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1 [The R.M.C. 803 session was called to order at 0800,  
2 13 February 2018.]

3 MJ [Col RUBIN]: The commission is called to order. Trial  
4 Counsel, if you could please announce the members of the  
5 prosecution team present. I do note several are absent.

6 TC [CDR SHORT]: Yes, Your Honor; present for the  
7 government today is myself, Commander Douglas Short,  
8 United States Navy; Commander Kevin Flynn, United States Navy;  
9 Mr. Vaughn Spencer; and Sergeant First Class Dale Oe. Not  
10 present are Lieutenant Commander Lincoln, United States Navy;  
11 Captains Rudy and Depue, United States Marine Corps; and  
12 Ms. Lindsey Spitler.

13 MJ [Col RUBIN]: Thank you.

14 Commander Cooper, please announce the members of the  
15 defense team who are present.

16 DC [CDR COOPER]: Good morning, Your Honor. The members  
17 of the defense team who are present are myself, Commander  
18 Aimee Cooper, United States Navy; Major Yolanda Miller,  
19 United States Air Force; Mr. Adam Thurschwell; Tech Sergeant  
20 Kathryn Gritzmaker; James Anderson; and LNC Shenika Mayes.

21 MJ [Col RUBIN]: Thank you.

22 DC [CDR COOPER]: I would also note that Captain Jeffrey  
23 Fischer, United States Navy, is absent, sir.

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1 MJ [Col RUBIN]: Thank you, Commander Cooper. I note that  
2 the accused is present.

3 Counsel and I had a brief R.M.C. 802 conference  
4 outside the presence of the accused. This took place on  
5 6 February 2018 at 0850 in my chambers. The counsel and I  
6 discussed whether guards would be in close proximity during  
7 attorney-client meetings in the courtroom. We discussed the  
8 timing of the deposition and some potential personal conflicts  
9 as well as the anticipated length of the deposition  
10 cross-examination.

11 We discussed some administrative and logistical  
12 issues related to the deposition and the extension of the  
13 session. Finally, we discussed procedures for display of  
14 materials during the deposition.

15 The counsel and I had a second R.M.C. 802 conference  
16 outside the presence of the accused. This conference took  
17 place at approximately 1115 on Sunday, 2 February 2018, in my  
18 chambers. I informed the counsel that I wanted to litigate  
19 the three outstanding motions, specifically AEs 099CC, 099HH,  
20 and 102E before ending this session.

21 I inquired whether the defense intended to call  
22 Mr. al Darbi for the purposes of a forthcoming anticipated  
23 suppression motion. Defense counsel indicated they did not

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1 intend to call Mr. al Darbi during an open session of the  
2 commission with the understanding that his deposition  
3 testimony could be used for the purpose of suppression.

4 Finally, the parties and I agreed on a 0-8 start time  
5 on today's date, Tuesday, 13 February 2018, to litigate the  
6 final three docketed motions.

7 Counsel, do you concur with my summation of our two  
8 R.M.C. 802 conferences?

9 TC [CDR SHORT]: The government concurs, Your Honor.

10 ADC [MR. THURSCHELL]: The defense concurs as well.

11 MJ [Col RUBIN]: Thank you. Counsel, let's begin with  
12 AE 099HH. In 099HH, the defense requested the commission  
13 enter an order barring the use of forced cell extractions on  
14 the accused except where a dire risk to safety or immediate  
15 potential loss of life is foreseeable. The government opposes  
16 the defense motion as set forth in AE 099NN.

17 Does the defense wish to present oral argument?

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

19 MJ [Col RUBIN]: You may proceed.

20 ADC [MR. THURSCHELL]: Judge, to be clear, the standard  
21 that we seek you -- seek to have you incorporate in an order  
22 for the use of FCEs in this motion is verbatim the medical  
23 advice and determination by a consistent series of senior

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1 medical officers who are JTF's own medical advisors. And so  
2 that's important to understand.

3           We're not asking JTF -- asking you to order JTF to do  
4 anything that they are not -- they have not determined through  
5 their medical wing is the appropriate and necessary medical  
6 care for Mr. Al-Tamir under these circumstances. So that is  
7 the -- and that is the standard we've asked them to follow --  
8 order you to have them follow, their own standard.

9           So the background of this request is well known to  
10 the commission. At this point Mr. Al-Tamir has had multiple,  
11 four at this count and with the possibility of more, very  
12 significant back operations that have left him fragile,  
13 needing to only move in a wheelchair for an extended period of  
14 time, according to the senior medical officers, not cleared  
15 even for transport to attorney-client visits.

16           And so that -- and he -- and against that background,  
17 prior to that, even before he was fragile, there were  
18 incidents -- a series of incidents that are laid out in our  
19 fact section of the motion. In the past, most recently about  
20 a year ago, where he was FCE'd even while his -- this back  
21 problem was emerging over a very long course of time, and  
22 we'll come back to that in a bit.

23           So there is a significant medical risk to have him --

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1 impose an FCE on him that is recognized by JTF itself. And  
2 one of the -- I'll just say one of those incidents, FCEs that  
3 occurred some time ago, in 2014, was -- an FCE was used to  
4 remove him from a medical appointment with an SMO and that's  
5 in the medical records that we have attached to the motion.

6           These are all avoidable and there are accommodations  
7 that can be made, and I'll come back to that, that would  
8 satisfy any security requirements. Whether they could have  
9 been used before, they need to be used now, and in a -- that  
10 is, in effect, I think, the finding of their own medical  
11 advisor.

12           These FCEs -- I emphasize one other point. The FCEs  
13 threaten Mr. Al-Tamir's health, very clearly. But they also  
14 threaten the forward movement of these proceedings. I mean,  
15 when we were on hold, in effect, because of his medical  
16 disability for many months, an FCE is highly likely to render  
17 him in a state that will make further proceedings impossible  
18 here.

19           And so this is not simply a matter of a judge telling  
20 a prison how to run its prison, this is a matter that goes  
21 directly to the -- to the heart of your jurisdiction to have  
22 control over your proceedings. And I think that's an  
23 important point to emphasize. You are certainly authorized to

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1 protect Mr. Al-Tamir's individual rights. And you are -- in  
2 particular, not just as a pragmatic matter, the forward  
3 movement of these proceedings, but his rights to attend these  
4 proceedings is within your clear jurisdiction. You've had  
5 rulings on it. The FCE motion goes to the -- goes to that.

6 I want to address briefly the government's three  
7 arguments, Judge, in response to this. The government  
8 response is AE 0 -- AE 090FF [sic], I believe is the appellate  
9 exhibit designation. They cite -- first they cite  
10 Lyons v. City of Los Angeles for the proposition that unless  
11 there is a real and immediate threat of repeated injury, then  
12 the person seeking an injunction has no standing to seek that  
13 equitable relief. That is what Lyons says in part. But I  
14 want to read you the actual standard that they use, the  
15 Supreme Court articulated.

16 It's -- the Supreme Court said, "In order to  
17 establish an actual controversy in this case, Lyons would have  
18 had not only to -- not only had to allege that he would have"  
19 -- I'm sorry, let me back up. I'm going to try to do this in  
20 a more coherent fashion and give you -- Lyons was a case about  
21 an individual who had been subjected to an illegal choke hold  
22 by the City of Los Angeles police. Having been choked, he  
23 sought, among other things, an injunction against that

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1 practice ever being used on him again. And so that is the  
2 background of this quote.

3 Lyons said, "In order to establish an actual  
4 controversy in this case, Lyons would have had not only to  
5 allege that he would have another encounter with the police  
6 but also" -- what the court then says, is "to make the  
7 incredible assertion either (1) that all police officers in  
8 Los Angeles always choke any citizen with whom they happen to  
9 have an encounter with -- that was (1), and that was clearly  
10 incredible -- "or (2) that the City ordered or authorized  
11 police officers to act in such manner."

