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1 [The R.M.C. 803 session was called to order at 0904,
2 25 September 2018.]

3 MJ [LtCol LIBRETTO]: The commission is called to order.
4 All parties present when the commission last recessed are
5 again present. The accused is once again not present.

6 In light of the accused's absence, the commission
7 intends to proceed this morning with the taking of the
8 testimony of the individual who provided the information as
9 directed by the commission yesterday afternoon to the accused
10 this morning.

11 We will then take a recess to allow the parties to
12 finalize their positions as to whether or not this commission
13 can proceed today in absentia. We will come back. I will
14 hear argument on that issue. We will take another recess for
15 a period of time, and we will come back and address the
16 resolution of that issue.

17 Any questions about the way ahead this morning?

18 ATC [MR. SPENCER]: None from the government, Your Honor.

19 ADC [MR. THURSCHELL]: Judge, only to put on the record
20 again our objection to moving forward in any way without
21 satisfying AE 074C and, again, to request that we get to put
22 that objection on the record fully elaborated before -- at
23 some point but before any further proceedings occur, but at a

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1 minimum, before any substantive proceedings to include, first,
2 any voir dire.

3 MJ [LtCol LIBRETTO]: I understand your position and your
4 request, and I will permit you to do so after we take the
5 testimony of the individual as directed by the commission in
6 conjunction with the argument on whether or not this
7 commission can proceed.

8 With that, Government, is that individual available
9 to testify?

10 ATC [MR. SPENCER]: Yes, Your Honor.

11 MJ [LtCol LIBRETTO]: If you would, please, call the
12 witness.

13 ATC [MR. SPENCER]: Your Honor, pursuant to our
14 discussions yesterday and practice, in accordance with
15 AE 014A, Protective Order #3, this witness will also be
16 testifying under pseudonym.

17 MJ [LtCol LIBRETTO]: Good to go. I approve that request.

18 ATC [MR. SPENCER]: Your Honor, the government calls the
19 assistant staff judge advocate for JTF.

20 [END OF PAGE]

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1 ASSISTANT STAFF JUDGE ADVOCATE, U.S. NAVY, was called as a
2 witness for the prosecution, was sworn, and testified as
3 follows:

4 DIRECT EXAMINATION

5 Questions by the Assistant Trial Counsel [MR. SPENCER]:

6 Q. Sir, as you heard, since you were in the courtroom, I
7 will not be addressing you by name. I will refer to you as
8 the assistant SJA, if that's acceptable.

9 Can you please state, despite me having said that,
10 your current billet and duty assignment.

11 A. I am an assistant SJA for JTF-GTMO.

12 Q. And in that capacity, did you have the opportunity to
13 meet the accused this morning?

14 A. I did.

15 Q. During that meeting, did you provide him with a
16 document titled Statement of Understanding, Right to Be
17 Present At Commission Proceedings?

18 A. I did.

19 ATC [MR. SPENCER]: And, Your Honor, that's been
20 previously marked now as Appellate Exhibit AE 1240.

21 MJ [LtCol LIBRETTO]: Defense, do you have a copy of ----

22 ADC [MR. THURSCHELL]: We do, Judge.

23 MJ [LtCol LIBRETTO]: Very well. Thank you.

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1 Q. Sir, that document that I just referred to, is that
2 the standard document that is presented to commission accused
3 prior to their coming to court or choosing to come to court?

4 A. Yes, it is.

5 Q. Did you go through that document with him?

6 A. Yes, I did.

7 Q. There are ten paragraphs in that document over two
8 pages, in English, explaining to him what his rights are?

9 A. Correct.

10 Q. The standard advisement of rights?

11 A. Yes.

12 Q. And did you explain all ten of those paragraphs to
13 him?

14 A. Yes, I did.

15 Q. You read them to him?

16 A. Yes, I did.

17 Q. Did you read them in English?

18 A. Yes, I did.

19 Q. Did he require an interpreter for the reading of that
20 document?

21 A. He did not require an interpreter.

22 Q. And upon reading him that document, did you then
23 further advise him of the rights that the judge -- or the

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1 notices that the judge ordered yesterday?

2 A. I did.

3 Q. Specifically did you advise him that the judge had
4 ordered there would be a military commission held this morning
5 at 0900 on 25 September?

6 A. Yes.

7 Q. Did you also advise him that, in accordance with Rule
8 for Military Commission 804, that -- the accused, that he had
9 a right to be present at the commission this morning?

10 A. Yes.

11 Q. Did you also tell him that the senior medical officer
12 had cleared him medically to attend this proceeding this
13 morning?

14 A. Yes, I did.

15 Q. Did you also tell him that the military commission
16 had ordered his presence at this hearing this morning?

17 A. Yes, I did.

18 Q. Did you also inform him that the -- that no forced
19 cell extraction would be authorized to bring him here?

20 A. Yes, I did.

21 Q. And did you also tell him that if he chose not to
22 come, that it's possible the commission will proceed without
23 his attendance?

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1 A. I did.

2 Q. And did -- was there a translator required for that
3 portion?

4 A. He did seem to be a little uncertain of what I was
5 saying, and I'm not sure if, because he couldn't hear me
6 clearly for that portion, but the translator did interject and
7 explained it in Arabic.

8 Q. So there was a translator present for this whole
9 evolution?

10 A. Yes.

11 Q. And although he didn't need it for the first part, he
12 took advantage of the translator's presence and abilities in
13 the second part?

14 A. Yes.

15 Q. Did he make any election following you explaining
16 both the standard rights advisement as well as the order from
17 the commission yesterday?

18 A. Election whether to sign?

19 Q. Election whether to sign first.

20 A. Yes. He did not want to sign.

21 Q. So he chose not to sign the standard rights
22 advisement?

23 A. Yes.

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1 Q. And then did he make any election as to whether he
2 wished to be present this morning?

3 A. He did not want to appear at the commission.

4 Q. And did he give a reason for that, sir?

5 A. He said that he is medically unable to appear.

6 ATC [MR. SPENCER]: All right, sir. Thank you. I have no
7 further questions. The defense may have some questions as
8 well as the commission.

9 MJ [LtCol LIBRETTO]: Mr. Thurschwell?

10 ADC [MR. THURSCHWELL]: Yes. Thanks, Judge.

11 **CROSS-EXAMINATION**

12 **Questions by the Assistant Defense Counsel [MR. THURSCHWELL]:**

13 Q. Sir, you testified that the form that you used,
14 AE 1240, was the standard form given to detainees before
15 coming to court; is that correct?

16 A. Yes, sir.

17 Q. In fact, it's not the standard form used before
18 detainees come to court for the first appearance at a military
19 commission session; is that correct?

20 A. I have not done this for any other commission, but it
21 is my understanding that for the first commission, the
22 detainees are normally required to attend.

23 Q. So this is the form that's used after they've had an

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1 initial appearance before the military judge ordinarily?

2 A. That's correct, for the second day, if there is more
3 than one day of commission.

4 Q. Are you familiar with AE 074C ruling in this military
5 commission case?

6 A. I am not.

7 ADC [MR. THURSCHELL]: Okay. Nothing further, Judge.

8 MJ [LtCol LIBRETTO]: Okay. Thank you.

9 Thank you for coming into the commission this
10 morning. I have no questions for you. You are free to step
11 down and return to your normal duties.

12 WIT: Thank you.

13 [The witness was excused.]

14 MJ [LtCol LIBRETTO]: Counsel, is 15 minutes' recess
15 sufficient time to finalize your arguments as to whether or
16 not this commission can proceed in absentia with the accused's
17 absence?

18 ATC [MR. SPENCER]: Yes, Your Honor, for the government.

19 MJ [LtCol LIBRETTO]: Mr. Thurschwell?

20 ADC [MR. THURSCHELL]: Yes, Judge, for the defense.

21 MJ [LtCol LIBRETTO]: Very well. This commission is in
22 recess for 15 minutes.

23 [The R.M.C. 803 session recessed at 0912, 25 September 2018.]

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1 [The R.M.C. 803 session was called to order at 0931,
2 25 September 2018.]

3 MJ [LtCol LIBRETTO]: This commission will come back to
4 order. All parties present when the commission recessed are
5 again present.

6 Trial Counsel, are you prepared to present the
7 government's position and argument on whether or not this
8 commission can proceed with the accused in absentia?

9 ATC [MR. SPENCER]: Yes, Your Honor.

10 MJ [LtCol LIBRETTO]: You may proceed.

11 ATC [MR. SPENCER]: Good morning, Your Honor. Vaughn
12 Spencer for the government.

13 MJ [LtCol LIBRETTO]: Good morning.

14 ATC [MR. SPENCER]: Sir, the central question in this case
15 under these facts is this: Will the commission allow the
16 subjective, speculative concerns of an accused to hold a
17 military commission hostage in contravention to the objective
18 medical findings of his treating medical staff?

