. We'll see in a moment. Let me ask

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1 this in this regard: Let's, for a moment, assume that DoD  
2 hasn't changed their position ----

3 LDC [MR. KAMMEN]: Okay.

4 MJ [Col SPATH]: ---- just because of the government's  
5 filings.

6 LDC [MR. KAMMEN]: Sure.

7 MJ [Col SPATH]: Let's for a moment assume that. Is this  
8 focused on the deliberate indifference standard or is it  
9 focused on Turner and Hatim?

10 LDC [MR. KAMMEN]: I know this is not going to be a very  
11 satisfactory answer when I say all of the above and just  
12 simple humanity.

13 MJ [Col SPATH]: I understand what you are saying. Here  
14 is the issue I have, and I don't mean this -- given the  
15 timing, it seems to appropriate. I said this recently in a  
16 trial court. Whether or not I like or agree with the rules,  
17 and I am not indicating that I do or don't, if people don't  
18 like the process, they need to go vote. And I don't mean that  
19 in a horrible way. I honestly mean my role is to interpret  
20 the law I get in large part, whether I like it or not. Now,  
21 there are things that are unconstitutional. I mean, I  
22 understand my lane. That is why I'm trying to figure out  
23 where your motion falls.

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1 LDC [MR. KAMMEN]: With respect, I think your lane is  
2 much, much wider than you give it credit for.

3 MJ [Col SPATH]: How with Turner, though, for this issue  
4 for the Skype phone call?

5 LDC [MR. KAMMEN]: Turner doesn't say that you -- I mean,  
6 first, Mr. Nashiri is presumed to be innocent. And as a  
7 presumption of innocence, you know, again, in federal court,  
8 in military courts you would never have this kind of severing,  
9 even with a SAM, which is not something the government has  
10 argued. SAMs are ultimately under the control of the court.

11 If the court finds that the SAM is overbroad, unfair,  
12 overreaching, gratuitously inhumane, it can modify it. So  
13 ultimately the court controls. And to say that you have no  
14 role in ----

15 MJ [Col SPATH]: And I'm not saying that. I'm not saying  
16 that. I have to figure out what test I'm supposed to use.  
17 And so then Turner, and we just had this discussion with  
18 regard to Hatim, we just had this discussion about that, that  
19 standard for the actual controls of a facility, the facility  
20 does get some deference. So if the facility says we believe  
21 we have -- we have attempted to offer some things like letters  
22 and like videos that are exchanged as opposed to the Skype  
23 that is being asked for, that they do get some deference.

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1 LDC [MR. KAMMEN]: They get some deference, but I think  
2 their deference in this situation has to be weighed against  
3 the Department of Defense policy. Because that's why we  
4 submitted it, because it was -- it does change the landscape.

5 The Department of Defense policy does not exclude  
6 HVDs.

7 MJ [Col SPATH]: Concur. But it has that lawyer language  
8 put right in there.

9 LDC [MR. KAMMEN]: When practicable.

10 MJ [Col SPATH]: Where practicable.

11 LDC [MR. KAMMEN]: Practicable. And they have not said  
12 this can't be done, they have simply said they don't want to  
13 do it. And that is -- they have not -- none of their  
14 responses, and that is why we think that the progression here  
15 should be about witnesses, and then -- because none of their  
16 responses have said this is impracticable, this can't be done.

17 All they have said is we don't want to do it. And  
18 the justifications -- I agree you have to give them some  
19 deference, but their justifications have to at least pass the  
20 straight-face test. And if -- you know, here's what's going  
21 on, and if I may, we are seeing this kind of over and over and  
22 over again.

23 We filed 284, and the government's response was to

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1 include -- response was to say no and attach two declarations,  
2 one of which was classified. When we argued that, if you will  
3 recall that argument, at some point the government was kind of  
4 going, well, maybe we are withdrawing these declarations. It  
5 got very, very murky as to what was going on. And then you  
6 ruled and basically said, well, one declaration doesn't really  
7 contradict what the defendant is saying, and the other was --  
8 whatever.

9           Well, then we submitted, you know, rather  
10 straightforward new information, Department of Defense policy.  
11 And, again, the Department of Defense policy doesn't exclude  
12 HVDs, you know, and talks about family visits -- you know, and  
13 I don't know where all the Department of Defense is detaining  
14 folks. I mean, there may be a whole lot of folks being  
15 detained in places I'm not familiar with. But the one that  
16 jumps out at anybody who reads that it applies in Guantanamo  
17 Bay.

18           What the government did, and it is particularly  
19 troubling, is they now say forget these other declarations.  
20 This is Admiral Cozad, and Admiral Cozad does this, but they  
21 don't even do you the courtesy of doing a declaration, they  
22 just put it in a motion. It is not even what we would call  
23 evidence.

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1           So essentially what they are saying to you is, rely  
2 on these factual representations, but don't let the defense  
3 challenge them. Because all of these have one commonality:  
4 If they were subject to meaningful scrutiny, they would be  
5 demonstrated to be ludicrous in the context of Guantanamo Bay  
6 and in the context of what we are discussing.

7           MJ [Col SPATH]: And I think that's why -- that's why I  
8 spent -- this is one of those I ended up spending a lot more  
9 time on, frankly, than when I first saw it. But it is in part  
10 because I think the requested relief was confusing from when  
11 it started. Because it did start as more of a medical care  
12 issue, I understand, being diagnosed with PTSD and depression,  
13 and we have Dr. Crosby saying it would be medically  
14 beneficial.

15          LDC [MR. KAMMEN]: And Dr. 97 saying it would be medically  
16 beneficial.

17          MJ [Col SPATH]: He sure did. I think he said it would be  
18 medically helpful, I think, was Dr. 97. But that is totally  
19 different than how the motion was initially styled; that is,  
20 the deliberate indifference for medical care.

21                 That is why I'm trying to get through are we dealing  
22 with a medical care issue where the standards are up here,  
23 frankly, for deliberate indifference, it is much higher. Or

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1 are we dealing with Hatim and issues like that; and that is,  
2 facilities are certainly free to run their facility, but the  
3 judge who is dealing with the person in the facility certainly  
4 has a duty to make them demonstrate why they are engaging in  
5 the behavior they are engaging, and that's a different  
6 standard.