12 And so Lyons provides a fairly sensible standard for  
13 the -- for injunctions against violence by government actors  
14 who act illegally. And they say unless you can show that  
15 either this always -- as a matter of fact, this violence  
16 always happens, or that the City itself authorizes its  
17 government agents to act in this illegal fashion, then you  
18 have no standing.

19 Here we satisfy the second branch. JTF-GTMO has, in  
20 fact, authorized and required its agents to use FCEs in  
21 contexts where, because of Mr. Al-Tamir's medical condition,  
22 it will violate his constitutional rights. And so Lyons is  
23 not -- to the extent that it applies at all, it actually

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1 supports our position.

2 In other words, Mr. Al-Tamir clearly has standing to  
3 seek this relief. And this is a standing case. It's really  
4 not about the merits of it. We should win on the merits, too.  
5 I will get to that in a moment. But I think there's no doubt  
6 that Mr. Al-Tamir has standing to seek this injunction. It's  
7 happened to him before, it's authorized to be used, and  
8 most -- and most importantly -- well, let me come back to  
9 that. Sorry.

10 Second, the government argues that under  
11 Turner v. Safley, the commission owes a large measure of  
12 deference to JTF-GTMO's own determination of what is the  
13 appropriate prison procedure. We don't disagree in general  
14 that that's what Turner says. However, all we ask here, in  
15 effect, is that you do defer to their own determination by  
16 their designated medical experts that the use of FCEs in this  
17 context is medically inappropriate and should be -- should be  
18 inconsistent with the actual practices that they use when an  
19 FCE situation arises.

20 So we're, in effect, asking the commission to ensure  
21 that JTF follows its own standard. That is deferring, under  
22 Safley, to the prison authorities. It's not overturning a  
23 decision by the prison authorities.

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1           Finally -- or let me not say finally, but third, the  
2 government argues that there already is a standard for the  
3 treatment of detainees. That standard is contained in the  
4 Detainee Treatment Act. The Detainee Treatment Act, they go  
5 on to argue correctly, bars cruel, inhumane, or degrading  
6 treatment; and further defines cruel, inhumane, or degrading  
7 treatment as a -- meaning a violation of the Eighth Amendment  
8 prohibition on cruel and unusual punishment. We entirely  
9 agree. We entirely agree.

10           Here, that's exactly what -- the standard that we're  
11 asking them to adhere to. The Eighth Amendment is violated by  
12 prison authorities with respect to medical treatment when they  
13 are deliberately indifferent to the serious medical needs of  
14 an individual in their custody -- custody. And I don't have  
15 the cite right on me. This was raised by the government in  
16 their response. The case is Estelle v. Gamble, I believe, and  
17 I can get the cite for you later. But that's the basic  
18 standard for the constitutional treatment of -- medical  
19 treatment of detainees under the Eighth Amendment, deliberate  
20 indifference to the serious medical needs of an individual in  
21 the custody of the prison authorities.

22           At this point, were the -- were the JTF to use an FCE  
23 against Mr. Al-Tamir under current circumstances, they would

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1 be -- would be being deliberately indifferent to his medical  
2 needs. How do we know that? Deliberate indifference means  
3 being consciously aware of the serious harm that you could  
4 cause, but going ahead and doing it anyway. Is JTF  
5 consciously aware that using FCEs, except in extreme  
6 circumstances, will cause him serious medical injury? Yes,  
7 they are. That's what their doctors say.

8           And so under current circumstances, agreeing with the  
9 Government's Eighth Amendment analysis, it would be a per se  
10 violation of the Eighth Amendment for JTF to use an FCE  
11 against Mr. Al-Tamir. And this is a live issue. He is --  
12 you, Your Honor, in your role as deposition officer, ordered  
13 no FCEs to be used to bring Mr. Al-Tamir to and from the  
14 deposition. That does not cover, at this point, further court  
15 sessions. It does not cover attorney-client meetings. It  
16 does not cover meetings with his medical staff or regular  
17 check-ups outside of his cell. There is a real danger --  
18 there is a real danger of this situation arising.

19           And I will finally say that the government again  
20 suggests that this is a complaint about female guards. It is  
21 not. There are many ways to accommodate Mr. Al-Tamir's deeply  
22 held religious beliefs that do not create situations that  
23 threaten his health and are completely gender neutral. And

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1 they require, at most, fairly minor modifications to SOPs;  
2 modifications that at least under the current circumstances  
3 for now could be temporary, to the extent that they are tied  
4 to his current medical condition and the advice of their own  
5 doctors, that have nothing to do with gender.

6           And so that, we submit, under -- especially under  
7 current circumstances, that whole question -- that question  
8 has been raised. We acknowledge it's been answered by the  
9 commission. We're not asking for a ruling about the use of  
10 female guards. We are asking for accommodations to ensure  
11 that JTF complies with its own medical determination.

12           MJ [Col RUBIN]: If you could just be a little more  
13 specific on the accommodations ----

14           ADC [MR. THURSCHELL]: Well, Judge ----

15           MJ [Col RUBIN]: ---- the defense would like to see made  
16 by JTF.

17           ADC [MR. THURSCHELL]: There -- my understanding is that  
18 it's a very limited -- and I will be corrected if I'm wrong.  
19 So this is -- but my understanding is that the actual, the  
20 contact that's involved is -- primarily occurs during the  
21 moment of shackling and that there -- especially given his  
22 current medical condition, there are either alternatives to  
23 shackling or there can be other kinds of restraint. There

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1 could be other kinds of assurances. I can't actually be more  
2 specific than that except to say that it's a fairly limited  
3 element of -- of, you know, personal contact that -- that  
4 violates -- that creates the problem. Let's put it that way.  
5 And that's my understanding. And we do not want to tell JTF  
6 how to do their job. We're trying not to do that. But we do  
7 think that some reasonable accommodation is more than  
8 possible.

9 That's all I have, Judge.

10 MJ [Col RUBIN]: Thank you, Mr. Thurschwell.

11 Trial Counsel, does the government wish to present  
12 oral argument?

13 DTC [CDR FLYNN]: Yes, sir.

14 MJ [Col RUBIN]: Commander Flynn.

15 DTC [CDR FLYNN]: Good morning, Your Honor. Commander  
16 Flynn for the government.

17 MJ [Col RUBIN]: Good morning.

18 DTC [CDR FLYNN]: Sir, the defense's request for  
19 injunctive relief -- and that's what it is, specifically the  
20 request that you order JTF to temporarily cease using FCEs --  
21 fails for two reasons. The first reason is the request has no  
22 basis in either evidence or in the law. Now, as usual  
23 Mr. Thurschwell was very eloquent in his arguments but there

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1 wasn't much evidence addressed in there and kind of just  
2 glossed over the law.

3           With respect to the law, Your Honor, it's clear. The  
4 defense request is based entirely on a suspicion that the  
5 accused might be subject to an FCE in the future. But the law  
6 is clear: Mere speculation that the accused would be  
7 subjected to a FCE at some unknown time in the future is not a  
8 sufficient basis for this commission to inject itself into the  
9 JTF decision regarding detention operations.

10           Now, defense counsel, Mr. Thurschwell, cited a case  
11 that we cited in our response, and basically that case says in  
12 order to obtain relief, the type of relief that the defense is  
13 requesting, they must establish that the accused faces a real  
14 and immediate threat of repeated injury. And then he kind of  
15 just left it at that. But there's -- there's many cases out  
16 there, sir, and they're cited in our -- our response.

17           The defense must present evidence of harm that is  
18 both certain and great and it must be actual and not  
19 theoretical harm. It's the defense's burden here, sir. You  
20 know that. They have the burden to carry this motion.  
21 There's been no -- no evidence presented anywhere with respect  
22 to this that an FCE is, you know, of immediate -- you know, is  
23 immediately in the future. This case law is clear: The

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1 injury complained of must be of such imminence that there is a  
2 clear and present need for the relief that the defense is  
3 asking for.

