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1 [The R.M.C. 803 session was called to order at 0910, 17 April
2 2018.]

3 MJ [Col RUBIN]: The commission is called to order. All
4 parties present when the commission last recessed are again
5 present with the exception of Captain Fischer. The accused is
6 present.

7 Trial Counsel, who is here to represent the
8 government?

9 TC [CDR SHORT]: Good morning, Your Honor. All those
10 present that were here when the commission recessed are
11 present. As you recall, we -- three members of our team were
12 not present when we recessed, and they are present here today;
13 that is Lieutenant Commander David Lincoln, United States
14 Navy; and Captains Eric Depue and Johnathan Rudy, United
15 States Marine Corps, Your Honor.

16 Also present is Sergeant First Class Dale Oe, United
17 States Army; and Ms. Lindsey Spitler.

18 MJ [Col RUBIN]: Thank you. Trial Counsel, would you just
19 please announce where the proceedings are being transmitted to
20 by closed-circuit television?

21 TC [CDR SHORT]: Yes, sir. These proceedings are being
22 transmitted stateside via CCTV to remote viewing sites at Fort
23 Meade, Maryland and Fort Devens, Massachusetts, pursuant to

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1 the commission's order, Appellate Exhibit 005I.

2 MJ [Col RUBIN]: Thank you. And who is here to represent
3 Mr. Hadi?

4 DC [CDR COOPER]: Good morning, Your Honor.

5 MJ [Col RUBIN]: Good morning.

6 DC [CDR COOPER]: All members of the defense team that
7 were present when the commission closed on February 13, 2018
8 are again present with the exception, as you noted, of Captain
9 Jeffrey Fischer. Mr. Al-Tamir has waived his presence and you
10 have granted his absence.

11 Also in addition we have a new member of the defense
12 team, Major Kenitra Fewell from the United States Air Force,
13 Your Honor, and she has the requisite security clearances.

14 MJ [Col RUBIN]: Thank you. Captain Fischer requested to
15 be absent from this session in AE 115A. That request was
16 granted by the commission in AE 115B. Thank you, Commander.

17 Major Fewell, good morning. Please step forward and
18 for the record please state your full name, your detailing
19 information, legal qualifications and status as to oath and
20 whether you have acted in any disqualifying manner in this
21 case.

22 DC [Maj FEWELL]: Good morning, Your Honor.

23 MJ [Col RUBIN]: Good morning.

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1 DC [Maj FEWELL]: I am Major Kenitra Fewell. I have been
2 detailed to this military commission by the Chief Defense
3 Counsel in accordance with R.M.C. 503. I am qualified under
4 R.M.C. 502 and I have previously been sworn in accordance with
5 R.C.M. 807 [sic].

6 I have not acted in any manner that might tend to
7 disqualify me in this proceeding and the document detailing me
8 is in Appellate Exhibit 007T.

9 MJ [Col RUBIN]: Thank you, Major. Welcome aboard.

10 I will now advise the accused of his right to be
11 present and his right to waive his presence.

12 Mr. Hadi, good morning, sir. You have the right to
13 be present during all sessions of the commission. If you
14 request to be absent from any session, your absence must be
15 voluntary and of your own free will.

16 Your voluntary absence from any session of the
17 commission is an unequivocal waiver of your right to be
18 present during that session. Your absence from any session
19 may negatively affect the presentation of the defense in your
20 case. Your failure to meet with and cooperate with your
21 defense counsel may also negatively affect the presentation of
22 your case.

23 Under certain circumstances, your attendance at a

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1 session can be compelled regardless of your personal desire
2 not to be present.

3 Regardless of your voluntary waiver to attend a
4 particular session of the commission, you have the right at
5 any time to decide to attend any subsequent session. For
6 example, if you decide not to attend the morning session of
7 the commission, but wish to attend the afternoon session, you
8 must notify the guard force of your desires.

9 Assuming there is enough time to arrange
10 transportation, you will then be allowed to attend the
11 afternoon session. You will be informed of the time and date
12 of each commission session to afford you the opportunity to
13 decide whether you wish to attend that session.

14 Sir, do you understand the advisement I just
15 provided?

16 ACC [MR. HADI]: Yes, Your Honor, I understood very well.

17 MJ [Col RUBIN]: Thank you.

18 A Rule for Military Commission 802 conference was
19 held at 1710 on 16 April 2018 in AV-34. The military judge
20 and the parties were present. The accused was not present.

21 Counsel and I discussed whether it was preferable to
22 conduct half-day sessions or full-day sessions this week. The
23 parties and I agreed that that decision could be made as we go

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1 along. The court is amenable to half-day sessions to
2 accommodate the medical needs of the accused, if necessary.

3 We discussed the start time and prayer schedule for
4 today. I do note the next prayer time today is at 1301. I
5 noted we have new defense counsel detailed in this case,
6 Major Fewell, who placed her detailing information and legal
7 qualifications on the record.

8 The parties informed me they were ready to argue
9 AE 014C. That motion has been added to the docket.

10 The defense noted that Captain Fischer was excused
11 for this week's hearing.

12 And finally we discussed the order of motions for
13 this session.

14 Counsel, are there any corrections or additions to
15 the commission's recitation of our 802 conference?

16 TC [CDR SHORT]: Nothing from the government, Your Honor.

17 ADC [MR. THURSCHELL]: Judge, I would only add that as we
18 discussed, we would like to proceed in terms of the schedule
19 for today on a kind of see-how-it-goes basis with
20 Mr. Al-Tamir. He is -- he is willing to go forward if he is
21 up to it beyond the half day we had discussed, but I would
22 like to revisit that later.

23 MJ [Col RUBIN]: Absolutely. Mr. Thurschwell, Defense, if

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1 Mr. Hadi needs a 15-minute break to get up and walk around, if
2 that will assist, please let me know and discuss that matter
3 with the guard force, and I believe it can be accommodated.

4 DC [CDR COOPER]: Yes, Your Honor.

5 MJ [Col RUBIN]: AE 115 is the docketing order. It lists
6 four motions for the commission to hear argument and receive
7 evidence on as required. More specifically, AE 111, that is a
8 defense motion to abate the proceedings; AE 112, a defense
9 motion to compel production of discovery requested in the
10 defense's discovery request dated 11 June 2014; AE 113, a
11 defense motion to compel extension of the current magnetic
12 resonance image contract; AE 114, which is a defense motion to
13 compel government adjudication of documents marked "Pending
14 Classification Review."

15 The commission will also hear argument and receive
16 evidence on AE 014C, a defense motion to reconsider
17 Protective Order #3.

18 Counsel, let's start with AE 111. In AE 111, the
19 defense requests the commission abate the proceedings until
20 such time as adequate resources are afforded to facilitate the
21 competent legal representation of the accused. The government
22 opposes the defense motion as set forth in AE 111C. The
23 defense replied in AE 111D.

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1 Does the defense wish to present oral argument on
2 AE 111?

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

4 Judge Rubin, as you discussed, this request is a
5 request to abate the proceedings until there are adequate
6 resources provided. I want to address the factors in the
7 Cronic case, but there's -- I need to go through some of the
8 history and the current status to explain this, and there is
9 really -- the deep background that everyone needs to
10 understand is that it is in Mr. Al-Tamir's interest to go to
11 trial as soon as feasible, and that is what he wants to do.
12 This request is actually intended to facilitate that endpoint.

13 I want to emphasize that the people who have gotten
14 out of Guantanamo are people who have been convicted, served
15 their time, and/or made a plea deal and served their time.
16 This is not a capital case. So that is our goal, his goal, is
17 to go to trial. But not just any trial; I mean, it has to be
18 a constitutionally fair trial. That's what "as soon as
19 feasible" means.

20 And I need also to emphasize that the current defense
21 team -- and I will come back to the word "current" -- has been
22 working extremely diligently to make that happen, since it
23 took shape in its current form in really October, November --

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1 November, really, of 2016. And I'll come back to that. So on
2 one hand Mr. Al-Tamir -- it's in his interest to go to trial,
3 and that is exactly what we are trying to do.

4 On the other hand -- this is not a capital case --
5 the government's interest is in keeping Mr. Al-Tamir
6 imprisoned in Guantanamo Bay for as long as possible. That is
7 where he is right now. He is imprisoned in Guantanamo Bay.
8 And while there may be other residual interests they have,
9 those are de minimis, given that this is not a capital case
10 and their interest is not in ending his life, but keeping him
11 where he happens to be right now for a little bit longer.

12 If it takes a little bit longer to get to trial, the
13 government has lost nothing except -- except an opportunity to
14 exploit tactically the problems that the defense has had with
15 resourcing and other matters that I am going to come back to,
16 but that we describe in the motion. And so that's the deep
17 background, right, of this.

18 And what this request really amounts to is a request
19 to abate -- and I'll come back to that, the specific need for
20 an abatement now, but also to rescind the litigation order,
21 AE 110, either -- and/or amend it to a timeline that actually
22 is consistent with the interests that I just described, and
23 that above all allowing Mr. Al-Tamir to get the fair trial

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1 that he is entitled to under the MCA and under the
2 Constitution.

3 So let me -- let me characterize this current
4 situation in this way. There is a short-term crisis in the
5 defense right now, and there is a long-term crisis. And the
6 short-term crisis, which I'll come to in a second, is what
7 really mandates -- it mandates or requires abatement as the
8 most practical solution to get past it and be able to move
9 forward, and that concerns the security clearance problem.

10 The long-term crisis is what really mandates the
11 rescission or amendment of AE 110, an adjustment to a timeline
12 that allows for the defense that, again, Mr. Al-Tamir is
13 entitled to.

14 So the short-term crisis. As we explain in our
15 motion, as of June of 2018, according to current staffing
16 plans and personnel movements and assignments, Mr. Al-Tamir
17 will only have two counsel who are cleared to meet with him
18 and to review a great deal of the discovery, who have been
19 both -- have their full TS//SCI and have been read on. One of
20 those two was only detailed and met with him for the first
21 time within the past month, and we are delighted that they are
22 on the team and they are arguing today, and they are excellent
23 lawyers, but they are both O-4s; Major Miller was an O-3 when

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1 she joined the team. And we are losing the two senior people,
2 who really are -- and I will come back to this -- who took the
3 lead initially when they first joined the team and started
4 making the defense actually happen, and who have by far the
5 closest relationship with the client, and so on.

6 So the situation will be that although we now have --
7 and have two cleared -- we will have two cleared counsel. And
8 we currently have a civilian counsel who will be -- is on the
9 team, has been on the team for a long period of time, but --
10 Susan Hensler, but because she doesn't have her clearance yet,
11 despite having fulfilled all of the requirements to get one
12 by, you know, last August, she can't review much of the
13 discovery; she cannot meet with the client; she has not formed
14 an attorney-client relationship; and the -- she cannot, as I
15 was reminded this morning, I mean she can't work in our
16 workspaces here at the ELC unaccompanied.

17 So, you know -- and so even in sort of the limited
18 support role, even though she is a senior attorney who is
19 going to be the person who takes over, she can't -- she can't
20 effectively operate as counsel without the clearance.

21 You know -- and so all of that -- that goes to the
22 fact -- and I will return to this when we talk about the
23 resourcing issue generally -- is that it is -- this short-term

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1 crisis is compounded by the fact that the chief defense
2 counsel and the convening authority, who are the individuals
3 who are tasked by statute and regulation with determining the
4 appropriate staffing for the defense, have determined that
5 Mr. Al-Tamir is entitled to three civilian counsel. He will
6 have no cleared civilian counsel at the current -- if the
7 current situation holds.

8 And so although -- and we have one more. We have one
9 who has been finally -- after a delayed hiring period has been
10 made, given an offer, and we are hoping and hearing rumors
11 that he will start within the next couple of months, but
12 that's contingent on even getting an interim SECRET clearance.

13 You know, at the current rate at which these
14 clearances are happening, Mr. Al-Tamir is going to be deprived
15 of the resource -- just at the level, and there is more
16 resources to talk about -- but at the most important level of
17 the counsel who have been determined to be required to
18 represent him adequately, he will not have them. He will not
19 be able to meet with the ones who are actually arguably the
20 people who should be in the lead position, approve them to
21 form an attorney-client relationship.

22 So that is the short-term crisis we are facing, and
23 it has become -- it has been a rolling crisis. We have been

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1 talking about it. The commission is aware of it and has
2 acknowledged that there is an issue that he is -- that you are
3 aware of, Judge. It has become a crisis essentially because
4 of the scheduling order, because now -- I mean, we have been
5 extremely patient, although we have been raising it, but the
6 current scheduling order makes this into a significant crisis,
7 because he will -- under the litigation order, he will have
8 barely -- the client will have barely met his -- you know, his
9 lead counsel. And one of them won't even be effectively
10 operating, probably, by the time of trial under this schedule.
11 And he will have met them hopefully, you know, within a few
12 months, at most, of trial.

13 So why do we ask for abatement? And it is a very
14 practical reason, Judge. I mean, this -- the government
15 argues correctly that you cannot order the OCA to issue
16 security clearances. You do not have that power; we
17 acknowledge that. But you do have the power, as the
18 government has acknowledged in other cases, to address the
19 effects of things that are out of your control legally, but
20 that impact the defense's ability to operate by abating the
21 case.

22 And as a very practical matter, as a historical
23 matter in this case and in other commission cases, nothing has

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1 focused the OCA's attention on the need for a timely
2 adjudication of security clearances like the reality or the
3 threat of an abatement. And I will not give you the examples,
4 but I think they have been discussed on the record before and
5 it's happened in this case I believe at least once, and it has
6 happened in many other cases at other times.

7 So abatement, frankly, is really requested because we
8 anticipate, A, it's needed. I mean, it's not just tactical on
9 our side. I mean, this case cannot proceed constitutionally
10 and adequately with the level of counsel staffing that
11 Mr. Al-Tamir anticipates having in June right now, so it's a
12 legitimate request. But also, frankly, we anticipate that an
13 abatement order will expedite this short-term crisis so that
14 at least Ms. Hensler and Lieutenant Martinez's longstanding
15 security clearance applications will be adjudicated and he can
16 begin developing the attorney-client relationship he needs
17 especially with Ms. Hensler.

18 MJ [Col RUBIN]: Mr. Thurschwell, abate until what or when
19 physically?

20 ADC [MR. THURSCHELL]: Abate -- I would say abate until
21 the lieutenant -- and I want to say -- may pick a reasonable
22 and arbitrary number, until counsel whose security clearance,
23 security clearance applications have been finalized, the

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1 application for -- pending for four or more months are
2 resolved.

3 MJ [Col RUBIN]: Does that include the recently, I'll say,
4 hired civilian counsel or an offer has been made?

5 ADC [MR. THURSCHELL]: He has -- he -- I think he would
6 not fall within the scope of that time period, but in the next
7 couple of months he would. And I would say then at that
8 point, you know, this would be something that we could revisit
9 depending on the -- on the situation. I mean, this is a
10 context that there may be changes and so on.

11 But I think -- I think that an order abating on those
12 grounds -- and let me just say, Judge, an abatement -- this is
13 an abatement of proceedings, further proceedings in the
14 session.

15 The defense is not going to sit -- I will come back
16 to this -- has not been sitting on their hands, and by all
17 means we will not be sitting on our hands. In fact, an
18 abatement would in many ways give us a chance to catch up on
19 stuff that should have happened a long time ago. So this is
20 not a request to stop things so we can go on vacation, quite
21 the opposite, and I can represent that absolutely clearly.

22 Okay. That -- so that is the abatement request
23 that's based on this short-term problem, critical short-term

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1 problem.

