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1 [The R.M.C. 803 session was called to order at 0819,  
2 5 February 2018.]

3 MJ [Col RUBIN]: The commission is called to order. All  
4 parties present when the commission recessed are again  
5 present. I do note that Major Miller is not present. I was  
6 informed a moment ago that she will be running late this  
7 morning. Is that correct, Commander Cooper?

8 DC [CDR COOPER]: Yes, sir, that is correct. Major Miller  
9 had a logistical issue this morning but will be in shortly.

10 MJ [Col RUBIN]: Very well. We'll proceed in her absence.  
11 I do note that the remainder of the accused's defense team is  
12 present. Major Miller has the commission's permission to  
13 arrive late.

14 The accused is present this morning.

15 Yesterday at the conclusion of our session, counsel  
16 and I had a Rule for Military Commission 802 conference in my  
17 chambers. That conference was held outside the presence of  
18 the accused. We discussed the timing of a potential Military  
19 Commission Rule of Evidence 505(h) hearing. Trial counsel  
20 stated that the government may be ready to proceed by the  
21 afternoon of 5 February 2018. We discussed the status of  
22 certain motions related to M.C.R.E. 505(g). The government  
23 inquired about the way ahead on AE 101. Defense counsel

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1 requested an opportunity to present argument on the testimony  
2 of the neurosurgeon that testified yesterday. Finally, we  
3 briefly discussed certain accommodations for the accused.

4 Counsel and I had another brief R.M.C. 802 conference  
5 in chambers. That conference was held at 0750 this morning.  
6 It was conducted outside the presence of the accused. We  
7 briefly discussed some of the mechanics for hearing testimony  
8 by pseudonym. We also agreed on a later start time this  
9 morning to allow defense counsel additional time to meet with  
10 the accused.

11 Counsel, do you concur with my summation of our 802  
12 conferences? Please feel free to add or correct anything I  
13 may have misstated.

14 TC [CDR SHORT]: The government is fine with it,  
15 Your Honor.

16 ADC [MR. THURSCHELL]: We agree with your summary, Judge.

17 MJ [Col RUBIN]: Thank you.

18 Counsel, for planning purposes, the commission will  
19 now issue oral rulings on the record.

20 With respect to AE 090J, the defense request for the  
21 assistance of Dr. Leo in preparation for the cross-examination  
22 of Ahmed al Darbi, that motion is denied.

23 With respect to AE 096, the defense motion for

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1 production of Ahmed al Darbi's mental health and/or  
2 psychotherapy records, or, in the alternative, for the  
3 military judge to conduct an in camera review, that motion is  
4 denied.

5           The commission's essential findings and conclusions  
6 of law will be captured in later written rulings.

7           On 31 January 2018, I ordered the record of oral  
8 argument on AE 096 to be sealed in light of the language of  
9 Military Commission Rule of Evidence 513(e)(5), which states:  
10 "The motion, related papers, and record of the hearing shall  
11 be sealed." However, the rule goes on to state, "unless the  
12 military judge or an appellate court orders otherwise."

13           There was no request to close the hearing from either  
14 party and no objection to an open hearing from counsel for  
15 Mr. al Darbi. Additionally, there was no privileged  
16 information discussed during the course of the open session.  
17 I therefore rescind my earlier order that the record of the  
18 open session remain under seal; however, all motions and  
19 related papers will remain under seal as filed until later  
20 order of the commission or court of competent jurisdiction.

21           Defense counsel indicated yesterday that they wished  
22 to be heard on the testimony of the neurosurgeon. Much of  
23 this argument is related to the defense motion to continue the

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1 deposition in AE 107A. I'm going to give counsel the  
2 opportunity to hear argument on these issues simultaneously.

3 In AE 107A, the defense requests that the commission  
4 continue the cross-examination of Ahmed al Darbi from this,  
5 the January-February 2018 session to the scheduled 9 April  
6 2018 session and to prohibit the transfer of Ahmed al Darbi  
7 outside the jurisdiction until cross-examination is completed.  
8 The government has not yet had the opportunity to respond to  
9 this motion.

10 Does the defense wish to be heard on these issues?

11 ADC [MR. THURSCHELL]: Yes, Judge, although I confess, I  
12 have been wrong-footed on AE 107A. That was a motion that you  
13 had indicated you anticipated hearing at the conclusion of the  
14 remainder -- all of the other motions, I think, in our initial  
15 802. And so while I was prepared to go forward with the other  
16 motions that were ripe, based on responses and pending  
17 AE 101 -- M.C.R.E. 505(h) finalizations, I was prepared -- I  
18 am prepared -- I was not prepared to proceed to discuss the  
19 motion to continue in particular.

20 I can do that. I request the opportunity to  
21 supplement in writing and/or orally if I go back and find I  
22 missed something, but I can do that. And I do very much wish  
23 to address the neurosurgeon's testimony from yesterday, which

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1 is apart from the question of continuing the deposition, which  
2 is a separate matter, is applicable to the kind of  
3 accommodations and the framework that the commission should  
4 follow in thinking about those going forward.

5 MJ [Col RUBIN]: Mr. Thurschwell, I would like to hear  
6 both. I think there is tremendous interplay between the two.  
7 If you would like a recess to just collect some additional  
8 thoughts, I will give you that opportunity, but the commission  
9 does intend to litigate 107A at this session of the  
10 commission.

11 ADC [MR. THURSCHELL]: Judge, I can do that. If I have  
12 ten minutes, I can be prepared.

13 MJ [Col RUBIN]: Very well. I am going to give you 15  
14 minutes, Mr. Thurschwell, all right?

15 ADC [MR. THURSCHELL]: Thank you.

16 MJ [Col RUBIN]: It's 8:25. The commission is in recess  
17 until 8:40.

18 [The R.M.C. 803 session recessed at 0825, 05 February 2018.]

19 [The R.M.C. 803 session was called to order at 0826,  
20 05 February 2018.]

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

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1 Lieutenant Commander Lincoln, did you want to briefly  
2 address the matter we discussed in the 802 conference this  
3 morning, the testimony via pseudonym?

4 ATC [LCDR LINCOLN]: Yes, Your Honor.

5 MJ [Col RUBIN]: You may.

6 ATC [LCDR LINCOLN]: Thank you, Your Honor, for the  
7 opportunity. I know the witnesses, you know, they testified  
8 on the expectation of their identity being protected and  
9 they're understandably a little concerned based on some of the  
10 discussions yesterday, so I thank you for the opportunity to  
11 clear this up promptly.

12 Just to clear up, sir, under AE 014A, which is  
13 Protective Order Number 3, the government needs to request a  
14 protective order from the commission for a witness, and we ask  
15 that you take the oral or -- we ask that you take the oral  
16 request that we made prior to the assistant SJA and the  
17 neurosurgeon testifying this week as a request to protect  
18 their identities pursuant to AE 014A.

19 Specifically, you requested a declaration  
20 explaining -- specifically toward the neurosurgeon. The  
21 prosecution respectfully directs your attention to AE 014A --  
22 excuse me, AE 014, Attachment B in its entirety, but  
23 specifically page 27. That is filed ex parte and under seal.