19 The government's position is that obviously the
20 answer to that question should be no.

21 The record is very clear. The accused has been
22 cleared multiple times for brief sessions that factor in the
23 limitations that are the result of his admittedly serious

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1 medical condition for which he's been receiving treatment for
2 some time. The government has not objected to multiple
3 iterations of accommodations, multiple iterations of
4 adjustments in the scheduling, in the care, in the detention
5 of the accused to allow specifically for his medical condition
6 to be accounted for and accommodated.

7 The testimony you heard yesterday from the senior
8 medical officer was that -- can be distilled down to the
9 accused is worried that he's going to have a bad day if he
10 comes to court; and whether that's a reasonable concern or
11 not, it is speculation by definition.

12 The accused's speculation cannot drive this
13 commission and the reasonable process of justice, and there's
14 no law that would suggest otherwise, Your Honor; no court, no
15 appellate court that would suggest that the accused can
16 indefinitely prevent the forward motion of justice by simply
17 saying I don't feel like I'm up to coming to court because I
18 am worried my medical condition might prevent me, in the face
19 of the objective medical findings.

20 Now, the defense, presumably, is going to spend some
21 time analyzing or attempting to analyze 074C, Appellate
22 Exhibit 074C, so I would like to discuss that briefly,
23 Your Honor. The defense yesterday claimed that the commission

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1 was violating 074C. It's not clear to me how a military
2 commission can violate its own order. Certainly a commission
3 could violate a senior court's order. The commission would
4 always be free to modify its order.

5 But a simple review of 074 series makes very clear
6 that under those circumstances where the defense sought a
7 blanket waiver for the accused not to have to come to court
8 whenever he chose not to, a blanket waiver which was in
9 response, the government asserts, to the multiple counter
10 rulings on the female guard issue, which I presume the
11 military judge has reviewed, that procedure and that history
12 played into why 074C -- why 074 was issued.

13 And Judge Rubin, in his ruling in 074C, made very
14 clear that the analysis -- in his analysis portion, that the
15 judge has absolute discretion on how to run the proceeding,
16 and the judge has discretion as to whether a waiver of the
17 accused's presence will be granted and the manner in which it
18 will be granted.

19 Now, in the instance of 074C, that's clearly an
20 express waiver. The order, which the defense alleges is being
21 violated, is a permissive order. The third word in 5 --
22 paragraph 5.a. is "the commission may." "The commission may,"
23 not "the commission shall." Even if it were an order that

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1 were forever binding on subsequent iterations of the same
2 commission, which is an absurd argument, the order is "the
3 commission may."

4 That should end the analysis as to whether 074C is
5 being violated by this commission. It leaves the discretion
6 to the court. Clearly, that's specific to those facts in 074,
7 which have nothing to do with these facts. It preceded all of
8 what brought us here today, which is the multiple surgeries
9 that the accused had.

10 Additionally, Your Honor, 074C is specific to an
11 express waiver. And the -- I would invite the commission's
12 attention, and I'm quite certain the commission has reviewed
13 this at length, to R.M.C. 804(c). Specifically the discussion
14 talks about express waiver. Express waiver is the exact
15 scenario contemplated in 074C.

16 That's not the facts that we are talking about here
17 today. That's not the scenario under which the court could
18 proceed without the accused's presence, although in the second
19 paragraph of the commission -- of the discussion, it calls it
20 "voluntary absence." Another way to phrase that, given the
21 text of that paragraph, is "implied waiver." So essentially
22 you have two -- two ways that the accused can waive his
23 presence: Express waiver or implied waiver.

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1 Now, the implied waiver could be a function of a
2 couple of things, to include the accused's disruptive behavior
3 in the commission after multiple warnings by the judge.
4 Obviously that's not the case here. But as that paragraph,
5 the voluntary absence paragraph, makes clear in R.M.C. 804(c)
6 discussion, "Voluntariness may not be presumed, but it may be
7 inferred, depending upon the circumstances."

8 That's the exact circumstances that we have here
9 today, Your Honor. The accused, having been advised by
10 multiple medical professionals, including a neurosurgeon, that
11 he is -- that moving to and from the commission will not
12 exacerbate his underlying medical condition in any way,
13 refuses to accept that, and as a result chooses not to come
14 because of the discomfort that he may or may not experience.

15 Discomfort, by the way, which -- as the SMO testified
16 yesterday -- discomfort for which he often does not take pain
17 medication; discomfort that he could ameliorate, if he chose
18 to, by taking a variety of pain medication available to him.
19 The SMO testified that he typically only does that at night.
20 Presumably that's for the purposes of sleeping, which is
21 understandable.

22 But he can't choose not to treat his symptoms and
23 then complain that his symptoms might be exacerbated, having

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1 not chosen the treatment. And he can't do that in such a way
2 that would frustrate the interests of justice by his
3 speculation that it might -- or that even if, based on his
4 past experience it has caused him pain, that is not sufficient
5 for him to be justifiably excused or justifiably cease the
6 proceedings of the commission.

7 So the SMO's testimony yesterday, the staff judge
8 advocate's testimony this morning, as well as Appellate
9 Exhibit 124, make clear -- 124M is the standard rights
10 advisement from yesterday in which the staff judge advocate
11 indicated the language from the accused is that my health is
12 not helping.

13 I would agree with the accused, his health is not
14 helping. But given the objective medical findings in the face
15 of his subjective and, in this case, speculative concern about
16 what might happen, that's not sufficient justification to
17 prevent the proceeding moving forward.

18 Under R.M.C. 804, the commission can and should find
19 that his absence is voluntary, inferred from all of the
20 surrounding facts and circumstances specific to this instance,
21 has nothing really whatsoever to do with 074C. And even if
22 074C were somehow written in stone, binding on the commission,
23 the commission could certainly modify that order if it so

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1 chose. It's the government's position that's not necessary at
2 all, and 074C was specific to those facts and expressly
3 applied to an express waiver, which is not the situation here,
4 Your Honor.

5 Subject to your questions, that's all I have.

6 MJ [LtCol LIBRETTO]: I have none. Thank you,
7 Mr. Spencer.

8 ATC [MR. SPENCER]: Thank you.

9 MJ [LtCol LIBRETTO]: Mr. Thurschwell.

10 ADC [MR. THURSCHELL]: Thank you, Judge. I will turn to
11 AE 074C in a moment, but I just want to flag one, and respond
12 to the government's arguments and interpretation of it in that
13 context. But I just want to flag one distinction that the
14 government understandably tries to rely on in this
15 circumstance, and it's directly contradicted by the record.

16 The government's argument you just heard turns on a
17 distinction between Mr. Al-Tamir's, quote, subjective
18 feelings, I think they -- versus the objective medical opinion
19 of the expert. And I will come back to this.

20 But I just need to say -- the first problem is that
21 the objective medical opinion of the -- of all of the experts,
22 all of the SMO's testimony, the neurosurgeon's testimony went
23 into it in detail, is that the objective medical opinion takes

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1 its lead largely from the subjective pain and expressed
2 symptoms of the patient. That is the objective medical
3 opinion. And so to say you can ignore the subjective views is
4 simply contrary to what their actual objective medical opinion
5 shows.

6 The -- and I'll just -- one other point, and again, I
7 will return to this. But characterizing -- that does not mean
8 -- let me just say that does not mean the judge is required to
9 accept anything that the -- the accused says. Nobody is
10 arguing that. And I'll return to that.

11 But to characterize this as the objective opinion of
12 the SMO -- and I again will return to that question of what
13 that weight should be given to his opinion, but the -- versus
14 -- the word that the government used was the accused's
15 speculation about his medical condition is bizarre on this
16 record.

17 The accused last week, according to the SMO's
18 testimony, suffered two episodes of back spasms so intense and
19 so painful that he was literally unable to breathe for a
20 period of time. Speculation is statements that have no
21 supporting evidence. Mr. Al-Tamir has all of the supporting
22 evidence on his side -- I will return to this -- and there is
23 no contrary supporting evidence.

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1 So to start with, the -- accusing him of subjective
2 speculation versus objective facts, medical opinions, is
3 simply strange and contrary to the record.

4 But let me turn to AE 074C, because there are layers
5 of issues presented by what has happened so far in this --
6 during this session, and the first is the problem with
7 AE 074C.

8 AE 074C states in full -- I should say
9 paragraph 5.a., which is the operative paragraph, states in
10 full, "The Commission may allow the Accused to waive his right
11 to be present at the first session of a hearing," so it's
12 precatory. The commission may do that, and it may not. It
13 may not allow him to waive. That is absolutely correct,
14 Mr. Spencer's statement.

15 But it goes on, and there are conditions precedent to
16 that decision whether or not he waives. May be allowed -- the
17 accused may be "allowed to waive his right to be present at
18 the first session of a hearing if he submits a written waiver
19 executed in the presence of his defense counsel -- in the
20 presence of his defense counsel after counsel advise him of
21 his right to be present at the specific hearing. Permission
22 will be granted by the Commission on a case-by-case basis."