2 The long-term crisis that I referred to has many
3 factors. A major one is under-resourcing. The other one
4 which, you know, has been there but we have not discussed,
5 because, you know, I talk about it with some regret, but the
6 litigation order forces us to raise this, is that really the
7 constitutionally adequate defense of Mr. Al-Tamir began in
8 November 2016. So this is not -- you know, not in 2014 when
9 he was charged. And I don't -- I will come back to that.

10 But let me just -- first the under-resourcing, you
11 know, the facts are in the motion and in the Filbert
12 declaration and its attachments. The chief defense counsel
13 and the convening authority, after a back and forth, and this
14 was a back and forth evolving understanding of what the
15 requirements were in all of the cases, but in particular in
16 the noncapital case -- cases, but really we have been the one
17 noncapital case -- evolving understanding of what the needs
18 are for an adequate defense.

19 And I would say that this really has evolved over
20 time for good reason. It's evolved over the course of a
21 couple or three convening authorities. It's not just one.
22 And it's evolved because these are absolutely unique cases,
23 and it was not understood by anyone, I think, originally that

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1 even the noncapital cases are so enormous and complex and
2 unlike anything that you've ever come across in a
3 courts-martial and really hardly ever come across in federal
4 court, that issues like continuity of counsel, issues
5 like just the sheer complexity of the legal issues that are
6 some -- you know, like federal defenders and people like that
7 address who have dealt with capital cases and with
8 international cases deal with, but very little, few military.

9 And the continuity of counsel in particular, just
10 take these cases, takes too long. It has grown to understand
11 that even the noncapital cases really require civilian
12 in-house GS civilian attorneys for continuity of counsel and
13 for the kind of experience with the side of the military
14 commissions, because the military commissions are military
15 courts, but they are -- also have enormous federal court-like
16 aspects too, both the cases and the procedures. You need
17 civilians.

18 That's why there are civilians -- you know, the
19 Department of Justice staffs the 9/11 case. There are
20 civilians on the prosecution side. There are civilians on
21 this -- you know, on the prosecution team here. It has
22 gradually become -- and so the resolution has been and the
23 approved number is three GS attorneys for Mr. Al-Tamir's case.

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1 We currently have two. I am -- you know, I was
2 detailed, basically detailed -- you know, frankly the chief
3 defense counsel detailed his general counsel because it became
4 understood that this was a requirement, and there was no
5 in-house civilian on the case, and I will come back to this.
6 But we now have -- so I was the only one, and it was done on a
7 temporary basis. I am scheduled -- I was -- it was understood
8 it would be temporary, and this summer was really my
9 understanding of when the shift back would happen.

10 We have hired one who has been on the case for a long
11 time, doesn't have a security clearance, and it is for all the
12 problems that I have mentioned before; we've hired another,
13 but that still leaves us, you know, one short of where we are
14 supposed to be. And then there are -- we are supposed to be
15 staffed with three intelligence analysts; we have one. We are
16 supposed to have two investigators; we have one.

17 And this will get me into the next -- well, there is
18 a big difference between GS attorneys and pro bono attorneys,
19 and that was part of the evolving understanding that this
20 case, I think, revealed. And I'll come back to that. The pro
21 bono civilian attorney model did not work in this case,
22 frankly, and I will give you the facts shortly. But it didn't
23 work, and that's why we need these civilians who are cleared

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1 who can be operating as counsel. Okay.

2 The under-resourcing has been compounded by the
3 discovery issue related to audio discovery. We mention it.
4 The government filed AE 116 notice as a classified document,
5 and we are going to respond to that, and I don't -- because I
6 don't want to talk about it here, let me just say the -- as we
7 said in our reply brief, the government's -- the raw quantity
8 estimate that we had was incorrect. The government's is
9 closer to that, closer to correct on our thing. And I can
10 explain that. I have an unclassified exhibit if you need to
11 see it. I think that it would be easier to address.

12 But suffice it to say we agree that the quantity --
13 but the bottom line is it actually doesn't matter. Our
14 estimate of the work hours required, which we obtained not
15 through -- through a different methodology than just looking
16 at the size, is actually very much in the ballpark of the
17 government's work hours estimate, and so without getting into
18 more detail, that's still an enormous number of hours.

19 So the under-resourcing, particularly on the
20 intelligence analyst and investigator side, and even more than
21 that, on the linguist side, where we are -- have not had the
22 linguist support that we require to handle this quantity of
23 discovery, has also -- makes it -- you know, the AE 110

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1 unrealistic, that schedule.

2 And finally, and I want to address this -- I hope I
3 can address this in more detail under AE -- when I argue
4 AE 114, but we also raise the issue of the -- I don't even
5 know what the word to call it, but the problems with the
6 government's marking of documents and their handling of
7 classified discovery, which on the one hand is -- it's not
8 just that it's inconsistent with -- as we will argue in other
9 motions today -- inconsistent with all of the, with the
10 executive order and with the DoD Manual and so on, but it
11 creates like enormous amounts of completely unnecessary work
12 for us when we try to sort it out. And so let me address that
13 later. That's not the main point of this.

14 And then -- but finally, I mean, the last unfortunate
15 fact is, as I mentioned, that this really -- it was only when
16 Commander Cooper and Captain Fischer joined the defense
17 team -- and not as lead counsel; they didn't come in as lead
18 counsel -- in October or November of 2016 that this case began
19 to actually move.

20 And I just -- I can submit -- we can submit, if the
21 commission wishes, a detailed declaration. I don't, I don't
22 like even saying this, and I don't -- I mean in public. I
23 would ask to submit an ex parte declaration because it will

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1 discuss internal defense matters. But suffice it to say, as
2 of November 2016, there was -- had been essentially no
3 investigation of the charges. There was not even an
4 investigation plan.

5 Nothing had been -- related to torture or the black
6 sites had been looked at at all. There was no analysis, proof
7 analysis, of what the government's evidence was, how it
8 related to the charges, no systematic attempt to analyze
9 discovery from that point of view. There was really no theory
10 of the defense at all.

11 Discovery had -- was indexed in an Excel spreadsheet
12 in one attorney's files. There was no systematic attempt at
13 analysis. Concordance, which was available as a software that
14 would greatly facilitate the kind of analysis that wasn't
15 being done -- it was available. It wasn't being used. No one
16 had sought training for anyone to do it, with one exception,
17 who was really the wrong person and ended up leaving the case,
18 but at least they were in the right subject matter.

19 The only experts that had been sought or discussed
20 being sought were constitutional law experts, in terms of
21 seeking expert assistance. And that despite, you know, the
22 fact that there is DNA evidence, there is fingerprint
23 evidence, there is handwriting evidence, there was a general

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1 failure to analyze the resourcing needs or seek appropriate
2 resources.

3 Client communications were inadequate, and there
4 was -- there was effectively not a team structure, no
5 day-to-day work plan for personnel and so on. You know, and I
6 don't -- I can -- I could say more. I think, you know, I
7 would prefer not to. I mean, I don't like doing this, but
8 it's in the -- you need to be aware that that's the reality of
9 this case.

10 That is no longer the case. I mean, really beginning
11 with the arrival of our two senior military at the end of
12 2016, they -- even though they weren't lead counsel, they took
13 charge and made things happen. And so -- and I think you are
14 aware. I mean, you have seen what we have been doing. We
15 have been working extremely, extremely diligently, to the
16 extent we can, to get all of these things up and running.

17 Given the limitations of our resources, you know, the
18 one investigator and especially -- and I want to come back to
19 this a little bit. But, I mean we -- virtually as soon as
20 this began to actually operate effectively we were -- the team
21 was slammed with two things. First was the Darbi deposition,
22 which resulted in, you know, thousands of additional pages of
23 discovery being delivered that had to be analyzed on a very

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1 short-term basis; diverted enormous resources, legal,
2 investigative, all of that, into that. And, you know,
3 immediately following that the health crisis, which we were
4 unable to meet with the client. That again diverted all kinds
5 of resources into that issue.

6 And so I -- without belaboring it, I just -- that is
7 the actual situation. And so when thinking about the
8 litigation schedule, I think that's the timeline that it has
9 to be understood.

10 Now, I want to -- against that background, I can now
11 talk about the Cronic factors, and the government -- I mean, I
12 can talk about Cronic as well. I don't think I need to, if
13 the government wants to try to compare it. Our case is almost
14 point by point the counterpoint to the reasons that the court
15 recognized that these factors apply, but then found in Cronic
16 that it didn't apply, they didn't justify Cronic. Point by
17 point they justify us, if you go back. And I won't do that
18 now. If the government wants to argue in detail I will, but I
19 have gone on for too long.

20 But the first Cronic factor is the time afforded for
21 investigation and preparation. And then I mean that really
22 goes to what I was just talking about.

23 This is really a -- the time afforded -- he was

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1 charged -- Mr. Al-Tamir was charged in 2014, but nothing
2 happened until the beginning of 2017. And we have been
3 working hard on that, sidetracked by these two other big
4 issues, working hard anyway. All of the issues that I said
5 were not happening when we arrived, they are happening now.

6 The experience of counsel is the second factor.
7 Again, I won't repeat what I said about the short-term crisis
8 with cleared counsel. The most experienced counsel, the
9 counsel who, you know, have been determined by the two people
10 who are assigned by the statute and by the regulation for
11 determining the needs of the defense, those experienced
12 counsel are unavailable now. One of them is just in the
13 process of hiring, and one of them still hasn't -- can't meet
14 with the client or look at discovery.

15 The gravity of the charge. The government -- this is
16 a potential life sentence. We assume that that's what the
17 government is seeking. It couldn't be more significant.

18 The complexity of possible defenses. This is an --
19 this is an -- I don't really need to belabor this, but it is
20 an enormously complex case. The legal issues have only really
21 just begun. And I mean, by legal issues I mean the legal
22 factual issues. And I will just give you -- I will mention
23 three that are highly significant that we anticipate will

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1 require substantial hearing, fact hearings, discovery
2 investigation prep that hasn't been able to happen yet.

3 The first is a suppression hearing. And the
4 government -- whether the government intends to use
5 Mr. Al-Tamir's statements against him or not, we are entitled
6 to attempt to show that the evidence -- that evidence they do
7 intend to use was derived from his illegally obtained
8 statements. And this -- you know, he was in a black site.
9 Torture is on the table. And I don't need to go into that
10 now. This was one of the things that was just not looked at,
11 but he -- he was, at a minimum, by the relevant government
12 people's own admission in their books, he was threatened with
13 torture, and if he spoke, that's the reason he spoke.

14 And so we are entitled to investigate, get additional
15 discovery, if that's appropriate. Those are -- projects are
16 underway. That needs to happen. So all -- like all of the
17 evidence is subject to challenge.

18 Jurisdiction is an enormous issue. It was raised
19 early and then withdrawn, appropriately withdrawn. There was
20 no -- there was no, you know, investigation in what you need
21 to do, I mean, to raise that issue here. It's a significant
22 fact question about his status and whether he is eligible for
23 trial by military commission. That's a factual issue that

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1 needs discovery.

2 There is -- I'll just throw this out. There are an
3 enormous number of statements out there in discovery that are
4 potential hearsay admissibility issues if the government
5 intends to use them. We have asked what they intend to use;
6 we have not heard back what they intend to introduce. There
7 will be complex constitutional factual challenges to those.

8 There is a lot of work to be done. This is not a
9 check-kiting scheme, which is what was at issue in Cronic.
10 Let's put it that way.

11 And finally, the accessibility of witnesses to
12 counsel, you know, I mean, they are in Afghanistan, many of
13 them, and/or they were in the custody of the United States and
14 were released and they are now in various other Middle Eastern
15 countries under controls of governments that may or may not be
16 cooperative.

17 I mean, the obstacles of assembling an adequate
18 defense are enormous. That job has -- did begin. It got
19 sidetracked. It is underway. It is in Mr. Al-Tamir's
20 interests to make it happen. We are attempting to make it
21 happen. We cannot make it happen under the current litigation
22 schedule.

23 And so we would ask that that order be rescinded and

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1 allow us to proceed, you know, as we have been attempting to.
2 We are not delaying. And, again, there is essentially no
3 prejudice to the government given that they are not seeking to
4 execute him, they are seeking to keep him where he is anyway.

5 All right, Judge, thank you. That's all I have.

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

7 Trial Counsel, who will be speaking for the
8 government?

9 ATC [MR. SPENCER]: I will be, Your Honor. Good morning,
10 Your Honor, Mr. Spencer for the government. I will note for
11 the record that I am recently a civilian attorney assigned to
12 the case. I was on the case as an O-4 for many years. We do
13 not have any other civilian attorney and have not had a
14 civilian attorney, a DoJ civilian attorney, for example, for
15 several years.

16 Your Honor, I previously in previous oral argument
17 referenced the abatement yo-yo that the defense was attempting
18 to employ. It appears we are now in an abatement
19 merry-go-ground back with the abatement arguments. For
20 reasons I will explain, Your Honor, abatement is still not
21 appropriate, as it wasn't multiple times before.

22 The defense is seeking to punish the government for
23 problems that are largely of the defense's own creation or the

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1 accused's own creation. As the commission is no doubt aware,
2 the previous military judge on this case very clearly went
3 into a long colloquy with the accused in September of 2015
4 when the accused chose to voluntarily release his two counsel,
5 Lieutenant Colonel Jasper and Major Stirk.

6 During that colloquy, the military judge asked the
7 accused and the accused consented and acceded that the
8 delay -- "the significant delay" was the exact phrase used,
9 that might result with the judge granting his release of
10 counsel, the accused accepted that.

11 Now, that did cause delay. That delay took a
12 several-month time period, Your Honor, at which point he then
13 had three counsel that were detailed. I believe the current
14 count is roughly a dozen counsel that the accused has had over
15 the years. Some of that -- some of those counsel transfers
16 were not of the accused's doing. Certainly, at least with
17 Major Stirk and Lieutenant Colonel Jasper, those were his
18 choice.

19 With respect to the three individuals that came in to
20 replace Colonel Jasper and Major Stirk, I don't know. The
21 government is not privy to those discussions or how those
22 individuals were transferred off the team. I do know that two
23 of those individuals are still within the Military Commissions

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1 Defense Organization on other cases.

2 So the internal movements of counsel by the chief
3 defense counsel, to include Mr. Thurschwell, apparently the
4 pending internal movement of him back to his position as
5 general counsel, those are choices by the chief defense
6 counsel. It's not the government's place to assert whether
7 those choices are wise or unwise.

8 The chief defense counsel is certainly within his
9 discretion to manage his counsel under the Regulation for
10 Trial by Military Commission. If the chief defense counsel
11 chooses to reassign multiple counsel, as Mr. Thurschwell has
12 indicated will likely be happening, that is his choice.

13 The accused is entitled to representation by military
14 counsel. The accused is entitled to representation by
15 civilian counsel at no expense to the United States.

16 Mr. Thurschwell in his argument referred multiple times to the
17 accused is entitled, the accused is entitled, the accused is
18 entitled. He is talking about GS civilian counsel,
19 Your Honor. The accused is not entitled to
20 government-employed civilian counsel, period. He is entitled,
21 just as every accused in a military court-martial is entitled,
22 to civilian counsel at no expense to the United States.

23 The fact that that model apparently has not worked, I

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1 believe is the language that Mr. Thurschwell used in this
2 case, again, the government is not aware of why that is. We
3 are not privy to those discussions. It's unfortunate
4 potentially. But that is what the accused is entitled to. He
5 is entitled to military counsel. He is entitled to civilian
6 counsel at no expense to the United States.