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1 We have a copy should the commission not have one available  
2 that we can bring over. It is classified, but we can get that  
3 to you unless you already have a copy. We ask that Your Honor  
4 rely on that in issuing a protective order regarding the  
5 neurosurgeon and the assistant SJA.

6 And we also call your attention to the order that  
7 this commission filed, AE 021T, in which it previously  
8 protected the identity of potential government witnesses,  
9 because, if publicly released, the information could  
10 reasonably be expected to threaten the safety of individuals.

11 The government also calls your attention to the fact  
12 that the names of these individuals are considered sensitive,  
13 but unclassified information.

14 MJ [Col RUBIN]: Thank you, Trial Counsel. I will review  
15 those items.

16 Mr. Thurschwell, do you want to be heard?

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

18 ATC [LCDR LINCOLN]: Thank you, Your Honor.

19 ADC [MR. THURSCHELL]: Judge, so the record is clear, we  
20 continue to object to the anonymous testimony of the witness  
21 for the reasons I stated earlier; our ability to actually do  
22 the background research, especially with respect to an expert  
23 witness, so I reiterate that objection.

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1           We object to the commission's use of ex parte under  
2 seal information that we do not have access to to decide that  
3 issue, which we think is an ongoing one and critical to our  
4 ability to present the defense generally, and specifically  
5 with respect to these issues. We do not object to you -- your  
6 hearing the government's application in an oral form and we  
7 take no position on the form of order that you issue with  
8 regard to the specific question of the anonymous treatment of  
9 the witness.

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

11           Counsel, the commission is in recess until 0845.

12 [The R.M.C. 803 session recessed at 0830, 5 February 2018.]

13 [The R.M.C. 803 session was called to order at 0933,

14 5 February 2018.]

15           MJ [Col RUBIN]: The commission is called to order. All  
16 parties present when the commission recessed are again  
17 present. I will note that Major Miller is present. She was  
18 present prior to the recess as well.

19           Counsel and I had a brief R.M.C. 802 conference in  
20 chambers at approximately 0845 this morning. The accused was  
21 not present. Defense counsel requested an additional 45  
22 minutes to prepare for argument. I granted that request.

23           Counsel and I briefly discussed the way ahead today

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1 as well as the feasibility of having an M.C.R.E. 505(h)  
2 hearing this afternoon. Counsel agreed on a potential 1500  
3 start time for a closed session.

4 Counsel, did I capture all of our 802 conversation?

5 TC [CDR SHORT]: Yes, Your Honor.

6 MJ [Col RUBIN]: Commander?

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

8 MJ [Col RUBIN]: Thank you.

9 Mr. Thurschwell, are you prepared to present oral  
10 argument on AE 107A as well as the testimony of the  
11 neurosurgeon?

12 ADC [MR. THURSCWELL]: I am, Your Honor.

13 And, Your Honor, I am going to address the  
14 neurosurgeon's testimony initially on its own, so to speak,  
15 because it provides very significant input to the -- to the  
16 request for a continuance in certain respects and it is also  
17 relevant to numerous other issues, including the  
18 accommodations that you have been providing so far and our  
19 proposed way ahead in terms of scheduling and accommodations.

20 MJ [Col RUBIN]: As you deem appropriate, sir.

21 ADC [MR. THURSCWELL]: Thank you, Judge.

22 So the -- I will call him the neurosurgeon testified  
23 primarily -- well, not primarily, but with respect to the

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1 issue of surgery and the need for further surgery.  
2 Unfortunately, the transcript is not yet available and so I am  
3 going to go from notes and memory, but the commission will  
4 correct me or remember differently if you do.

5           Essentially his testimony was he wasn't sure if  
6 further surgery would be needed at this point or not. There  
7 are indications that it might be, and that is why he has  
8 ordered the EMG tests, which he anticipates being performed  
9 within the next week or two, I think was his testimony. So  
10 it's not clear now whether the additional surgery will be --  
11 will be necessary. So that's -- I would say that's the  
12 initial thing.

13           What -- there are certain -- other than that, certain  
14 points are very clear, and I would like to run down what they  
15 are. And the first is that he very candidly recognized, and I  
16 think appropriately recognized, that he could not opine and  
17 could contribute nothing from an expert perspective on  
18 Mr. Al-Tamir's ability to participate meaningfully in his  
19 defense for purposes -- and he didn't say this, but I would  
20 say add, by necessary implication -- for purposes of the  
21 rulings that the court is required to make with respect to  
22 AE 099 and related -- related issues about accommodations to  
23 the extent that the accommodations are aimed at not just his

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1 physical condition and alleviating his physical condition, but  
2 his ability meaningfully to participate in his defense.

3 He was very clear on that. He said that is not --  
4 those were not -- his qualifications did not qualify him for  
5 that; he has not even been a criminal defendant, much less a  
6 criminal defense lawyer. And so his testimony was limited to  
7 his opinion of the effect of his current medical status, as he  
8 could determine it, and the -- the likelihood of physical  
9 impact -- medical physical impact on Mr. Al-Tamir's health of  
10 proceeding with these proceedings in various ways.

11 And while -- I'm going to come back to the issue of  
12 pain, but he testified that he did not initially -- that he  
13 did not believe that proceeding with these proceedings sitting  
14 in the chair would -- would impact -- would impact, and being  
15 transported back and forth in an appropriate manner would  
16 adversely affect the condition of Mr. Al-Tamir's nerves and  
17 spine. But he qualified that when, I believe, the commission  
18 pressed him about how long he could sit without that -- having  
19 a physical impact. He qualified that by saying, well, it  
20 depends on how long, and this is where I don't remember  
21 exactly, but he made it clear that he was not in a position to  
22 claim that sitting here for any particular length of time,  
23 certainly past the kinds of half days we've talked about,

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1 would not actually -- might have a physical impact, and it --  
2 for reasons that I will come back to, it is going to have  
3 indirectly a physical impact in terms of his -- Mr. Nashwan --  
4 Mr. Al-Tamir's progress in terms of healing. Let me come back  
5 to that.

6           So that his testimony was, "I can't talk about how  
7 this is going to affect his ability to actually participate --  
8 listen to the proceedings, pay attention to his lawyers, or be  
9 able to sit and read while he is alone in his cell trying to  
10 prepare." He couldn't -- he couldn't testify to the impact of  
11 the medical condition, but he could say, and this is my  
12 second -- I mean, let me back up. He was -- he also -- very  
13 importantly, I will come back to this when we talk about some  
14 of the other motions. He clarified the meaning of the  
15 repeated language in the recent SMO declarations that have  
16 been filed in the AE 099I series filed by the government that  
17 state that he is -- that Mr. Al-Tamir is medically cleared for  
18 transport to attorney-client meetings.

19           He was very clear that that, consistent with his own  
20 testimony about his own qualifications and the qualifications  
21 of any other medical expert, like the SMO, that -- that  
22 that -- that statement was a statement not about if you -- if  
23 you would like, his -- his clearance or ability to actually

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1 conduct an attorney-client meeting in a meaningful way, by  
2 constitutional or any other standards, but simply that the  
3 transport, with appropriate safeguards, wearing the CT0 and so  
4 on, would not adversely affect his actual physical condition  
5 of his spine and nerves.

6 And so that is the only significance to date of those  
7 prior declarations. They do not say and cannot say that he  
8 was -- on December 5th, you know, when they cleared him, that  
9 he was actually competent to participate in his defense.