4           Generally, to sum it up with respect to the law, sir,  
5 the courts do not grant injunctive relief to guard against  
6 something that is merely feared as liable to occur at some  
7 infinite time in the future. And the defense didn't come  
8 close to carrying this burden. They haven't presented, again,  
9 any evidence that the accused faces an immediate threat of  
10 being subject to an FCE.

11           And more importantly, Mr. Thurschwell talked about  
12 FCEs that have been -- that have happened in the past. That's  
13 not good enough, and the case law is clear about that as well.  
14 The general allegation that the accused has experienced FCEs  
15 in the past is insufficient to warrant this requested order.

16           It's important to note, Your Honor, that an FCE has  
17 not been ordered with respect to the accused since January of  
18 last year. So with respect to the law, Your Honor, and with  
19 respect to the lack of evidence, the defense has failed to  
20 carry its burden of establishing why this commission should  
21 inject itself into prison operations.

22           Now, Your Honor, with respect to the -- our second  
23 argument, the order is just not necessary at this time. The

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1 prosecution has been informed that the commander of JTF has  
2 instructed JDG to follow the senior medical officer's opinion  
3 with respect to FCEs and the accused. So right now it's  
4 pretty clear, from the latest senior medical officer's  
5 opinion, that an FCE is not a good idea with respect to the  
6 accused because of -- because of his health. And JTF is --  
7 has decided to defer to that opinion, and they're going to  
8 continue to do so, sir.

9           So to conclude, Your Honor, the defense, number one,  
10 hasn't carried its burden to show you why you should inject  
11 yourself into JTF operations. They have not shown at all, no  
12 evidence of a real and immediate threat of repeated injury.  
13 And, therefore, Your Honor, the defense motion should be  
14 denied.

15           If I could have one minute, sir? I'm trying to  
16 understand this note.

17           MJ [Col RUBIN]: Yes.

18           DTC [CDR FLYNN]: There was one issue that Mr. Thurschwell  
19 raised about female guards. It's the government's information  
20 that dating back at least six months, no female guards have  
21 had physical contact with the accused. It's our understanding  
22 that any females on a guard force for the last six months will  
23 be in an observer role, so there is no -- there is no issue

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1 with that at least for the last six months.

2 MJ [Col RUBIN]: Is that captured anywhere in any type of  
3 JTF order, or for that matter JTF following the SMO's medical  
4 opinion regarding FCEs? Is that passed by word of mouth or is  
5 it captured anywhere in writing?

6 DTC [CDR FLYNN]: I actually do have an e-mail, sir.  
7 That's where I'm getting my information, from JTF SJA. But I  
8 could certainly -- if you need, you know, something more  
9 official, I'm sure we could get that as well.

10 And that's all I have, sir, unless you have any  
11 questions.

12 MJ [Col RUBIN]: No, Commander. Thank you.

13 DTC [CDR FLYNN]: Thank you.

14 MJ [Col RUBIN]: Mr. Thurschwell?

15 ADC [MR. THURSCHELL]: Just very quickly. First, I  
16 wanted to just give you the page cite for the Lyons quote that  
17 I read. It's 461 U.S. Reports at pages 105, 106.

18 Judge, we -- we appreciate if, in fact, this  
19 accommodation -- these accommodations have been made as a  
20 matter of fact, we, of course, appreciate them. However,  
21 the -- Mr. Al-Tamir has not actually been moved for the past  
22 six months until very, very recently, about three weeks ago  
23 when he was moved to -- back to Camp VII. And so while there

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1 may have been some movements for medical tests and so on,  
2 that -- that evidence of practice is less compelling than it  
3 sounds.

4           That said, let me go to the legal question, which is  
5 whether we have offered more than sheer speculation about the  
6 use of FCEs in the future. That -- again we -- there is no  
7 issue, I think, that under -- unless I heard Mr. Flynn --  
8 sorry, Commander Flynn wrong, there is no issue that FCEs  
9 remain an authorized practice under current JTF policy against  
10 Mr. Al-Tamir. That is authorized.

11           So step one is in terms of whether this is sheer  
12 speculation, we know that it is the required practice under  
13 certain circumstances. We also know critically that it is at  
14 this point in the hands of the government itself when an FCE  
15 is going to be used. It is -- in that sense there is no  
16 speculation about it. The government need not speculate.  
17 What there is not a shred of in the record is evidence that  
18 under any circumstances other than the, you know, use of  
19 female guards to physically touch Mr. Al-Tamir, that he is  
20 anything but completely compliant when he needs to move. And  
21 so it is entirely predictable and far from speculation on the  
22 government side when this is going to occur.

23           And finally, and most critically, there is a -- call

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1 it an exception or a modification of the usual standing rules  
2 that, sir, you are probably familiar with, known as -- that  
3 arises when an act like this is capable of repetition yet  
4 avoiding review. And what that means is it is possible or  
5 likely to reoccur, but when it does reoccur, it will -- to put  
6 it in our context -- happen so quickly that there is no chance  
7 to litigate its appropriateness under the particular  
8 circumstance. And so the usual imminence requirement is  
9 waived or modified, depending on the factual circumstances.  
10 And this is a classic case of a -- of a violation of  
11 Mr. Al-Tamir's Eighth Amendment rights that is capable of  
12 repetition, yet will clearly avoid review, because we will not  
13 have the chance before he is FCE'd to come in, request an  
14 injunction.

15           And so for all of those reasons, and one other that I  
16 will simply mention and neglected to say at the beginning, we  
17 think this is an appropriate order to enter. And we will say,  
18 just going back to the authority of the -- of the commission  
19 to order this. I will note that the deposition officer  
20 ordered a limited form of this prohibition. And so it is --  
21 it's consistent with the practice in this proceeding to ensure  
22 that the proceedings can continue, to ensure that  
23 Mr. Al-Tamir's rights are honored, for the presiding officer

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1 to issue this limited relief that comports to their own  
2 standard.

3 And that is all I have, Judge, unless you have  
4 questions.

5 MJ [Col RUBIN]: I do have one question, follow-up  
6 question, Mr. Thurschwell. It appears that the JTF leadership  
7 may have issued some type of policy or order on this matter.  
8 Trial Counsel, I would like to see that, whatever may be  
9 captured in whatever form, whether it's an oral instruction,  
10 an e-mail, something more formal. I would like you to provide  
11 that to the commission.

12 DTC [CDR FLYNN]: Yes, sir.

13 MJ [Col RUBIN]: Mr. Thurschwell, assuming that such an  
14 order exists from JTF leadership saying no FCEs, absent risk  
15 to life, substantial harm, would that satisfy the defense? Is  
16 it necessary for the commission to take action, assuming such  
17 an order exists?

18 ADC [MR. THURSCHELL]: If that is their policy -- and of  
19 course, I would need to see the policy to be sure. The devil  
20 is often in the details. But I would say to the extent that  
21 there is an actual order that is -- conforms to the relief  
22 that we request, then their policy has changed; they no longer  
23 authorize it. And we -- I would say our argument would be

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1 different.

2 I don't -- I mean, I think that if -- I would -- let  
3 me just say I would need to see the -- it would change -- it  
4 would certainly change our argument. And so I want to say the  
5 leg of our argument that stands on the fact that this is right  
6 now an expressly authorized policy would apparently no longer  
7 be the case, subject to whatever the order actually says.

8 MJ [Col RUBIN]: I concur. The devil is in the details.  
9 We would have to see what the order is and the specifics.

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

11 MJ [Col RUBIN]: Okay. Thank you.

12 Trial Counsel, anything further from the government?

13 DTC [CDR FLYNN]: I will, once we're done here, inquire  
14 about that, Your Honor.

15 I would want to point out, because I'm not sure I was  
16 clear, it's our position that FCEs are a decision by JTF.  
17 It's the government's position that this commission should not  
18 inject itself into prison operations unless the defense can  
19 show you the factors under Turner, which they have not done.