7 He has all of that still. As far as the government
8 is aware, Your Honor, Mr. Rushforth, excuse me, is still
9 detailed to the case. Now, I understand there were some
10 health issues there. He has not been participating. There
11 are some other civilian counsel that have been detailed. The
12 government is not aware of their detailing status either.
13 They were cleared. Other pro bono counsel were cleared with
14 the assistance of the government -- with the assistance of the
15 prosecution, once the prosecution was made aware of it,
16 Your Honor.

17 The defense wants to penalize the government for not
18 clearing all of these extra counsel that they are -- asked
19 for. Number one, they are not entitled to. Number two, with
20 respect to Ms. Hensler and the new Navy lieutenant, the
21 government wasn't even aware that those security clearances,
22 the government, as in the prosecution team, was not even aware
23 that those security clearance applications were pending until

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1 the very last session of court, Your Honor.

2 So the defense seeks to now penalize the government
3 for some sort of alleged dereliction or feet-dragging in the
4 security clearance process. This is the same bell that the
5 defense has attempted to ring multiple times in this case,
6 Your Honor, both before you as a military judge as well as
7 before Judge Waits.

8 The security clearance process takes time. Does it
9 take longer than some of us would like? Of course it does.
10 But the commission does not have the ability to control that,
11 and in this case where -- where the ongoing need for security
12 clearance is the result of the accused's choices and the chief
13 defense counsel's choices, the government should not be
14 penalized for those choices.

15 They were voluntary choices, voluntary at least on
16 the accused's part as is clear on the record from September of
17 2015. With respect to the other multiple internal
18 assignments, again, that's within the chief defense counsel's
19 discretion under the Regulation for Trial by Military
20 Commission.

21 Now, essentially, Your Honor, what the defense has
22 alleged, which is somewhat remarkable by -- presumably by
23 Mr. Thurschwell's own admission -- is ineffective assistance

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1 of counsel by -- or potential ineffective assistance of
2 counsel by every counsel prior to the time that Captain
3 Fischer and Commander Cooper were assigned. That is a
4 remarkable claim, Your Honor. Some of the representation I
5 believe was during your time here.

6 Certainly with respect to Captain Waits, Captain
7 Waits found -- did not make a good-cause finding upon the
8 release of Lieutenant Colonel Jasper or Major Stirk because he
9 didn't need to, but he referenced, I believe, not being aware
10 of any good cause for their release. There was no indication
11 at the time, at least, from anyone, including the accused,
12 that there was ineffective assistance of counsel, and that's
13 certainly true for his attorneys prior to Colonel Jasper and
14 Major Stirk.

15 The suggestion that all other attorneys prior to
16 Commander Cooper and Captain Fischer coming on in November
17 of '16 being ineffective is one that -- the facts aren't
18 before the commission. It's a remarkable claim, a concerning
19 claim on a variety of levels, especially when, again, at least
20 two of those attorneys -- I won't say their names for this
21 purpose, but at least two of those attorneys are still within
22 MCD0, and Mr. Thurschwell has been a longstanding attorney
23 within MCD0 at least in a general counsel capacity.

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1 The government is not aware of what general counsel
2 capacity would involve in terms of supervisory counsel, but,
3 you know, chief defense counsel -- multiple chief defense
4 counsels have been in a supervisory role. So for the defense
5 to say that there was a history of IAC on this case without
6 more and substantial evidence supporting the Strickland
7 analysis is a remarkable one, Your Honor, and I would
8 respectfully suggest that the commission should not consider
9 that in determining whether an abatement is appropriate in
10 this case.

11 In terms of the Cronic factors, Your Honor, the
12 government does detail that. We address that in our brief,
13 Your Honor. I won't go into extensive detail on that. The
14 defense has had a significant amount of time to prepare. I
15 have been on this case for nearly five years and have
16 witnessed a very aggressive and zealous representation by
17 multiple sets of counsel.

18 Contrary to Mr. Thurschwell's claim, there have been
19 multiple experts assigned to this case, at least two, Brian
20 Glyn Williams and Professor Chemerinsky. The defense sought
21 at least one other, a con law -- a constitutional law expert
22 that was denied -- I believe that was denied by Judge Waits.
23 So there have been ongoing litigation, complex litigation done

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1 by highly qualified counsel well prior to Commander Fischer
2 or Captain -- I'm sorry, Captain Fischer or Commander Cooper
3 or Mr. Thurschwell being detailed to the case. The suggestion
4 that that is otherwise is just simply inaccurate, Your Honor.

5 With respect to the resourcing issue kind of in a
6 more global sense, again, the government is not going to
7 assert what the chief defense counsel should or should not be
8 doing or could or could not be doing. That is not the
9 government's place to do. The chief defense counsel is
10 responsible for resourcing his personnel. Now, whether that
11 could be done more efficiently with WHS or other entities that
12 are referenced in the defense's memo, the government is not
13 aware of how those procedures have broken down or not broken
14 down. The government obviously is not privy -- the
15 prosecution side is obviously not privy to that process, nor
16 should we be.

17 Your Honor, I would like to highlight the fact that
18 in previous instances where the defense has needed resourcing,
19 for example, expert assistance, the defense has requested that
20 of the convening authority. And if that was denied, the
21 defense then could seek and did, at least on a couple of
22 occasions, to compel the employment of that assistance, right?
23 The same as the defense would do in any context, whether it be

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1 federal court, military court.

2 As defense counsel, defense counsel in the military
3 frequently seek expert investigative assistance. Convening
4 authorities rarely grant that. Defense counsel would then
5 attempt to compel the employment of expert investigative
6 assistance, and then the military judge would make the ruling
7 whether it was necessary or not under the rule.

8 The defense has not done that in this case. The
9 defense has -- none of the resources about which the defense
10 currently complains and wants to penalize the government for
11 not providing them for it with an abatement, has the defense
12 sought the commission to compel the employment of. They want
13 to essentially say, well, we didn't get what we want,
14 Your Honor, from these other people in the government, so
15 penalize the prosecution.

16 That seems to be a less than ideal way to litigate
17 the case, Your Honor. Certainly if they can show that these
18 individuals are necessary, that they are -- that in
19 Mr. Thurschwell's term, they are entitled to them from a due
20 process standpoint presumably, then they can make that showing
21 or attempt to make that showing to the military judge. They
22 haven't done any of that, Your Honor.

23 With respect to the analysts, for example -- with

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1 respect to the analysts, previously I know there has been an
2 indication that only one of their three GS billets are filled.
3 Again, those are determinations made by the chief defense
4 counsel as to billeting. Previously, certainly in my time on
5 this case, the MCD0 had a contract with a private company for
6 intelligence analysts, just like we do, Your Honor. We have
7 few, if any, GS intelligence analysts. They are contracted.
8 MCD0 had a contract with that same company, possibly as
9 recently as one or two years ago, Your Honor. The fact that
10 they have not continued that contract, again we are not privy
11 to why that is. These are all resourcing decisions that are
12 within the purview of the chief defense counsel.

13 Presumably Mr. Thurschwell is not claiming
14 dereliction on the part of chief defense counsel, and the
15 government certainly isn't either. What discussions happened
16 at his level with respect to resourcing are not before this
17 commission and, frankly, are not within the government's
18 purview or knowledge. The government meaning the prosecution.

19 But that's the basis for the requested continuance,
20 Your Honor -- or the requested abatement, excuse me, is these
21 resourcing issues that are completely separate from the
22 court-martial process, that the defense has made no showing or
23 demonstration, have impacted the court-martial process in any

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1 way. That's what the defense wants this commission to rely on
2 in granting an abatement, and that's simply not appropriate,
3 Your Honor.

4 Now, with respect to the ongoing work that the
5 defense needs to complete to be prepared for trial, the
6 government obviously seeks to assist the defense in any way we
7 can with those issues, just like we did with the security
8 clearances, just like we will continue to do with the security
9 clearances.

10 We're not -- we don't have a trial date, Your Honor.
11 There is not a set date that the defense says, well, we have
12 to be prepared by X date. We have to do -- accomplish these
13 tasks by X date because there is no trial date, Your Honor.
14 The defense has some amount of time. The government is not
15 privy to the military judge's thoughts on when an appropriate
16 trial date might be, if the military judge has any.

17 The appropriate mechanism for doing that, for
18 altering those dates, when those dates are set, or even the
19 dates as outlined in Appellate Exhibit 110, are -- would be a
20 continuance. That's the appropriate remedy if the defense can
21 articulate why a continuance is necessary. They haven't done
22 that either, Your Honor. They haven't articulated why a
23 continuance is necessary from particular dates.

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1 The so-called short-term crisis from the defense
2 won't start until after May. I would note for the
3 commission's awareness, as I am sure the commission is aware,
4 but the defense is as well, the May deadline set by Appellate
5 Exhibit 110 is a fairly significant one of law motions. Law
6 motions are certainly important. If they need additional time
7 to litigate a particular law motion, then certainly they could
8 request that, but they -- their apparent dream team is in
9 place at least until after that time. They are certainly
10 capable -- more than capable of litigating those issues. And
11 the attorneys that are left over are certainly more than
12 capable of continuing to litigate those issues once their team
13 is internally readjusted.

14 There is no indication, there is no evidence before
15 the commission that the defense has been unable to or will be
16 unable to effectively represent their client, Your Honor. Is
17 the accused entitled to the dream team? No, he is not. What
18 the accused is entitled to is, as I have said, military
19 counsel. The accused is entitled to civilian counsel at no
20 expense to the United States. He has far more counsel
21 currently and historically than he is entitled to. And he has
22 had excellent representation throughout multiple shifts in
23 counsel for at least the five years that I have been here,

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1 almost five years. The defense has made no showing as to why
2 they can't continue on an as needed basis. If they need a
3 continuance, they can request a continuance and articulate why
4 that continuance is needed.

5 With respect to suppression, Your Honor, that motion
6 was filed. That motion was filed and withdrawn by this
7 current -- it was withdrawn by this current defense team, as I
8 recall. Now, why they chose to withdraw it, because maybe it
9 wasn't articulated as well as they would have liked, maybe it
10 wasn't as investigated as much as they would have liked. But
11 that was done quite some time ago, Your Honor. The defense
12 has had ample opportunity. They've had ample opportunity to
13 review discovery.

14 Eighty percent of the discovery -- I'm sorry,
15 approximately 75 percent of the discovery that's in their
16 possession is unclassified, so even the people that do not
17 have TS//SCIs can review the overwhelming majority of
18 discovery in this case.

19 They've had a large defense team for several years.
20 Now what they have been doing, and how they have been
21 organized and whether they have been using, you know, one
22 software or another software or not using software, that's not
23 for the prosecution to say well they should have been doing

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1 this, they should have been doing that. That's internal
2 defense counsel management by supervisory defense counsel.
3 Those are not -- that's not a basis for abating the
4 proceedings or even continuing the proceedings.

5 Your Honor, subject to your questions, I have
6 nothing -- nothing else to add.

7 MJ [Col RUBIN]: Thank you, Mr. Spencer. No questions.

8 Mr. Thurschwell?

9 ADC [MR. THURSCWELL]: Judge, the issue with the
10 Jasper/Stirk issue is really something that I would have to
11 address in an ex parte declaration. Would you like an
12 ex parte declaration? I mean, would that be helpful?

13 MJ [Col RUBIN]: You may certainly file one if desired.

14 ADC [MR. THURSCWELL]: Okay, we will do that.

15 The government's notion that we are trying to
16 penalize it is one that I don't understand. As I pointed out
17 in the initial argument, the government is entitled to a fair
18 trial, just as is Mr. Al-Tamir. That is what we are
19 attempting to do.

20 Now, how they are being penalized, I must have missed
21 that, how they are being penalized. If the trial takes --
22 doesn't -- occurs in six months or a year or two years,
23 whenever it is, later than the current schedule suggests, it

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1 would be -- and I am not suggesting that as a schedule; I am
2 just throwing that out -- the fact of the matter is
3 Mr. Al-Tamir is suffering the same punishment, de facto
4 punishment, that he would be after a conviction right now.
5 And so it's unclear to me how they are being penalized.

6 I did not say that there was ineffective assistance
7 of counsel prior to November 2016, because ineffective
8 assistance of counsel may or may not be argued at the
9 appropriate procedural moment. I don't know. That's an
10 argument you make after a conviction. He's not convicted.

11 All I am trying to do and all we are trying to do is
12 allow Mr. Al-Tamir to get a fair trial on a reasonable
13 schedule so that, frankly, in the government's own interests
14 also, it has a better chance of standing up on appeal. That's
15 all we are doing here right now. There's no -- there's no
16 penalty that I am seeking. There is no ineffective assistance
17 of counsel that I am arguing because it's -- that's not the
18 issue. The issue is actually making the process work; that's
19 what we are trying to do with this motion, as I said before.

20 The government places a lot of weight on the
21 statutory language saying that the accused in military
22 commissions are entitled only to a military counsel and a
23 civilian counsel at no expense to the government. That is

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1 true that is what the statute says. That's a baseline.

2 The statute also, and amplified by the Regulation for
3 Trial by Military Commission and the rules, delegates the
4 decision about staffing and personnel and resourcing of the
5 defense to the chief defense counsel in the first instance,
6 and the convening authority ultimately. And I -- by that I am
7 not just talking about request for experts, but also under
8 R.T.M.C. 9-4, when the chief defense counsel believes he needs
9 additional resources assigned to the office, new GS slots, for
10 example, he requests it from the convening authority, who then
11 is the keeper of the fisc, and who is in the role of making
12 those decisions.

13 Whatever the baseline statutory requirement, I think
14 it would be highly appropriate for the commission to defer to
15 the individuals who are assigned by statute and regulation
16 with the determination of what is required for an adequate
17 defense when determining how to resolve this motion. And it's
18 unequivocal, I mean, what they together agreed on and what we
19 currently have. And so whatever the baseline requirement is,
20 I think deference to those officials is appropriate.

21 And finally -- I mean, I know this is hardly worth
22 mentioning, Professor -- counsel mentioned experts and
23 confirmed what I said. I mean, he mentioned Professor Brian

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1 Williams, who I'm not -- was the expert who basically didn't
2 work out, but was -- at least was an expert in an area that
3 was related to the needs of the case. Professor Chemerinsky
4 was the dean of a law school and a constitutional law
5 professor, and then there was another con law professor who
6 was requested.

7 I mean, we are behind the curve in catching up. We
8 are catching up as fast as we can. I mean, that's the message
9 I want to bring you. We can't catch up in time to do what --
10 operate on the kind of schedule that the AE 110 suggests we
11 need to, but that doesn't mean we are in any way being
12 dilatory.

13 That's all I have, Judge.

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

15 Mr. Spencer, anything further?

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

17 MJ [Col RUBIN]: Anything further from either party on
18 AE 111? Mr. Thurschwell?

19 Counsel, would you like to take a recess or press on
20 to AE 112?

21 All right. Let's take a 15-minute recess. The
22 commission is in recess.

23 [END OF PAGE]

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1 [The R.M.C. 803 session recessed at 1014, 17 April 2018.]

2 [The R.M.C. 803 session was called to order at 1034, 17 April
3 2018.]

4 MJ [Col RUBIN]: The commission is called to order. All
5 parties present when the commission recessed are again
6 present. The accused is present.

7 In AE 112 the defense requests that the commission
8 compel production of discovery requested by the defense on
9 11 June 2014. The government opposes the defense motion as
10 set forth in AE 112A. The defense replied in AE 112B.