23 Again, if the procedure is followed, then there is an

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1 issue under AE 074C whether it's a voluntary waiver or not,
2 whether he has actually waived, whether it was -- and whether
3 he fully understood the rights that he was waiving, but only
4 if the condition precedent was followed.

5 This is not -- our objection is not that you are
6 required by AE 074C, or were required to follow, to actually
7 decide whatever his subjective opinion was. Our objection was
8 that there was a procedure in place. This is a procedural
9 objection that was overturned inexplicably and without
10 argument -- and I will come back to that -- and that has
11 infected everything that has occurred since then.

12 The AE 074C requirement is not just a formalism; it
13 is -- it is a thought-out substitute for the ordinary course
14 of business in these military commissions, which in the other
15 cases has -- and up until AE 074C was decided, this case
16 required the actual presence of the detainee in front of the
17 military judge for a waiver on the record.

18 Now, what was the reason for that uniform practice in
19 the other military commissions and in this one up to AE 074C?
20 It was to ensure that an accused who cannot or does not wish
21 to appear understands before he -- before he makes that
22 decision, understands his rights to appear or to not appear,
23 to understand the consequences of his not appearing, on one

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1 hand, and on the other hand, critically that the commission,
2 in approving his absence, is assured that it is a genuine
3 waiver of a constitutional and statutory right; that the
4 detainee actually does understand his rights and that he has
5 voluntary -- voluntarily waived it.

6 The personal presence of the defendant allows the
7 commission to ascertain that both by the subjective view of
8 the defendant and by the possibility of the defendant saying,
9 "Judge, no, I didn't understand that question. And the judge
10 saying, "Do you understand that? You look puzzled,
11 Mr. Al-Tamir. You know, are you sure you understand that?"
12 Because the commission's job is to make sure that a waiver of
13 rights is in fact voluntary and knowing. So that was the
14 situation up to AE 074C.

15 AE 074C addressed one circumstance that created a
16 problem with Mr. Al-Tamir's conflict for him leaving his cell,
17 and that situation involved his religious beliefs, a conflict
18 between his religious beliefs and JTF protocols. It led to
19 problems beginning, not insignificantly, an FCE in January of
20 '17, after which his condition began to decline precipitously,
21 his back condition after an FCE, related to his religious
22 beliefs. Partly based on that, partly based on compassion,
23 understanding, and a good-faith attempt to balance the

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1 particular circumstances that caused him to be unable to
2 appear in court and the commission's absolute need to be
3 assured that, you know, a waiver of presence is in fact
4 voluntary and knowing.

5 AE 074C was fashioned to allow an officer of the
6 court, the defense counsel, who the detainee trusts and who
7 the court trusts to stand in and ensure with physical presence
8 that the detainee -- that Mr. Al-Tamir in this case was able
9 to actually understand his rights, to answer questions if he
10 was puzzled about a particular issue, to -- and to come back
11 and to affirm to the court that this was, based on their
12 conversation with their client, a voluntary waiver or not --
13 they're officers of the court, and to explain the basis,
14 because they have had the opportunity to actually see him and
15 speak to him indirectly. That is the purpose of AE 074C.

16 That was not followed here. For the first time in
17 military commission history, there is no guarantee, no
18 knowledge, no awareness by the commission and no testing of
19 the voluntariness or involuntariness of Mr. Al-Tamir's failure
20 to appear yesterday and today. There is -- none of that has
21 been satisfied now.

22 Now, does that matter? Oh, yes. This is not
23 hypothetical, and we now know that from the SJA testimony.

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1 The SJA just testified that Mr. Al-Tamir understood the rights
2 form that had been read to him before. He's done that; all
3 the detainees have. He understood that. He knew what it
4 meant. "I don't need a translator for that."

5 But when the SJA got to the new stuff, the elements
6 of the instructions that were for the very first time put in
7 place by the commission to read to him, the testimony was he
8 needed an interpreter. I don't believe the SJA used the word
9 "confused." Maybe he did. But the clear inference was he
10 became confused at that point about his rights. And we have
11 no knowledge at this point, no understanding whether he
12 understood those rights or not.

13 You did not physically -- were not there to answer
14 those questions. It was your charge. You are the one who is
15 ultimately charged with deciding whether this was voluntary or
16 not. You have no basis for that.

17 We, as officers of the court, had we had AE 102H come
18 out differently and we were allowed to meet with him in his
19 cell, we could have served that function contemplated by
20 AE 074C and report to you as officers of the court, answered
21 his question, assure him that he did understand it. He needed
22 an interpreter for some of it, but we were able to, like, go
23 back and forth and answer his questions. But we can't do

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1 that.

2 So there's no basis now, there's no -- none of the
3 basis of your being able to be assured that he understood his
4 rights this morning or yesterday either when none of that
5 happened.

6 Now, it is absolutely the case that AE 074C arose out
7 of the particular circumstances that gave rise to his, his
8 problem there, his problem leaving the cell. The problem
9 there was this conflict between his religious beliefs and JTF
10 protocols. It is -- Mr. Spencer is absolutely right, it is a
11 different situation here. It is a much more compelling
12 situation than that arguably.

13 Here we have someone who doesn't want to leave the
14 cell because -- this is speculation. We have not been able to
15 communicate with him. You have not been able to communicate
16 with him -- but had serious extreme pain from the briefest
17 periods of sitting up last week. His -- so yes, it's a
18 different set of circumstances in AE 074C.

19 AE 074C is the right vehicle, and nothing on it by
20 its terms limits it to those other circumstances for resolving
21 this parallel problem. So the fact that it's a different set
22 of circumstances is irrelevant. What's relevant is there is a
23 very possible good-faith basis for him to be unable to leave

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1 the cell to appear before you in person. Okay. And that was
2 not followed in this case, and the consequences of it are
3 clear now on the record from the SJA's description of his
4 confusion about the part of the order that you asked him to
5 read.

6 So instead of following AE 074C, the commission has
7 now, in effect, done the precise opposite of what -- of all of
8 those underlying reasons based in the constitutional
9 requirements of a valid waiver was designed to fix. And I --
10 we can argue back and forth about whether the commission
11 violated its own order or it overturned its order without the
12 opportunity for any of the parties to be heard about the --
13 that I'm now providing you, why you really shouldn't do it
14 this way. But it gives the appearance of lawlessness.

15 There was a procedure in place. The commission
16 ordered this change in procedure about a crucial
17 constitutional decision without any input from the parties.
18 And we object on that basis.

19 The effect is, as I will now elaborate, that -- that
20 everything that's followed is ultra vires. I mean, we no
21 longer know. We no longer know, as AE 074C was designed to
22 guarantee whether he understood the waiver and whether it was
23 voluntary.

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1 But it's worse than that, because in effect, the
2 order that the commission -- the instruction that the
3 commission ordered to be read to Mr. Al-Tamir is a threat.
4 It's a threat. By saying, "The senior medical officer has
5 medically cleared the accused to travel to this commission
6 session that is scheduled for 25 September 2018, the
7 commission is hereby ordering the presence of the accused at
8 the 25 September 2018 session," those instructions in tandem
9 say the decision has been made. I have credited the testimony
10 of the -- of the SMO -- credited the testimony of the SMO, by
11 the way, before cross-examination is complete, because we had
12 asked for an opportunity to cross on the records. But -- and
13 the decision is made. That means you will be treated as
14 having waived voluntarily if you don't come.

15 At that point, what is Mr. Al-Tamir's position?
16 Let's assume by -- let's just speculate, although it's much
17 more than speculation, that, in fact, travel to a court on
18 this particular day would actually cause him extreme
19 suffering. I mean, he now is in the position of knowing,
20 okay, if I -- going to court is going to cause me extreme
21 suffering, but if I don't go to court, I don't get to exercise
22 my right to be present.

23 A court can't make physical suffering the condition

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1 of a defendant's exercise of his constitutional and statutory
2 rights and then claim that a decision to waive those rights is
3 voluntary. That's what this order does.

4 And again, you know, if -- if AE 102H were
5 reconsidered, decided differently, you know, we would have
6 been able to follow through on the AE 074C procedure. But it
7 was not.

8 And by the way, at the end of last week we learned on
9 Friday that the International Committee for the Red Cross
10 desired to meet with Mr. Al-Tamir about his medical condition.
11 The -- Mr. Al-Tamir said, "I can't move." Just as he had --
12 and I will come back to this -- canceled all of his
13 appointments with the defense team last week, he said, "I am
14 unfit to be transported to meet with the ICRC. Can they meet
15 with me in my cell?" And what he told us was that they did
16 meet with him in his cell. So it's not as if this is an
17 impossibility, what we requested and what was rejected in
18 AE 102H.

19 But that didn't happen. And so that -- Mr. Al-Tamir
20 is now posed with this problem. If I go to court, I'm going
21 to suffer. If I don't go to court, the commission has told me
22 I'm waiving my rights. And it is true, to be absolutely
23 clear, that the commission caveats that outcome by saying,

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1 finally, six, that it is possible that the commission may
2 proceed in the accused's absence if he refuses to attend. But
3 that wiggle room does not detract, I would argue, from the
4 unconstitutional condition that's being imposed on him as a
5 matter of waiver.