10 Okay. He can -- I mean, he's a back surgeon; he  
11 deals with patients in a post-surgical setting. He -- it  
12 falls within his expertise to talk about pain that is  
13 subsequent to operations, and he talked about Mr. Al-Tamir's  
14 pain. Generally speaking, he said -- he agreed that pain does  
15 interfere with daily acti- -- can interfere, let me qualify  
16 that, with daily activities of various kinds; that -- and  
17 specifically, pain can interfere with intellectual activity,  
18 because it's -- it's distracting and it makes it hard to  
19 focus.

20 It can -- similarly, it can interfere with trying to  
21 read material, because that also requires a kind of  
22 intellectual focus, and it can interfere with the ability to  
23 attend to conversations. If you're in extreme pain and, you

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1 know, you're in a conversation, you're going to miss some of  
2 the stuff that people say. And that is both common sense and  
3 was his testimony as a -- as a medical expert who treats  
4 individuals who are in a post-surgical setting.

5           With respect to Mr. Al-Tamir, he -- what he reported  
6 Mr. Al-Tamir saying -- and this is not entirely clear, so I'm  
7 going to -- I'm going to try to say what he said and then say,  
8 "I think the reasonable inference is from that" and address  
9 some of the government's cross on him -- or redirect on him  
10 about that.

11           What he said when he met with Mr. Al-Tamir most  
12 recently, on Friday night, was that he reported that he was  
13 in -- that he was experiencing pain up to a level of 8 out of  
14 10. I want to put that in context because it is -- this was  
15 not clarified, but I think it's a reasonable inference. What  
16 he also testified was that Mr. Al-Tamir was reporting mostly  
17 about the previous ten days and the -- the significant  
18 increase in his pain and other symptoms, and it is not clear  
19 to me that he was saying, "I am in pain today at 8," or that  
20 "my pain level has been up to 8 during that time."

21           Either way -- and the one reason I -- and I tried  
22 to -- I asked him if he was aware that Mr. Al-Tamir, when he  
23 had met with him, had not been in court or attorney-client

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1 meetings for, I believe at that point, two days, so he was  
2 able to rest in his cell, whether he was aware of that; he  
3 said no. And so he had testified that he didn't -- apparently  
4 he didn't seem like he was in a level-of-8 pain. That's a  
5 subjective sense. Maybe he didn't look that way. Maybe he  
6 wasn't in a level-of-8 pain at that time, that is conceivable,  
7 and that that reference was to the earlier period.

8           In any event, his report to the neurosurgeon of his  
9 pain is consistent with what he's been telling us, the exact  
10 levels. We have been monitoring, numerically, his pain. He  
11 has -- in here, he has reported, by the end of the day, levels  
12 of 6 to 8. It varies. At the very end of the day, especially  
13 when we've gone over, he's indicated 8. I don't think he's  
14 ever said 9.

15           So fully consistent with that, and most critically, I  
16 asked the neurosurgeon whether he had any reason to doubt the  
17 truthfulness of Mr. Al-Tamir's reports of his own subjective  
18 experience of the pain; he said no, he had no basis for that.  
19 And later, he offered himself that Mr. Al-Tamir has always  
20 been very, and I think the word he used was "straightforward,"  
21 with me.

22           And so, you know, I think there is no basis -- to the  
23 extent that the government has been trying to insinuate that

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1 there has been some manipulation of the process by  
2 Mr. Al-Tamir, or counsel, hopefully, that that can be put to  
3 rest. And, you know, we are -- we are trying, Judge, and  
4 that's what we have been doing since we got here for this  
5 session, and he is trying. So that's -- but so against that  
6 back -- now, and let me -- against that background, let me  
7 pick up again with his testimony.

8           With regard to the pain, he testified very clearly  
9 that the assessment of pain by the neurosurgeon, who -- you  
10 know, when they're evaluating it in a post-surgical context,  
11 is this subjective report of the -- of the patient, and that  
12 is inevitable if -- anyone who has undergone an operation,  
13 certainly a back operation, will recognize that. They want to  
14 know how you're feeling.

15           And what he testified as well -- and this goes to the  
16 question of accommodations. You know, I asked him, you know,  
17 if a patient is doing an activity in -- a patient with  
18 Mr. Al-Tamir's medical profile, I specified -- is doing an  
19 activity and reports to you that doing it for an extended --  
20 for a period of time, the level of pain increases up to --  
21 significantly, wouldn't your advice be, yes, stop doing the  
22 activity when it hurts that much? And he said, yes, it would.

23           And I then asked him if -- if the same patient was

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1 doing the -- that same activity and stopping when the pain  
2 became too much, but found that doing that activity on a daily  
3 basis itself, even with stopping along with the pain, itself  
4 increased the level of pain and the intensity of pain and made  
5 it harder and harder to go during the day, those -- then would  
6 your advice be to stop doing that on a daily basis, and he  
7 said yes. Again, that is very significant. It's his  
8 medical -- that's his medical -- that is within his expertise;  
9 that is advice that a surgeon gives to a patient in a  
10 post-operative setting.

11 Just one moment, Judge. Just -- if I may have a  
12 second to make sure I have covered what I need to say.

13 [Pause.]

14 ADC [MR. THURSCHELL]: I think -- okay. So that is --  
15 that was the essence of his -- of his testimony, I think, for  
16 purposes of the request for accommodations and so on.

17 What we -- we can talk about now, if you would like,  
18 based on that, our proposed way forward and what we -- and  
19 this would be based on his testimony and also on our --  
20 especially now with his testimony and our own subjective  
21 experience of working with Mr. Al-Tamir over a period of days  
22 in attempting and seeing what's happened in our attempt to  
23 meet with him in attorney-client meetings, we can talk about

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1 our proposed schedule now or we can talk about that after  
2 we've addressed these other issues. That's -- that's your  
3 discretion, Judge.

4 MJ [Col RUBIN]: I'd like to hear on the defense proposed  
5 way forward.

6 ADC [MR. THURSCHELL]: You'd like, all right. Based on  
7 Mr. Al-Tamir's subjective expressions of pain and his  
8 good-faith attempts to actually do what we've asked, and our  
9 experience meeting with him in court -- I'm sorry, meeting  
10 with him a week and a half ago, beginning on January 26 for  
11 three consecutive days, it was three consecutive days, and  
12 then the experience in court last week and his subjective --  
13 his expressions of what he was capable of and when he stopped  
14 being able to actually attend and focus and his level of pain,  
15 we -- we think there is a four-day cycle that is -- is --  
16 would be needed.

17 And the four-day cycle would be two days -- and this  
18 is a proposal based, you know, on what we think he can do. If  
19 his -- we don't know what the long-term consequence -- I mean,  
20 the long-term effect of doing this cycle will be. But for  
21 now, it appears that two days of the four days on half-day  
22 sessions in court, two days not in court; the last day of  
23 the -- on one of those days, we realistically -- the two off

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1 days, excuse me, on one of the two off days, we realistically  
2 expect to be able to meet with him for a half-day for an  
3 attorney-client meeting; and that would be for various  
4 purposes, including, I will say, and anticipating the motion  
5 to continue, trying -- subject to other considerations, being  
6 able to start preparing him -- preparing ourselves, I should  
7 say, and allowing him to prepare us for the al Darbi cross.