11 Does the defense wish to present oral argument?

12 ADC [MR. THURSCHELL]: Yes, Your Honor.

13 MJ [Col RUBIN]: Major Miller, good morning.

14 ADDC [Maj MILLER]: Good morning, Your Honor. The defense
15 respectfully requests that this commission compel the
16 government to turn over underlying documents related to the
17 interrogation of Mr. Al-Tamir, specifically handwritten agent
18 notes; typewritten agent notes; IIRs; IIR evaluations; HCRs,
19 which are HUMINT collection requirements; SDRs, source
20 directed requirements, as well as other documents including
21 interrogation plans or intelligence plans, depending upon how
22 they are named by the government.

23 And as Your Honor knows, we originally requested this

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1 information on 11 June in 2014. The government responded to
2 that request by saying they would turn over discoverable
3 information, and then almost a year later we were forced to
4 file a motion to compel in April of 2015.

5 In response to that motion to compel the government
6 specifically argued that the motion was premature because they
7 had not yet had the opportunity to scorch through all the
8 documents to know what was and was not discoverable.

9 And now here I stand, Your Honor, almost three years
10 later, forced to again submit a motion to compel because
11 almost three years later we still have no IIR evaluations.
12 Almost three years later we still have no HCRs, no SDRs
13 related to the interrogations of Mr. Al-Tamir. We have no
14 debriefing logs related to the interrogation of Mr. Al-Tamir.
15 We have no interrogation plans related to the interrogation of
16 Mr. Al-Tamir. And I believe I already said that we have no
17 HCRs and SDRs, Your Honor.

18 We have argued many motions to compel, so at this
19 point the standard should be well ingrained in everyone's
20 head, Your Honor, but I feel the need to just briefly
21 reiterate it again, because it's very clear that the
22 government is not applying the correct standard for what is
23 and is not discoverable.

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1 Specifically, Mr. Al-Tamir is entitled to documents
2 and other tangible items that are material to the preparation
3 of defense or reasonably tend to negate his guilt during
4 findings, or reduce the sentence during sentencing. And this
5 comes straight from R.M.C. 701 as well as from Brady.

6 Now, Yunis, which the government often relies on when
7 it comes down to providing discovery of classified
8 information, says that information is material to the
9 preparation of the defense if it is helpful to the defense of
10 the accused.

11 And so, Your Honor, demonstrating materiality is not
12 supposed to be a heavy burden. As stated by the D.C. Circuit
13 in Lloyd, there must simply be some indication that the
14 pretrial disclosure, as long as there is -- excuse me. There
15 must be just a strong indication that it will play an
16 important role in uncovering admissible evidence, aiding in
17 witness preparation, corroborating testimony, or assisting in
18 the impeachment or rebuttal.

19 Your Honor, it's very clear that the government is
20 not applying this standard. They are applying some sort of
21 higher level of discoverability than what is applied by either
22 the D.C. Circuit or the United States Supreme Court in Brady.

23 For example, Your Honor, if I can direct your

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1 attention to the defense's reply, 112B, specifically
2 Attachment B. Attachment B, Your Honor, represents the one
3 IIR that the government has provided to the defense in
4 discovery. And, Your Honor, we are not going to discuss the
5 specifics here, but we ask that you review that document
6 because you have also reviewed all the statements provided by
7 Mr. Al-Tamir.

8 And in the grand scheme of things, under the
9 government's understanding of what's discoverable, that is the
10 one IIR that they have determined is helpful and material
11 and/or exculpatory to the defense. And one could reasonably
12 argue why did we even get this document? And so this is just
13 one of the reasons why I feel compelled to actually reiterate
14 the standard, Your Honor.

15 Out of all the IIRs that were generated by
16 Mr. Al-Tamir's interrogations, this is the only one that we
17 have received in discovery and it doesn't -- I won't say
18 anything more, Your Honor, on that point.

19 However, I would like to illustrate the second reason
20 why we believe the defense -- excuse me, the government is not
21 applying the correct standard, given that this is the only IIR
22 that they have come to the decision is discoverable. However,
23 it is very clear that the government relies on Mr. Al-Tamir's

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1 supposed statements for many of the charges in this case,
2 sometimes substantially relies on those statements,
3 specifically with regards to the German VBIED attack,
4 Your Honor. The government's case relies substantially on
5 statements that Mr. Al-Tamir made to interrogators.

6 However, the government has not provided the defense
7 with any IIRs related to even that interrogation, no HCRs, no
8 SDRs, no interrogation plans. And all of this information is
9 helpful and material to the defense, because they would not
10 only assist the defense in arguing against the motion -- for a
11 motion to suppress, but also in highlighting to the commission
12 when the government has used derivative evidence from
13 illegally obtained statements.

14 Specifically with regards to the German VBIED attack,
15 Your Honor, without the statements of Mr. Al-Tamir, what would
16 the government have? Circumstantial evidence derived from
17 other detainees who were tortured could very well be their
18 answer, Your Honor. But that is why Mr. Al-Tamir's statements
19 and the underlying documents surrounding those statements are
20 so material to the preparation of his defense. And to have
21 the government simply provide Attachment B to the
22 government's -- I mean to the defense's reply, and that's the
23 only IIR that they deem material, is absurd.

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1 Your Honor, this underlying information would
2 drastically alter the quantum of proof in Mr. Al-Tamir's
3 favor. What requirements in the form of HCRs and SDRs were
4 levied against Mr. Al-Tamir? What was the interrogation plan
5 going in? What was the tactic? How did they intend to lure
6 him, elicit, and get him to make these statements? What were
7 the specific threats that were made to Mr. Al-Tamir,
8 Your Honor?

9 And I just briefly want to say that it's come to my
10 attention this morning that I am not permitted to discuss or
11 display certain documents that have been marked
12 UNCLASSIFIED//FOUO in this hearing. And so therefore my
13 argument is going to be somewhat watered down because I cannot
14 go into detail, even though those documents are
15 UNCLASSIFIED//FOUO. And so I would respectfully request the
16 opportunity to potentially supplement, since I won't be able
17 to display the documents in this hearing.

18 MJ [Col RUBIN]: You may.

19 ADDC [Maj MILLER]: Your Honor, the government says that
20 it has no intent to use any of the IIRs or anything related to
21 the statements of Mr. Al-Tamir. Even if that is in fact the
22 case and they don't change their mind later, that does not
23 absolve them of their discovery obligation.

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1 If the discovery rules only required them to turn
2 over information that they intended to use at trial and the
3 defense is so hamstrung on how much investigation it can and
4 cannot do separate from the government, the defense would
5 never have any helpful information, because the government
6 would never present helpful information in their case in
7 chief. It runs contrary to what they are trying to do. And
8 so the government seems to believe that just by making the
9 statement that they don't intend to use it, that therefore we
10 are not entitled to it, and that can't be further from the
11 truth, Your Honor.

12 Your Honor, briefly, I believe in our reply we very
13 specifically identified documents for the commission's
14 attention that are helpful and material to the defense.
15 Again, I am forced not to be able to elaborate on those
16 arguments in this oral presentation; however, we do request
17 that you consider the written motion for that.

18 But, Your Honor, not only do -- is Mr. Al-Tamir
19 entitled to information and discovery that is helpful and
20 material, which is a low burden, he is also entitled to
21 information and discovery that is exculpatory in nature. And
22 the case law is very clear that helpful and material is lower
23 than exculpatory. But in this case, not only do we meet the

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1 lower materiality standard, but we also have direct evidence
2 of exculpatory nature that makes the underlying documents
3 related to his interrogation that much more crucial and which
4 the government has yet to turn over.

5 Given that there is evidence out there that
6 inculpatory him and exculpates him and then his statement is
7 somewhere in between, knowing exactly how they interrogated
8 him, the threats, the coercive nature of the interrogation
9 would alter the quantity of the proof in favor of
10 Mr. Al-Tamir.

11 Your Honor, also in the reply, which is -- some of it
12 is marked classified or what have you, it also explains the
13 intelligence-gathering cycle, which is pretty important for
14 Your Honor's consideration, especially in light of what's
15 material. Because the D.C. Circuit and other circuits have
16 made it very clear that materiality is not determined in a
17 vacuum; it is determined in relation to the other information
18 in the case.

19 So the reason why the defense is asking for an IIR
20 and then also asking for the HCR and the SDR and the
21 interrogation plan, which the government would probably argue
22 is cumulative, is to basically provide a context surrounding
23 the entirety of the interrogation. Because each and every

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1 phase matters within an interrogation cycle, and some
2 information in one document might not be present in another
3 document, Your Honor. And this is why it's very crucial that
4 we get all of this information. And, Your Honor, as indicated
5 in the reply, we know that this information exists as it
6 relates to Mr. Al-Tamir.

7 Your Honor, with respect to a motion to suppress, the
8 prosecution argued on the last motion that the defense could
9 have been investigating, you know, and developing its motion
10 to suppress argument for a long time now; however, many of the
11 statements that the defense has received have come of late and
12 they're summaries that do not contain any information to allow
13 the defense to actually go out there and investigate.
14 Basically these summaries would require the defense to trust
15 the information that the government has provided and not do
16 any other investigation.

17 And, Your Honor, even if Mr. Al-Tamir is not
18 successful in winning a motion to suppress his statements or
19 in highlighting fruit of the poisonous tree, Mr. Al-Tamir
20 still has the right to present that information to the jury.
21 When it comes down to whether or not they will believe that he
22 actually voluntarily provided these statements or whether they
23 were coerced or anything of the sort, that's something that

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1 they should be considering.

2 They should have the information to know exactly how
3 the government stalked Mr. Al-Tamir, their process for
4 coercing the statements out of him, the threats that they made
5 to him, Your Honor. And we do have some summaries related to
6 his conditions of confinement, but these summaries don't go
7 into depth about exactly what was said, the threats that were
8 made. And again, Your Honor, since I have been told that I
9 cannot discuss some UNCLASSIFIED//FOUO stuff, I will just
10 reserve that for a supplement.

11 The members, Your Honor, essentially need to know how
12 deliberate the government was in pulling this information out
13 of Mr. Al-Tamir. Typically statements against interest are
14 reliable under the hearsay exception, but not when torture and
15 coercion are involved, Your Honor. And the members need to
16 know that, so that they can weigh the credibility of that
17 statement in light of the information that actually exculpates
18 him from some of these offenses on the charge sheet. We
19 cannot do this, we cannot do our part as his defense counsel,
20 his representatives without having this underlying
21 information.

22 Your Honor, and I will just point your attention back
23 to Ritchie, which is what the government cites to. They cite

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1 to Ritchie to basically -- for the proposition that when they
2 say something is not discoverable, their word is the law; and
3 obviously that is absurd. We would never need a motion to
4 compel if their word was actually the law.

5 What Ritchie says is that when the defense has
6 presented general information about exculpatory documents,
7 then the government can say nope, it's not discoverable and
8 their word is the law, quote/unquote. However, when specific
9 documents are identified by the defense, their word is no
10 longer the law, Your Honor. You make the determination.

11 You make the determination as to whether or not that
12 information is helpful, material and/or exculpatory and should
13 be provided to the defense.

14 Now, I'm sure the government will probably argue that
15 you are not permitted to make de novo determinations as
16 regarding classification. That is not what the defense is
17 asking Your Honor to do. It is well within the scope of
18 Your Honor's responsibilities to ensure that Mr. Al-Tamir has
19 the exculpatory information or the discovery that is helpful
20 and material to his case.

21 Should the government say no, that's classified, you
22 don't get that, then Your Honor can make a determination from
23 that point as to whether or not they get to use other

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1 evidence, whether or not the case goes forward, and the
2 government then has to make decisions. This is not a de novo
3 review of the classification; this is simply Your Honor saying
4 this information he is entitled to have, so, Government, make
5 a decision.

6 Your Honor, the defense is also not arguing the
7 sufficiency of the substitutions in this motion. If the
8 government is saying this is the UNCLASSIFIED//FOUO version
9 that you get to display in court, fine. However, Your Honor,
10 helpful and material includes whether or not the information
11 would lead to additional admissibility -- admissible evidence.

12 The defense counsel in this room all have the
13 necessary requisite security clearances. Whether or not the
14 substitutions are UNCLASSIFIED//FOUO and that's all you can
15 display in court is one thing. Whether or not the defense,
16 through Mr. Al-Tamir's rights, should get the underlying
17 documents even if they are classified, is another.

18 Again, Your Honor, the defense has the requisite
19 security clearances, and we would argue the need to know. And
20 not only that, but Mr. Al-Tamir has a right to an effective
21 defense in this case, Your Honor.

22 And pending any questions from you, that concludes my
23 argument.

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1 MJ [Col RUBIN]: No additional questions. Thank you,
2 Major.

3 ADDC [Maj MILLER]: Thank you, sir.

4 MJ [Col RUBIN]: Trial Counsel, does the government wish
5 to present oral argument?

6 ATC [Capt RUDY]: Yes, Your Honor. Good afternoon,
7 Your Honor. Captain Rudy for the government.

8 Your Honor, as Major Miller has already stated, this
9 is far into a long line of motions to compel discovery. We've
10 adequately briefed the discovery standard in multiple motions
11 to compel. Government filings, we're well aware of our
12 discovery obligation under both 701, Brady, Giglio, Yunis and
13 the like. The government, over a course of many years, has
14 applied that discovery standard to review and produce what we
15 have determined to be the relevant and helpful/material
16 information to the defense.

17 Specifically to the categories that the defense is
18 now seeking this commission to compel, we have reviewed
19 information that would fall squarely within some of those and
20 arguably within others, but it seems like the defense is
21 mostly focused at this point on statements made by their
22 client, the accused.

23 Unequivocally, the government has produced

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1 information corresponding to every one of the statements made
2 by the accused while in government custody. As Your Honor is
3 well aware, a majority of those have been produced via the 505
4 summary process, and that process has actually offered the
5 defense a greater degree of, say, reliability or perhaps
6 comfort level because there has been such a high level of
7 military judge review and approval of the ultimate summaries
8 that have been produced to the defense.

9 And again, as the commission, Your Honor, and the
10 defense are aware, those summaries are in the hundreds that
11 have been produced. And those summaries span statements made
12 by the accused, and they also cover the corresponding
13 conditions of confinement that he was under while he made
14 those statements.

15 We have also produced, as it pertains to those
16 statements, a chart in classified format that you, Your Honor,
17 and the defense can use to link up those two time periods, so
18 they will be able to link a particular statement with whatever
19 conditions he was under when he made those.

20 Now, all of those statements, as we briefed -- we
21 have stated before, but definitively stated in AE 112A that we
22 don't intend -- the government does not intend to rely on any
23 of those statements in its case in chief. So that's kind of

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1 one block of statements, and that was mostly what Major Miller
2 seemed to be focused on.

3 What we are going to rely on are the other
4 statements, the statements made by the accused to the FBI, and
5 we have produced those in four letterhead memoranda from the
6 FBI. All of those are dated 2007, and they were all produced
7 in 2014 to the defense with the referral binder.

8 They can also rely as it pertains to those on things
9 like the DIMS records, which track kind of chronologically
10 what -- like a day-to-day log or something like that of the
11 accused's time while in DoD custody.

12 And, Your Honor, I guess I will pause there. If you
13 have any questions on the specific summary process or would
14 like more information, I can provide that now, and then I will
15 move on to the IIRs which seemed to be the second part.