20 The accused is under the authority of JTF. Any  
21 movement of the accused is by JTF personnel. So I've been --  
22 the prosecution has been informed that the JTF commander and  
23 leadership is going to defer to the senior medical officer's

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1 opinion. But we're not conceding that this military  
2 commission -- or the defense has shown that this commission  
3 should inject itself into detention operations.

4 MJ [Col RUBIN]: Thank you.

5 Mr. Thurschwell, anything further?

6 ADC [MR. THURSCHELL]: Judge, if I can speak from here.

7 Just as long as we see that in a formalized writing  
8 as a statement of -- of policy, however temporary.

9 MJ [Col RUBIN]: Thank you.

10 Counsel, let's move on to AE 099CC. In AE 099CC the  
11 defense requests that the commission compel production of  
12 discovery requested in the defense's Twenty-Ninth,  
13 Thirty-First and Thirty-Second Supplemental Discovery  
14 Requests. The government opposes the defense motion as set  
15 forth in AE 099FF. The defense replied in AE 099JJ.

16 Does the defense wish to present oral argument?

17 ADC [MR. THURSCHELL]: We do.

18 Judge, the discovery at issue in AE 099CC covers a  
19 variety of issues, and there are a number of specific  
20 requests. I am going to try to talk about them in groups and  
21 explain our current position, based on the government's  
22 expressed position in their opposition. Some we will continue  
23 to press for; others we are going to ask for a delayed ruling

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1 because they're -- I'll explain it when I get there. There's  
2 a hodgepodge of issues.

3 By and large, the -- these requests relate to the  
4 identities of medical personnel and contact information of  
5 medical personnel who have been dealing with Mr. Al-Tamir  
6 since the original emergency surgery over the weekend, Labor  
7 Day weekend of 2017. That is one category.

8 Another category, broadly speaking, concerns evidence  
9 of an undue or wrongful influence by the JTF command, or  
10 elements thereof, or someone in that structure, on the medical  
11 opinions that are being issued, in particular those that have  
12 been issued in the past and may yet still be issued in the  
13 future, authorizing Mr. Al-Tamir's medical clearance to be  
14 transported for meetings.

15 I can go into the history of this, if necessary. It  
16 is laid out in detail in our motion. But the commission will  
17 recall that on December 5th, 2017, there was a sudden change  
18 of position by the SMO authorizing transport, and it was -- we  
19 were informed of this in an e-mail from JTF, not by a medical  
20 opinion. It was immediately followed by a formal filing by  
21 the government in the AE 099I series of medical update status  
22 reports that was -- that would follow by a day, I think, that  
23 similarly said he's cleared to meet with attorneys, no medical

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1 opinion attached.

2           It was not until December 15th, I believe, that we  
3 received the -- a filing that actually confirmed in a written  
4 declaration by the SMO that he was cleared for travel. And  
5 the background of this is that on the same day that we  
6 received the initial notice, unaccompanied by medical opinion,  
7 that he was cleared for travel, the commission issued AE 099Y,  
8 a defense motion -- a ruling on the defense motion to continue  
9 the December 2017 hearing, in which the commission stated, and  
10 I will quote: The commission will not conduct any further  
11 hearings until the accused and defense counsel are able to  
12 conduct in-person meetings.

13           And the confluence of that timing, we -- is  
14 suspicious, the sudden reversal on the same day that the  
15 commission says "no proceedings until Mr. Al-Tamir is capable  
16 of meeting with his attorneys," and if -- but that was very  
17 much confirmed by communications that we were able to have  
18 with Mr. Al-Tamir during the same time period that indicated  
19 his symptoms were actually getting worse. They were severe.  
20 There was -- it was completely unclear why -- what the medical  
21 basis of this reversal could be.

22           And it was also clear that he was not fit to meet  
23 with us. He did not -- was not -- was going to be in too much

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1 pain. And we've talked about this in the context of the  
2 continuation motion, but there was really -- it was -- he was  
3 not medically fit at that point.

4           And I would emphasize, again, the testimony of the  
5 neurosurgeon who said "clearance for medical transport does  
6 not mean fit to participate in an attorney-client meeting."  
7 That requires attention, focus, a level of pain and low enough  
8 symptoms that you're not distracted, not exhausted and so on.  
9 The opinion that they issued was simply one that said he could  
10 be transported. So we -- and we documented all of that  
11 information we were receiving from him that was contrary to  
12 the SMO opinion in the AE 099AA, another of the medical status  
13 updates, that was filed on 12 December 2017.

14           And I mention those in the -- that is the background.  
15 We -- oh, and I will just say in that -- that was -- AE 099AA  
16 was filed on 12 December. On 15 December, as I mentioned, we  
17 finally got a medical report from the SMO saying he was -- the  
18 SMO, him or herself saying Mr. Al-Tamir is cleared to be  
19 transported. And that declaration by the SMO for the first  
20 time included the language, "My opinion is based solely upon  
21 the medical evidence, as well as my discussions with members  
22 of petitioner's medical team, and has not been influenced by,  
23 nor does it take into consideration, the ongoing litigation."

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1 Which is certainly -- they are entitled to claim that, but  
2 there is a -- there is a problem of protesting too much. I  
3 mean, in recognizing that we had raised that as an issue, it's  
4 an unusual thing to be in a medical -- a medical opinion.

5           So the sequence of events, the communications from  
6 Mr. Al-Tamir raised real concern about the medical opinions  
7 being issued by JTF and their staff, which would be the senior  
8 medical officer -- I am excluding at this point, it is a  
9 separate discovery related to the surgeons -- but the JTF  
10 medical staff, that they were being influenced and that  
11 Mr. Al-Tamir was being inappropriately, and contrary to the  
12 actual medical situation, cleared to do things that he  
13 shouldn't have been allowed to do. So a significant amount of  
14 our discovery is aimed at making that determination, trying to  
15 find out if we -- if that was going on.

16           And I will refer the commission to the government's  
17 response, AE 0 -- sorry -- 099FF, and on their pages 17 and  
18 18. In their footnotes 17 and 18 -- footnotes 17 and 19, I  
19 should say, they recognize in principle that that kind of  
20 influence, the potential, is a legitimate and -- a legitimate  
21 area of inquiry for the defense. And so they very  
22 appropriately say with their -- they are referring here to  
23 only one aspect of this, but it applies more broadly.

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1           They're referring to the evidence that suggests that  
2 the second-to-last SMO -- we call him -- he or her, the  
3 July-October 2017 SMO, which is the period when they were  
4 serving -- that they say this information may be  
5 discoverable -- discoverable if it indicates that JTF-GTMO  
6 personnel played some role in getting the July-October 2017  
7 SMO transferred because they were unhappy that he was not  
8 clearing the accused to travel to meet with his attorney.

9           And they quite properly agree that that is a  
10 legitimate material basis for discovery, and my understanding  
11 is that that discovery review is ongoing. And so we may yet  
12 be getting information related to that. But that general  
13 principle is -- covers a large amount of the information that  
14 we are seeking.

15           I will talk about the other specifics in the context  
16 of the specific requests. And if I can now go through the  
17 requests, not item by item, but by somewhat grouping them, but  
18 I will refer to the paragraph number of the request in the  
19 context so that it can be clear what we're talking about.

20           So in the Twenty-Ninth Supplemental Request, which is  
21 Attachment B to AE 099CC, this is where we request the IDs of  
22 the original surgical team, that is paragraph 8.a., and we  
23 request communications regarding Mr. Al-Tamir's medical crisis

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1 on the weekend of 31 August and his subsequent surgeries.

2 And those communications are not medical records.

3 They are seeking e-mail traffic, other forms of communication,  
4 especially on that weekend of the 31st of October 2017,  
5 between JTF -- within JTF, but also between JTF and the  
6 medical establishment CONUS about his condition and about the  
7 appropriate thing. And that -- the basis for that, the  
8 government has denied that on the basis of that it was  
9 irrelevant and not material.