6 So it's not just that the commission is without the
7 information it needs to make the waiver decision right now on
8 his rights, but it's actually now effectively made any
9 decision that he made today, after the reading of those
10 rights, a matter -- you know, involuntary. My argument is it
11 is per se involuntary. I will come back to that.

12 But the third problem with the order, and I mentioned
13 this already, it incorporates findings of fact that have not
14 been litigated or established, including the credibility of
15 the SMO's declaration, which you say is -- or I should say the
16 commission indicates in the instructions read to the detainee
17 are the basis for this order telling him he has to come no
18 matter how he's feeling or it will be treated as -- as a
19 voluntary waiver.

20 That's a prejudgment of the SMO's testimony. And
21 there's really much more significant -- and that's before
22 cross-examination, again, was completed even. We requested
23 medical records and the opportunity to cross on them. The

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1 judge withheld ruling on that.

2 But more -- more concerning from the defense
3 perspective is it's a prejudgment of the legitimacy and the
4 credibility of Mr. Al-Tamir's own reasons for feeling
5 medically unable to attend court, as he states in AE 1240,
6 because it is -- all of those things in this order have, by
7 necessary implication, been decided against him and in favor
8 of the SMO's objective, objective finding that he is able to
9 come to court.

10 And in point of fact, there is every reason -- I'll
11 come back to this -- to discount the worth and the credibility
12 of the SMO's testimony, while there is every reason to credit
13 Mr. Al-Tamir's claims about his -- his pain -- levels of pain
14 symptoms and the -- and the restrictions that he believes that
15 imposes on him, to the point where he believes he is actually
16 going to experience excruciating pain.

17 Nothing in the record, nothing, suggests that
18 Mr. Al-Tamir's reports of pain from day one, since he arrived
19 years ago here, have been anything but insincere, credible,
20 and I quote, forthright, according to the neurosurgeon.

21 We cite the neurosurgeon's testimony on this point in
22 other pleading -- recent pleadings. The neurosurgeon
23 testified, "I have no reason to doubt what he says. He has

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1 always been forthcoming." The SMO testified at page 2114 that
2 he has no reason to doubt Mr. Al-Tamir's reports of pain, that
3 Mr. Al-Tamir's medical record at Guantanamo is a continuous
4 story of his complaining of pain and other symptoms that in
5 virtually every case were followed up by objective, in quotes,
6 medical findings of serious, diagnosable medical issues that
7 JTF staff were eventually forced to treat.

8 The record -- there is no record of his malingering,
9 of his exaggerating. And in fact, as a matter of record, his
10 reports to counsel through his -- when we have been able to
11 communicate with him have caused counsel to question
12 statements made in SMO declarations repeatedly in the past
13 that we say are inaccurate, understate symptoms, misstate his
14 actual functional abilities. And those have, in response
15 have -- you know, the SMO reports have -- following SMO
16 reports have altered their statements to conform to what he
17 said the actual medical situation was.

18 And I would add that that includes, significantly for
19 this case, an incident in which the SMO -- in November of
20 2017, the SMO cleared him for attorney-client sessions. We
21 scheduled attorney-client sessions with him, and he said, "I
22 cannot come. I am in -- don't care what the SMO report says."
23 In effect, I am completely unable to come to attorney-client

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1 sessions.

2 And so we did not -- you know, he canceled. We
3 didn't go. And we informed the court of this by way of
4 pleadings. And lo and behold, the next SMO report, he is not
5 cleared for pleadings, and he ultimately -- the follow-up to
6 that was he had another operation.

7 So every -- oh, and finally, not only has he attended
8 and participated at every session that he has been able
9 physically to attend when, in early 2018, he was attending
10 sessions on a, you know, part-time basis, on a rushed schedule
11 in order to accommodate Mr. al Darbi's need to be transferred
12 to Saudi Arabia. We had compressed hearings on more than one
13 occasion -- we can find them in the record, but they are
14 there -- that like after we anticipated going, say, until
15 noon, Judge Rubin said, "Do you think your client could go
16 until 1230?" And we would consult with him, and, by God, he
17 was willing to go past the original point. So his credibility
18 is untarnished right now.

19 But the order that the commission issued yesterday,
20 again, essentially has decided against, without hearing any of
21 this argument, without examining the record, that his opinion
22 is discounted, the SMO's opinion is credited.

23 The -- our position first is that the failure to

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1 abide by AE 074C, regardless of the commission's power to
2 spontaneously sua sponte change a very significant order that
3 had been the settled understanding and was designed to address
4 this situation -- sua sponte decision to change that on the
5 run without any consultation with the parties, assuming that
6 power exists, it doesn't matter.

7 I mean, given the underlying reasons for it, that the
8 failure to abide by the terms and the purposes and the
9 functional -- the functional roles put in place to allow the
10 commission to make the finding of knowing and voluntary
11 waiver, that's enough. That by itself means further
12 proceedings in this case are ultra vires. And to be blunt,
13 Judge, that damage is done now. I mean, he has been given an
14 unconstitutional choice. That is a violation that is now in
15 the appellate record.

16 I mean, our position is now what the commission can
17 do is mitigate the prejudice that will increasingly attach to
18 that -- that error by proceeding on any basis with substantive
19 concerns. In Mr. Al-Tamir's absence, until he -- until he
20 either comes to court, which he may do -- I mean -- I mean, he
21 comes to court. He wants to participate. I am here to tell
22 you as an officer of the court that he is an active member of
23 the defense team. He is not a passive client. He wants to be

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1 here. He always is here unless there is some compelling
2 medical need or religious issue that arises -- but going
3 forward is going to compound this prejudice that's already in
4 the record.

5 So the way forward, solely based on that -- and I
6 have not yet addressed the SMO testimony. I am going to.
7 Because in the alternative, even if this argument is not
8 accepted, I'm will -- I'm going to elaborate on some of the
9 things I have said about why you ought to believe Mr. Al-Tamir
10 and not what the -- with regard to the specific issue of his
11 competence to be hailed into court voluntarily. So I'll come
12 back to that in a second.

13 But for now, our position is that the court should
14 adjourn. We are here for a week. There is -- there is -- you
15 know, hope springs eternal. I mean, he had a very bad week
16 last week, but maybe he will come to court. You know, if we
17 are able to go and see him, that will increase the chances.
18 But I'm not going to -- you know, that's an issue that the
19 court has asked us not to argue here, but to submit something
20 in writing, and we will do that.

21 So the way forward is to wait for the OMC flight to
22 leave on Saturday and be prepared to, you know, hold a hearing
23 if he shows up over the next couple of mornings. If he

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1 doesn't, then we will adjourn until -- I submit adjourn until
2 the November hearing and with the hope and expectation that
3 the additional month will allow this to happen.

4 And, Judge, the government did not oppose our request
5 for a hearing -- a continuance until November. I mean, there
6 is -- there is -- there is very little to be gained, you know,
7 at most, four hours of testimony at the risk -- you know, at
8 the risk of him harming himself or suffering significant
9 spontaneous pain to moving him here. But we're here. If he
10 shows up over the next few mornings, let's have a hearing. If
11 not, right now we can say, without regard to the SMO's
12 testimony and considering whether it's credible/not credible,
13 that's the way forward.

14 But let me come to the SMO's testimony and the
15 question of whether it actually supports a finding of a
16 voluntary waiver or absence. At the outset, I again object
17 and raise the issue of the fact that we have not been
18 authorized our own medical expert. So the reliance on the --
19 sole reliance on the SMO's conclusion, without our chance for
20 meaningful adversarial testing, which under cases like
21 Ake v. Oklahoma and its progeny, require equality of arms in
22 expert testimony on medical issues in criminal cases. We --
23 you know, we object to going forward on that basis as well,

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1 and that request has been repeatedly denied. I'm not going to
2 address it here.

3 But moving on past that objection, nothing -- and I
4 won't repeat what I said earlier. On the one hand, nothing in
5 the record and nothing that the SMO said suggests that
6 Mr. Al-Tamir's reports of his pain symptoms and inability --
7 and own evaluation of his medical ability to show up to court
8 is anything but credible, and I won't repeat what I said
9 earlier on that.

10 On the other side, the current SMO barely knows
11 Mr. Al-Tamir. He -- this is -- he has been on duty for a week
12 now, a week and a day as of today. He met with him for the
13 first time next [sic] week. He was able to clarify on cross
14 that he has not actually personally communicated with the
15 neurosurgeon who is the actual expert on Mr. Al-Tamir's
16 current situation and who the -- the SMOs in the past -- and
17 he agreed with this in terms of, you know, what he relies on.
18 He relies on those, the acts of the medical experts.