7 LDC [MR. KAMMEN]: And I would say it like this, is --  
8 clearly it's a conditions of confinement issue, but one of the  
9 facts in favor of the relief is the fact that it does have  
10 this other benefit. And so I'd say I think they are  
11 compatible in this context, and I think it's -- I understand,  
12 you know, the need, the desire to parse it; but I think in  
13 this situation where everything is so intertwined, you can't  
14 really parse it as neatly as you might want. Because if  
15 they've got ludicrous justifications, then the fact of the  
16 medical benefit weighs into the equation.

17 But let's assume that they really had genuine,  
18 legitimate concerns that were realistic in the context of the  
19 world of 2014 in Guantanamo Bay. Then the medical situation  
20 might be less -- put less weight on the scale, if that makes  
21 it clear.

22 So, you know, to me the starting point given where we  
23 are is -- and, again, I mean, the government is going to say

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1 you have to defer to the commander even though there is no  
2 evidence of what his position is, there is just some  
3 representations, which I presume are in good faith. But that  
4 doesn't make it evidence. The fact that a lawyer files it in  
5 a pleading doesn't make it evidence.

6 MJ [Col SPATH]: Very true.

7 LDC [MR. KAMMEN]: So to us the starting point, if you are  
8 going to give any deference to the commander, is to have a  
9 witness.

10 Now, that's added to this new development because  
11 if -- you know, if there is this other -- you know, if it is  
12 really being considered -- I mean, I don't know, I doubt this  
13 happens, so I'm just saying this, recognizing that it is a  
14 hypothetical and I'm not wanting to make anybody crazy, but  
15 let's say that, you know, they called the prosecution and  
16 said, oh, we are going to do this so you don't really need to  
17 oppose this. And the prosecution said no, we don't want you  
18 to do it because we want to keep Nashiri upset. Well, that  
19 would be important to know.

20 Now, I'm not suggesting that happened, but, again,  
21 how it came that he was told this, I think, is very, very  
22 important to this discussion. And if it was a mistake, it is  
23 a terribly inhumane mistake. And if it was something -- so I

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1 think that's ----

2 MJ [Col SPATH]: That also at this point is a  
3 representation. I mean, that is an important ----

4 LDC [MR. KAMMEN]: That's true. All I can tell you is  
5 what we have been told.

6 MJ [Col SPATH]: Yes, that is something we are going to --  
7 I think that is the starting point, to figure out are those  
8 conversations occurring -- whoever wants to attempt to unravel  
9 that, you have the burden, of course, but are those  
10 discussions occurring, and then kind of move from there.  
11 Because evidence has to get here somehow on that issue.  
12 Because that is an important question. If those conversations  
13 are occurring, hopefully we can just find out and not go  
14 through this in long form.

15 LDC [MR. KAMMEN]: Yes. And, again, we alluded to this  
16 earlier, so much of this morning just sitting here made me  
17 crazy, because you say you have the burden, and that's true.  
18 But, again, in a court-martial with the burden, I send the guy  
19 a subpoena or I go to the government and we don't get the kind  
20 of resistance. In federal court, I just send the guy a  
21 subpoena.

22 MJ [Col SPATH]: That's fair, and I understand maybe in  
23 the past, and again this is not a comment on how I'm ruling on

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1 this, so far I haven't been asked to produce a lot. We have  
2 been dealing with the preliminary pieces.

3 LDC [MR. KAMMEN]: Right. We just learned of this today,  
4 so ----

5 MJ [Col SPATH]: Understand.

6 LDC [MR. KAMMEN]: We can't -- you know, I mean, if I  
7 don't bring it to your attention and then you rule, then the  
8 government is going to be saying, well, wait a second, what's  
9 changed? And we are going to have a repeat of the "only the  
10 government gets to make motions to reconsider" dilemma,  
11 and ----

12 MJ [Col SPATH]: I realize that issue. But you must --  
13 that is a standard, that has happened to me before. Any time  
14 I granted a motion to dismiss or suppressed significant  
15 evidence in a case, the government can appeal that decision.

16 LDC [MR. KAMMEN]: I understand.

17 MJ [Col SPATH]: They haven't been shy about doing that to  
18 me.

19 LDC [MR. KAMMEN]: No. So I guess that's the starting  
20 point is, you know, where are we on this.

21 MJ [Col SPATH]: But that helps me, though, as I work  
22 through the motion. It is not that I need it, that I need to  
23 be in a particular spot, it's just I have to apply a legal

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1 standard of some sort. And what I have to understand is, is  
2 the contention that not allowing the phone call, is this cruel  
3 and unusual punishment where I'm looking for deliberate  
4 indifference from that, and you've talked through it, I  
5 understand; or is it a condition of confinement where, again,  
6 the facility does get discretion and they have some -- I  
7 wouldn't say abuse of discretion standard but certainly they  
8 have wider latitude to run their facility the way they believe  
9 is required, as long as they can show me it's reasonably tied  
10 to a security concern, a logistics concern, whatever that  
11 happens to be, but they would have to show me that if we are  
12 using the Hatim standard, I think.

13 LDC [MR. KAMMEN]: Well, I mean, if you are suggesting  
14 that the cruel and unusual punishment standard is less,  
15 candidly, I like that one better.

16 MJ [Col SPATH]: No, I'm saying that one -- deliberate  
17 indifference, I think, is a higher standard than the  
18 discretion that they have to run a confinement facility based  
19 on the findings in Hatim, and the District Court or Circuit  
20 Court required significant justification in that case.

21 LDC [MR. KAMMEN]: So, I mean, I think where we are is  
22 it's a conditions of confinement issue, but aided in your  
23 consideration by the fact that it is -- you know ----

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1 MJ [Col SPATH]: It is medically helpful, and that  
2 evidence is already before me.