8           So -- and if he can meet with us more during those  
9 two days, that would be -- we will do that. I mean, we need  
10 to meet with him, but that's our realistic assessment of what  
11 he is capable of.

12           When we met with him -- in the week before the  
13 session started, we -- as I reported at the outset, we were  
14 able to meet with him for about three and a half hours or so,  
15 three hours before he became exhausted. The next day he was  
16 able to do it for about two and a half hours or so, maybe  
17 three, around there, and then it was -- and then it was down  
18 to two hours before he really had enough. And then he was  
19 incapable -- he really did not want to meet with us on Monday,  
20 and -- and -- so that -- and then the experience in court has  
21 been similar.

22           He was -- we had a half-day on Tuesday, then he had  
23 the extra strain of the nighttime MRI. He came on Wednesday

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1 afternoon. He was not -- afternoon sessions are more  
2 difficult. We would ask for morning sessions, I think, is --  
3 so the afternoon session was already later in the day. And  
4 then the -- the session was, in order to accommodate, try to  
5 get in all the argument, it ended up getting extended by  
6 either 30 minutes or more past what he really told us was  
7 like, "I am not being able to pay attention now."

8           And the result was he was really -- he was out of  
9 commission on Thursday and really unable medically -- I mean,  
10 unable medically to attend. And so that -- that is the cycle  
11 that we would ask for.

12           Let me say this, even that cycle is a problem, and  
13 it's a medical problem for him. And as I said, we are  
14 addressing here his ability to meaningfully participate in his  
15 defense for constitutional and statutory purposes. But the --  
16 the -- the neurosurgeon stated that he was doing physical  
17 therapy and he recommended physical therapy and physical  
18 therapy would help.

19           On days, especially when he is in court, but even  
20 when he meets with us, it is slightly less stressful -- I  
21 mean, it is less stressful to meet with his attorneys. It is  
22 still -- the physical positioning is the same, but it's less  
23 stressful. But on days when he is in court, and especially on

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1 days -- and other days as well, he -- he really -- that uses  
2 up the energy he has got.

3           He is not able to do the physical therapy exercises,  
4 or do them in a much more limited way, is our understanding,  
5 than he would otherwise. And so proceeding on this basis is,  
6 in fact, affecting his medical progress and his ability to  
7 heal. And so we, with a great deal of hesitancy, are  
8 proposing this four-day -- having our motion to abate having  
9 been denied, we are proposing this as way forward as  
10 accommodations, subject to, you know, the qualification that  
11 this cannot be a -- on our side, a promise that he will not  
12 fade and that other -- clearly other developments medically  
13 might obstruct his ability to come to court on a particular  
14 day or affect the accommodations needed.

15           And if I might have a moment, Judge, just to make  
16 sure I ----

17           MJ [Col RUBIN]: Sure.

18           ADC [MR. THURSCHELL]: Judge, that -- that is all I have  
19 to say specifically about the neurosurgeon's testimony. And I  
20 don't know if you want me to proceed directly into the  
21 continuance motion or you want the government to respond to  
22 my ----

23           MJ [Col RUBIN]: Please proceed right now into 107A,

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1 please.

2 ADC [MR. THURSCHELL]: All right. Let me first say with  
3 respect to the continuance motion, I -- I appreciate -- the  
4 commission, upon our request, granted an additional amount of  
5 time for me to prepare. At an earlier 802, after we had  
6 requested to address the continuance first, the commission had  
7 said no, let's listen -- see what else happens and then  
8 address that last, and I was not prepared to go forward today.  
9 And I appreciate that extra opportunity.

10 Let me say that having -- appreciating that -- that  
11 indulgence, I trust that that will not affect or be subtracted  
12 from the period of time that Mr. Al-Tamir has to sit here in  
13 court. I mean, it's not going to affect his -- it doesn't add  
14 45 minutes to his day.

15 Thank you, Judge.

16 Okay. So the -- the basis of this -- of the  
17 continuance motion -- and to be clear, the relief we are  
18 requesting is a continuance until the next-scheduled session,  
19 which begins, I believe, on April 9th, another two-week  
20 session. The basis of the motion is predicated, first, on  
21 Mr. Al-Tamir's constitutional and statutory rights to make a  
22 defense, to meaningfully -- to conduct a -- to confront the  
23 witnesses against him, his right to counsel, and his general

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1 due process rights to a fair proceeding.

2           And the -- the factual basis of the motion, there are  
3 three elements to it, all of which combine to make it  
4 literally impossible for us to effectively -- constitutionally  
5 effectively prepare for this deposition if it is going to be  
6 held in the next -- during this week or next week or for  
7 the -- if it isn't put off to a time frame that's comparable,  
8 at a minimum, to the amount of time we would have if we just  
9 did it during the next-scheduled session.

10           And the first basis is that we have been effectively  
11 prevented from meeting with Mr. Al-Tamir to talk about  
12 anything face to face for -- effectively until this past  
13 mid-January, and the -- I'm going to recount the history  
14 briefly for that so that it's clear.

15           Second, we are -- even had we been allowed to meet  
16 with him, what we were able -- what we were ethically able to  
17 talk to him about under present circumstances, for reasons  
18 that are laid out in AE 101, do not include litigation  
19 strategy. And we had -- we intended to only talk to him about  
20 the medical issue, which was front and center. We had no --  
21 to remind the commission, we've had, you know, no medical  
22 expertise of our -- regarding his current condition or to  
23 advise us, we have had no medical records that are more than

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1 40 -- that are more recent than 45 days old, and we haven't  
2 been able to talk to him directly to get a direct, subjective  
3 gauge of his symptoms.

4 He has done as good a job as he could, and it's been  
5 pretty effective, but it doesn't compare -- in his letters, it  
6 doesn't compare to his personal -- the right to meet with your  
7 attorney personally. So that, that -- that is all we were  
8 capable -- I'm sorry, all we would have been capable of  
9 meeting with him about would be the medical issues, which were  
10 front and center. And in fact, that is all we have talked  
11 about. That's mostly what we have been talking about in the  
12 hearings to date.

13 When we speak to him in the -- when we spoke to him  
14 in our sessions, all we talked to him about were sort of  
15 procedural, what's going to happen, and medical questions, and  
16 getting information from him, to the extent we could, about  
17 his medical condition to present to the commission and to use  
18 for the medical-related litigation.

19 And A -- and the reasons are set out in AE 101.  
20 We -- I hope we get a chance to argue that in some form. We  
21 have not. But for purposes of the motion to continue, and I  
22 will -- I may elaborate on this a little bit later, but just  
23 briefly to lay out the form of the argument, even if the

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1 commission were to deny AE 101 today, as soon as I stop  
2 talking, on its face, we -- that would not have -- would not  
3 have given us and would not retroactively have authorized us  
4 ethically to have met with Mr. Al-Tamir during the limited  
5 period anyway that we could have met with him at all about the  
6 issues we need to talk to him about to do the cross.