16 MJ [Col RUBIN]: I have no questions. Move on.

17 ATC [Capt RUDY]: For the IIRs, Your Honor, we -- and the
18 like IIRs, IIR evals, all the DoD material that was cited in
19 the defense motion, that is basically kind of a recycled
20 argument from Darbi, or the litigation to Mr. al Darbi for the
21 same kind of material. And unlike Mr. al Darbi, where much of
22 the discoverable information, the actual information they are
23 entitled to that was inside of that kind of document.

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1 In this case, all of those -- all of those types of
2 documents are cumulative, wholly cumulative with the
3 underlying information that was summarized and produced.
4 Again, they are classified under Yunis. The government does
5 not have a discovery obligation for cumulative material. And
6 the information that is contained in IIRs, IIR evals, HCRs,
7 SDRs, that information has been reviewed by the government and
8 has been determined to be cumulative with the underlying
9 material and the summarized information that was produced to
10 the defense. The defense is not missing any information
11 because the government has not produced any of that category.

12 Furthermore, some of those documents in that
13 category, for example, IIR evals, HCRs, SDRs, those just as a
14 category are not discoverable. What the defense is entitled
15 to under 701(c)(3) are the statements of the accused, not what
16 other individuals in the government may have been discussing
17 leading up to whatever he said.

18 What matters is what the accused said. The defense
19 has that information. They have the corresponding information
20 that they may rely on for a future motion to suppress. The
21 defense has what they are owed, Your Honor.

22 There's some other specific information that the
23 defense requested in their motion. They didn't address it in

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1 oral argument. If you like, I can go through those as well,
2 but essentially, Your Honor, the government's position ----

3 MJ [Col RUBIN]: As you deem appropriate, Captain Rudy.
4 If you want to, you can, yes.

5 ATC [Capt RUDY]: No, Your Honor. Unless you have
6 questions I don't intend to. We've laid it out in our motion.

7 MJ [Col RUBIN]: Very well. It's your decision.

8 ATC [Capt RUDY]: Okay. Your Honor, that is essentially
9 the government's position. We have looked for the information
10 they have requested, we have analyzed it, and we have produced
11 it in either redacted format, a unclassified format, a
12 summary, whatever way, but they have that information.

13 And, Your Honor, that concludes my argument. If I
14 may confer with counsel.

15 MJ [Col RUBIN]: Yes, you may, Captain Rudy.

16 **[ATC Capt Rudy conferred with co-counsel.]**

17 ATC [Capt RUDY]: That concludes my argument then,
18 Your Honor.

19 MJ [Col RUBIN]: Major Miller, I will give the defense the
20 final word.

21 ADDC [Maj MILLER]: Your Honor, I'll just start my
22 rebuttal with what the government ended with: We've produced
23 everything they asked for in whatever way. I would hope that

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1 they would know exactly the way in which they provided us such
2 crucial information, Your Honor. The government has been
3 known to be flippant regarding the information that the
4 defense is requesting, and this is just one example of it.

5 The government also said that IIR evaluations -- I
6 believe they said IIR evaluations as a category are
7 nondiscoverable. And so, Your Honor, that statement in and of
8 itself tells you that it is the government's position that no
9 matter what is within an IIR evaluation, as a category, those
10 are nondiscoverable, categorically excluded from their
11 consideration of what is and is not discoverable, Your Honor.

12 Your Honor, the government also said that
13 Mr. Al-Tamir is not entitled to any record of discussions that
14 anybody had leading up to his interrogation. Your Honor, the
15 interrogation tactics and strategy would all be a part of
16 discussions that were had leading up to his interrogation.
17 Whether or not EITs were approved would be a conversation that
18 happened up into his interrogation, Your Honor.

19 Regarding a motion to suppress, that is very crucial
20 to whether or not he was tortured and/or coerced or threatened
21 with torture in providing these statements that the government
22 substantially relies on, at least with regards to the German
23 VBIED attack.

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1 Your Honor, the government also highlighted that this
2 is an issue that we, quote/unquote, recycled from the
3 litigation involving Mr. al Darbi. However, the one thing
4 Your Honor probably remembers is that we received several IIRs
5 for Mr. al Darbi's interrogations. We've also received
6 interrogation plans for Mr. al Darbi's interrogations.

7 So again, Your Honor, when I emphasize that the
8 government seems to think that if they are not intending to
9 use information that they then don't have to provide it, this
10 is just an example. Mr. al Darbi was a witness that they
11 wanted to use; therefore, they provided all this information
12 that they knew was discoverable. Because they don't intend to
13 use the statements Mr. Al-Tamir made, they seem to think that
14 the defense isn't entitled to that same information.

15 And not only that, Your Honor, the defense did in
16 fact receive summaries, 505 substitutions regarding
17 Mr. al Darbi's interrogations, and yet still received the
18 underlying documents for those interrogations. So that is a
19 very important point to note.

20 Another point, Your Honor, is the government seems to
21 always believe that the argument that they provided us a whole
22 lot of information means that we are not entitled to the
23 actual information we should have as justification.

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1 So, for example, the government mentioned that they
2 provided DIMS, which is a chronology of Mr. Al-Tamir's
3 confinement. That does not document his interrogations. That
4 does not document exactly what he said. That does not
5 document the tactics. That does not document what the
6 requirements were or the plan. So the fact that they provided
7 the DIMS we do appreciate and we do think are discoverable,
8 but that does not negate the fact that other information is
9 also discoverable.

10 And, Your Honor, we do note that we have several
11 summaries that the government states that you have reviewed
12 and approved. However, the question would be whether or not
13 the government provided you with the HCRs. Did the government
14 provide you the SDRs? Did the government provide you the
15 interrogation plans? Did the government provide you the IIR
16 evaluations, so that when you approved the summary you
17 actually had the surrounding relational circumstances to be
18 able to adequately determine whether or not that substitution
19 was sufficient?

20 The defense believes what the government did was say,
21 oh, those HCRs aren't discoverable so the judge doesn't need
22 to see those. We are just going to give him this; or the SDRs
23 aren't discoverable. We are just going to give him this; or

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1 the plans aren't discoverable so we are just going to give him
2 this.

3 Again, the defense has no way of knowing if that was
4 the case because these are ex parte filings. We get notice
5 that it was filed, but we don't even know exactly what was
6 filed. However, that would be a question that I would ask to
7 the government on that point.

8 And as a final point, Your Honor, the government's
9 right. We have been in to -- and we have argued various
10 motions to compel. It is the defense's position that we
11 shouldn't have to do this like this. When we submit a
12 discovery request, they should answer that discovery request.
13 When they say they are going to provide material, they should
14 then provide it, or provide an additional response saying
15 we've reviewed this information and it is not discoverable.

16 I'm not saying that that would stop us from going and
17 filing a motion to compel, Your Honor. But what's happening
18 in this case is that we have asked them for information, they
19 don't really go check and look, but then we have to file a
20 motion to compel. And then within the 14 days that they have
21 to respond, they go look, and then they come make a conclusory
22 statement to you that they have reviewed everything and either
23 it's categorically excluded, like IIR evaluations, or nothing

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1 in there is relevant and material and shouldn't be produced.

2 And, Your Honor, the defense has more than met its
3 burden with respect of showing specific instances where we
4 have not received helpful material information and/or
5 exculpatory information to at least warrant -- one, we believe
6 we should be provided these documents outright, Your Honor,
7 but to at least warrant in camera consideration, because the
8 government is clearly not providing the correct standard. And
9 even in Ritchie, the government -- the court did not rely on
10 the government's assertions.

11 Thank you, Your Honor.

12 MJ [Col RUBIN]: Anything further from counsel on AE 112?
13 Captain Rudy?

14 ATC [Capt RUDY]: Yes, Your Honor, if I may.

15 MJ [Col RUBIN]: You may.

16 ATC [Capt RUDY]: Your Honor, when the government says
17 that we will do something, that is not -- those are not empty
18 words. When we said that we would provide the discoverable
19 information back in 2014 when they originally filed this
20 discovery request, that was the truth, and ultimately we have
21 produced it.

22 When the defense files a discovery request requesting
23 specific information or, as they generally do, categories of

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1 potentially relevant information, we go look for it. That's
2 our job. That's our duty. That's what we have been saying in
3 every discovery motion and motion to compel for the past two,
4 three years now.

5 As it pertains directly to the IIRs, IIR evals, HCRs
6 and SDRs, we have looked at every single one of those and
7 determined them to be cumulative. In fact, I personally just
8 reviewed the IIR evals, HCRs, and SDRs and have personally
9 determined them to be cumulative with the summaries already
10 produced. So while they may categorically, as our position
11 is, not be discoverable because they are just other people's
12 plans for future questions, that doesn't mean that we are
13 shirking our responsibility and just excluding them from our
14 thought. We go find them, review them, and then make the same
15 discoverability determination that we would for any other
16 documents.

17 Furthermore, in the rebuttal argument, it seems like
18 again this is just another complaint or not being satisfied
19 with the way that the 505 process works for the government
20 asserting its national security privilege for information
21 deemed to be discoverable yet classified, and that we are
22 unable or unwilling to turn over in just like a redacted
23 format, for example, Your Honor.

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1 And that's the core of what -- that's, I would say,
2 the bulk of the information that we are discussing here that
3 falls under that rubric of the government asserting its
4 privilege, giving that source material to the military judge,
5 and then the end result being a summary. That is not
6 something that is, I guess, open for defense review, but
7 again, Your Honor, you are well aware of the -- of that
8 process and how meticulous it is.

9 So again, Your Honor, we have reviewed the
10 information within the categories requested by the defense.
11 We have made discoverability determinations, and they have all
12 that they are entitled to, Your Honor.

13 And if you have any questions.

14 MJ [Col RUBIN]: No questions.

15 Major, I am going to give you the final say this
16 time.

17 ADDC [Maj MILLER]: I will keep it brief, Your Honor. The
18 government hammers home and relies on a conclusory, "we
19 reviewed this information and it's cumulative," period. Prove
20 it.

21 The defense has met its burden of showing how this
22 information is not cumulative, i.e., there is an intelligence
23 cycle. Some information does not make it to another document.

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1 When the government says that this information is cumulative,
2 Your Honor, the question is what is their definition of
3 cumulative. Is it verbatim? Are there subtle differences
4 that the defense could then use in its case in chief or in
5 rebuttal or in sentencing?

6 It is absurd to think that every single IIR, HCR,
7 eval is cumulative to what was provided in the summary. We
8 know this is absurd because an HCR is a requirement. It
9 discusses what are you trying to get from this individual.
10 None of our summaries say we were trying to get this
11 information from Mr. Al-Tamir.

12 We know that an interrogation plan would go through
13 explicit details about the interrogation strategy. We do not
14 have a "we know all" or anything like that within these
15 summaries, Your Honor, so it is absurd for them to stand up
16 here and argue cumulativeness. They must actually prove that
17 these documents are identical, verbatim, that there are no
18 subtleties, and otherwise contradict the SOP that the
19 government relies on when discussing that some information
20 that might make it into an IIR, wouldn't make it into an SDR,
21 that wouldn't make it into the interrogation plan.

22 The defense has more than met their burden with
23 showing that this isn't cumulative. Your Honor, we

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1 respectfully request that the government not just get up here
2 and make a conclusory statement that it is cumulative. And we
3 ask that the commission actually direct them on what is the
4 standard for cumulativeness and require them to actually show
5 it, Your Honor.

6 Pending any questions.

7 MJ [Col RUBIN]: Thank you, Major. No questions.

8 ADDC [Maj MILLER]: Thank you, Your Honor.

9 MJ [Col RUBIN]: Counsel, let's move on to AE 113. In
10 AE 113 the defense requests that the commission compel funding
11 for the continuation of the magnetic resonance image, MRI,
12 capability at U.S. Naval Base Guantanamo Bay. The government
13 opposes the defense motion as set forth in the government's
14 response, which is AE 113A. The defense replied in AE 113B.

15 Does the defense wish to present oral argument on
16 AE 113?

17 DC [Maj FEWELL]: Good morning, Your Honor.

18 MJ [Col RUBIN]: Good morning.

19 DC [Maj FEWELL]: I would like to start with a quote from
20 Brennan v. Farmer. "It is society's responsibility to protect
21 the life and health of its prisoners. When a sheriff or
22 marshal takes a man from the courthouse in a prison van and
23 transports him to confinement for two or three or ten years,

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1 this is our act. We have tolled the bell for him. And
2 whether we like it or not, we have made him our collective
3 responsibility. We are free to do something about him. He is
4 not."

5 I'm not going to go through each and every detail
6 concerning Mr. Al-Tamir's medical issues, because they have
7 been thoroughly briefed in Appellate Exhibits 099, 102, and
8 103, but it is important to note that Mr. Al-Tamir has
9 significant medical issues. He has had complaints of back
10 pain for years, and last fall he had a serious degradation in
11 his health and decline which led to an urgent medical
12 situation and ultimately four spinal surgeries.

13 The defense is requesting this motion to compel
14 funding based off of two inextricably intertwined reasons, and
15 that is to provide adequate medical care and also to ensure
16 the just and efficient continuation of the proceedings.

17 Adequate medical care -- adequate medical care is
18 guaranteed by the Eighth Amendment and includes not just
19 diagnosis, but also treatment. Mr. Al-Tamir, in his
20 particular case, that includes the magnetic resonance imaging,
21 which I will refer to as an MRI from here on out, because of
22 his specific issues.

23 An MRI was brought to Guantanamo Bay by the convening

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1 authority. It was paid for by the convening authority. And
2 the contract would need to be extended by the convening
3 authority, not JTF-GTMO.

4 The proceedings as discussed under R.M.C. 801 are to
5 be fair and orderly, without unnecessary delay or waste of
6 time and resources, and this can only happen if that's
7 coordinated with Mr. Al-Tamir's medical issues and that the
8 commission is aware of those medical issues.

9 Now, the government's argument solely centers around
10 trying to make JTF-GTMO take some required action, but there
11 are two factors in Mr. Al-Tamir getting an MRI, funding and
12 then the application or the use of an MRI. The MRI must be
13 paid for, for it to even be available for its use. The
14 application of it is whether it will be used or how it will be
15 used by JTF-GTMO.

16 The government chose not to even address the funding
17 issue in this case and instead chose to focus on the
18 application of the MRI, us asking JTF-GTMO to do something in
19 particular. However, in this commission or all of these
20 commissions, this situation, the funding came from the
21 convening authority, and the convening authority should be
22 compelled to continue the funding to ensure not just the
23 application or the use of the MRI, but to also effectuate the

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1 fair and just continued processing of these proceedings.

2 If not funded, the MRI machine leaves; then let's
3 talk about a delay. The government actually noted in their
4 response that the MRI was ordered in 2015, but it took over
5 two years before it was ever even brought to Guantanamo Bay;
6 and after its arrival, it initially was not even operational.

7 So let's return back to the adequate medical care
8 concern. We have a collective responsibility for providing
9 for the needs of Mr. Al-Tamir, who the government has detained
10 for years, who cannot act for himself, and therefore we must
11 act for him and take care of him. It is totally disingenuous
12 to act as though adequate medical care does not include an MRI
13 as it relates to Mr. Al-Tamir.

14 How do we know this? Because of the actions of the
15 United States Government. The government, through JTF-GTMO,
16 through medical providers, already showed us it is necessary
17 for Mr. Al-Tamir's adequate medical care. They used an MRI on
18 him in late January 2018. Now, granted, this was after four
19 surgeries. But the government's own neurosurgeon reviewed it
20 before he testified on 4 February in front of this military
21 commission.