19 His own specialities have absolutely nothing to do
20 with -- with the treatment of someone who has had five back
21 operations -- five back operations over an eight-month period
22 and who still, more than a year after the first one, can't
23 walk unaided. Nothing in his experience suggests that he is

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1 actually qualified to -- to speak to that, even if he knew
2 Mr. Al-Tamir for longer than a week, including, I think, three
3 or four 15- to 30-minute sessions was his testimony.

4 There are other reasons that are to discount his
5 evaluation. I mean, the SMO went to visit Mr. Al-Tamir
6 yesterday because he hadn't gone to court, and then he didn't
7 ask him why he hadn't gone to court. You know, had he done
8 that, and had he been able to give Mr. Al-Tamir's actual
9 response to that question, then -- and I am not conceding that
10 this is enough, and I am not conceding that this would satisfy
11 all the concerns that we just raised about AE 074C and your
12 ability to evaluate on the record his -- his -- the
13 voluntariness or involuntariness of his waiver, but at least
14 we would have had a hearsay statement by a government expert
15 about this is what Mr. Al-Tamir had to say about why he is not
16 here.

17 Right now what we've got are -- we don't even have
18 that from him. And with respect -- with actual respect -- oh,
19 and he -- other aspects of his testimony are troubling in that
20 he -- he really seems to have, understandably, under the
21 circumstances, very little knowledge and understanding of the
22 current and past impact of things like transportation on
23 Mr. Al-Tamir.

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1 I mean, the record is rife in -- you know, in prior
2 pleadings with the fact that there is a huge difference
3 between what Mr. Al-Tamir has to go through to get from his
4 cell to sitting in the courtroom. And yet the SMO's testimony
5 was, well, he seemed fine moving around in the very tiny
6 enclosed space. He was able to sit and stand, you know, in
7 the small cell that he was with [sic].

8 Judge, there's no -- that's not a basis for an
9 opinion, and he -- that he will be, you know, unharmed by the
10 movements necessary to come here. And, you know, in fact,
11 it's clear, to the extent that he thought that that was a
12 basis, he doesn't actually understand at this point what the
13 actual medical ramifications of Mr. Al-Tamir's conditions are
14 and the restrictions they place him in. Again,
15 understandably, he has barely seen him, and it is not his
16 specialty, and he has not actually heard from the neurosurgeon
17 or communicated with the neurosurgeon himself.

18 But even putting those questions aside and turning to
19 his reports, such as they are about Mr. Al-Tamir's current
20 state of pain and other symptoms, what the SMO was able to say
21 was that Mr. Al-Tamir, quote, seemed to indicate that things
22 were about the same as they were before -- that's the
23 transcript at 2105. And later, where -- "before" meant the

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1 previous week, so last week. And then similarly that he,
2 quote, reported the same as he has which he felt has not
3 changed significantly. That's at 2006 in the transcript,
4 again, referring to, you know, last week.

5 That's extremely significant, as limited and
6 uninformative as it is, since, again, last week, as the SMO
7 agreed, Mr. Al-Tamir suffered at least two episodes of back
8 spasms so severe and intense that he was temporarily unable to
9 breathe, and further suffered, in fact, continuous pain that,
10 according to the SMO, fluctuated throughout the rest of the
11 week.

12 And the details -- some of the details of that that
13 we have been able to get, without having the opportunity to
14 meet with him, are in AE 124L, which is the AE 091 -- AE 099I
15 notice regarding his current condition, trying to update the
16 court with as much information as we could prior to this
17 hearing, we submitted at the end of last week.

18 Thus, when Mr. Al-Tamir said he feels, quote, about
19 the same, according to the SMO, I mean, he is referring to a
20 period during which he was experiencing regular, spontaneous,
21 unpredictable, severe episodes of spasms and high levels of
22 pain and discomfort -- a word I'll come back to in a moment --
23 throughout.

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1 Now -- and it is highly significant for an evaluation
2 of the -- Mr. Al-Tamir's belief that he is not currently
3 medically capable of coming to court. And the SMO's --
4 contrary that -- the SMO agreed these were spontaneous and
5 unpredictable episodes. We don't know. He couldn't predict
6 when they happened. This is at 2113, 2114 in the transcript.
7 And the -- it's clear -- you know, it's clear from his letters
8 that what's triggered them is sitting up, sitting up for
9 any -- sometimes for as short as, like, a 20-minute period,
10 the severe pressure on his spine and spasms. That's highly
11 significant.

12 Mr. Al-Tamir could rationally and reasonably conclude
13 that by coming to a session, he is running a substantial risk
14 of causing himself harm or, at a minimum, severe pain and
15 suffering. And that would emphatically make his decision not
16 to attend involuntary, if that's why he's not, the only reason
17 he is not attending. The record fully supports that as the
18 basis for his decision at this point not to attend, and the
19 extended record of his own participation in these proceedings.

20 Now, Judge, the commission made a distinction in its
21 questioning of the SMO between, quote, discomfort and medical
22 risk, and asked a question or two about that, focusing on
23 whether, well, is he at medical risk even if this causes him,

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1 quote, discomfort? And that distinction does not hold up,
2 either pragmatically or legally, when evaluating medical
3 competence to attend a session.

4 The court attendance should not be -- is not supposed
5 to be a form of torture, where it's okay, where you can come
6 and there is no permanent damage but you are suffering extreme
7 pain by attending court. That's not -- that's not a
8 distinction that makes any sense; it's -- attending court,
9 exercising your right to be present, shouldn't be torture.

10 Just as important, that distinction doesn't hold up
11 as a matter of law. The standard for medical incompetence
12 is -- in United States v. Schaffer, 433 F.2d 928 and page 930,
13 and United States v. Landsman, 366 F.Supp 1027 and 1028, is
14 that an accused is not physically competent to stand trial if,
15 quote, his presence at trial would substantially increase the
16 risks to his health or life, or if his present physical
17 condition is such that it may substantially impair his ability
18 to present a proper defense. And Landsman is quoted in one of
19 the rulings in the AE 099 sequence by Judge Rubin, a former
20 ruling.

21 The neurosurgeon and the SMO both testified that they
22 were not qualified to attest to the effects of Mr. Al-Tamir's
23 pain, on his ability to participate at a military commission

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1 proceeding. It's not their expertise. They are not lawyers.
2 They are not judges. That's not their training. They can
3 attest to medical risk. The SMO said, cautiously, that I
4 think it's not going to be a medical risk to him.

5 But that's not the issue. The issue for the
6 commission -- or that's only one half of the issue.
7 Regardless of that, if his pain and potential pain is
8 sufficient to impair his ability to participate in the
9 proceedings either by impairing them or by his focus being not
10 on the proceedings but on his own pain and what we're doing
11 about it, that he is not competent to stand trial.

12 So I would urge the court not to rest on that
13 distinction. It's not in the law, and it makes no sense as a
14 matter of pragmatism, justice, and, frankly, morality when you
15 talk about how the court system should work.

16 And, Judge, I will finish by saying the big picture
17 is significant at this point in the proceedings. I understand
18 the commission's desire to move these proceedings along and to
19 make them move in an orderly fashion. But the truth is, it is
20 too late to make this train run actually on time.

21 The government held Mr. Al-Tamir for seven years
22 without charges in a CIA black site and incommunicado at
23 Guantanamo before charging him and giving him a lawyer. Then

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1 the destruction of Mr. Al-Tamir's back is directly
2 attributable to what was happening to him during those seven
3 years of not represented, not being in court.

4 Against those seven lost years, the month delay in a
5 hearing schedule to allow Mr. Al-Tamir to be more secure than
6 a SMO opinion that says you can move him for maybe four hours
7 once a week, I mean -- versus leaving him an extra month to
8 recover a little more, we submit that should have been an easy
9 call; and, frankly, the government didn't oppose our request
10 for that extension.

11 You know, even -- should -- moving forward yesterday,
12 deciding all of these issues that were implicitly decided,
13 including credibility of witnesses, overruling of a prior
14 ruling, important ruling, without -- you know, without any
15 input from the parties, it couldn't -- it couldn't wait --
16 maybe Mr. Al-Tamir -- we don't know actually what Mr. Al-Tamir
17 would have done if he hadn't been read this order this morning
18 that was confusing, that may have been intimidating, that may
19 have -- I mean, you know, that was a surprise. We don't know
20 what would -- maybe he would have come.

21 I mean, waiting an extra day against, in the big
22 picture, is really not that big a deal, should not be. So,
23 you know, on balance I will just say very -- to really

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1 conclude, Mr. Al-Tamir has no interest in delaying these
2 proceedings, and he has not acted as if he has an interest in
3 delaying them. If he were a capital defendant, delay is good.
4 You know, that's a good thing when you are trying to stay
5 alive. He is not trying to stay alive. He is trying to get
6 out.

7 There are a very limited number of ways for him to
8 get out of here, and, like, putting off trial indefinitely,
9 dodging coming to commission hearings where important issues
10 will be decided is not one of the ways that he is going to get
11 out of here.