7           And the AE 101 -- and I will just say, whatever else  
8 it is, it is a good faith effort to comply with our own -- our  
9 own ethical requirements as -- as amplified and -- by the  
10 Chief Defense Counsel in an unclassified memorandum, which we  
11 will talk about, I hope, at the AE 101 hearing. So we have  
12 not had a ruling on that. And because of that, we cannot just  
13 assume that we're allowed to do -- well, it will probably get  
14 denied, so we might as well talk to him about the stuff that  
15 we think we're ethically unable to talk to him about.

16           So at -- even if it was denied, even if the motion to  
17 abate has been denied, whatever the accommodations are that  
18 are worked out now -- and I will come back to this again in  
19 terms of the realistic timing -- we have not been able to talk  
20 to him ethically and legally, as far as we're concerned, and  
21 in good faith and reasonably, about anything related to the  
22 al Darbi deposition, substantive, and there is a great deal to  
23 talk about.

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1           Now, the third problem that might have, to a certain  
2 extent maybe, alleviated some of this, it could have, is if we  
3 had been able to send Mr. Al-Tamir the basic written documents  
4 that he would need to review and discuss with us, when we  
5 finally did get a chance to talk to him, if we could have sent  
6 them to him in advance. We have not. The only thing we are  
7 allowed, by regulation, by -- by DoD regulation, by the  
8 interpretation we have been provided by the -- the head of  
9 security for the OMC, are documents if they are -- that are  
10 marked DISPLAYABLE TO THE -- or, I'm sorry, RELEASABLE TO THE  
11 DETAINEE.

12           We have been asking for months and pointing out to  
13 the government for months that the al Darbi transcript of his  
14 direct is marked U//FOUO, and that we're not able to send --  
15 being unable to, you know, meet with the client to talk to him  
16 about it, we can't even send it to him to ask him to read it  
17 in advance. And we've been pointing it out for months. The  
18 commission noted that fact, that he was unable to do it,  
19 itself in AE 099Y. That was on the 5 th of December.

20           To this day, we do not have either, just to begin  
21 with -- and there are other documents as well -- the Darbi  
22 direct testimony transcript or the Nashiri direct testimony  
23 transcript marked in a way that we could have -- we could

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1 leave it in his cell with him, once we got to meet with him,  
2 or have sent it to him months ago and to the extent he was  
3 able to read it in advance, without our presence to talk to  
4 him about it, it would have at least given us that. That has  
5 not been available.

6           So in every way, we have been hamstrung by the -- by,  
7 and I'm going to emphasize this, the government's own policies  
8 and decisions. It was the government's decision not to  
9 accommodate our requests for -- to meet with the client. We  
10 began requesting in-person meetings with the client in  
11 September. He was operated on in early September. Our  
12 requests began within days of his surgery, saying, "Can we  
13 meet with him?" So -- and the -- we were repeatedly rebuffed.  
14 They -- on one hand, they would not -- at that point, he was  
15 not cleared to meet with us for transport to an  
16 attorney-client meeting, and we now know what that means.  
17 Not -- but he was not even cleared for that medically, for  
18 transport. We requested to meet with him in the hospital, or  
19 wherever he was being held so that we'd be -- we could find  
20 out about him and start working on whatever we could work with  
21 him on. That was repeatedly rebuffed.

22           And we moved in AE 102 in -- on the 5th of October,  
23 we filed a motion to compel access to counsel where he was

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1 located. That was denied eventually by this commission, but  
2 the commission itself noted that the -- that the inability of  
3 the government to accommodate, in the face of these  
4 unfortunate circumstances -- that is, the illness -- in-person  
5 or even telephonic attorney-client communications will be  
6 weighed in consideration of future requests for continuances  
7 or appropriate relief. Those are the commission's words,  
8 AE 102D at paragraph 4. So the commission recognized that  
9 this was a problem in terms of our ability to move forward,  
10 this lack of access.

11 On 31 October, for JTF -- and I don't have this in  
12 front of me -- but JTF approved visits if the client was  
13 wearing his CTO for November 8th and 9th. That was the first  
14 statement that he was cleared for transport that we received.  
15 And we immediately thereafter received an SMO declaration the  
16 next day that actually confirmed his ability to do that under  
17 that medical standard.

18 And subsequently we actually -- they moved up -- I  
19 think they approved visits, maybe spontaneously, for  
20 November 2nd. But in any event, as soon as we were able,  
21 after receiving that, we arranged to fly down to Guantanamo to  
22 meet with him, having gotten that word.

23 By the way, this is all documented, Judge. It's

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1 documented in AE 107A, the motion to continue; it's documented  
2 extensively elsewhere, and I think in particular AE 07- --  
3 AE 0990, which was an earlier motion to continue, and the  
4 exhibits thereto; exhaustively documented in the record, our  
5 exhaustive efforts to meet with him in some form as soon as  
6 possible. We did not sleep on our rights with respect to any  
7 of these issues. The delay that this has now occasioned is --  
8 lies entirely at the feet of the government to proceed.

9           We flew down on November 7th and -- in the hope to  
10 meet with the client on November 8 -- 8th, 9th, and 10th,  
11 which I believe were the scheduled visits. Mr. Al-Tamir, it  
12 turned out, was unable to meet with us on those dates. Now,  
13 he -- he -- he felt medically unable to meet with us, despite  
14 the clearance which said he could be physically transported  
15 without damage to his spine. So he said, "I am not  
16 medically -- my opinion is I'm not medically competent to meet  
17 with my attorneys."

18           On the -- so on the 13th of November, the defense was  
19 informed that he was no longer cleared. So this was a brief  
20 window in which he was -- he was cleared. He told us he was  
21 unable to meet with us, and he told us we are no longer  
22 cleared. And then, lo and behold, we learn that the next  
23 day -- this is the 14th of November, less than a week after

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1 the meetings that he said "I don't feel well enough" to meet  
2 with us -- they operated on him.

3           So to be absolutely clear, his -- he had a more  
4 accurate read on his medical ability to meet with us than the  
5 SMO who said, "You're cleared to be transported." He -- he  
6 was about to receive another emergency operation before that.  
7 So I don't -- that put to rest, again, the fact that he said  
8 he was unable to meet with us on those days, those were not  
9 realistic opportunities for us to meet with him. Then he was  
10 no longer -- he was operated on, he was no longer cleared  
11 under the medical standard, even under the medical standard  
12 which does not address his ability to participate in his  
13 defense.

14           On -- and on the 5th of December -- and that  
15 clearance, I should say, we -- there is an issue that I don't  
16 have to get into here but it's one that's floated, which is  
17 our concern that the -- and I've said it before -- that  
18 medical decisions at some level -- and I'm not saying this  
19 about the neurosurgeon, but at the JTF level -- are being  
20 driven by the -- by litigation concerns, and I -- and we have  
21 a significant concern about that.

22           His clearance -- his clearance, days before he was  
23 operated on on an emergency basis, I mean, it either -- it

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1 suggests, by reasonable inference, that the commission's very  
2 recent suggestion that his -- Mr. Al-Tamir's inability to meet  
3 with the -- his counsel would be taken into account in further  
4 continuance -- you know, requests for continuance, that is  
5 what preceded brief -- shortly that decision to suddenly clear  
6 him. It either suggests that that was a factor or, at the  
7 very least, that the -- the advice and decision-making by JTF  
8 medical personnel was unreliable, I mean, at that point in  
9 time at least. They cleared him a week before they said he  
10 needs an emergency operation, and he was medically unable, as  
11 he told us, and that is why he didn't meet with us.