10 Judge, in the interest of shortness, I will say this  
11 is relevant and material to the issue of JTF bias, let me say,  
12 nonmedical bias about the appropriate treatment of  
13 Mr. Al-Tamir. But we would ask that you hold off on ruling on  
14 that until at a further litigation that will make it far more  
15 clear what the materiality of that information is; that it  
16 is -- our position is it is relevant and material now, but its  
17 materiality will be much more clear after we file certain  
18 other medical-related litigation. And at that point we can go  
19 back to the government, renew it, have them look at it under  
20 this new -- these new issues, and we may well be able to work  
21 that out. So we are asking for you to hold off on that.

22 The Thirty-First Supplemental Discovery Request,  
23 which is Attachment D to AE 099CC, requests, first, e-mail and

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1 other communications between the July-October 2017 SMO and JTF  
2 and SOUTHCOM and other persons. And that is the information  
3 that I believe was referred to in the two footnotes that the  
4 government -- that I cited in the government's brief. My  
5 understanding is that that information is being reviewed now.  
6 They've received -- they've inquired of the relevant parties,  
7 and they are reviewing it. And so I think that one is -- is  
8 my understanding is that that's not ripe now. We may -- we  
9 may get what we need. So I would ask to hold off on that as  
10 well. The -- and that is in paragraph 9.c. and d. of the  
11 Thirty-First Supplemental Request.

12           Second, we ask for e-mail and other communications  
13 between medical staff, JTF, SOUTHCOM, or other persons  
14 concerning accommodations for Mr. Al-Tamir's attorney-client  
15 meetings. And again, these are -- that's in paragraphs 9.m.,  
16 n., and o. of the Thirty-First Request.

17           Again, that is information that, because it concerns  
18 communications about his accommodations, would tend to show if  
19 JTF is saying he doesn't need that to the medical officer.  
20 And we have some -- we have some good-faith basis for concern  
21 about the accommodations that have been provided, the slowness  
22 of them, and resistance based on a good-faith basis for  
23 inquiring. I think that should fall within the same general

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1 materiality principle that the government concurs with in its  
2 footnote 17 and 19, but that is our position.

3 Paragraph 9.q. of the Thirty-First Request seeks  
4 information relating to the standard applied by JTF in  
5 determining that Mr. Al-Tamir is medically cleared to be moved  
6 to attorney-client meetings. That's paragraph 9.q. That is  
7 crucial to knowing what the government SMO report means, I  
8 mean, when it says he is medically cleared.

9 This was addressed at some length in the -- my  
10 colloquy with the neurosurgeon. And he agreed that a medical  
11 officer is not -- medical expert is not competent to say  
12 anything other than that the transport of this person will not  
13 actually be detrimental to his health, and nothing at all  
14 about his ability to participate in the defense. But we need  
15 to know what that means, what the standard is, why they're  
16 using that language in order to address competently what --  
17 what -- you know, the response that we need to have to their  
18 medical opinions.

19 Paragraph 9.r. seeks the security clearance level of  
20 the medical personnel who participated in Mr. Al-Tamir's  
21 surgeries. The neurosurgeon told us his clearance. It is  
22 highly significant for us, because we are receiving these  
23 classified medical records. We need an expert. I will note

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1 that AE 103 remains, as I understand it, outstanding, perhaps  
2 pending further developments and showing. We're not clear on  
3 that.

4 But certainly any expert we have, whether funded by  
5 the government or acting pro bono, it's highly significant to  
6 know, A, the security clearances of the individuals who  
7 reviewed the records, because the records are classified as we  
8 get them, mostly at the SECRET level initially for an extended  
9 period; and second, the ability to meet with the client. You  
10 know, there is -- there are security clearance requirements  
11 for meeting with the client. If those are waived for medical  
12 purposes for the government, they should be waived for our  
13 purposes as well, if and when we are in a position to arrange  
14 that meeting. So that's highly relevant information.

15 The name and contact information for the July-October  
16 SMO and his successor, paragraphs 9.g. and j., and other  
17 information related to the shortened tour of the July-October  
18 SMO, we've requested that information, also, in 9.g. and j.  
19 And the later paragraphs.

20 Let me say here about the names and contact  
21 information requests, the government's response is we're not  
22 going to give that to you, but you can -- you can ask for an  
23 interview. And we have asked for interviews with now the

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1 neurosurgeon again. We will seek those interviews. And it is  
2 important, for those interviews, to be able to do some  
3 background research on the individual, basically for the  
4 interview itself.

5           But certainly in the event -- in the event that those  
6 individuals are going to be called, either by us or by the  
7 government, to testify in relation to his medical condition,  
8 it is essential that we be able to have sufficient  
9 information. We can get it subject to protective orders,  
10 subject to certain protective use in the courtroom when we're  
11 cross-examining witnesses. But in order to do our job of  
12 cross-examining the expert, we need that kind of information,  
13 hopefully before the interviews, certainly before any  
14 testimony.

15           And that all -- so the Thirty -- that's the Thirty --  
16 moving on to the Thirty-Second Supplemental Discovery Request,  
17 Attachment E, there we inquire at paragraphs 9.a., 9.b., c.,  
18 and g. -- requests the same kind of information about an  
19 individual doctor who is referred to as the ortho spine -- who  
20 is the one who allegedly first informed Mr. Al-Tamir that he  
21 was cleared to travel to legal meetings in that December 5th  
22 period.

23           Again, this is information that pertains to the

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1 overarching question: Was there wrongful nonmedical influence  
2 on medical opinions being issued by the senior medical  
3 officers. And the government has again offered to --  
4 suggested that we request an interview. We will do that. And  
5 that -- this information falls into the same category as that  
6 I just mentioned about the other identifying and similar  
7 information.

8           Paragraphs 9.d., e., and f. refer to information  
9 relating to the decision -- other information relating to the  
10 decision to medically clear Mr. Al-Tamir for travel to legal  
11 meetings. Again, this goes to the general question of the  
12 bias on the part of the medical opinions that are being put  
13 forth by the government before the commission, potential bias  
14 based on command influence. And so we would also ask for  
15 that.

16           So hopefully -- I was down in the weeds, but I hope  
17 that that clarifies exactly the scope of what we're talking  
18 about now, and the government will -- you know, can respond.  
19 But that's my understanding of where we stand in terms of what  
20 they've agreed to, the principles they've agreed to, and what  
21 we're currently requesting and what we will -- we wish to hold  
22 off on, in particular about the weekend of August 31st, 2017.  
23 The information pertaining to that will become -- the

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1 materiality of that will be much clearer after we file this  
2 further medical-related litigation.

3 And that's all I have, Judge, if you don't ----

4 MJ [Col RUBIN]: Thank you.

5 Trial Counsel?

6 DTC [CDR FLYNN]: Yes, sir. Your Honor, Commander Flynn  
7 for the government again.

8 Before jumping into my argument, sir, I just want to  
9 make sure that you're aware that last week, when I thought we  
10 were going to argue this motion -- I forget what day,  
11 everything is kind of blending together. But I had an exhibit  
12 marked; it is 099MM. It's a declaration from the first SMO.  
13 I gave a copy to the defense last week. It's basically, like  
14 I said, a declaration rebutting much of -- or some of the  
15 accusations made in the defense motion. So I just want to  
16 make sure you're aware that that's out there.

17 Your Honor, I'm not going to rehash discovery law.  
18 You've heard about it quite a bit. It's briefed in both  
19 pleadings, and you've heard it in previous motions to compel.  
20 The one thing I will say is that, you know, it's the  
21 responsibility of government trial counsel in all criminal  
22 prosecutions to review and determine what information is  
23 discoverable and to turn that over to the defense. And that's

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1 what we have done, and that's what we will continue to do.