12 So put together the whole package, that underlying
13 authentic interest that all of his conduct to date confirms,
14 including his willingness to push through commission sessions
15 where he really feels terrible objectively, I just think the
16 balance is clear -- the balance of interest is clear.

17 We propose -- as I said, we are here for a week.
18 Let's see what happens tomorrow. If he doesn't come tomorrow,
19 we can see what happens the next couple of days. And if
20 nothing happens, then we will be back in November. There will
21 be an extra month. You know, hopefully progress will be made,
22 although it's been slow.

23 So that's our proposed way forward. And I will sit

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1 down unless the judge, the commission, has questions.

2 MJ [LtCol LIBRETTO]: I do not. Thank you.

3 Trial Counsel, would you like to respond to any of
4 Mr. Thurschwell's arguments in rebuttal?

5 ATC [MR. SPENCER]: Yes, Your Honor, briefly, since the
6 government has the burden on this issue.

7 MJ [LtCol LIBRETTO]: You may.

8 ATC [MR. SPENCER]: Your Honor, much of what the defense
9 just argued was highly speculative, contained a number of
10 really salacious allegations. I will address some of them,
11 but I am not going to belabor the court's time on all of them.

12 First, the defense's argument seems to rest, since he
13 mentioned it so frequently, on an absolutely false assertion
14 that there is any constitutional issue here at play. There is
15 none. Even if the Constitution applied under these
16 circumstances to the accused, there's no constitutional right
17 to be present at a pretrial hearing, period.

18 In federal court, federal defendants are often --
19 have pretrial sessions of court that are not -- on the merits,
20 not on the question of guilt or innocence, but pretrial
21 matters that are decided frequently without the presence of
22 federal accused. There is no constitutional right for any
23 accused to be present at a pretrial session.

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1 Now, in this case, there is a statutory right that's
2 established in Rule for Military Commission 804. So the
3 constitutional argument is -- that the defense frequently
4 makes is, again, a red herring.

5 The sleight of hand, the defense sleight of hand on
6 the confusion question, if you recall how the defense argued,
7 it was very craftily done. I am not sure whether the witness
8 said he was confused. He may have said he was confused, so
9 then repeatedly asserting that the accused was confused this
10 morning with the court's order.

11 There is no evidence that he was confused. His
12 native language is not English, which is why an Arabic
13 translator was standing by. The Arabic translator was there
14 to explain the text in Arabic of what the judge's order was.
15 AE 124M and AE 1240, which are the standard rights advisement,
16 have also a written Arabic version of that. The accused has
17 seen that many times and didn't have to have it translated.
18 That doesn't -- there is no implication or suggestion by the
19 SJA that there was any confusion to suggest that that was a
20 threat from the military commission or somehow bullying was
21 certainly an implication is without any basis in fact.

22 Now, briefly, Your Honor, I will also say the
23 accused -- the record is crystal clear on this. The accused

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1 has been advised of his R.M.C. 804 rights dozens and dozens,
2 if not hundreds, of times. He has been -- appeared numerous
3 times on the record, and every single day that he has ever
4 appeared on the record, every military judge in this
5 commission has advised him of his R.M.C. 804 rights at the
6 beginning, at the end. He's had the standard rights
7 advisement explained to him multiple times by counsel. There
8 can be no suggestion that he doesn't have a crystal clear
9 understanding of what his rights to be present are and how
10 they are impacted.

11 The court went above and beyond -- or the commission,
12 excuse me, went above and beyond in this case by issuing the
13 order that it did yesterday to further guarantee that the
14 accused understood the implication of his voluntary choice to
15 come or not.

16 The only question is, is his choice voluntary or not.
17 Everything else, all of the rest of it, the defense argument,
18 is chaff. It's to distract from the question of is it
19 voluntary. Why he is making a voluntary choice is, in this
20 instance, under these facts not relevant. The reason why,
21 contrary to what the defense says, is because of speculation.

22 The defense did a very good job of articulating of
23 the back spasms, although perhaps exaggerated the

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1 impossibility of breathing versus just the difficulty of
2 breathing. But the SMO's testimony was clear: That happened
3 earlier in the week two times. It did not happen since
4 Thursday. There was no issues the weekend. So the accused,
5 when he said to the SMO that he was the same on Monday, he was
6 referring to the Friday examination where the SMO had
7 previously examined him.

8 So there had been no changes in his condition from
9 Monday to Friday. Over the weekend there was no indication,
10 according to the SMO, that there had been any spasms, any
11 complications; nothing. The accused had also not taken any
12 medication with respect to those times.

13 So the accused's concern that something might happen
14 is pure speculation, and that is not him choosing him -- his
15 voluntary choice not to come based on pure speculation is just
16 that, it's voluntary. And the government has established that
17 by a preponderance of the evidence. The record is crystal
18 clear, based not just on today's testimony and yesterday's
19 testimony but the entire history of these proceedings.

20 His -- the SMO's recommendations in January and
21 February were very similar to the SMO's recommendations this
22 week and last week. Now, we heard from the senior medical
23 officer yesterday that he actually reduced the time -- his

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1 recommendation from two to three days to one day out of two
2 things, out of a concern for the accused's discomfort, and it
3 was only a discomfort concern, and also because the SMO was --
4 had a -- did not have a long personal history with the
5 accused. If anything, that is demonstrative of the fact that
6 the SMO and the commission, in complying with that
7 recommendation, has done everything to accommodate the
8 accused's medical condition under these circumstances.

9 The fact that the SMO recently met with him, that's
10 also a red herring. Medical professionals all the time, all
11 over the world, consult with each other and consult for past
12 medical history, which the SMO testified that he did. He
13 consulted with the outgoing SMO; he consulted with his current
14 treating medical staff, the corpsmen, the nurses, the physical
15 therapists, the physical therapy technician, all of whom have
16 expertise in treating this exact symptom.

17 So in the sense that the SMO is the primary care
18 physician in this instance doesn't make him not qualified to
19 render an opinion, especially when that opinion is based on
20 the medical expertise. And even though he did not
21 successfully link with the neurosurgeon, he still is aware of
22 the neurosurgeon's opinions based on conversations with the
23 outgoing SMO.

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1 And, Your Honor, if you have had the opportunities,
2 as I am sure you have, to review the neurosurgeon's testimony
3 from the January-February sessions, it's true that the
4 neurosurgeon, like the SMO yesterday, was unable to render a
5 legal opinion. That's no surprise to anyone. But what the
6 neurosurgeon and the SMO did testify -- they testified
7 consistently that there is no indication that this would
8 increase the underlying medical or exacerbate the underlying
9 medical condition.

10 The facts -- the findings of fact that Judge Rubin
11 made in that instance based on those -- that litigation was
12 subject to the neurosurgeon's testimony and also Judge Rubin's
13 observations in court. So I would invite the court's
14 attention to the details of that, again, similar
15 recommendations from the SMO.

16 And yes, there has been a subsequent surgery, but in
17 the aftermath of that surgery, obviously there was a portion
18 of time where he wasn't cleared at all. We are back to where
19 we were essentially in his recovery. And there is no
20 indication that, contrary to what the defense suggests, that
21 the government has caused this or that the government is
22 exacerbating this in some way. There is no indication of
23 that, Your Honor.

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1 It is clear from the SMO's testimony, clear from the
2 neurosurgeon's testimony, and Judge Rubin actually ruled that
3 there had been no deliberate indifference, despite repeated
4 allegations of such by the defense. He is getting expert
5 medical care. And in the expert medical opinion of his
6 caregivers, he was medically cleared to come to court. His
7 choice not to is voluntary.

8 Thank you, sir.

9 MJ [LtCol LIBRETTO]: Thank you.

10 Mr. Thurschwell, you are standing.

11 ADC [MR. THURSCHELL]: I am. Judge, if I can respond
12 briefly to some of the new -- very briefly. I promise.

13 MJ [LtCol LIBRETTO]: Go ahead.

14 ADC [MR. THURSCHELL]: Thank you.

15 The government now is arguing, I think for first
16 time, that because Mr. Al-Tamir has had his rights explained
17 to him hundreds of times in the past, that that's good enough.
18 And it's not good enough. Those hundreds of times were all
19 in, either on the record in court or via the AE 074C mechanism
20 during the session, at some point during the session at which
21 he waived. And after that initial waiver, he was able to do
22 the signed waiver. But it's just that's -- that fact is
23 irrelevant outside of that context.

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1 Finally, you know, the government just argued that
2 Judge -- relied on Judge Rubin's ruling. I mean,
3 Judge Rubin's ruling of competence predated this most recent
4 surgery, and his issues have gotten significantly worse since
5 that -- since during this -- it has been up and down, but
6 mostly down since that surgery.

7 Judge Rubin didn't observe him afterwards, but he did
8 observe him. You have not observed him. Again, you don't
9 have the factual basis for making the voluntariness
10 determination that is required now because of the problem that
11 I addressed with regard to AE 074C before we even get to the
12 credibility of the surgeon and the question of whether the
13 government has met its burden. And I'm not going to repeat
14 the argument there. I think it's clear that they have not met
15 their burden of showing voluntariness on the totality of the
16 circumstances.