12           So that's where things stood on the 5th of November  
13 when we suddenly received a further notice that the client was  
14 able to meet with us, that he was cleared again.

15           On that same day, the judge -- the commission ruled,  
16 and I am going to quote, that the problem of access, and this  
17 is -- was a problem that lies at the feet of the government.  
18 And let me not put words in the commission's mouth; let me  
19 just read two quotes from AE 099Y, which was also issued on  
20 the 5th of December.

21           That -- the commission said, "There are two possible  
22 ways to restore in-person attorney-client communications: The  
23 accused recovers, or the government finds alternative means of

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1 restoring such communication. And while that first option is  
2 not within the control of either party, his recovery, the  
3 second is fully within the control of the government, although  
4 not the prosecution itself. The prosecution has represented  
5 that the United States Government cannot accommodate  
6 attorney-client meetings, and the commission will defer to  
7 this decision. However," and I underline this language, "this  
8 inability is still a decision rather than a factual  
9 impossibility."

10 And in the same order on 5 December, the commission  
11 also noted that -- that some of the information related to the  
12 Darbi deposition, including the deposition transcript, can  
13 only be reviewed by the accused in the presence of defense  
14 counsel. Consequently, the accused has yet to review this  
15 information or discuss it with his counsel. That's on 5th of  
16 December.

17 And so that is a clear, I think, recognition by the  
18 government that, as of the 5th of December, this was not --  
19 you know, there was nothing we could be doing to get -- to  
20 work with our client, for all of the reasons we said so far,  
21 leaving aside the AE 101 issue, which I will come back to  
22 momentarily.

23 So we then get a 5 December -- on the same day, we

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1 get a sudden clearance. That was -- because that clearance  
2 was entirely inconsistent with the information we were  
3 receiving from our client about the steady decline in his --  
4 in his subjective pain levels and symptoms, we filed, quickly  
5 thereafter, AE 099AA, which reported that discrepancy, that  
6 attached letters, as we had elsewhere, describing his  
7 subjective levels of pain and his subjective symptoms.

8           Again, according to the neurosurgeon, that is the  
9 relevant standard for determining ability to conduct  
10 activities. And to explain why, you know, we had deep  
11 concerns about our ability to meet with him and so on.

12           That took us into the holidays. We -- and I don't  
13 have the date of the request to meet with him, but we filed a  
14 request pursuant to the two-week requirement, sometime during  
15 the holiday period, in order to try to get clearance -- get  
16 approved meetings before the hearing. And we were able to get  
17 those cleared hearings the week before the hearing. And we  
18 met with him -- we were able to get transportation and meet  
19 with him on the Friday, Saturday, and Sunday preceding the  
20 first week of this session.

21           And that is the only access we have had to him in  
22 person since August 15th. So we have had no access to him  
23 between August -- August 15th of 2017 and 26th of January of

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1 this year; unable to speak to him in person about anything.

2           Now, had we been able to meet with him, we would not  
3 have been allowed to talk to him. We would not allow  
4 ourselves, and for reasons explained in AE 101, to talk to him  
5 about any substantive litigation matters except the bare  
6 necessity of litigating his health and to try to maintain an  
7 attorney-client relationship with a charged detainee in  
8 Guantanamo who is suffering greatly and who a six-month break  
9 in the relationship is -- is a nontrivial matter just in terms  
10 of the basics of attorney-client representation.

11           So we needed to meet with him, we needed to get to  
12 know him, we needed to find out how he was doing and so on.  
13 And we felt like we could do that and we would have been able  
14 to do that if we had been able to meet with him earlier. But  
15 that was all we could do when we got here on January 25. And  
16 first and foremost, we talked to him about his health in order  
17 to inform the commission and figure out what we were going to  
18 say.

19           And we -- so we were -- but we were unable to do  
20 anything else by virtue of AE 101. And with respect to  
21 AE 101, again I want to emphasize the timing, because this is  
22 not some belated excuse that we came up with to explain why,  
23 even if we had had access, we couldn't talk to him. We filed

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1 the predecessor of AE 101, which was then titled AE 094, in --  
2 I don't have the date in front of me, but I believe it was  
3 July of 2017.

4           And we -- it was then hung up, if I can describe it  
5 informally as classification review limbo for months, for a  
6 month, maybe six weeks, I think. It was finally turned  
7 around. It was filed as AE 101, I believe, in August, and it  
8 has been pending since then. We have not slept on our rights  
9 with respect to that either. We have been trying to solve the  
10 access problem for months, in the most timely possible way,  
11 and we now stand -- and -- and, at the same time, and I will  
12 finish with this, I already mentioned it, without even the  
13 minimal ability to at least let our client, who we couldn't  
14 meet with and can't talk to, the most basic documents required  
15 for him to meaningfully to, you know, prepare to assist us in the  
16 cross-examination. And I will remind the commission he was --  
17 he was required to be there on the first day in order to allow  
18 the identification during the direct examination. He showed  
19 up. He did it.

20           He waived the second day. He did not hear it because  
21 he was medically unable. I mean, it was -- this was  
22 immediately in the brief period leading up to the very first  
23 sequence of four emergency operations that he has been

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1 subjected to over the past five months, and still scheduled  
2 probably for another one at some in the indeterminate future.  
3 That's the medical background of this. So he did not -- he  
4 did not even hear the second day of testimony.

5           The government marked the transcript as U//FOUO.  
6 Similarly the Nashiri deposition, marked U//FOUO. The  
7 government knows the regulations say that unless if it is  
8 not -- everything has to be marked DISPLAYABLE TO THE DETAINEE  
9 to be displayed and specifically RELEASABLE TO THE DETAINEE  
10 if -- in order to be released to him.

11           That is -- it is absolutely clear in the -- from DoD  
12 regulations, from prior practice. We have a recent e-mail  
13 confirming this from Mr. Bumpus, the WHS security manager for  
14 the commissions, that only information marked RELEASABLE TO  
15 THE DETAINEE is actually sendable to him.

16           We, as early as November, and I think orally earlier,  
17 we began reminding the government of this fact. I refer the  
18 commission and the government to AE 0990, footnote 41 on  
19 page 10, where the commission -- the defense says, "Yet the  
20 government has marked the transcript of Mr. al Darbi's  
21 deposition as FOUO, meaning that defense counsel must be  
22 present while Mr. Al-Tamir reviews it."

23           That was filed on 13 November. We repeated that, and

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1 there were other -- there may have been e-mail communications  
2 about this, I don't recall; there were certainly oral  
3 communications about it, about the problem.

4           On 27 November, in AE 099T, page 2, we noted that --  
5 and this was a notice to the commission and the government  
6 relating to his health. We noted, again, that "Undersigned  
7 counsel is barred from providing copies of the transcript of  
8 the direct examination of Mr. al Darbi and related materials  
9 to Mr. Al-Tamir because their classification markings permit  
10 Mr. Al-Tamir to review such documents only with counsel  
11 present." As I'd mentioned earlier, the commission on  
12 5 December specifically pointed out to the parties that we  
13 have been unable to show him the Darbi deposition because of  
14 the classification marking problem. We have never, to this  
15 day, received one that we can leave with him to review.