3 LDC [MR. KAMMEN]: That's true. It is medically helpful  
4 and, again -- and all of these things are intertwined. I  
5 don't want to revisit 205, but the -- what the psychiatrist,  
6 Dr. 97, did in terms of changing his diagnosis to aid the  
7 prosecutor's litigation stance was particularly troubling.  
8 And, you know, so all of this is -- you know, we are just  
9 pretending that this -- that the PTSD from which  
10 Mr. al Nashiri suffers somehow is really getting treated when  
11 we think the evidence certainly was -- and if it goes on, will  
12 be even stronger -- that it's not. And, again, this is kind  
13 of that same piece of it: Yeah, we know he had this, yeah;  
14 even this would be helpful, but too bad.

15 But, again, if they had real justification that  
16 really passed the straight-face test in the real world of  
17 Guantanamo Bay, that changes the equation. But if there is a  
18 hearing, I suggest that the evidence will be they don't.

19 MJ [Col SPATH]: Do you know, if I were to grant an  
20 evidentiary hearing, who you would be requesting at this  
21 point?

22 LDC [MR. KAMMEN]: Yes. We would be requesting Admiral  
23 Cozad -- at present, we would be requesting Admiral Cozad and

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1 we would be requesting whoever the person was that spoke to  
2 Mr. Nashiri, those two people.

3 MJ [Col SPATH]: Thank you.

4 LDC [MR. KAMMEN]: Okay.

5 MJ [Col SPATH]: Lieutenant Morris.

6 ATC [LT MORRIS]: Sir, good morning.

7 MJ [Col SPATH]: Good morning. Let me ask, you heard the  
8 representations, haven't had a chance -- maybe you just heard  
9 them, I don't know, maybe you had some knowledge already. Are  
10 those discussions underway, do you know? Do you know if  
11 that's occurred?

12 ATC [LT MORRIS]: Yes, sir, as of yesterday. And the  
13 government was made aware that -- and defense's representation  
14 that the accused was prematurely notified that there may be  
15 some efforts towards providing a form of -- an additional form  
16 of communication with the outside world. That was unfortunate  
17 that was done.

18 It is our understanding and what has been told to us  
19 is that that is not available to him now. With this policy,  
20 as with all policies, there is an ongoing evolution to try to  
21 include things. But as Your Honor has rightly and clearly  
22 paved the way forward, that what's before this commission with  
23 the defense's motion -- this is their burden, this is their

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1 pleading that they've brought -- is the standard in  
2 Estelle v. Gamble, is does lacking Skype constitute a  
3 deliberate indifference of serious medical needs, and the  
4 standard goes on to state, which constitutes an unnecessary  
5 and wanton infliction of pain. That's the full standard laid  
6 out.

7 MJ [Col SPATH]: Okay. Here's my question and my concern:  
8 Let's assume it is that easy for a moment, and I leave and I  
9 work with the staff here, and I issue a ruling that not  
10 allowing that communication is not indicative of cruel and  
11 unusual punishment and is not indicative of deliberate  
12 indifference to medical care, because the evidence presented  
13 thus far is it would be medically helpful, not medically  
14 necessary.

15 Everyone here has indicated a desire to move forward.  
16 So we know what's going to happen next. There's going be the  
17 follow-on motion with Hatim, and the case, we've talked about  
18 it enough, and that is the policy that's in place here, is  
19 there a rational justification for the policy. So we are  
20 going to end up having this discussion. But instead of doing  
21 it now, where we maybe can move the discussion forward, we are  
22 going to do it whenever we are coming back next. We will do  
23 it in December, then we will do it in January.

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1           ATC [LT MORRIS]: Yes, Your Honor. The government's  
2 position is what has been briefed thus far, we are at that  
3 point right now and we can proceed. We've got the directive  
4 in front of us, we've got the case law in front of us, defense  
5 fully briefed this; we are all the way up to Quebec.

6           MJ [Col SPATH]: I agree. And we had this discussion last  
7 time about we can follow based on the pleadings. That law is  
8 reasonably clear, and we can move forward in that way. I  
9 just -- again, I recognize I hear frequently -- more  
10 frequently from this side than the defense, I hear from both  
11 sides a desire to move forward.

12          ATC [LT MORRIS]: Yes, Your Honor.

13          MJ [Col SPATH]: I just see the litigation process that is  
14 going to unwind on this issue.

15          ATC [LT MORRIS]: I understand what you are saying. I  
16 think the helpful case in front of Your Honor right now is the  
17 Al Odah case, which observed both the standard under  
18 Estelle v. Gamble and the wide-ranging deference standard that  
19 we see in Bell v. Wolfish. And the useful aspect of that case  
20 is a habeas case where defense is asking under the canopy of  
21 medical care for realtime communication. And the response in  
22 that case in denying that defense motion is that in using  
23 Estelle v. Gamble, that this does not amount to serious

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1 indifference but is, well, almost like a belt-and-suspenders  
2 argument that the belt is holding up and is the  
3 Estelle v. Gamble, that that is -- defense has not shown a  
4 deliberate indifference. But on top of that, if we were to  
5 include the Bell v. Wolfish, which I'm going to describe as  
6 suspenders, the government still has a rational basis. So  
7 even without any declarations ----

8 MJ [Col SPATH]: I think that's, I concur, a rational  
9 basis, but where do I get to rational basis? Do you have the  
10 burden to present evidence to demonstrate then?

11 ATC [LT MORRIS]: The government in good faith went above  
12 and beyond, and in our response we went above and beyond to  
13 not just provide Your Honor with what is common sense, what is  
14 common sense as filtered through case law specific to  
15 Guantanamo Bay detainees, but we also went above and beyond  
16 and provided Your Honor with declarations, declarations from  
17 the DoD which said that, yes, this is, in fact, the policy,  
18 that high-value detainees are not allowed Skype; a declaration  
19 from a senior medical officer as attached to Estelle v. Gamble  
20 stating that -- and touching as well on the second prong of  
21 the Turner v. Safley, there are reasonable alternatives that  
22 are available.