17 The real issue is that the underlying basis for your
18 determination of a voluntary or involuntary waiver has not --
19 has not been provided. And just by virtue of that fact alone,
20 the proceedings should not continue until that is satisfied in
21 some form, at a minimum, after which we can have -- what
22 becomes relevant at that point is everything else I said at
23 length about the inadequacy of whether they've met their

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1 burden of proof on this issue or not.

2 And that's all I have, Judge.

3 MJ [LtCol LIBRETTO]: Thank you.

4 Counsel, I have driven the train in terms of the
5 evidence that I wanted to receive before ruling on this issue.
6 Does the government independently desire to present any
7 additional evidence.

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

9 MJ [LtCol LIBRETTO]: Defense?

10 ADC [MR. THURSCHELL]: We have nothing further, Judge.

11 MJ [LtCol LIBRETTO]: It is currently 1037. We will stand
12 in recess until at least 1200. Be prepared to come back on
13 the record at that time. If I need additional time, I will
14 let the parties know. Court is in recess.

15 [The R.M.C. 803 session recessed at 1038, 25 September 2018.]

16 [The R.M.C. 803 session was called to order at 1255,
17 25 September 2018.]

18 MJ [LtCol LIBRETTO]: This commission will come back to
19 order. All parties present when the commission recessed are
20 again present.

21 The refusal of the accused to attend yesterday and
22 this morning's session, directed to be held by this
23 commission, has raised the issue as to whether this commission

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1 can proceed in absentia.

2 Central to the commission's analysis is whether the
3 accused's refusal implicates the principle of express waiver
4 or voluntary absence. The two principles are distinct.
5 Express waiver, to be valid, requires an accused to be fully
6 informed of his right to attend and the consequences of
7 foregoing that right. Voluntary absence, on the other hand,
8 has no such requirement. The absence needs only be found to
9 be voluntary. In order to be voluntary, the accused must have
10 known of the scheduled proceeding and intentionally missed
11 them.

12 As an initial matter, this commission finds that the
13 circumstances presented by the accused's refusal to attend the
14 scheduled sessions thus far this week implicate the principle
15 of voluntary absence, not express waiver, as argued
16 extensively by the defense.

17 Based on the evidence of record, the commission makes
18 the following findings of fact and conclusions of law:

19 The accused was arraigned on 18 June 2014. On
20 19 May 2018, the accused underwent surgery for lumbar spine
21 stenosis. The surgery went as planned, and the accused has
22 since been recovering from his surgery.

23 Since that time, there have been no postsurgical

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1 complications, although the accused has continued to
2 experience pain and discomfort associated with his underlying
3 condition and his recovery. The accused has participated and
4 continues to participate in recommended physical therapy,
5 which has generally assisted in his recovery efforts.

6 As of 11 July 2017, the senior medical officers,
7 which rotate at regular intervals, have cleared the accused to
8 be transported to participate in events, including
9 attorney-client meetings and commission hearings to varying
10 degrees. The opinions of the senior medical officer since
11 11 July have varied in the number of moves per week and the
12 duration that are advisable, given the accused's condition at
13 the time the opinions were formed and published.

14 From 11 July 2018 through 24 July 2018, the senior
15 medical officer recommended that such movements be limited to
16 a duration not to exceed two hours and for no more than once
17 per week.

18 From 8 August 2018 to 17 September, the senior
19 medical officer recommended that such movements be limited to
20 a duration not to exceed four hours and not more than two to
21 three times per week.

22 On 18 September and again yesterday, the senior
23 medical officer recommended that the movements be more limited

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1 than that -- than that had been recommended in the preceding
2 month and a half. Specifically, the senior medical officer
3 recommended that movements for events, including social
4 meetings, attorney-client meetings, or commission hearings, be
5 limited to a duration not to exceed four hours but not more
6 than once per week.

7 These recommendations were prompted by the recent
8 occurrence of back spasms and associated breathing difficulty.
9 The recommendation provided yesterday was conducted at the
10 direction of the commission in light of the accused's refusal
11 to appear at the commission session.

12 To varying degrees throughout this period of time,
13 the senior medical officer has also recommended other steps,
14 such as wearing a brace during movements and taking breaks
15 every 50-or-so minutes to allow the accused to stretch in
16 order to mitigate any aggravation of symptoms.

17 The opinions formed by the senior medical officers
18 throughout this period of time have been based on their own
19 discussions and evaluations with the accused, information they
20 obtained from the accused's medical history reports,
21 conversations with other treating providers, including a board
22 certified neurologist who has treated the accused, and
23 physical and occupational therapy practitioners, as well as

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1 other medical staff that are not involved in the accused's --
2 that are involved in the accused's medical care.

3 On 2 August 2018, due to increased upper back pain
4 and spasms, the accused underwent cervical and thoracic spine
5 X-rays. The X-rays showed no evidence of complications.

6 According to the reports from his medical providers,
7 the accused's pain has been tolerable, which has been assisted
8 by the taking of oral medication. The accused has recently
9 only chosen to take these medications during the evening and
10 nighttime.

11 The accused has communicated with counsel and
12 expressed that he is under almost constant severe pain
13 associated with his back condition. The accused has
14 reportedly, for at least the last two months, needed minimal
15 assistance with performing routine daily activities, although
16 he does rely on continued use of a walker to be mobile.

17 The last session of this commission was held on
18 17 April 2018. Since that time, the commission has canceled
19 two previously scheduled hearings based on the accused's
20 then-current medical status and opinions of the senior medical
21 officers.

22 This session of court originally scheduled to take
23 place on two to three days this week, with each session not

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1 scheduled to last more than four hours, was modified based on
2 the senior medical officer's most recent declarations.
3 Specifically, consistent with the senior medical officer's
4 recommendation, the commission planned to meet only once this
5 week, yesterday, for a duration not to exceed four hours.

6 Last week, the accused canceled a scheduled meeting
7 with members of his defense team. On at least one occasion
8 since his surgery, the accused has voluntarily been
9 transported to participate in a social meeting.

10 The senior medical officer's recommendations
11 regarding the limitations on the accused's movements are
12 driven primarily by the desire to minimize the potential for
13 pain and discomfort experienced by the accused. The senior
14 medical officer does not believe that there is a significant
15 risk to aggravating or worsening the accused's underlying
16 medical condition or that movement would cause injury to the
17 accused. In effect, the senior medical officer's
18 recommendation accounts for the accused's current medical
19 conditions and symptoms thereof.

20 During the most recent visits by the senior medical
21 officer, the accused has been able to perform normal activity
22 associated with those evaluations. He has been observed
23 sitting for periods of time and standing and sitting, as

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1 necessary.

2 During the most recent evaluation on
3 24 September 2018, the senior medical officer specifically
4 checked for spasms, tension, and contractions in the accused's
5 back that may be aggravated by movement. His evaluation found
6 none. There has been no indication that the severe spasms
7 that resulted in the change to the senior medical officer's
8 recommendation have reoccurred since last week.

9 The commission further finds the following:

10 That the accused was specifically informed that this
11 commission would reconvene this morning, 25 September 2018, at
12 0900; that the accused was informed of his right to be
13 present; that the senior medical officer has medically cleared
14 the accused to travel to the commission session; that the
15 military judge had ordered his presence this morning; that the
16 commission will not order the use of force to compel the
17 accused's presence; and that it is possible that the
18 commission may proceed in the accused's absence if he refuses
19 to attend the session.

20 The commission finds that, based on the exchange with
21 the assistant staff judge advocate as testified to him -- by
22 him to -- this morning, the accused was aware and understood
23 what he was being told.

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1 The commission finds in no uncertain terms that this
2 information provided to the accused at the direction of the
3 commission is not a threat, nor does it find that providing
4 this information and direction to the accused puts him at
5 risk. Rather, it is additional information presented to the
6 accused which, under the principles associated with the
7 voluntary absence and the case law addressing it, is not even
8 required for him to make a decision to intentionally attend or
9 not attend the proceedings.

10 Under Rule for Military Commissions 804, the accused
11 shall be present at the arraignment, the time of the plea, and
12 at every stage of trial, including sessions conducted without
13 members. However, certain exceptions to this presence
14 requirement exist.

15 Under Rule for Military Commissions 804(c), the
16 further progress of the trial shall not be prevented and the
17 accused shall be considered to have waived the right to be
18 present whenever the accused is voluntarily absent after
19 arraignment. Indeed, the Supreme Court has time and again
20 noted that there is no doubt whatever that the governmental
21 prerogative to proceed with a trial may not be defeated by
22 conduct of the accused that prevents the trial from going
23 forward.

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1 R.M.C. 804 goes on to state that "An accused who is
2 in the military custody, or otherwise subject to military
3 control at the time of trial or other proceeding, may not
4 properly be absent from trial or the proceeding without
5 securing the permission of the military judge on the record."
6 Notably, this rule contemplates that the accused in the first
7 instance appears at the proceeding.