2 I understand the defense is frustrated with some of  
3 the -- you know, timing of some of the discovery that they're  
4 receiving, and the government understands that frustration. I  
5 just -- the defense needs to remember that this isn't a UA,  
6 simple UA/larceny case. This is a very complex, national  
7 security terrorism case, involves thousands and thousands of  
8 classified documents. And there's a process that's in place  
9 and that needs to be followed. Defense doesn't like this  
10 process. And again, we understand that, but that's what the  
11 process is. We will continue to live up to our discovery  
12 obligations. We've done it, and we will continue to do so.

13 What I want to do, sir, similar to what  
14 Mr. Thurschwell just did -- however, before getting into the  
15 specific request, I want to make sure we all understand what  
16 the relevant issue is here today. And the relevant issue is  
17 whether, with respect to Supplemental Request Twenty-Nine,  
18 Thirty-One, and Thirty-Two, the government is fulfilling its  
19 discovery obligation and whether a motion to compel is  
20 appropriate at this time. Those are the two issues that are  
21 before this commission.

22 And the reason I say that, Your Honor, is because the  
23 defense, mostly in its motion but even a little bit here

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1 today, is not focused on those issues. They use this motion  
2 to compel to question the integrity and the competence of the  
3 former SMOs, and they use this motion to allege a vast and  
4 nefarious conspiracy mostly by JTF that includes influencing,  
5 wrongfully influencing the former SMO to change their medical  
6 opinion so that the government can move forward with this  
7 case.

8 In fact, Your Honor, the rationale for most of these  
9 requests in these three -- these three supplemental requests,  
10 is that this information will reveal whether the government is  
11 involved in pressuring the former SMOs and not taking the  
12 accused's health -- medical health seriously.

13 Your Honor, it's the government's position that  
14 before requesting information such as this, before making  
15 these allegations, there needs to be some evidence to support  
16 that. And defense counsel's assertions of timing of various  
17 things, that's -- that's not evidence. Again, that's him  
18 testifying.

19 This is basically, Your Honor, the proverbial fishing  
20 expedition. It's entirely speculative, no credible evidence  
21 to establish that the government is somehow engaged in some  
22 type of conspiracy to move this case forward without regard to  
23 the accused's medical condition. Saying there's a good-faith

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1 basis -- saying there's a good-faith basis doesn't mean there  
2 is a good-faith basis. And I wanted to throw that out there,  
3 sir, because it's important that you understand that.

4 I would just like to spend two minutes going over  
5 some, I think, of the critical facts in this case because when  
6 you do that, you will see how ludicrous these allegations are  
7 and how they are not supported by any credible evidence. And  
8 I'm not going to go through all of the facts because I  
9 think all of the relevant facts are laid out in our facts  
10 section in our response.

11 As you know, Your Honor, the accused was cleared to  
12 meet with counsel and to attend sessions by the surgeon who  
13 operated on him and by -- in consultation with the senior  
14 medical officer. These two individuals are part of the  
15 accused's medical team. The former -- I guess the second SMO,  
16 the female SMO who we refer to as the second SMO, would see  
17 the accused on an almost daily basis. The current SMO sees  
18 the accused on almost a daily basis. Their decisions were  
19 based on objective medical evidence, including an evaluation  
20 of the accused, including conversations with the accused, as  
21 well as consulting the latest cervical x-rays which show good  
22 healing of his neck and good placement of the hardware.

23 It's important to note, Your Honor, that the second

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1 SMO on numerous occasions refused to clear the accused to meet  
2 with his attorneys because of his health condition.

3 The first SMO, as alleged in the defense's motion,  
4 was not removed from his position by JTF-GTMO because JTF-GTMO  
5 was unhappy with his opinions regarding the accused. That's  
6 another example of the defense throwing something out there  
7 that is absolutely and totally false.

8 The first SMO had a medical condition that required  
9 his transfer back to the United States. The first SMO did not  
10 whistle-blow against JTF-GTMO -- JTF-GTMO's refusal to permit  
11 the accused's access to necessary medical care. Your Honor, I  
12 have absolutely no idea where that came from. There is no  
13 evidence of that and that did not occur. And the declaration  
14 by the first SMO, he said he -- JTF-GTMO listened to his  
15 opinions, he liked working here. He got great performance  
16 evaluations from here. So making accusations like that  
17 doesn't make them true.

18 Neither JTF-GTMO nor any other government entity  
19 pressured the second SMO into changing her medical opinion.  
20 That opinion that the accused was recovering from his  
21 surgeries and was able to travel was based on objective  
22 medical findings.

23 Finally, Your Honor, with respect to the facts, the

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1 medical team involved with the accused, they have ethical  
2 obligations that would prevent them from medically clearing a  
3 patient to travel if the objective evidence didn't support  
4 that. And if I'm not mistaken, Your Honor, I believe the SMO  
5 when he testified -- I'm sorry, the neurosurgeon, was asked  
6 something to the effect would he clear the accused for -- or  
7 was he pressured? I believe he almost took offense to that --  
8 to that suggestion. All right.

9           So, Your Honor, I just want to spend the next couple  
10 minutes going through some of the requests the way defense  
11 counsel did. With respect to Twenty-Ninth Supplemental  
12 Request for Discovery 8.a., Your Honor, the government is not  
13 going to give over the identities or contact information of  
14 medical personnel unless you order us to do so. There's a  
15 process in place. I believe it's AE 028. It's a -- we  
16 litigated this issue with respect to access to witnesses.  
17 It's been in place now for almost two years.

18           If the defense wants to talk to any of these medical  
19 providers, they make the request. They have actually talked  
20 to the neurosurgeon. They made a request to talk to the -- I  
21 think the current SMO and I believe he didn't want to talk to  
22 them, and that's his -- that's his right.

23           With respect to 8.b., Your Honor, the government has

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1 turned over thousands of documents related to the accused's  
2 medical condition and will continue to do so. The rest of the  
3 information is entirely overbroad and not relevant, and we're  
4 going to -- we're standing on that, sir.

5           With respect to -- moving to the Thirty-First  
6 Supplemental Request, a. and b. is requesting documents  
7 including orders of the prior -- I think that's of the first  
8 SMO, directing him to GTMO. Again, not relevant -- there's no  
9 relevance to that even under this speculative conspiracy  
10 theory. The orders would have shed no light on that.

11           We have agreed to look for information under 9.c.  
12 through -- I believe it's d., sir. We have inquired of  
13 SOUTHCOM and JTF about this information. They have turned  
14 over approximately 6,000 e-mails, sir. So we are diligently  
15 working through those. I believe we've gone through most of  
16 them and have found zero evidence of any type of conspiracy or  
17 pressure, but we will -- we're still making that decision and  
18 will turn over any information that we deem discoverable.

19           Again, sir, with respect to 9.f. through l., I don't  
20 want to go through each one. We're standing on our  
21 objections. f. -- or 9.f. is military orders regarding the --  
22 again, that's the -- we're not -- there's no relevance to  
23 military orders of these doctors.

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1           Unless, sir, you want me to go through these one by  
2 one, we have agreed to, again, look for information under, I  
3 believe, 9.m. and o. Other than that, we are standing on our  
4 objections.

5           Quite frankly, with respect to 9.q., I have no idea  
6 what the defense is looking for, this standard that -- I don't  
7 know if that's the standard that the doctors used. Obviously  
8 doctors, when they're asked to give an opinion, they use the  
9 reasonably medical standard. But if that's what it is, we can  
10 certainly ask them that. But we were confused by that  
11 request.

12           And then moving to the Thirty-Second Supplemental  
13 Request, sir, as defense counsel indicated, the first request  
14 under number 9. are similar requests that were previously  
15 made. Again, unless ordered, we don't plan on turning over  
16 names of any of the medical providers.