23 We have to keep in mind that defense is requesting

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1 Skype as a form of treatment for PTSD, and they are asking  
2 this commission to reach into JTF-GTMO and dictate for them  
3 how to take care of the accused's medical needs. And some of  
4 the questions in addition to the Estelle v. Gamble the  
5 government still wins; that if you look for is there a  
6 rational basis, you see, as I stated before, common sense  
7 provides that it doesn't matter what prison facility, the  
8 prison administrator has a responsibility to control the flow  
9 of information going in that prison and going out of that  
10 prison.

11           One of the first cases I prosecuted at the state  
12 level was a contraband in a penal institution; a prisoner had  
13 a cell phone. State legislators recognized the importance of  
14 controlling information. And certainly with a high-value  
15 detainee, common sense would tell you that the restriction of  
16 that flow of information would be further constrained. That's  
17 the case here. He has other alternatives that are available  
18 to him.

19           So to answer Your Honor's question, what we have  
20 provided for Your Honor above and beyond what is necessary,  
21 because as defense has acknowledged, they cannot -- in their  
22 pleading before Your Honor, they cannot state what they need  
23 to state, and that is that a lack of Skype amounts to the high

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1 threshold in Estelle v. Gamble. That being the case, the  
2 government has provided additional rationale for Your Honor if  
3 we were to look at this under a Bell v. Wolfish, under a  
4 Florence v. Freeholder standard.

5           So if there was a world where somehow somebody said  
6 that Skype was medically necessary and that somehow all HVDs  
7 were given Skype but for the accused, in that world which we  
8 are not in, then Your Honor could go down the inquiry of  
9 asking the government, with wide-ranging deference towards the  
10 prison, of asking the government is there a rational basis.  
11 And in that hypothetical world, which we are not in, the  
12 government still provided Your Honor with common sense,  
13 through pleadings, through case law, to -- they're specific to  
14 Guantanamo Bay; and in addition to that, Your Honor, we  
15 provided declarations. But none of those things changed the  
16 issue that is in front of Your Honor and that Your Honor sees  
17 clearly as being in Estelle v. Gamble.

18           Now, as an administrative matter, the defense has  
19 filed 284Q as a motion to compel. Yesterday the government  
20 responded to that in its filing. So where we are today and  
21 what the government suggests is that we are sufficiently able  
22 to litigate and brief 284Q and R, that after Your Honor's  
23 decision is made on that, then we can proceed to if Your Honor

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1 needs to hear additional oral arguments on the underlying  
2 motion as well as the motion as a directive.

3 But before we would get there, I would submit to Your  
4 Honor that -- and you asked this to defense counsel, how does  
5 this directive play into the analysis right now; has this  
6 somehow shifted from a medical analysis to a Bell v. Wolfish  
7 or a Hatim analysis? And as the government stated in its  
8 pleading and in providing Your Honor the Al Odah case, the  
9 directive does not change the analysis and does not change the  
10 standard before this commission as being Estelle v. Gamble.

11 What it does is you see, as Your Honor pointed out,  
12 language in that directive that where appropriate and where  
13 practicable there will be certain forms of communication that  
14 will be provided to detainees. With a directive that applies  
15 to all law of war detainees that is giving guidance, you would  
16 expect that language. You would expect that language because  
17 certain detainees are high-value detainees and certain  
18 detainees are not high-value detainees. It is exactly the  
19 type of language you would expect in a directive. It is  
20 exactly the type of language, even under a Bell v. Wolfish  
21 saying give wide-ranging deference to the prison, you expect  
22 to find that language. It is the type of language that is  
23 consistent with this commission's handling of other issues

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1 when it is talking about its relationship with JTF-GTMO.

2 But most importantly, Your Honor, the directive  
3 "appropriate, where practicable, providing this communication"  
4 does nothing to change the defense's underlying pleading.  
5 They are asking for Skype as a form of medical treatment.  
6 They cannot even state that the standard that they need to  
7 state, that it is, but for Skype, a deliberate indifference to  
8 a serious medical need, they cannot state that. And until  
9 they are prepared to plead that and state that according to  
10 that standard, then the defense's motion should rightly be  
11 denied.

12 Subject to Your Honor's questions and as Your  
13 Honor -- I would ask how he would like to proceed through the  
14 specific motions, but again, the government's position is this  
15 is fully briefed, case law is full in front of Your Honor, and  
16 the government is fully prepared to go forward.

17 MJ [Col SPATH]: Thank you.

18 Mr. Kammen?

19 LDC [MR. KAMMEN]: I'm kind of confused as to what the  
20 government's position is because it seems to be kind of a  
21 moving target. We presented you with declarations, so you  
22 should consider the declarations. But we really don't want  
23 the defense to cross-examine these people because if the

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1 defense cross-examines these people you might learn that  
2 what's in the declarations is total and complete nonsense.  
3 And that we are telling you Admiral Cozad says this and such,  
4 but, boy, don't call him as a witness. But if you want to  
5 call him as a witness it is okay, but the defense hasn't  
6 sustained its burden of proof because we won't approve him as  
7 a witness, and so go ahead and deny the defense's motion.

8           We asked to produce the two witnesses who provided  
9 declarations. And in that colloquy, the government kind of  
10 indicated, well, never mind, we really don't want them to  
11 testify. So if you are going to have them testify, we are  
12 going to withdraw them. And it got very, very confused. But  
13 you denied that, and so be it.

14           But, you know -- and if it is our failure, it is  
15 certainly one of many. But the DoD directive changed the  
16 landscape because it is now -- you know, this was not  
17 something -- I mean, I'm getting familiar with how the  
18 military works, and it is not something that somebody sat down  
19 one afternoon and said I'm going to write this policy, and I'm  
20 not going to let anybody review it, and let me just publish  
21 it. I just know that this went through all manner of  
22 bureaucracy and all manner of people had a hand in this.

23           And if somebody wanted to say, you know, there is

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1 this arbitrary and now meaningless distinction of people in  
2 Guantanamo between HVDs and low-value detainees, they were big  
3 boys and girls, they knew how to write it, and they can have  
4 said for low-value detainees, this is the standard, for  
5 high-value detainees it is something different. And they  
6 didn't.