22 Ostensibly a medical professional ordered the imaging
23 be done. It was not completed to provide some type of

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1 extraordinary care for Mr. Al-Tamir. That clearly has not
2 been the case, as it has taken four surgeries to ensure that
3 Mr. Al-Tamir is here today and not paralyzed, but it was to
4 provide him with adequate medical care.

5 For the government to now argue that the MRI is not
6 needed for adequate medical care for someone who has undergone
7 multiple surgeries on their spine is nonsensical. The history
8 of this case flies in the face of such an assertion. It is
9 needed because the government-provided neurosurgeon testified,
10 and I quote, The MRI has -- could indicate that he, speaking
11 of Mr. Al-Tamir, needs surgery. That same neurosurgeon agreed
12 he bases his expert opinions on, I quote, medical records and
13 medical tests like MRI, x-rays, and other medical testing
14 information.

15 I want to wrap up with another quote from Brennan v.
16 Farmer. Justice Blackmun in his concurring opinion explained,
17 "Our Constitution sets minimal standards governing the
18 administration of punishment in this country, and thus it is
19 no answer to the complaints of the brutalized inmate that the
20 resources are unavailable to protect him from what, in
21 reality, is nothing less than torture."

22 This request is about resources, ensuring the
23 efficient processing of these proceedings, including

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1 scheduling around medical appointments, scheduling around
2 procedures, and scheduling for the recovery is clearly
3 intertwined with Mr. Al-Tamir receiving adequate medical care.

4 Mr. Al-Tamir should not be deprived of resources
5 necessary to ensure he receives medical care as required by
6 the Eighth Amendment, and the resources necessary to continue
7 towards the fair and just administration of these proceedings.

8 To ensure necessary resources are funded and continue
9 to be provided, we ask that you grant the defense's motion to
10 compel extension of the MRI contract.

11 Do you have any questions, Your Honor?

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

13 DC [Maj FEWELL]: Thank you.

14 MJ [Col RUBIN]: Trial Counsel, does the government wish
15 to be heard? Commander.

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

18 Your Honor, this motion marks at least the fourth
19 time that the defense has requested that this commission
20 intervene into detention operations by JTF-GTM0. I won't get
21 into the other three motions that requested that the
22 commission do this. I'm sure you are aware of what those
23 three were.

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1 This motion, Your Honor, specifically requests that
2 you intervene into an area where case law makes absolutely
3 clear that you should not intervene into, and that is in the
4 area of medical care and treatment of detainees/prisoners.
5 And because the defense has failed to carry its burden of
6 establishing why this commission should interfere into the
7 medical care and treatment of detainees here at
8 Guantanamo Bay, the government requests that you deny this
9 motion.

10 Now, you just heard the defense argue that this issue
11 with respect to the MRI machine is mainly a funding issue.
12 Your Honor, that argument is a little too simplistic, I would
13 submit to you, because it ignores the big picture. Now, does
14 the keeping of the MRI machine involve a funding component?
15 Of course it does. I mean, the government can't get up here
16 and say it doesn't.

17 However, the overriding issue, Your Honor, is that
18 this motion is a medical issue. And because it is a medical
19 issue, the defense has the burden. They have the burden of
20 establishing how the removal of the MRI machine constitutes
21 deliberate indifference to the medical needs of the accused,
22 and they have utterly failed to do that, Your Honor.

23 It's the government's position that this commission

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1 should continue to give substantial deference to JTF-GTMO
2 decisions regarding detention operations which unquestionably
3 includes decisions on the medical diagnosis and treatment of
4 detainees.

5 Now, Your Honor, I would respectfully suggest that in
6 resolving this motion, you can ask yourself a few really basic
7 questions:

8 First, what is the defense requesting here? And no
9 matter how they spin it, Your Honor, they are asking that you
10 again interfere and issue an order preventing the MRI machine
11 from leaving Guantanamo Bay.

12 The second question is obvious: What is an MRI
13 machine? Well, it's a piece of medical equipment.

14 And the third question, Your Honor: What is the
15 specific purpose of the MRI machine at issue here? The MRI
16 machine at issue here, Your Honor, is used for the diagnosis
17 of medical conditions and medical treatment of detainees down
18 at GTMO. And I would point out, Your Honor, this MRI machine
19 was ordered to come here in another -- in another commission
20 case, in the Nashiri case.

21 In other words, the defense was requesting, quote,
22 that you extend the MRI contract, end quote. And it is the
23 government's position that is absolutely a medical decision.

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1 And the law is absolutely clear, Your Honor, on this issue.
2 Every case found by the government on this issue indicates,
3 without question, that the medical care of prisoners and
4 detainees is entrusted to the detaining authority, which
5 obviously in this case is JTF-GTMO. In other words,
6 Your Honor, the decisions regarding medical care and treatment
7 falls under the umbrella of managing general detention
8 operations.

9 We have argued in the past in this case and in other
10 cases that detention operations are entitled to judicial
11 deference. This principle has been accepted by this military
12 commission and the three -- the two other military commissions
13 on a time -- time after time, sir.

14 So the defense has failed to cite a single case.
15 There is not one case that they cite to support the
16 proposition that a military tribunal or federal civilian court
17 in a criminal case should inject itself into the management of
18 daily detainee operations, which includes decisions on medical
19 care and treatment of the prisoners and detainees.

20 Now, defense counsel was very passionate about the
21 MRI, and she did, quite frankly, a very good job.
22 Unfortunately, passion doesn't carry the day. Where is the
23 evidence? There is absolutely no testimony by anyone,

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1 Your Honor, that removing the MRI machine constitutes
2 deliberate indifference to the medical needs of the accused.
3 We have heard no testimony. We have seen no evidence. We
4 have heard a good argument, a passionate argument about an MRI
5 machine. No evidence. No testimony.

6 Now, Your Honor, I would like to spend my last few
7 minutes just making a few comments on the motion -- defense
8 motion and their reply. To be blunt, the original defense
9 motion on this issue is extremely light on law and analysis.
10 Under the law and argument section of the motion it cites to
11 R.M.C. 801, which quite frankly, in the government's opinion,
12 has very little to do with the specific issue here.

13 They also cite to the Eighth Amendment, and defense
14 counsel mentioned that a little bit in her argument. In their
15 brief they quote -- or they state that the Eighth Amendment
16 imposes duties on prison officials to ensure inmates receive
17 adequate food, clothing, shelter, and medical care, and must
18 take reasonable measures to guarantee safety of the inmates.

19 Your Honor, I would submit that the accused in this
20 case has received more than adequate medical care. He has had
21 surgeries performed by emergency medical teams that have been
22 flown down here.

23 What they conveniently fail to discuss with you,

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1 Your Honor, is that to constitute inadequate medical care
2 under the Eighth Amendment, they have to show unnecessary and
3 wanton infliction of pain. Now, not surprisingly, in light of
4 this incredibly high standard, the defense never comes out in
5 their motion and actually says that removing this machine,
6 this MRI machine, would be a violation of the Eighth
7 Amendment, and, Your Honor, is obviously why they don't make
8 that argument. I think it would be very hard to argue with a
9 straight face that removing the MRI machine from Guantanamo
10 would constitute the infliction of unnecessary and wanton
11 pain.

12 Finally, Your Honor, with respect to the defense's
13 reply, they raised for the first time this curious argument
14 with respect to, you know, that removing the MRI machine is a
15 funding issue. And kudos for the defense for being creative,
16 but that argument doesn't hold water. Again, we are dealing
17 with a piece of medical equipment used for the medical
18 diagnosis and medical treatment of detainees here at GTMO.

19 And finally, Your Honor, in their reply the defense
20 states, quote, Removal of the MRI would negatively impact the
21 accused, and there is a couple of problems with this
22 statement. First, it is a conclusory statement. I mean,
23 that's fine, but again, there is no evidence, Your Honor, to

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1 support that. They don't -- there is nothing that shows
2 otherwise.

3 More importantly, this isn't the test to apply in
4 this situation. In other words, the fact that the removal of
5 the MRI machine would, quote, negatively impact the accused,
6 that's not the standard. That's not the standard to use when
7 you are looking at the Eighth Amendment, and that's what they
8 are arguing.

9 The standard that they have to meet, they have to
10 show, is that the removal of the MRI machine is -- constitutes
11 deliberate indifference rising to the level of unnecessary and
12 wanton infliction of pain, and, Your Honor, they have not come
13 close to that standard.

14 To conclude, Your Honor, the defense has utterly
15 failed to carry its burden of establishing why this commission
16 should interfere, intervene into the medical care and
17 treatment of detainees under the control of JTF-GTMO. And in
18 light of that, Your Honor, the government requests that the
19 defense's motion be denied. Thank you.

20 MJ [Col RUBIN]: Commander, I do have a question.

21 DTC [CDR FLYNN]: Okay.

22 MJ [Col RUBIN]: The government's response makes a mention
23 that JTF-GTMO may take permanent possession of the MRI from

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1 Navy Medical Logistics Command. Is there an update, a
2 timeline, any further information you may have?

3 DTC [CDR FLYNN]: Nothing officially, Your Honor. I can
4 definitely check on that. The last the prosecution was aware
5 of it was that there was negotiations ongoing between JTF-GTM0
6 and the medical command that owned the MRI machine. To my
7 knowledge officially that has not concluded. There is no
8 official word on whether JTF is going to do that or not.

9 Again, Your Honor, our position is that's really -- I
10 mean, I guess it's relevant because it would be moot if they
11 were going to do it, but our position is that this commission
12 should not be getting involved in those determinations. Thank
13 you.

14 MJ [Col RUBIN]: Thank you, Commander.

15 Major, you've got the final word.

16 DC [Maj FEWELL]: Your Honor, it's important to note that
17 our client, Mr. Al-Tamir, is sitting in an orthopedic chair
18 right now, months after surgery, unable to walk independently
19 without a walker.

20 Now, government counsel quoted from Estelle v.
21 Gamble, a 1976 U.S. Supreme Court case saying that deliberate
22 indifference to serious medical needs of prisoners
23 constituting the unnecessary and wanton infliction of pain was

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1 what was needed to establish a challenge in regards to the
2 Eighth Amendment.

3 However, Brennan v. Farmer is from 1994 and the
4 Supreme Court said, Hey, we need to look at what is deliberate
5 indifference, because courts have been trying to -- I need to
6 slow down -- have been trying to determine how we are going to
7 decide if -- if prison officials have been showing or being
8 deliberately indifferent. And what they said was, we hold
9 that a prison official may be liable under the Eighth
10 Amendment for denying humane conditions of confinement only if
11 he knows the inmates face a substantial risk of serious harm
12 and disregards that risk by failing to take reasonable
13 measures to abate it.

14 That's what's happened in this case. Our client
15 complained of back pain for years and the government decided,
16 as Attachment B to their response, to include defense
17 counsel's request to the convening authority for the contract
18 extension in there, and we even talk about what they could
19 have done to abate the need for essentially an emergency
20 surgery in September of last year.

21 It is standard care for spinal surgeries and people
22 complaining of back pain to have an MRI prior to surgery, and
23 then if they're having problems after surgery to have an MRI.

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1 And then even after that, it is standard practice to receive
2 post-operative care for up to one year following spinal
3 surgery. That is specifically why the defense requested that
4 this MRI funding be extended to September of 2018. The
5 initial surgery was in September of 2017. So this is a
6 funding issue.

7 However, if we want to go over to the adequate
8 medical care Eighth Amendment argument, we all know there is a
9 substantial risk of serious harm to Mr. Al-Tamir. He actually
10 almost fell victim to it because he actually had to require
11 multiple surgeries to even be in the position now to be able
12 to walk.

13 Not ensuring that he continues to receive adequate
14 medical care for his spinal conditions is disregarding that
15 very specific risk in this case. That includes not just
16 physical therapy and pain relievers but access to a
17 neurosurgeon, to a neurologist, an orthopedic specialist, and
18 for the post-operative care that he needs, which includes an
19 MRI that their own neurosurgeon testified that he uses to
20 evaluate and base his expert opinions on.

21 The government cited to multiple, multiple cases
22 about courts or the judicial deference to prison officials,
23 but almost all of them were about prison regulations.

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1 Turner v. Safley was about inmate correspondence in opening up
2 mail; Bell v. Wolfish was about double-bunking, hardback
3 books, body cavity searches, people not being able to receive
4 packages except during Christmas. Thorn v. Abbott [sic] was
5 about rejecting incoming publications that prison security
6 thought might be inflammatory; Florence v. Board of Chosen
7 Freeholders allowing strip search of inmates without
8 reasonable suspicion.

9 I mean, I could go on and on. But prison
10 regulations, that is not the same issue -- not even be
11 considered to be equal to adequate medical care when it comes
12 to the fact that Mr. Al-Tamir could be at the point right now
13 where he might not be able to walk.

14 Thank God after four surgeries he is able to walk
15 with a walker, but even the government's own neurosurgeon
16 said, Hey, I saw that MRI and I thought he is going to need
17 more surgery within a couple of weeks. Luckily after talking
18 to our client he said, Hey, I'm going to have to check again;
19 see how he progresses; look at the symptoms. But we all know
20 he, Mr. Al-Tamir, is going to need additional post-operative
21 care.

22 JTF-GTM0 pretty much is already saying he needs
23 additional post-operative care. They are the ones that

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1 allowed the MRI in January 2018. They are the ones allowing
2 him to go to physical therapy. The problem isn't JTF-GTMO
3 allowing him to have an MRI or allowing him to have access to
4 medical providers. The problem is an MRI machine was only
5 funded through a specific time period by the convening
6 authority.

7 We're not asking you to force JTF-GTMO to give an MRI
8 on a specific date or to take some kind of specific action.
9 We are asking for funding so that JTF-GTMO is in the position
10 to provide that adequate medical care and to ensure that this
11 case can continue to proceed, because if there is another
12 additional issue, much like in fall of last year, it's going
13 to lead to an extensive delay because we did not take the
14 adequate preventive medical care to ensure that Mr. Al-Tamir
15 can continue on in these proceedings.

16 Again, it's our society's responsibility, since we
17 decided to detain Mr. Al-Tamir, to protect his life and
18 health, and we must make the resources available; therefore,
19 we are asking that you grant our motion to compel continued
20 funding of the MRI machine by the convening authority.

21 Do you have any questions, Your Honor?

22 MJ [Col RUBIN]: No questions. Thank you, Major.

23 DC [Maj FEWELL]: Thank you.

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1 MJ [Col RUBIN]: Counsel, it is approximately 11:35. If
2 you'd just discuss amongst yourselves how you would like to
3 proceed.

4 [Pause.]

5 MJ [Col RUBIN]: Mr. Thurschwell?

6 ADC [MR. THURSCHWELL]: Judge, I think if we could take a
7 bathroom break now, Mr. Al-Tamir says he thinks he can make it
8 to prayer time, and I think we can almost certainly finish
9 possibly well before that.

10 MJ [Col RUBIN]: Very well. Prayer time is 1301, which I
11 think we would have to recess approximately 1245. Is that a
12 fair assumption?

13 DC [CDR COOPER]: Yes, Your Honor.

14 MJ [Col RUBIN]: All right. Very well. Let's take 15
15 minutes and then we will press on. The commission is in
16 recess.

17 [The R.M.C. 803 session recessed at 1140, 17 April 2018.]

18 [The R.M.C. 803 session was called to order at 1203, 17 April
19 2018.]

20 MJ [Col RUBIN]: The commission is called to order. All
21 parties present when the commission recessed are again
22 present. The accused is present.

23 In AE 114 the defense requests that the commission

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1 direct the government to submit all documents currently
2 pending classification review to the original classification
3 authority for adjudicated classification. The government
4 opposes the defense motion as set forth in AE 114A. The
5 defense replied in AE 114B.