16           And that is only part of the problem. Leaving --  
17 apart from the Nashiri deposition transcript, which is -- has  
18 the same problem and which is critical for him to review,  
19 there is a significant amount of discovery that was disclosed  
20 that also does not have the required markings that we can show  
21 him. Some of them are marked RELEASABLE, so the government  
22 knows about this; most are not. Some are marked NOT  
23 RELEASABLE, fair enough. But there is a vast amount of other

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1 U//FOUO documents or other unclassified information that,  
2 because it hasn't been marked RELEASABLE, we haven't been able  
3 to show him. And that -- some of it is listed on -- at the  
4 end of the facts section in AE 107A. I apologize for the lack  
5 of page numbers, but it's at the very -- the second-to-last  
6 paragraph before the argument section, which is Section 6.

7           So in short, Judge, what we need before we can  
8 proceed with the deposition is a reasonable time to discuss  
9 with our client and get his input and insight into  
10 Mr. al Darbi's direct testimony, Mr. al Nashiri's -- I mean,  
11 his testimony in the al Nashiri case, these other documents,  
12 and more generally, to just to discuss the whole strategy. We  
13 have not had the chance to talk to him, and this is the  
14 government's star witness.

15           This is not something that we can do -- given the  
16 volume of material, this is not something that can happen --  
17 this is not an eight-hour project. This would be something  
18 that we, in another setting with a medically comp -- fully  
19 medically able defendant -- I mean, I would be spending days  
20 with the client, days of in-court -- I mean, in-session time  
21 with him, multiple days working with him, trying to, you  
22 know -- suggesting other angles, getting his input.

23           There are lines of attack that he may know something

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1 about that we know nothing about because of his greater  
2 knowledge of the underlying -- some of the underlying facts of  
3 the case, at least. We don't know. We've not had that  
4 opportunity. And so that's what we would do if we were able  
5 to talk to him about subject matter other than his medical  
6 condition.

7           Now, based on the neurosurgeon's testimony and our  
8 experience, we are talking about if -- assuming that we can --  
9 if we got the continuance until the next session, we would  
10 have the interim period to basically meet with him. We can  
11 reasonably anticipate, I think, three out of four -- at least  
12 three out of four half days. And, you know, look, he's -- he  
13 seems to be getting better in some way. The pain is still  
14 there. We hope he keeps getting better. We can't promise  
15 that, and the neurosurgeon couldn't promise that.

16           But, you know, if -- to the extent he can work with  
17 us for more than that period of time, three half days out of  
18 four total, we will, but we -- that does not add up very  
19 quickly to the amount of time that's realistically required  
20 for a criminal defendant to adequately participate in his  
21 defense, to contest the testimony of the government's star  
22 witness.

23           That is conditioned, I would -- I have to add, on the

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1 solution to the AE 101 problem and the grant of the relief and  
2 the, you know, agreements from the client based on the kind of  
3 relief we are asking for. We are assuming that that will --  
4 would issue, you know, shortly, and that would then allow us  
5 to start immediately.

6 But to be holding court hearings in the meantime, to  
7 be asking the client to be -- after going through the current  
8 court hearings and then continue, even on our proposed  
9 schedule, like through not just next week but the week after  
10 and the week after, he's going to wear out. And it is simply  
11 unrealistic to ask him to do that.

12 And let me finally say, as I have been saying all  
13 along, this commission's task in this context, as I understand  
14 it, is to ensure that the rules are followed, to ensure that  
15 the -- the defendant's -- the accused's constitutional and  
16 statutory rights are honored by the proceedings, that he gets  
17 them fully satisfied.

18 Now, does the government have interests also? Yes,  
19 the government has interests that sometimes have to be taken  
20 into account in any -- in any context. But here, the  
21 government's interests are in a -- a transfer -- let me be  
22 very specific about our relief, a six- to eight-week,  
23 probably, delay in the execution of a transfer to a foreign

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1 country of a detainee who they promised to do that to. They  
2 don't want to break their promise, okay? They don't want  
3 the -- we wouldn't want the detainee to be disappointed. He  
4 will be, clearly. And, you know, that -- and those are all --  
5 maybe those are factors that should be weighed, maybe not.

6           But when you weigh the government's desire not to  
7 delay a transfer by a month or a couple of months against the  
8 appearance of being railroaded, I'll say, of the -- this  
9 deposition and these proceedings in order to accommodate, you  
10 know, Mr. al Darbi, and against his disappointment, I think  
11 the balancing, to the extent there is a balancing involved, is  
12 absolutely crystal clear, and that it would be a clear  
13 violation of Mr. Al-Tamir's rights, constitutional and  
14 otherwise, to say that those minor inconveniences may be --  
15 might there be embarrassment to have to ask Saudi Arabia to  
16 wait two months for -- to receive their detainee? I frankly  
17 doubt it, but let's assume there is. That doesn't outweigh  
18 Mr. Al-Tamir's right to actually make a meaningful defense.

19           And so I would ask two things, and I want to follow  
20 up with this last request, because I think this is actually  
21 critical, and it's based in part on recent political events.  
22 The first is we ask for the continuance, okay? The -- as  
23 requested and for the reasons I stated.

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1           The second is I think the commission needs to know  
2 that -- from an authoritative source, that this transfer is  
3 actually going to happen. If the transfer is actually up in  
4 the air or in question in any way, then there is no reason not  
5 to continue these proceedings as they were scheduled in the  
6 original scheduling order and as modified for this current  
7 calendar year and do this deposition at a reasonable time  
8 after we have had a chance to talk to our client. Recent  
9 political events, and I am referring to the recent executive  
10 order that, you know, reaffirms the President's belief in the  
11 need for Guantanamo and to use it, rumors circulating  
12 elsewhere suggest that it is not -- it's up in the air, it's  
13 not clear to us that this is going to happen.

14           And we would ask, before you deny our motion for  
15 continuance, that you get a declaration from the Secretary of  
16 Defense, who has final authority for transfers, that he  
17 intends to transfer Mr. al Darbi on a date certain that would  
18 actually then -- you could then weigh into this balance.

19           I mean, our position is not that that is dispositive,  
20 but that that -- I mean, in fact, whether -- whenever they --  
21 whatever declaration he provides, there is no question -- I  
22 mean, we don't think it's going to outweigh Mr. Al-Tamir's  
23 rights. But you do not have to even address the continuance

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1 at all -- or, I mean, it makes it a foregone conclusion if the  
2 Secretary of Defense is unwilling to say he actually is going  
3 to be unavailable in a manner that requires us to force this  
4 forward under these circumstances.

5 And unless you have questions, Judge, I'm finished.

6 MJ [Col RUBIN]: No questions. Thank you. You have  
7 answered all of my anticipated questions. Thank you.

8 Trial Counsel. Does the government wish to be heard?

9 ATC [MR. SPENCER]: Your Honor, may we have a brief  
10 five-minute recess in place?

11 MJ [Col RUBIN]: Let's take five minutes. The commission  
12 is in recess.

13 [The R.M.C. 803 session recessed at 1033, 5 February 2018.]

14 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1042,  
2 5 February 2018.]