7           And I, again, know how things work. And I don't  
8 believe for a second somebody prematurely decided to go off  
9 the reservation and tell Mr. al Nashiri you are going -- you  
10 know, this is going to happen. That's -- you know, things  
11 there in this situation are too controlled. You know, we  
12 can't even wear cufflinks back to see him because of the  
13 amount of control. Nobody is going to just sort of  
14 prematurely do something like that. And so, you know, the  
15 notion that this person was just acting oh, wow, I wasn't  
16 supposed to tell? I mean, that's just -- I'm sorry.

17           So, you know, the government wants it all ways. And  
18 this is the problem with their litigation policy. Always  
19 defer to us, never make us present witness -- never make us  
20 present any real evidence subject to cross-examination, and  
21 don't let the defense present evidence. And then the defense  
22 always loses.

23           And this is going to be a reoccurring theme the rest

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1 of the day because their litigation strategy for virtually  
2 every other hearing is a variation of the same thing. We want  
3 to have hearings, but we only want to have hearings where one  
4 side gets to meaningfully participate. Well, we will address  
5 those issues.

6           The point, Your Honor, is this: They want you to  
7 defer to what under the law is nothing. There is nothing  
8 before you to defer to. You've said you are not considering  
9 the two declarations. Fine. There is nothing in their  
10 pleading that gives -- that says -- you know, that gives you  
11 any right -- there is no evidence in their pleading. They  
12 just say, well, this is the policy. We haven't heard any  
13 evidence.

14           Now, if you want to say, okay, you guys messed up  
15 because you didn't amend your pleading in the proper way when  
16 you attached the DoD directive, yeah, I mean, then we put this  
17 off to the next time. But in the end of the day, what are we  
18 about here? I mean, it's -- it would seem to me, you know, if  
19 your position is we are not -- he is not going to get a phone  
20 call, I'm not going to get involved in this, let's have this  
21 fight and let's be done with it. Hear the evidence and then  
22 let's have this fight.

23           And if they can show that there is a real

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1 justification for this and they can really show that, you  
2 know -- I mean, it seems to me and it just occurred to me, if  
3 Mr. Nashiri was prematurely told about this potential change,  
4 then there clearly is practical, because they're talking about  
5 a potential change. So unless some person just decided to  
6 make something up, that would be important to know. And if  
7 this change was in the works and then all of a sudden got  
8 rescinded because, hey, didn't you know that the government is  
9 opposing, that would be important to know.

10           So, you know, as I understand what the prosecutor  
11 said, I think Quebec and Romeo are the motions to compel. He  
12 says those are fine, let's, you know, rule on those. We think  
13 those should be granted and that the government should be  
14 required to produce the two witnesses that we've requested,  
15 Admiral Cozad and whoever prematurely -- and it also would be  
16 interesting to know what guidance that person was provided,  
17 how that came to be. So if there is any documentation, we  
18 think the government should provide that as well, and then  
19 after we hear these witnesses, then let's see where we are.

20           But it does strike me as unfair and, quite frankly,  
21 inhumane to just say, well, we are not going to hear these  
22 witnesses, you know, and we are -- you know, we are not going  
23 to address this motion or we are going to hold you to a

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1 standard that clearly has changed as a result of the  
2 Department of Defense's own directives.

3           So, I mean, you know, I think where we are from the  
4 defense perspective is we would like you to grant the motions  
5 to compel the witnesses. Frankly, in view of their  
6 resurrecting the declarations and somehow asking you to rely  
7 on the declarations, we would expand it to all four witnesses:  
8 The doctor, the DoD official and Admiral Cozad, and the person  
9 who prematurely told Mr. Nashiri about that.

10           So I think that's the place, you know, where we are,  
11 you know, and it would seem to me at least two of them could  
12 probably testify tomorrow. I suspect they are here and  
13 relatively available. And then we can see where we are on the  
14 other two if that really remains an issue. Thank you.

15           MJ [Col SPATH]: Thank you.

16           ATC [LT MORRIS]: Your Honor, the defense says it would be  
17 interesting to call these witnesses. Interesting is not the  
18 standard laid out very clearly for defense that defense has  
19 applied before in requesting other witnesses. And  
20 specifically focusing on this witness request, this isn't the  
21 first time that they have requested Admiral Cozad. They  
22 requested Admiral Cozad last time. They made a relevance and  
23 necessity argument as the Rules of Military Commission state

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1 they need to under 703(b) and (c). And Your Honor in 284  
2 denied Admiral Cozad, along with other witnesses, stating  
3 there was nothing that he was going to testify to that was  
4 going to provide this commission under the Estelle v. Gamble  
5 standard with anything useful to resolve that issue.

6 MJ [Col SPATH]: And I completely understand why I said  
7 that, and I still feel -- in that particular area, I feel the  
8 same way.

9 ATC [LT MORRIS]: Yes, Your Honor.

10 MJ [Col SPATH]: I guess my question is -- I keep looking  
11 at Hatim, because it talks about Turner. Turner seems to be a  
12 great place to look to. It's clear that at the District Court  
13 level, a significant amount of evidence was produced to  
14 demonstrate why particular restrictions were being put in  
15 place, to show they weren't exaggerated responses, and  
16 ultimately the court gave lots of deference, again, as the  
17 defense has conceded, I think. Got it.

18 And that is why I keep coming back to this question:  
19 The way 284 started, there is no doubt it was deliberate  
20 indifference to medical care, and I have the testimony from  
21 two medical experts that said it would be medically helpful.  
22 That does not get us to deliberate indifference, I don't  
23 think. I haven't found a case that would suggest we get there

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1 because of that.

2 My worry is, again, just judicial economy. This has  
3 morphed -- I know that you were accused of presenting a moving  
4 target. This has been a bit of a moving target, maybe by  
5 design, maybe by development with Hatim. For you all, this  
6 has been a moving target. I concur. Here you are trying to,  
7 you know, respond now to, well, wait a minute, this is a  
8 slightly different argument.