8 The discussion section of the rule goes on to state
9 that "In any case, the accused may forfeit his right to be
10 present by being voluntarily absent after arraignment."

11 The commission is mindful of the defense's argument
12 pertaining to AE 074C wherein the commission granted a defense
13 request to allow the accused to waive his presence at the
14 initial session of the commission. This ruling was not a
15 limitation on the commission to proceed at its discretion, nor
16 does it preclude the commission from finding the accused to be
17 voluntarily absent at any given session. Again, the
18 principles of waiver and voluntary absence are separate and
19 distinct.

20 074C dealt with the issue of waiver. Here the
21 commission is presented with the issue of voluntary absence.
22 Thus, more important to the commission's analysis is whether
23 the accused has voluntarily absented himself from the

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1 proceedings after arraignment.

2 The government has the burden of establishing an
3 accused's absence is voluntary by a preponderance of the
4 evidence. Evidence has been presented that the accused is
5 aware of this session of the commission and has refused to
6 come. Furthermore, the accused has refused an order of this
7 commission to attend the session. Mindful of the accused's
8 current health condition, the commission has declined to order
9 the guard force to use force to compel the accused's
10 attendance, although such force -- use of force is authorized.

11 The court is aware and has reviewed the cases cited
12 to by the defense in arguing that under the accused's
13 condition, his absence is not voluntary. As it pertains to
14 the factors outlined in those cases, the commission finds as
15 follows:

16 One, that the accused's presence at trial would not
17 substantially increase risk to his health or life; and two,
18 that the accused's present physical condition is not such that
19 it may substantially impair his ability to present a proper
20 defense.

21 Here, as in the case of U.S. v. Landsman, quote, The
22 doctors agree the defendant is not a well man, and this court
23 accepts this general conclusion. However, many people who are

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1 not well are legally able to stand trial. And it is this
2 court's heavy burden to decide whether or not in this instance
3 the defendant's physical or emotional problems are so severe
4 as to bar a substantial public interest in the resolution by
5 trial of a criminal indictment.

6 Noting that we are not yet at trial, this commission
7 similarly finds, in part due to the delay already provided as
8 a result of the accused's medical condition, that further
9 delay of the substantial public interest in progressing with
10 these proceedings is not warranted, even if that progress is
11 slow, given the limitations in time that this commission has
12 implemented based on the senior medical officer's
13 recommendations.

14 In sum, the government has presented evidence that
15 the accused is medically cleared and able to attend the
16 proceedings. The commission has made accommodations for the
17 accused, including reducing the number of scheduled sessions
18 this week from three to one based on the medical officer's
19 recommendation, planning for shorter sessions, and taking more
20 often and longer breaks, and providing time before the session
21 was set to begin for the accused to meet with his counsel.

22 Based on the testimony from the senior medical
23 officer, there is no evidence that the accused's attendance at

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1 the commission session will endanger his health or further
2 aggravate his medical condition. Although there may be
3 discomfort associated with his movement and attendance in the
4 courtroom, the degree of that discomfort, if any, that may
5 result from his attendance is purely speculative. Moreover,
6 the commission will take every reasonable measure to ensure
7 that the discomfort experienced by the accused is minimized to
8 the greatest extent possible.

9 Furthermore, there is no evidence that the accused's
10 absence is involuntary or that he is unable to participate in
11 his own defense. The testimony received indicates the accused
12 understands his rights and has, in fact, made the personal and
13 intentional decision to refuse to attend the session.

14 Additionally, in recent weeks the accused has written
15 several letters, portions of which have been entered into the
16 record, that have been reasoned and articulate, demonstrating
17 his competency and mental faculties.

18 I therefore find that the accused's absence from this
19 session to be voluntary and that the accused will have
20 forfeited his right to be present if he continues to refuse to
21 attend.

22 Moreover, in light of his current medical status and
23 the purely legal nature of the issues to be taken up during

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1 this session, the commission will not order the use of force
2 to compel the accused's presence. In this regard, the
3 commission notes that Federal Rule of Criminal Procedure 43
4 specifically allows for the absence of the accused at pretrial
5 sessions that deal only with purely legal questions, as is the
6 case here, with the exception, of course, of the voir dire of
7 the military judge in light of my replacing Colonel Rubin.

8 Of course, the defense can at any time and at any
9 subsequent session of this commission, upon the showing of
10 good cause and within reason, request to voir dire the
11 military judge again. If, after initial voir dire and
12 possible challenges, the military judge continues to preside
13 over this case and the accused attends a subsequent session of
14 the commission, a request for additional voir dire in his
15 presence will certainly be entertained.

16 Finally, the commission does and will continue to
17 encourage the accused to attend and sincerely hopes that he
18 decides to attend and is committed to offering him as much
19 opportunity and accommodation that is reasonable under the
20 circumstances to facilitate his attendance.

21 Therefore, although the commission is finding that
22 his absence is voluntary and that the accused will have
23 forfeited his right to be present, this commission is prepared

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1 to recess and reconvene each day this week at 0900 to give him
2 as many opportunities during this scheduled session that are
3 available.

4 Therefore, each morning this week this commission
5 will be prepared to reconvene at 0900 if the accused decides
6 to attend. If the accused is present on any given morning, we
7 will continue with the matters to be addressed. If the
8 accused is absent on any given morning, the commission will
9 stand by until the following morning at 0900, and the process
10 will repeat itself.

11 Each morning the government is directed to have a
12 representative follow the same procedure as that which
13 occurred this morning, by presenting the accused with the same
14 information as was presented to him again this morning,
15 obviously accounting for the change in date of the scheduled
16 sessions.

17 Come Friday morning at 0900, if the accused is not
18 present, the representative will be available to testify to
19 his conversations with the accused on each morning, Wednesday
20 and Thursday, as well as Friday. Also, if come Friday morning
21 at 0900, this commission is called to order and the accused is
22 absent and this commission continues to find that his absence
23 is voluntary, the commission will continue in absentia.

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1 Are there any questions regarding the commission's
2 ruling?

3 ATC [MR. SPENCER]: None from the government, Your Honor.

4 ADC [MR. THURSCHELL]: None for the defense.

5 MJ [LtCol LIBRETTO]: Very well. Based on the
6 commission's ruling, this commission will stand in recess
7 until 0900 tomorrow. If the accused is transported and is
8 present at 0-9, we will reconvene at that time. If the
9 accused is not present prior to 0-9, we will not reconvene
10 until such time that he is present. At 0-9, whether or not --
11 on Friday morning, whether or not he is in attendance, this
12 commission will convene at that time.

13 Does each party understand the way ahead?

14 ATC [MR. SPENCER]: Your Honor, just for clarity's sake --
15 if I misheard, I apologize -- I thought I heard you say for
16 tomorrow and Thursday, that the testimony of the SJA would be
17 required as to what he said, which obviously we couldn't do
18 unless we reconvened tomorrow and Thursday morning.

19 MJ [LtCol LIBRETTO]: I was not clear, perhaps, in my
20 ruling on that point.

21 Tomorrow and Thursday we will be prepared to
22 reconvene if the accused attends. If he does not attend, I
23 have no intention on reconvening on those mornings.

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1 On Friday morning, whether or not the accused --
2 well, if the accused is in attendance, there is no need for
3 the assistant staff judge advocate or any other representative
4 to attend to testify to the prior days' conversations. If the
5 accused is not in attendance on Friday morning, that
6 representative will be available to testify to his
7 conversations with the accused on Wednesday, Thursday, and
8 Friday morning.

9 ATC [MR. SPENCER]: I understand now. Thank you, sir.

10 MJ [LtCol LIBRETTO]: Okay. In addition to being able to
11 testify as to the conversations, he will also be prepared to
12 comment on the information presented in the standard waiver
13 form practice, much like he did today.

14 ATC [MR. SPENCER]: Yes, sir.

15 MJ [LtCol LIBRETTO]: Okay. Defense?

16 ADC [MR. THURSCHELL]: Judge, if we could just ask: On
17 any day that he does elect to appear, if we could request the
18 same kind of accommodation we had asked for for Monday's
19 hearing; so we get to meet with him at 8:00 or whatever the
20 appropriate time is for about an hour, including probably 10,
21 15 minutes he needs for breaks before the session, so we get a
22 chance to talk to him before we go into session.

23 MJ [LtCol LIBRETTO]: Indeed. The idea is that we

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1 reconvene at 0-9 provided that there has been an opportunity
2 of 45 minutes to an hour for the defense to meet with the
3 accused.

4 ADC [MR. THURSCHWELL]: Thank you, Judge.

5 MJ [LtCol LIBRETTO]: Anything else to take up before the
6 court -- the commission stands in recess?

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

8 ADC [MR. THURSCHWELL]: Nothing from the defense.

9 MJ [LtCol LIBRETTO]: The commission is in recess.

10 [The R.M.C. 803 session recessed at 1315, 25 September 2018.]

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