17           We are -- we do agree that 9.d. and 9.e. are  
18 discoverable. We've been turning over medical records now for  
19 many months. I believe the defense has medical records up to  
20 and including December 5th. With respect to the medical  
21 records dated between 6 December and 16 January, we did  
22 receive those, and they're undergoing OCA review. With  
23 respect to 17 January to 3 February '18 medical records, we

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1 just received those on February 5th and are preparing to get  
2 those to the OCAs for review.

3           And with respect to 9.f., g., and h., we will -- 9.f.  
4 and g., we're standing on our objection. 9.h., to our  
5 knowledge, a video was not made of the surgery.

6           So Your Honor, that's all I have, unless you have  
7 specific questions.

8           MJ [Col RUBIN]: No questions. Thank you, Commander.

9           Mr. Thurschwell, any additional matters?

10          ADC [MR. THURSCHELL]: Very briefly.

11           I neglected to mention the SMO declaration that was  
12 provided to us. I meant to. I apologize. We acknowledge  
13 that that is their current position and explanation. The  
14 problem -- it's the same problem that we keep running into.  
15 The government doesn't seem to get that even with respect to  
16 this medical issue, it is an adversary legal issue, and that  
17 we are entitled to some measure of the adversary resources and  
18 the adversary process, so that we can test the information  
19 that's being put before the commission.

20           What we are asking for in this motion does not  
21 reflect an attack on the integrity of the former SMOs. I  
22 mean, what we are asking for is information that is fairly  
23 narrowly targeted and that the government has acknowledged may

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1 well be relevant and material on this basis, to allow the  
2 commission to evaluate the credibility and the weight to be  
3 given, the only expert opinions that are being put before it  
4 today, up to now, about Mr. Al-Tamir's medical condition.

5           We have no expert. Our medical records run out  
6 currently as of 5 December 2017. We have nothing after that  
7 date. The SMO reports is the only source of information  
8 before the commission on the -- on what should be an adversary  
9 question of -- legal question of Mr. Al-Tamir's fitness to  
10 participate in his defense. We at least need to be able to  
11 provide some information to the commission that would allow it  
12 a full-bore evaluation of, again, the credibility, how much  
13 weight, whether it's biased, that that -- that that expert  
14 opinion should be treated as having. So that is the basis.  
15 We are not attacking anyone for, you know, the integrity. We  
16 are -- we do have a good-faith basis.

17           We have -- I ran through it, the question of the  
18 timing is peculiar; the question of the fact that there was no  
19 medical opinion attached to the original December 5th decision  
20 to clear him; the fact that it was a sudden reversal from  
21 the -- I believe it was 29 November 2017 opinion saying he was  
22 not cleared. There was the contemporaneous -- the only  
23 contemporaneous information we have -- were privy to at the

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1 time and remain privy to, is our client's communication of his  
2 symptoms, which the neurosurgeon testified are a key element  
3 of any, you know, medical determination of his fitness to do  
4 anything, including be transported. And so we have ample  
5 good-faith basis for suspecting that other factors were at  
6 issue in these decisions.

7           If the commission is going to rely on those SMO  
8 declarations, as it has recently in its rulings, then it needs  
9 to be able to evaluate them in the context of all the  
10 information that is pertinent to being able to make that  
11 evaluation.

12           With respect -- I don't want to go back into the  
13 weeds of the requests themselves, except to say that with  
14 regard to the government's position that we need to interview  
15 the witnesses in lieu of getting the identification  
16 information, the short answer is that the order in AE 028BB --  
17 I may be getting that wrong, but the order -- or B -- the  
18 order that concerns the defense request for witness interviews  
19 says nothing at all about discovery, says nothing at all about  
20 whether we're entitled to their identification information or  
21 anything else.

22           So that said, we are going to -- now that -- you  
23 know, now that we have gotten through this period of the --

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1 intense period of the litigation, we intend -- fully intend to  
2 request those interviews. And as I mentioned before, that  
3 identification information is relevant to the interviews. It  
4 will become even more essential if and when witness testimony  
5 actually is required.

6           The government referred -- the only other thing I  
7 will say is that, to clarify, Requests 9.d. and e. in -- I  
8 don't have it in front of me, I think it was the Thirty -- it  
9 was either the Thirty-First or Thirty-Second Request. This  
10 was the one that the government said -- conceded are  
11 discoverable and referred to the medical records that they  
12 have been producing. I just want to -- let me make sure I  
13 have it right -- paragraph 9.d. and e. of the Thirty-Second  
14 Supplemental Request.

15           I want to be clear that those requests extend beyond  
16 the kind of formal medical records that go in the medical file  
17 that we requested. They were -- request e-mail communications  
18 and other information related to those decisions. I'm not  
19 clear whether the government is, you know, looking solely at  
20 the medical records that they're already producing or if  
21 they're looking beyond that. But that request, for all the  
22 reasons I've already stated, goes beyond necessarily the  
23 formal medical records, which is covered by AE 098 and the

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1 subsequent orders.

2 That's all I have, Judge.

3 MJ [Col RUBIN]: Thank you.

4 Trial Counsel, anything further?

5 DTC [CDR FLYNN]: No, Your Honor.

6 MJ [Col RUBIN]: Counsel, let's move on to AE 102E.

7 TC [CDR SHORT]: Your Honor?

8 MJ [Col RUBIN]: Yes.

9 TC [CDR SHORT]: Can we take a five-minute comfort break?

10 MJ [Col RUBIN]: We're going to push through.

11 TC [CDR SHORT]: Yes, sir.

12 MJ [Col RUBIN]: In AE 102E the defense requests the  
13 commission reconsider AE 102D, denying a motion to compel the  
14 government to grant immediate access to the accused in the  
15 hospital. The government opposes the defense motion, as set  
16 forth in AE 102F. The defense replied in AE 102G.

17 Does the defense want to present oral argument?

18 ADC [MR. THURSCHELL]: Very briefly, Judge.

19 Judge, in AE 102D the commission denied AE 102, which  
20 requested the ability to meet with Mr. Al-Tamir at his  
21 location, current location, because he was then unable to  
22 travel to medical -- sorry, to attorney-client meetings,  
23 denied it for -- as "unripe, absent any impending deadlines"

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1 was the quote, but noted that "the inability of the government  
2 to accommodate, in the face of these unfortunate circumstances  
3 in-person or even telephonic attorney-client communications,  
4 will be weighed in consideration of future requests for  
5 continuances or appropriate relief."

6           And so we are now back asking for reconsideration of  
7 that motion. I will not repeat at all the history that led us  
8 to file the initial motion and to return to request the  
9 current one. Circumstances have changed since that motion was  
10 filed, even the reconsideration motion. We are -- have  
11 currently been meeting with -- pursuant to the judge's  
12 findings and JTF clearances, we have been meeting with  
13 Mr. Al-Tamir in the attorney-client meeting room.

14           The problem is that JTF's position has never changed  
15 in its position regarding hospital visits. Mr. Al-Tamir's  
16 condition remains unstable, and litigating -- putting through  
17 the rigors of litigating is not -- exacerbates his symptoms.

18           He may well yet have another major lower back surgery  
19 at some point in the future. He is being tested, according to  
20 the neurosurgeon, with -- I think it's an EMG test to  
21 determine that. And so -- and especially, I will say, if AE  
22 099HH is not granted, the requirement of moving him to  
23 attorney-client meeting rooms will -- will pose the continuing

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1 threat of FCEs to him.

2           The problem -- I mean, the problem -- this is a  
3 chicken-and-egg problem, Judge, and I want to address that and  
4 I have a proposed solution. Right now on the face of it, it  
5 looks like we're able to meet with him currently, and so it  
6 may appear -- in the attorney-client meeting rooms. And it  
7 may appear that the request to meet with him in his -- in his  
8 hospital -- if he's moved back to the hospital and so on is,  
9 again, unripe.