6 Does the defense request oral argument?

7 ADC [MR. THURSCWELL]: We do, Your Honor.

8 MJ [Col RUBIN]: You may proceed, Mr. Thurschwell.

9 ADC [MR. THURSCWELL]: Judge, the government provided us
10 with 4,163, I believe is the number, documents in discovery
11 marked Pending Classification Review that I will say what we
12 said in our motion. There is no marking, official marking, if
13 you look at E013526, Pending Classification Review. It is the
14 government has an obligation or the originator of documents --
15 in this case the OCA itself has an obligation to do a
16 classification review for documents that may be classified and
17 mark them according to the executive order.

18 The government, under both the MCA and the R.T.M.C.,
19 has the obligation to work with the OCA to declassify
20 documents, which I take it means, among other things, that to
21 get the classification marking right that may be used for
22 trial, that it would include discovery production, all of
23 which is potentially useful for trial in one way or another.

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1 And I could argue that at length, and I can respond to their
2 argument about Bismullah and whatnot.

3 But I think the short argument is that actions speak
4 louder than words. And in the government's response they
5 inform us that having filed this motion -- once we filed this
6 motion they have now submitted all 4,163 documents for
7 classification review. And so that is what we sought as
8 relief.

9 We think that some kind of either schedule for when
10 these documents were produced will facilitate the earlier
11 rather than later production of those documents in legal form;
12 that is in appropriately marked form. And so we would ask for
13 either a schedule -- it could be tied to -- I don't want -- I
14 mean, I hate to use the abatement word because I know the
15 government hates that. But apropos of the argument in AE 111,
16 this is another example of how the potential of -- or the
17 imminence of judicial action, which I think the government
18 recognized once we filed this motion, is something that gets
19 this process kick-started.

20 We are delighted that the government has actually
21 given us the relief we moved for. We disagree with their
22 legal reasoning, and I can respond to that if you want. But I
23 think the key -- the key issue is whether and when this

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1 happens.

2 And I will say one -- one thing about the
3 government's response, the suggestion, which is contrary to
4 all the law and it's directly contrary to Bismullah, that it
5 is somehow having -- the OCA having marked its own documents
6 as Pending Classification Review without actually going
7 through a classification review, that it's the obligation of
8 the defense to request that, apart from the fact that it's
9 directly contrary to all the authorities, it's no way to get
10 this stuff done.

11 And I will simply refer you, Judge, to the
12 Attachment F of AE 111, which is the Anderson declaration,
13 paragraphs 6 and 7, in which, you know, we give an example.
14 Again, this is part of the problem that we've had going
15 forward in moving this case, in which we did submit documents
16 for classification review in December of 2016. And in
17 February of 2018 I believe is the date, we -- after multiple
18 inquiries that were not responded to: What's the status? We
19 were told that the OCA had no record of our requests for
20 classification review. And so this is -- it's the
21 government's job by law, and it's the government's job as a
22 pragmatic matter of getting it done, and I'm glad they finally
23 did it.

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1 I will be happy to speak to Bismullah. And if the
2 government argues it, I will respond. I think what I would
3 like to do, though, in lieu of that, since we have been given
4 by the government what -- the relief we requested, is submit
5 to the commission and publish an exhibit that is an
6 illustration of the problems for the defense that the
7 government's -- the mess that the government makes of their
8 classification -- classification review, clearance, et cetera,
9 process. It's a small example.

10 It actually relates to our difficulties with getting
11 AE 014, now C, filed. I decided to show it as part of this
12 because it relates to both AE 111 and this general problem
13 we're discussing today of the problems with classification
14 issues that the government can't get right. And so this will
15 in some way be a lead-in to AE 014C. But with your permission
16 I will hand it up and publish, if I may.

17 MJ [Col RUBIN]: Yes. And trial counsel has seen a copy
18 of this?

19 ADC [MR. THURSCHELL]: They have seen a copy. And it's
20 been marked, I should say, AE 014C for identification.

21 MJ [Col RUBIN]: Thank you. The commission has received
22 that exhibit.

23 ADC [MR. THURSCHELL]: And with the judge's permission,

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1 when you have reviewed it, I would like to publish it.

2 MJ [Col RUBIN]: You may, Mr. Thurschwell.

3 ADC [MR. THURSCHELL]: Thank you. Apparently my fingers
4 marked it -- thank you.

5 Judge, I'm going to show you the life cycle and then,
6 I would say, the afterlife of a discovery document that we
7 received marked UNCLASSIFIED//FOUO from the government in
8 discovery. We attached it initially as an attachment to what
9 was then AE 014B, and I'm going to explain what happened next.
10 But this is the initial leading up to of the filing. The
11 reason I am going to show you this is that ultimately this was
12 rejected because of -- it was considered a spill, our
13 attaching to it, marked in an unclassified pleading.

14 The document in question was created, according to
15 its date, at Guantanamo on 8 January 2016. Steps 1, 2, 3, and
16 4, I should say, and I will explain them, are somewhat
17 speculative for us. They are internal government processes,
18 but logically something like this had to have happened. And
19 so this document, when we received it, it was marked U//FOUO.
20 When it was rejected by trial judiciary and treated as a
21 spill, it was considered SECRET. And the question that this
22 slide asks is why -- how that happened, how something that we
23 received marked U//FOUO could have ended up being -- being

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1 ultimately rejected.

2 And so it's created at Guantanamo; it's evaluated for
3 delivery in some form to the chief prosecutor's office,
4 probably in response to a discovery request and passed on
5 down; it's received by OCP; it's reviewed to be sure in some
6 form along the way that it really is discoverable, I assume;
7 and then it is eventually burned to CD for delivery to the
8 defense. And we have circa 22 March 2017. That's the first
9 date that we are fairly certain of because that is the file
10 properties date on that file, so that's presumably when it was
11 burned.

12 Now, at every step along the way, this document had
13 to be considered -- the classification status of it had to be
14 considered, if only for handling purposes. And so steps 1, 2,
15 3, and 4, somebody within OCP or JTF initially had to make a
16 decision about this document. And so they marked it
17 apparently incorrectly at some point U//FOUO.

18 We receive it marked incorrectly -- and this
19 generally applies to all of these mismarked documents we've
20 got, whether they are supposed to be SECRET but they have been
21 marked U//FOUO, if they are marked as Pending Classification
22 Review. When we receive it and we review it by our DISO, we
23 are not allowed to change the marking that's been put on it by

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1 the OCA. And the document review we do is to make sure that,
2 okay, that's the status, are there paragraph markings, is
3 there -- I mean, to make sure it conforms to the form of the
4 requirements under the EO and the DoD Manual. So we did that.
5 We attached it to the motion and filed it on 19 March 2018,
6 marked and filed as it was marked by the OCA as we received it
7 by the government.

8 This now is the afterlife of that document,
9 attachment. Again, it's filed on 19 March 2018. Four days
10 later the filing is revoked. It's initially received and
11 filed. It's revoked. And we were told that it was -- it was
12 -- there was some kind of -- there was a problem with it, a
13 classification problem.

14 We then spent the next week trying to figure out what
15 was wrong. We were -- we repeatedly -- our DISO sent repeated
16 e-mails to WHS seeking to confirm, is this a spill or is this
17 not a spill? We weren't sure at that point. We received no
18 notice. Repeatedly -- we got an initial acknowledgment: We
19 received your e-mail. We're thinking about it. We heard
20 nothing.

21 In the meantime, I can't even, I mean, tell you like
22 how much time it takes. We are trying to figure out are we
23 going to be able to get this thing filed, what's the problem,

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1 what was the potential problem with this? We don't know. We
2 start looking. We have -- there is consultations with the
3 attorneys. There's like all the complications with new
4 filings and figuring out: Can we file this now without that?
5 Should we file it classified? All of this takes ridiculous
6 amounts of time. I mean, it's hard to describe, but these are
7 the logistical difficulties that are created.

8 We repeatedly -- 27 March again, we seek a
9 confirmation of a spill. We don't get that confirmation, but
10 on that date our IT people apparently learned that there was a
11 spill, and they began wiping our computers. More time taken
12 out from our -- we can't use the computers while they are
13 cleaning them up.

14 Finally, two days after that we get the formal
15 notification of the spill and we receive the redacted
16 discovery document from WHS cleaned up and are told you can
17 file this. We finally -- it's filed as AE 014C, which we are
18 about to argue.

19 Two more consequences that are not on this slide.
20 One is we didn't file a reply because it wasn't filed formally
21 until 30 March 2018. We really didn't have time to get it
22 together before we were able to respond to the government's
23 response. So it cut down our reply time by a week, and we are

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1 now in the position where we haven't filed a reply, a direct
2 consequence of a problem created by the government and the
3 OCA.

4 The second is we still don't know -- we filed a spill
5 report, our DISO did, as he is required to do. We haven't
6 heard anything. The consequences of this may be far broader.
7 I mean, this was a document that was mismarked. It's on
8 government servers. It's on -- who knows where it is at this
9 point. And so there may be major spill cleanups to follow.
10 We don't know. We have not heard back.

11 So I'm going to leave it at that, but I think it's at
12 least to give the commission a taste of what we're talking
13 about when we talk about the consequences of the government's
14 failure to abide by its own requirements on the classification
15 side.

16 And unless you have questions, Judge, I'm done.

17 MJ [Col RUBIN]: No questions, Mr. Thurschwell.

18 Trial Counsel, does the government wish to present
19 argument? Captain?

20 ATC [Capt DEPUE]: Good afternoon, Your Honor, Captain
21 Depue for the government.

22 MJ [Col RUBIN]: Good afternoon, Captain Depue.

23 ATC [Capt DEPUE]: As outlined in the government's

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1 response in AE 114A, there seems to be a misunderstanding,
2 albeit a reasonable one, on the intent of the Pending
3 Classification Review banner, and despite the original
4 classification authority originally classifying the documents
5 at issue, the defense has requested relief in three forms in
6 the AE 114 series.

7 The defense has requested that the -- an order from
8 the military commission to put the documents with the Pending
9 Classification Review banner into classification review, not
10 in the body of 114, but in just one small section in the
11 proposed trial conduct order. It requested in AE 114 a
12 timeline from the military commission for putting these
13 documents through classification review, and the defense also
14 talked about it more in its reply.

15 And then also in its reply the defense requested a
16 standing order as far as the Pending Classification Review
17 from the military commission.

18 As far as the defense's first requested relief and
19 the order from the military commission to put documents with
20 Pending Classification Review banners into classification
21 review, the defense in its oral argument conceded that that
22 issue is moot at this point, and the charts that the defense
23 put up had nothing to do with 114. It may touch on 014C, and

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1 Lieutenant Commander Lincoln will address that after I am
2 finished.

3 As far as the standing order, as far as Pending
4 Classification Review banners, the issue is not ripe and it's
5 unnecessary and it would be inappropriate. The defense's
6 request is based upon contingent events that may or may not
7 occur in the future. There is no indication that any
8 documents in the future will have the Pending Classification
9 Review banner or what type of documents they would be or how
10 many documents there would be. There's no indication of who
11 the person or the party would be that would be classifying
12 them or whether they would be derivatively classified,
13 tentatively classified or originally classified. So there
14 would be no basis for a proper standing order at this point,
15 but if the issue comes up in the future, the defense would be
16 free to file a motion at that point addressing the issue.

17 And as far as the proposed timeline that the defense
18 put forth in its proposed trial conduct order, the defense put
19 forth a 1 May 2018 date, and that date is just -- it's simply
20 not reasonable nor is it possible, quite frankly. The
21 government would propose if the military judge is inclined to
22 impose a date or a deadline for these documents to get through
23 classification review, the government would request a date of

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1 31 May.

2 And barring any questions from Your Honor, that's all
3 the government has.

4 MJ [Col RUBIN]: Thank you, Captain Depue. You answered
5 the one question I did have. Thank you.

6 Mr. Thurschwell?

7 ADC [MR. THURSCHWELL]: Nothing further, Judge.

8 MJ [Col RUBIN]: Counsel, let's move on to AE 014C. The
9 defense requests that the commission reconsider
10 Protective Order #3 and apply the standards set forth in
11 Attachment B, the draft interim amended Protective Order #3.
12 The government opposes the defense motion as set forth in the
13 government's response, which is AE 014E. As stated by
14 Mr. Thurschwell in the previous oral argument, the defense did
15 not file a reply.

16 Mr. Thurschwell, I know we discussed this during the
17 802. Is the defense prepared to litigate this motion now
18 absent the reply?

19 ADC [MR. THURSCHWELL]: Judge, we are prepared to litigate
20 it. We may need to supplement with the commission's
21 permission if that seems appropriate after the argument given
22 the short time we had to respond.

23 MJ [Col RUBIN]: Very well. Just let me know if the

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1 defense desires to do so.

2 ADC [MR. THURSCHELL]: Thank you, Judge, we will, and
3 Major Miller will be arguing.

4 MJ [Col RUBIN]: Major Miller, you may proceed.

5 ADDC [Maj MILLER]: Thank you, Your Honor.

6 Your Honor, the defense is specifically requesting
7 that you reconsider Protective Order #3 because as the facts
8 stand in this case today, Protective Order #3 doesn't really
9 protect sensitive but unclassified information. Also, it
10 provides very little guidance on the protection of controlled
11 unclassified information. This lack of guidance as it
12 currently states provides a hardship for Mr. Al-Tamir's
13 ability to participate in his own defense.

14 To break it down a little bit, Your Honor,
15 Protective Order #3 was specifically created to protect
16 sensitive but unclassified discovery materials. As mentioned
17 in our motion, sensitive but unclassified information is a
18 specific category contained within controlled unclassified
19 information. To the defense's knowledge, the government has
20 never marked a document as Sensitive But Unclassified. Also,
21 the government never complied with the military judge's order
22 that they segregate materials into Sensitive But Unclassified
23 Discovery Materials, and not.

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1 The defense has been provided classified materials,
2 Secret, Top Secret, and then we have been provided
3 unclassified materials, none of which have been marked SBU,
4 Sensitive But Unclassified, Your Honor. Instead, the
5 government has arbitrarily applied ad hoc dissemination
6 applications to these various unclassified documents. As
7 mentioned in our original motion, they've used Law Enforcement
8 Sensitive, they've used FOUO, they've used NOT FOR PUBLIC
9 RELEASE, they have used RELEASE TO ISN 10026 but not to
10 another detainee. They basically have used every
11 dissemination category under the sun except for Sensitive But
12 Unclassified Information, thereby making Protective Order #3
13 completely, I guess, ineffective in actually protecting
14 unclassified information.

15 The way in which that harms Mr. Al-Tamir is that now
16 the defense has documents marked UNCLASSIFIED//FOUO with no
17 understanding as to what the defense can provide to
18 Mr. Al-Tamir, what they can just display to him versus what
19 they can actually give to him and what they can't.

20 Now, Your Honor, I can explain that a little bit
21 more. So basically there are approximately 500 documents, as
22 we mentioned in our motion, that are marked simply
23 UNCLASSIFIED//FOUO statement-wise. Typically, as our

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1 understanding of it is, Your Honor -- and we do not get
2 classification guidelines. We've requested them, and we've
3 never been provided them. But our understanding of FOUO
4 documents is that it is not for public release. That is our
5 barebones understanding.

6 However, contradicting our understanding, the
7 government has actually provided documents marked
8 UNCLASSIFIED//FOUO//NOT RELEASABLE TO PUBLIC, and
9 UNCLASSIFIED//FOUO//RELEASABLE TO DETAINEE, DISPLAYABLE TO
10 DETAINEE, NOT RELEASABLE TO DETAINEE.