9 The DoD instruction is interesting. Frankly, I think  
10 "where practicable" might have been a bureaucrat's effort to  
11 cover high-value detainees, or not, I don't know. Just my  
12 guess reading the instruction that is the wiggle room they are  
13 after. "Where practicable" gives everybody lots of wiggle  
14 room and lawyers lots of things to talk about in court and we  
15 will be fighting about it for two years.

16 But here what I'm trying to do is prevent it. If the  
17 issue is does this make sense for the facility, is there a  
18 rational basis, not a particularly high standard, then who has  
19 the burden? And frankly I think the defense does, because it  
20 is not for you to demonstrate they have a rational basis; it  
21 is for them to demonstrate it's an irrational basis. The  
22 burden is on the defense, right? We agree with that.

23 ATC [LT MORRIS]: The Supreme Court, in Bell v. Wolfish,

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1 makes that very clear. Defense in that case, another prison  
2 restriction case, tried to put the burden on the government,  
3 saying, "Government, there is a compelling necessity argument,  
4 you must show the following." The Supreme Court very clearly  
5 says that's not the case and reaffirms the wide-ranging  
6 deference, the rational basis ----

7 MJ [Col SPATH]: It reaffirms that but also places the  
8 burden firmly on the defense to show me that the restriction  
9 is irrational, that it has no tie to a rational concern of the  
10 facility.

11 ATC [LT MORRIS]: The important thing, though, is that  
12 when we talk about a moving target, we talk about the  
13 litigation landscape that we are at in 284. It is not  
14 either/or. And when they try and say that -- and what I mean  
15 by that, it is not just discussing Bell v. Wolfish or  
16 Estelle v. Gamble.

17 The government's position is that this is the  
18 defense's pleading and that throughout this entirety, and even  
19 at the last filing, Your Honor, in 284Q, they request these  
20 witnesses per the medical necessity argument of Skype, and  
21 they still talk about the medical benefits. But what they are  
22 not able to do, and no witness on the face ----

23 MJ [Col SPATH]: I think I'm almost conceding that

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1 without -- not that I can't rule from up here, but I'm  
2 conceding that, I think.

3 ATC [LT MORRIS]: So if we are conceding that, I think no  
4 witness ----

5 MJ [Col SPATH]: Not so far. The defense had opportunity  
6 to put on evidence. Dr. 97 and Dr. Crosby made clear, they  
7 said it would be medically helpful. They would not go so far  
8 as to say -- or they didn't offer it as a statement that it  
9 was deliberately indifferent not to provide the Skype call. I  
10 think it would be hard to get a medical provider to say that,  
11 frankly.

12 ATC [LT MORRIS]: Yes, Your Honor.

13 MJ [Col SPATH]: We have all conceded that. So, again, I  
14 can do exactly what you want me to do. I can issue the  
15 ruling. We can be done.

16 ATC [LT MORRIS]: Let me then ----

17 MJ [Col SPATH]: Or we're going to do this again under the  
18 new DoD directive ----

19 ATC [LT MORRIS]: Yes.

20 MJ [Col SPATH]: ----- and we're going to do this again  
21 with the guidance from Hatim where there -- there was an  
22 evidentiary hearing of some sort at the District Court level.  
23 That's pretty clear because the Circuit Court relied on that.

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1 What defense is saying here is let us under Hatim have the  
2 opportunity to show this is an irrational policy.

3 And so all I'm asking is, if you really want to move  
4 forward in this case, should we discuss that issue now, or  
5 should we just keep focusing on deliberate indifference?  
6 Happy to do it.

7 ATC [LT MORRIS]: The government has discussed that issue  
8 in its pleadings. We talked about that the last time. I  
9 think what is more important to review ----

10 MJ [Col SPATH]: How does defense show me the policy is  
11 irrational? They have the burden. If we moved away from  
12 Estelle v. Gamble and you all are telling me, look, we've  
13 already assessed it, your-all's assessment is great, they have  
14 the burden, how do they show the policy is irrational?

15 ATC [LT MORRIS]: Defense has the burden on any pleading  
16 they bring, underlying pleading. The government's response to  
17 that certainly can speak to different prongs that are laid out  
18 in the tests.

19 And this is one of those instances that when we look  
20 for a rational basis the government has, it has, in the past,  
21 in each of the cases provided the court with whether it be  
22 common sense, as we provide for Your Honor in Amatel v. Reno,  
23 they didn't provide any declarations, they didn't provide any

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1 evidence. All they stated was here is a penological interest  
2 to restrict sexually explicit material in the prison. That is  
3 common sense ----

4 MJ [Col SPATH]: That one seems common sense to me.

5 ATC [LT MORRIS]: Yes, sir.

6 MJ [Col SPATH]: So does, by the way, having people in  
7 confined facilities and having people shackled when they move  
8 through the prison. There are some things they do here at  
9 Guantanamo, they are common sense.

10 I'm not -- I am not saying that there is not a world  
11 in which I understand why we are not granting the Skype call.  
12 I'm not working in a vacuum here. What I'm trying to figure  
13 out is can the facility -- if they have the burden, does  
14 defense get the opportunity to put someone on here to say  
15 here's why we are doing it?

16 Because you say it is common sense. I am trying to  
17 find -- there is no case on point, right? We haven't found a  
18 case where this particular issue is fairly well crystallized.

19 ATC [LT MORRIS]: If I may, Your Honor, Al Odah, the case  
20 I mentioned to you is very clear guidance and very helpful  
21 because it's not about a Federal Circuit case that has a  
22 similar issue. It is exact guidance for Guantanamo Bay for  
23 realtime communication, and in that case, you see clear

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1 guidance.

2 MJ [Col SPATH]: Correct. So what if you put a delay on  
3 the communication? There may well be a reason for that too,  
4 by the way, a rational basis. I'm just saying realtime  
5 communication is different.

6 ATC [LT MORRIS]: In the Al Odah case, you see the court  
7 contemplate that and he talks -- in the ruling, the court  
8 talks about two aspects: That they see a safety, that there  
9 is a penological interest in government safety in the prison  
10 itself, and the second prong that they talk about, which is  
11 important to your question, is public safety; that this is a  
12 national security -- a prison that has interests in protecting  
13 national security.