10           The problem, the chicken-and-egg problem is by the  
11 time the issue is ripe, that is that he is unable to move to  
12 attorney-client meeting rooms and/or the FCE motion is not  
13 granted, he -- he will -- highly likely to be unable to come  
14 to court to hear in open session us reargue our motion -- you  
15 know, renewed motion to reconsider AE 102D, which is what we  
16 would be facing. And so, you know, the -- so there's an  
17 inherent problem that we've already faced in this.

18           I propose -- if the court is inclined to deny this  
19 motion on ripeness grounds, I would simply request that it not  
20 do that; that it instead hear these arguments, treat these  
21 arguments as -- treat it as having been argued. And then if  
22 and when the time arises when it actually has become ripe  
23 again, because as is distinctly possible, he will be back in

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1 the hospital or for other medical reasons be unable to travel  
2 to attorney-client meetings, then the issue will be -- will be  
3 ripe. You will have heard the arguments, and we can renew it,  
4 we can -- and so on at that time and you can rule then.

5           It's just -- this is -- and because it poses this  
6 real problem, conflict between his right to be present and  
7 our -- his ability to be heard on this issue when he's unable  
8 to be present.

9           So that's all I have on 102E.

10          MJ [Col RUBIN]: Thank you, Mr. Thurschwell.

11           Trial Counsel?

12          ATC [MR. SPENCER]: Good morning, sir. Mr. Spencer for  
13 the government.

14          MJ [Col RUBIN]: Good morning.

15          ATC [MR. SPENCER]: Sir, the government's position is that  
16 this issue is entirely moot or, at a minimum, not ripe for  
17 future concerns. The defense motion -- while the initial  
18 defense motion that the commission has ruled on 102D, the  
19 reconsideration, the basis for reconsideration no longer  
20 exists. We've seen that play out this week and last week.  
21 They've been able to meet with their client multiple times.  
22 The future concern of, well, we know that he needs an  
23 additional lower-back surgery, and at some point he will be

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1 again unable to meet with counsel, that issue, specific to  
2 that issue, that's not yet ripe.

3           The defense's concern about the chicken and the egg  
4 is an interesting concern. They ignore the fact that the  
5 commission can, of course, rule on pleadings without --  
6 without requiring oral argument. That's always within the  
7 commission's discretion.

8           In this instance, the other piece of the puzzle is  
9 that the defense is seeking access to the accused in the  
10 medical treatment facility or in the recovery facility. The  
11 irony of that, Your Honor, is that as the defense is aware,  
12 those facilities are not set up to allow privileged  
13 attorney-client communications. So on the one hand, in a  
14 different motion series, the defense is complaining without  
15 evidence that there was an intrusion when there wasn't. On  
16 the other hand, they're saying, well, we want to talk to our  
17 client in a place that we know there will be intrusions. So  
18 the defense can't have it both ways.

19           Ultimately the question of whether they can  
20 communicate with their client has already been answered, and  
21 that, again, the government would invite the commission's  
22 attention back to the Supreme Court case of  
23 Overton v. Bazzetta. They have been able to communicate with

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1 their client in a significant, meaningful way for several  
2 months. Now, obviously in the immediate aftermath of any  
3 surgery, you know, a couple of days, perhaps a week, the  
4 accused is probably in a condition where he is not even able  
5 to write letters or communicate via correspondence. But  
6 that's been the vast minority of the time since August. They  
7 have been able to communicate with him. They've had access.  
8 There's never been a denial of access, there's never been a  
9 limited -- a limiting of access. The access has been  
10 sufficient per the Supreme Court.

11           Therefore, Your Honor, the overarching issue is moot.  
12 Any future issue of whether the accused needs surgery again or  
13 when he needs surgery again, if there's new information or new  
14 facts that might affect 102D, the government requests that we  
15 take it up at that point even if it's done in written  
16 pleadings only.

17           Subject to your questions, sir, I have nothing else.

18           MJ [Col RUBIN]: Thank you.

19           Mr. Thurschwell, you get the last word.

20           ADC [MR. THURSCHELL]: Thank you. I will simply -- I  
21 think I responded to most of that in my opening.

22           I'll say the claim that the defense can't have it  
23 both ways, we did indeed raise concerns about attorney-client

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1 confidentiality in other motions. That's within the control  
2 of the defense. I mean, the big -- the problem -- the  
3 chicken-and-egg problem that we've -- that we -- was extremely  
4 significant during this period when we were able to meet with  
5 him while he was unable to move, is that we could not get the  
6 limited information we were willing to try to talk to him  
7 about, which was his medical condition, so that we could  
8 accurately fully litigate that.

9           Now, if we choose to, with his informed consent, talk  
10 about other things and other contexts, that's the defense  
11 business. But it is -- it is a -- it has been a  
12 significant -- was an enormous problem, it led to this -- this  
13 particular motion, 102, in the first instance, that we  
14 couldn't even get the basic information we needed to give our  
15 side of the medical story to the commission before it ruled on  
16 these medical-related issues.

17           That's all I have, Judge. I have a couple -- I will  
18 ask to just make one comment on the record to notify you of  
19 something before we adjourn.

20           MJ [Col RUBIN]: Yes, sir.

21           ADC [MR. THURSCHELL]: But that's all I have on this --  
22 on this issue.

23           MJ [Col RUBIN]: All right. Counsel, anything else on

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1 this motion?

2 ATC [MR. SPENCER]: No, Your Honor.

3 MJ [Col RUBIN]: Mr. Thurschwell, if there is something  
4 you would like to place on the record, you may proceed.

5 ADC [MR. THURSCHELL]: Judge, I simply want to again note  
6 for the record the commission has already seen concretely the  
7 effect of this slowness of our security clearance process on  
8 this commission. We were unable to consult in real time with  
9 the member of our defense team who was most familiar with some  
10 of the evidence that was at issue in the 505(h) hearings  
11 because his clearance allowed him to do the work in the back  
12 office but not appear in front of the commission and give that  
13 input.

14 That is, I will just let you know, the tip of the  
15 iceberg. There's a lot -- the problem and the stresses it  
16 puts on the rest of the team are enormous, the slowness of the  
17 process that is invisible to the commission.

18 MJ [Col RUBIN]: How long has that process been going on  
19 for that particular individual?

20 ADC [MR. THURSCHELL]: The -- for Lieutenant Martinez,  
21 his -- all of his paperwork was completed in May. For  
22 Ms. Susan Hensler ----

23 MJ [Col RUBIN]: Is it May of ----

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1 ADC [MR. THURSCHELL]: May of 2017.

2 MJ [Col RUBIN]: '17.

3 ADC [MR. THURSCHELL]: I believe her paperwork was  
4 completed in July or August of 2017. And we -- as you are  
5 aware, we have military who are rotating out or retiring, and  
6 it's a real problem. And I will just say that.

7 MJ [Col RUBIN]: Thank you, Mr. Thurschwell. The  
8 commission understands the frustration and shares in it as  
9 well.

10 ADC [MR. THURSCHELL]: And I guess what I should add to  
11 make this completely clear, is it is going to be a subject of  
12 litigation in the near future if it isn't resolved in a very  
13 reasonably short amount of time. So I just wanted to alert  
14 you to that too.

15 MJ [Col RUBIN]: Thank you, sir.

16 Trial Counsel, any matters you want to place on the  
17 record?

18 TC [CDR SHORT]: No, Your Honor.

19 MJ [Col RUBIN]: Very well. Counsel, the commission is in  
20 recess until the week of 9 April 2018. We do have a two-week  
21 session blocked. Depending on what issues and the number of  
22 issues, we may be able to adjust going either the full two  
23 weeks, going the first week, going the second week. So let's

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1 play it by ear.

2           With that, Counsel, thank you very much for your  
3 professionalism over the last two weeks.

4           TC [CDR SHORT]: Thank you, Your Honor.

5           MJ [Col RUBIN]: The commission is in recess.

6 [The R.M.C. 803 session recessed at 0927, 13 February 2018.]

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