11 What that means is -- or at least for the defense is
12 that at least 500 statements are currently in limbo, because
13 they are simply marked UNCLASSIFIED//FOUO, and the defense has
14 no idea whether we can provide those statements to
15 Mr. Al-Tamir to get his input and to secure his participation
16 in his own defense, Your Honor.

17 We do have an exhibit that's been marked AE 014F,
18 Your Honor. A copy was previously provided to the government,
19 and I would like to provide a copy to you now.

20 MJ [Col RUBIN]: You may. The commission received a copy
21 of the exhibit.

22 ADDC [Maj MILLER]: Thank you, Your Honor. Now, the
23 defense is not going to display this. We are just going to

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1 discuss it as we walk through the situation that the defense
2 is faced with that Protective Order #3 provides no resolution
3 of.

4 Specifically, Your Honor, we get a discovery
5 document, and we assume the government -- and this is an
6 assumption, because as Mr. Thurschwell stated, this is an
7 internal process that they don't tell us what they do with.
8 But they get a discovery document. They determine whether
9 it's classified or not. If it's classified, then it goes into
10 the, you know, 505 process. It's produced on SIPRNet and
11 everything of that nature. That is not information that we're
12 discussing in Protective Order #3. We're specifically talking
13 about the unclassified information that we got delivered to us
14 via NIPRNet.

15 From that point, the government would say
16 unclassified, but then they'll mark it with additional
17 handling instructions. An additional handling instruction,
18 for example, is FOUO or RELEASE TO ISN 10026 or DISPLAY ONLY
19 TO ISN 10026. These are handling instructions for the
20 unclassified document. So if the document is marked FOUO,
21 they add, as I previously mentioned, the DISPLAY TO, the NOT
22 RELEASE TO, and we have plain FOUO as well as RELEASE TO.

23 The issue is the plain FOUO documents, Your Honor,

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1 because as I mentioned, based on the defense's understanding
2 of the classification guidelines and unclassification
3 guidelines, plain FOUO means it is not releasable to the
4 government; however, we have documents that say FOUO//NOT
5 RELEASABLE TO PUBLIC, implying the plain FOUO can actually be
6 released to the public.

7 Now, of course, we are still erring on the side of
8 caution when we get a document marked UNCLASSIFIED//FOUO.
9 We're not displaying it to the public; we are only using it in
10 -- FOR OFFICIAL USE ONLY in this proceeding. However, a
11 protective order is meant to provide clarification on these
12 issues, and right now Protective Order #3 does not do that.
13 We are in a state of confusion as to what we can do with these
14 documents and whether or not we can show them to Mr. Al-Tamir
15 so that he can weigh in and actually assist us in preparing
16 his defense.

17 Now, Your Honor, as Mr. Thurschwell stated, it is in
18 Mr. Al-Tamir's interests to proceed forward with this
19 commission. The defense is trying to catch up. It is
20 extremely difficult to do this when the current markings do
21 not assist us in actually handling these documents, and that
22 is why we're requesting that you reconsider
23 Protective Order #3.

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1 Also, contrary to the government's assertions when
2 they originally requested Protective Order #3, over 55 percent
3 of the statements that we have been provided, right now as
4 currently marked, we can't give them to Mr. Al-Tamir. Now, I
5 say that specifically because the government made assurances
6 to this commission that only in a limited amount of
7 circumstances will they say that a document can't go to
8 Mr. Al-Tamir that's unclassified; however, over 50 percent of
9 the documents that we have currently in our possession we
10 cannot show, discuss, or provide to Mr. Al-Tamir for his
11 review.

12 Now, we have received definitions from WHS on what
13 means RELEASE TO, NOT RELEASE TO, and DISPLAY TO. And we
14 don't know, but we assume WHS got those definitions from the
15 OCA. However, again, no one is taking these documents back to
16 the OCA that are marked plain FOUO to determine what are the
17 additional handling instructions for those documents, because
18 we wish to believe that, as the government said, they're
19 trying to limit the amount of unclassified information that is
20 not, I guess, viewable by the accused. We want to believe
21 that, but as it stands right now, they are not doing that, and
22 Protective Order #3 doesn't provide them any checks and
23 balances and doesn't provide us any guidance on what we are

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1 supposed to do with these documents.

2 Now, in the government's response, they made a big
3 issue of citing to M.C.R.E. 505, and again, as I pointed out,
4 Your Honor, when we were discussing AE 014F, we're not talking
5 about classified information. So 505 is out the door; it's
6 completely irrelevant to this issue. What we're discussing is
7 unclassified information and what we can do with that
8 unclassified information and what we cannot do. That is
9 squarely within the realm of Protective Order #3.

10 The government in their response also attempts to say
11 that what the defense is really trying to do is get the
12 commission to reconsider AE 084. That is, I guess, a blatant
13 misunderstanding of their own classification process,
14 Your Honor.

15 AE 084 is what documents we can give to Mr. Al-Tamir
16 based on how they are already marked. As it stands right now,
17 about 500 statements are currently marked with just FOUO;
18 therefore, Protective Order #3 is the appropriate manner in
19 which to handle this issue, because it doesn't deal with the
20 dissemination that comes after it's marked. It deals with how
21 you mark it to begin with; how do you protect it to begin
22 with. And then once it is marked, what the defense can and
23 cannot do.

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1 Again, this is not a motion to reconsider AE 084.
2 This is a motion to basically make Protective Order #3
3 actually applicable to the facts and circumstances of this
4 case.

5 Your Honor, pending any questions from you, that
6 concludes my argument.

7 MJ [Col RUBIN]: No questions, Major, not at this point.
8 Thank you.

9 Trial Counsel, who will be speaking for the
10 government? Lieutenant Commander Lincoln?

11 ATC [LCDR LINCOLN]: Yes, Your Honor. Your Honor, I will
12 be brief because AE 014C is in reality asking for a solution
13 for a problem that doesn't exist.

14 The defense has had a longstanding objection to the
15 classification process and the classification of documents.
16 It's taken various forms. We've seen it throughout the 505
17 process, the 023 series, the 505(h) hearings with al Darbi,
18 motions to compel classified discovery. But what they are
19 asking for is, in effect, for this commission to direct the
20 OCAs as to how to classify and how to mark documents.

21 Major Miller states that 014 -- AE 014A, the
22 Protective Order #3, has done nothing or has done little to
23 protect classified or unclassified but sensitive information.

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1 In fact, it has done a very good job at that. Her complaints
2 and the defense's complaints are with how they disseminate
3 information to the accused, and that does fall squarely within
4 what is contemplated in AE 084A.

5 You know, I looked at it is AE 014F, the document
6 that you were provided by the defense. I mean, from the looks
7 of it, first of all, there are some errors particularly on the
8 classified side, how that works; and obviously there is a lot
9 that goes into determining why a document is discoverable.
10 But as you look at it, it looks like they do have a generally
11 decent understanding of what they need to do with sensitive
12 but unclassified information.

13 I will not reiterate our argument that's in our
14 response. The response lays out why the mark -- why the OCAs
15 should be relied upon and that the defense has failed even in
16 the oral arguments today, even after -- even though they refer
17 quite frequently to the Executive Order 13526. Section 1.6
18 talks about ways in -- improper ways for an OCA to mark a
19 document or to classify a document. And even after bringing
20 that to the defense's attention in our response, the defense
21 has failed to even make one reference as to how a document
22 was -- was improperly classified.

23 So Major Miller states that there are classification

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1 issues the government just can't get right. I think they -- I
2 mean, they illustrated one example in what was marked as 114C.
3 I mean, it has very little relevance to the 114 series. I
4 mean, one document that had an issue with it I don't think
5 really carries much weight that the overall process is
6 completely messed up as the defense would lead everyone to
7 believe. That investigation is still ongoing, so I'm not
8 going to comment further, but again, it's an anecdotal one
9 document and it goes -- it doesn't provide any weight that the
10 overall system is messed up.

11 The defense's biggest issue I understand is with the
12 documents that they claim are, quote, in limbo, documents that
13 are marked FOUO but without dissemination caveats, and they go
14 to the point that some are marked FOUO//NOT FOR PUBLIC
15 RELEASE, some are just marked simply FOUO, FOR OFFICIAL USE
16 ONLY.

17 I mean, the NOT RELEASABLE TO PUBLIC, my
18 understanding that is a commission-specific marking
19 particularly to highlight the fact that a document can't be
20 displayed in this commission, which isn't an official setting,
21 but which the public is allowed to see, so that's my
22 understanding of that.

23 But more basically, there is -- there is significant

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1 guidance as to how the Department of Defense and other
2 agencies within the federal government mark documents. That's
3 the controlling guidance. I mean, the DoD Manual is lengthy.
4 It explains how documents are marked, legacy marking
5 documents, which are still authorized. And that is how they
6 mark their documents and, you know, they have done a laudable
7 job in going through mountains of documents and classifying
8 them, reviewing defense requests.

9 As for the 500 documents that the defense is
10 referring to today, I'm not aware of any specific request that
11 those be reprocessed for any particular purpose, and, you
12 know, we don't necessarily -- the defense can make those
13 requests without going through the government.

14 We bring up 505(a)(3) because that's one of our
15 obligations. That's the only mention we have in our response
16 to 505, and it's because we do have an obligation, and, you
17 know, we will -- we take that obligation seriously, and if
18 they want us to work with the OCAs on classification, we will
19 do that pursuant to our obligations. If they want to do that
20 without going through us, my understanding is there is a
21 process that they can submit that through. I don't have the
22 details to that. If there is an issue with that, I am not
23 aware of it.

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1 But to say that the documents are in limbo, again, is
2 not an accurate representation because obviously they have 500
3 documents they have identified as being For Official Use Only.
4 So now we go to AE 084, the privileged communications order,
5 which, again, was requested at the request -- or, excuse me,
6 the defense requested and issued by this commission without
7 objection by the government. That order is to facilitate the
8 provision of discovery to the accused, and that -- that's how
9 the government is working under the impression that this is
10 what's being used to bring information to the accused.

11 And as Major Miller stated, they have definitions for
12 what the various markings are. Those markings, RELEASABLE TO,
13 DISPLAYABLE TO, those are markings pursuant to AE 084A. They
14 are not DoD 5200 classification markings. They are being done
15 at the defense's request to clarify for the Privilege Review
16 Team what can go to the accused and how it can go to him.

17 So, you know, again, this is -- like I said, it's a
18 solution without a problem, because we have both 014A, which
19 protects the information, and 084A, which explains how -- the
20 process to get that information to the accused. And to the
21 extent that a document isn't marked pursuant to 084A, whether
22 -- they don't know whether they can release or display it to
23 there is a process there and we are happy to assist them in

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1 working with the OCA.

2 Do you have any questions, Your Honor?

3 MJ [Col RUBIN]: No questions. Thank you.

4 ATC [LCDR LINCOLN]: One moment, Your Honor.

5 MJ [Col RUBIN]: Yes.

6 ATC [LCDR LINCOLN]: That's all from the government,
7 Your Honor.

8 MJ [Col RUBIN]: Thank you.

9 Major Miller, I will give you the final word.

10 ADDC [Maj MILLER]: I will make it brief, Your Honor, as I
11 take note of the time.

12 Your Honor, the very nature and reason why we are
13 requesting a modification or reconsideration of Protective
14 Order #3 is evident by the government's argument to you just
15 now. The government says it's my understanding that the
16 phrase NOT RELEASABLE TO PUBLIC comes from the commission. My
17 understanding is that's what it is, okay? And then the
18 government says, it's my understanding that there is a process
19 for the defense to submit these 500 statements to the OCA. If
20 there is a problem with that process, I don't know anything
21 about that.

22 Again, Your Honor, there is a need for clarification
23 and Protective Order #3 is the way to do that. The government

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1 itself isn't even sure of its process and procedure. The
2 government itself can't even tell the defense how to do it.
3 It is the job -- or it is within the commission's realm to
4 essentially ensure that this case can move forward.

5 And if as the government says the NOT RELEASABLE TO
6 THE PUBLIC came from the commission itself, then the
7 commission very well has the authority to tell them to mark it
8 RELEASABLE, NOT RELEASABLE. We're doing that now; however,
9 the past FOUO documents, nothing's being done with those.

10 Now, the government says that I did not address the
11 executive order. Your Honor, under the executive order, they
12 should have made these changes 180 days after it was
13 effective. They shouldn't have even been using legacy
14 markings, but they are. So we're trying to work with the
15 system that the government is using to ensure that
16 Mr. Al-Tamir still has a right to participate in his own
17 defense.

18 And again, the government is still using the phrase
19 Sensitive But Unclassified Information. There is nothing
20 marked Sensitive But Unclassified Information. There is a
21 Controlled Unclassified Information that is then marked FOUO,
22 but there is no SBU marking, and yet the government is still
23 using that phrase, further causing confusion.

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1 We are operating in a realm where Pending doesn't
2 really mean Pending, where we can't trust when they mark
3 UNCLASSIFIED//FOUO that it is actually UNCLASSIFIED//FOUO.
4 And now we operate in a realm where they just toss out
5 Sensitive But Unclassified Information like it doesn't have
6 its own definition.

7 Your Honor, this is just further reiterating that we
8 need this commission to reconsider Protective Order #3 so that
9 we can, one, ensure that for controlled unclassified
10 information it's actually being disseminated appropriately so
11 as not to harm the national security of the United States of
12 America, but then also our obligation to effectively represent
13 Mr. Al-Tamir and his right to participate in his defense,
14 Your Honor.

15 Thank you.

16 MJ [Col RUBIN]: Thank you, Major.

17 Mr. Spencer?

18 ATC [MR. SPENCER]: Your Honor, may we take up one
19 housekeeping issue prior to going off the record?

20 MJ [Col RUBIN]: Yes.

21 ATC [MR. SPENCER]: Your Honor, in light of
22 Mr. Thurschwell's argument earlier, or discussion about the
23 short-term crisis of the counsel leaving in June, I believe he

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1 referred to, our next session of court isn't scheduled until
2 the end of June, and the government is concerned as to --
3 would like some guidance from the commission as to how the
4 commission intends to handle release of those counsel.

5 MJ [Col RUBIN]: I'm not prepared to address that right
6 now, but it's a matter I will give some consideration to. As
7 you state, the next session is currently scheduled to take
8 place the week of 25 June.

9 Mr. Thurschwell, you wish to be heard?

10 ADC [MR. THURSCWELL]: I only want to point out that
11 we've -- no one has moved to withdraw yet -- I mean, sorry,
12 there's one motion to withdraw. I have not moved to withdraw.
13 We can address that when the time comes.

14 MJ [Col RUBIN]: The commission hasn't seen any retirement
15 paperwork for Captain Fischer, any paperwork related to
16 Commander Cooper and reserve orders, at least nothing's been
17 filed that I've seen, so I'm not prepared to address that
18 right now.

19 ATC [MR. SPENCER]: Thank you, Your Honor.

20 MJ [Col RUBIN]: Counsel, is there any other matters we
21 need to address at this session? Trial Counsel?

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

23 MJ [Col RUBIN]: Anything from the defense?

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1 DC [CDR COOPER]: No, Your Honor.

2 MJ [Col RUBIN]: Very well. As previously stated, the
3 commission is in recess until the next session, which is
4 currently scheduled to take place the week of 25 June 2018.
5 Thank you very much everyone. The commission is in recess.

6 [The R.M.C. 803 session recessed at 1249, 17 April 2018.]

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