14 So I couldn't envision a case that would be more on  
15 point for Your Honor than a case which deals with Guantanamo  
16 Bay detainees within medical care, within also the secondary  
17 issue that Your Honor is talking about to prevent future  
18 litigation. They have already talked about ----

19 MJ [Col SPATH]: That's the one I'm more focused on.

20 ATC [LT MORRIS]: They have talked about that, and if you  
21 read the Al Odah case, you'll see Bell v. Wolfish, where it  
22 talks about what is appropriate treatment of detainees or  
23 prisoners while they're awaiting trial. There it contemplates

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1 Bell v. Wolfish, and it says under Estelle, under Bell v.  
2 Wolfish, both with this restriction not allowing realtime  
3 communication, that these are not only rational, but it  
4 doesn't even amount to deliberate indifference. That is not  
5 only an important ruling, but that is a ruling that gives Your  
6 Honor -- it answers the mail. It gives Your Honor what you  
7 are asking for and why, exactly why the government said this  
8 issue is fully briefed.

9           As to what you were saying about a lag in  
10 communication, Al Odah articulates that as something that they  
11 contemplate. They say that whether it be realtime  
12 communication or near-time -- that's the language that the  
13 court uses in Al Odah -- it is still has those concerns under  
14 Estelle and under Bell v. Wolfish. So a case clearly on point  
15 in front of Your Honor, to give Your Honor guidance -- and  
16 sufficiently, the government put the defense on notice as to  
17 that case; defense chose not to respond to it in their  
18 response.

19           And so as far as the landscape where we are now, I  
20 don't anticipate a need with the cases that are in front of  
21 Your Honor for there to be any evidentiary hearings in the  
22 future on this. And, again, if defense has a witness that  
23 they want to bring for any pleading, including this pleading,

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1 then the rules are there for guidance, 703(b) and (c), that  
2 the witness doesn't just need to say something interesting, it  
3 needs to say something that is relevant and necessary to the  
4 underlying issue before this commission, and so we simply ask  
5 ourself what the underlying issue is. That has almost been  
6 conceded, that these witnesses cannot talk to that.

7           And secondly, and I will close with this, Your Honor,  
8 is even if we were analyzing this under a Bell v. Wolfish,  
9 under Turner v. Safley, even there with common sense, with the  
10 declarations, with this case law, Your Honor has in front of  
11 him enough to say that, not just with common sense, with the  
12 declaration, that yes, there is a rational basis for not  
13 providing Skype.

14           MJ [Col SPATH]: Remember, the declaration I did not  
15 consider.

16           ATC [LT MORRIS]: If I could, the government in its use of  
17 the declaration -- and to clarify a misstatement of defense,  
18 they said that the government's position stands even in the  
19 absence of the declaration. So the declaration strengthens  
20 the government's position, but if the declarations were not  
21 there, the government's position still stands. And so ----

22           MJ [Col SPATH]: I mean, that's why we got into that long  
23 discussion and ultimately some movement -- the issue was if

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1 you file a declaration, is there inherently a right to  
2 cross-examine the proponent of the declaration?

3 ATC [LT MORRIS]: The important thing is to ask what is  
4 that issue.

5 MJ [Col SPATH]: That is important. If you attach a  
6 declaration to your motion and a witness says X is true,  
7 doesn't defense counsel get to cross-examine either the  
8 credibility of the declarant or whether or not even X is true?

9 ATC [LT MORRIS]: If X is necessary for the underlying  
10 motion; that was the government's position.

11 MJ [Col SPATH]: And if it is not, if it is not necessary  
12 for the underlying motion, should I consider it? No.

13 ATC [LT MORRIS]: But Your Honor's ruling in 284I, just to  
14 clarify the facts further, is that Your Honor was viewing this  
15 in the narrow interlocutory issue of Estelle v. Gamble, and  
16 then looking at then the additional step that the government  
17 took ----

18 MJ [Col SPATH]: That is correct.

19 ATC [LT MORRIS]: ---- in providing the declaration then  
20 did not see fit or a need to examine that declaration.

21 MJ [Col SPATH]: I didn't, and we've discussed why,  
22 because Dr. 97 and Dr. Crosby were clear. They said a Skype  
23 call would be helpful.

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1 ATC [LT MORRIS]: Right, Your Honor.

2 MJ [Col SPATH]: It does not get us to Estelle v. Gamble.  
3 It just doesn't.

4 ATC [LT MORRIS]: I need to mention secondly, as Your  
5 Honor asks, does a declaration then automatically provide for  
6 an evidentiary hearing for cross-examination? It doesn't  
7 matter what the underlying issue is, as I said primarily ----

8 MJ [Col SPATH]: It does. I think the underlying issue is  
9 important. I think it has to be important. But when we are  
10 attaching things to motions that are evidentiary, the opposing  
11 side should have some ability to contradict or -- I mean, that  
12 just seems to me to be fairly standard practice in motion  
13 practice anywhere.

14 ATC [LT MORRIS]: Your Honor, in prior -- just in two  
15 motions ago you said sometimes no good deed goes unpunished,  
16 and the government did not need to attach those declarations,  
17 consistent ----

18 MJ [Col SPATH]: That isn't what we were talking about.  
19 That's right. It has been a bit of a moving target. I hope I  
20 have said that well. I thought I had.

21 And that is where I'm trying to figure out, if it is  
22 more than Estelle v. Gamble, if it is a policy then of the  
23 confinement facility, does that alter the landscape for me

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1 where I allow the defense, if they think they can, to  
2 demonstrate it is irrational? I'm not saying they can, I'm  
3 not. I'm just asking, do they get the opportunity to call the  
4 witnesses or put on the evidence so they can show, because  
5 they have the burden, this policy is irrational? And they may  
6 fail in that, but do they get that opportunity?

7 ATC [LT MORRIS]: They get the opportunity to comply with  
8 the Rules For Military Commission, and those rules are clear.  
9 And they have not complied with what is necessary to produce  
10 any witness under 703(b) and (c).

11 The case of Hatim v. Obama, in that case, as we  
12 mentioned last time, that the government did exactly what the  
13 government did in this case. They attached declarations.  
14 There was not a full evidentiary hearing because, as Your  
15 Honor said, there are certain restrictions that you can look  
16 at and it just passes the smell test. And the government's  
17 opinion is that this on common sense alone is enough.

18 But in addition to that, the government provided  
19 declarations to corroborate what common sense already tells  
20 you, and that is you just don't allow unfettered realtime  
21 access to a high-value detainee. And it is not just the  
22 government saying that. Al Odah says that, they examine it,  
23 they analyze it, and they look at this issue specifically for

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1 realtime communication, and that gives Your Honor fairly clear  
2 guidance on how courts contemplate this.

3 Subject to your questions.

4 MJ [Col SPATH]: I have been looking at Al Odah quite a  
5 bit up here, so thank you.

6 ATC [LT MORRIS]: Thank you.

7 MJ [Col SPATH]: Mr. Kammen, do you want a few minutes?  
8 If you don't have enough time before we break, you can have  
9 more after.

10 LDC [MR. KAMMEN]: Let me start with Al Odah, because this  
11 is 2014. Al Odah was in 2005, and the Guantanamo Bay  
12 litigation landscape was considerably different.  
13 Additionally, I disagree and I think the commissions said in  
14 Hatim -- and I may be confusing it with some of the other  
15 Guantanamo litigation where there is an extensive factual  
16 record.

17 And if you use Judge Kessler's recent case, what  
18 occurred there was what's occurring here, and this seems to be  
19 the government's preferred -- big G government's preferred  
20 litigation strategy when it comes to Guantanamo: We won't  
21 call live witnesses, we will present declarations, we will  
22 present stuff, but we are not going to let people be subject  
23 to cross-examination. Whereas, again, in Judge Kessler's case

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1 there was extraordinary evidence that the medical care in  
2 Guantanamo Bay for detainees, high and low-value, is willfully  
3 indifferent, much greater litigation than Judge Pohl would  
4 have ever contemplated or ever allowed.

5           The other thing that I just need to touch on, Your  
6 Honor, is this: Whatever the merits were of this  
7 differentiation between so-called high-value and low-value  
8 detainees, whatever merit that may have had in 2000 and  
9 whenever, here today in 2014 that has absolutely no merit. It  
10 is an absurd distinction, which, if subjected to scrutiny,  
11 will be proven to be absolutely meaningless.

12           The notion that somebody who has been in Guantanamo,  
13 in U.S. custody for 12 years could have any intelligence value  
14 in 2014 is patently absurd under a common sense test, putting  
15 aside everything else we know, and I won't belabor it, about  
16 the first four years. So all of this is arbitrary nonsense.

17           You know, and so what you have said and what the  
18 prosecutor said is yes, we have the burden of proof, and they  
19 say okay, you have got to jump through the hoops. Fine, we  
20 jump through the hoops. We said Admiral Cozad is relevant  
21 because you referred to him in your pleading. How much more  
22 can we do? It is not like we can call the guy up and he will  
23 talk to us.

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1           They thought it was relevant to tell you this was his  
2 policy. That makes him relevant for this discussion. We have  
3 not jumped through the hoop with respect to the unknown,  
4 unidentified person because we didn't know about it until this  
5 morning. And it's disappointing that the government  
6 apparently learned about this yesterday and didn't bother to  
7 tell us.

8           And they probably know the witness we want, but they  
9 didn't say, hey, you know, there is this witness out there who  
10 provides what is arguably exculpatory evidence and you need to  
11 know about it. But things are happening quickly, I  
12 understand.

13           So we can't jump through that hoop, but we are here,  
14 and we know it exists, we know the person exists, and we know  
15 what the story is. So let's have a hearing. If we can't  
16 satisfy our burden, okay, we can't satisfy our burden.

17           If at the end of the hearing you say, you know,  
18 defense, you lose, so be it. Because if we don't, if you just  
19 say okay, you didn't plead it right, so you lose on the  
20 medical necessity, then we are going to come back and then  
21 they are going to say, oh, then they want to reconsider it.  
22 And we are just going to be caught in this never-ending cycle  
23 of ineffectiveness because we didn't get it right.

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1           Now, again, I take responsibility for the fact -- you  
2 know, it is a moving target, fine. But the target changed  
3 because the government policy changed. When the government  
4 published the DoD directive that says all detainees should  
5 have this, exactly what we are asking for, that does change  
6 the equation.

7           And you are absolutely right, maybe the "where  
8 practicable" means the wiggle room, sure. And if this is all  
9 cosmetic and if this is all just DoD publishing something  
10 nobody has any intention of enforcing, so that they can go off  
11 and hold press conferences and go to international conferences  
12 and say, oh, look how good we are and look at how we protect  
13 people's rights, but the truth is we have no intention of  
14 doing this, fine. If that's really what it is about and it is  
15 a meaningless policy, fine. But they published it, and we  
16 have the responsibility to bring it to your attention because  
17 it bears on exactly the issue before you.

18           So, you know, again, if it is our burden, fine, give  
19 us the tools so we can have this litigation. Give us the  
20 witnesses. If we don't sustain our burden, we don't sustain  
21 our burden and we can all move on. Thank you.

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

23           Government, if you could on the break, if we could

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1 just follow up on the medication issue. I don't know if we  
2 have an update. If you do have an update and you can provide  
3 it directly to Mr. Kammen, great. If you need to tell me and  
4 we need to put it on the record, we can do that too.

5 TC [MR. SHER]: Sir, during the lunch break the accused  
6 will have the opportunity to receive his medication.

7 MJ [Col SPATH]: All right. Mr. Kammen, just let me know  
8 if there are any issues. I know you all will as well. So all  
9 right.

10 1320 seems like a perfect time. It is a little  
11 longer as a lunch break. And we will get back on the record,  
12 and if you have any final comments on the Skype motion, you  
13 are welcome to make them at 1320. I will see you all at 1320.  
14 [The R.M.C. 803 session recessed at 1144, 5 November 2014.]

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