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

6 Trial Counsel, is the government ready to present  
7 oral argument?

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

9 MJ [Col RUBIN]: You may proceed.

10 ATC [MR. SPENCER]: Your Honor, apologies for the somewhat  
11 of a misorganization, potentially. The defense covered, by my  
12 count, five different motions in its argument on what should  
13 have been two motions. I do want to address some of those,  
14 even though they will be argued later, but I need to hit them  
15 briefly in the context of the continuance request.

16 Additionally, the -- the pure length of  
17 Mr. Thurschwell's argument, I won't take that long,  
18 Your Honor. But at some point if -- it may be helpful to the  
19 commission if the commission has questions to inquire, and I  
20 will certainly answer those questions to the best of my  
21 ability.

22 Your Honor, with respect to the doctor,  
23 Mr. Thurschwell's recollection of the doctor's testimony is

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1 slightly different from my own; however, at the end of the  
2 day, that doesn't really matter. To accept the defense's  
3 argument is to suggest that any criminal defendant in any  
4 jurisdiction could subjectively complain of pain and that  
5 would forever shut down the proceedings anytime that occurred.  
6 That's simply an absurd reading or absurd rationale of the  
7 accused's right to be present.

8           It's been consistently the government's position that  
9 the accused can always voluntarily waive his right to be  
10 present. If he's not feeling well, if he had, you know, a bad  
11 night's sleep, whatever the reason -- and the government has  
12 never suggested that he doesn't have a valid medical  
13 condition. He does have pain. The neurologist did say that  
14 the description of his pain didn't match what -- what the  
15 neurologist was observing, but he's certainly had pain.

16           And the government is sympathetic to that, which is  
17 why the government has consistently been reasonable in the  
18 accommodations that were requested by the defense. At every  
19 opportunity, we've made accommodations, both in the camp, in  
20 Echo II, where he meets with his counsel, and in the  
21 commission itself in terms of scheduling and how that was run.  
22 The government has bent over backwards for the accused to  
23 afford him the opportunity to be here, if possible. However,

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1 if he doesn't feel well or he is in pain, the neurologist's  
2 testimony was clear; it's not doing him any harm to be here.

3 He can't just say, "I'm not feeling well, therefore  
4 I'm not waiving my presence voluntarily, but I'm not going to  
5 show up," which is the defense's position. That's an  
6 incredibly unreasonable position, Your Honor. And again, that  
7 would allow any accused to hold the process hostage by virtue  
8 of his subjective complaint.

9 Now, with respect to the 101 argument, Your Honor,  
10 101, as I'm sure the commission is aware, the other  
11 commissions -- this is an on -- has been an ongoing issue.  
12 The underlying issue or allegations of 101 are, number one,  
13 pure speculation; number two, it's a red herring argument,  
14 Your Honor. It's a red herring that has been rotting in the  
15 Guantanamo sun for months.

16 Now, I'm hopeful that we'll get to that argument  
17 today. I am not going to argue that motion in full, but  
18 realize that that has absolutely nothing to do with what we're  
19 talking about here. 101 is a speculative, tactical decision  
20 on the part of the greater defense organization. And  
21 understanding that they're doing their job -- I'm not  
22 suggesting that they're being unethical about it -- it's a  
23 tactical decision on their part to attack the system, whether

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1 there is evidence or not, whether multiple commissions have  
2 ruled on the issue or not. They're still raising it; they're  
3 still relying on it as being something that it's not, despite  
4 multiple rulings of multiple commissions. And I'll allow  
5 Lieutenant Commander Lincoln to flesh that out further if  
6 Your Honor desires.

7           With respect to the -- what we're really talking  
8 about, Your Honor, in terms of a continuance is the  
9 accused's -- or the defense's opportunity to be prepared to  
10 present, from a due process standpoint, or whatever derivative  
11 right the accused has to adequately prepared counsel. That's  
12 really what we're talking about, nothing else. Everything  
13 else is chaff.

14           Now, ignored by the defense, conveniently, was the  
15 fact that since 5 December, he was cleared to move to attorney  
16 meetings. Not until 9 January did the defense afford  
17 themselves of the opportunity to come visit their client. And  
18 that was 9 January when the request was put in; the actual  
19 scheduled visit was two weeks later. The request, which on  
20 its face purported to limit it to only medical information,  
21 the defense had no intention of preparing for the scheduled  
22 deposition, Your Honor, and they made that clear in that  
23 request. Defense had since August to prepare for this

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1 deposition. They had 99.5 percent, probably, of the discovery  
2 related to this in June or very early August. The only thing  
3 that has trickled in over -- since then are kind of ongoing  
4 government discovery obligations or redesignations that were  
5 requested by the defense of information that they already had.

6 Which brings me to the transcript issue and the  
7 references to the -- what we heard a couple of days ago from  
8 the defense complaining about not being able to show things to  
9 their client or leave things with their client. Your Honor,  
10 it's correct that the defense complained of that in November.  
11 But in the context of how it was complained about, they just  
12 said, "Well, we can't show it -- we can't send it to him, so  
13 we have to be there." They were cleared to be there and they  
14 were actually there, and the accused again didn't feel well;  
15 the government is sympathetic. The defense never requested,  
16 as far as anyone in the prosecution can determine, never  
17 requested that the transcripts be remarked in any way. There  
18 was not any such request.

19 Now, the defense did request, on a handful of  
20 documents that had been turned over in discovery, that those  
21 be remarked. Those -- the requests for that remarking did not  
22 occur prior to 14 January, as far as the government has been  
23 able to determine. So for the last three weeks, there has

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1 been ongoing discussion and efforts by the government to  
2 reclassify or remark what we could so that they could provide  
3 it to their -- their client or discuss it with their client.

4           Again, all of this is -- I'm addressing in response  
5 to what is essentially testimony from Mr. Thurschwell. But  
6 since the government did not have an opportunity to respond to  
7 the motion because it was filed late and, you know, new  
8 information is being provided to the commission, if I -- if we  
9 obtain other information, Your Honor, that contradicts with  
10 what I said, I apologize. But we -- in a search and in a  
11 polling of the prosecution team, we have e-mails dating back  
12 to, you know, the beginning of the year. Searching all of  
13 that, we could find nothing that prior to 14 January, the  
14 defense had requested to reclassify anything to use with their  
15 client.

16           Yes, they complained of it twice in November, but  
17 they never -- even since 14 January, never requested the  
18 transcript. And in terms of the entirety of the history of  
19 this case since the deposition, to my knowledge, Your Honor,  
20 the defense did not request that the -- that the deposition  
21 itself ever be remarked. They complained about it in a couple  
22 of different contexts, but they never requested that it be  
23 remarked.

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1           Certainly, had the government been aware that that  
2 was the holdup, that they -- that but for that, they would  
3 have sent it to their client and their client could have  
4 reviewed it and then we wouldn't be having this discussion,  
5 then we could have potentially solved that for them had they  
6 simply asked. They did not.

7           Now, the reason that they did not, Your Honor, is  
8 because, again, the -- the coordinated efforts were never to  
9 be ready for this -- this deposition. Leading up to the  
10 August deposition, whether it was bifurcated or not, the  
11 defense had ample opportunity, months to prepare with their  
12 client for the deposition, including a cross-examination  
13 portion.

14           And as Your Honor is aware, in most such  
15 circumstances, they would go right into the cross-examination  
16 after the direct. There would be no additional time to  
17 reloop, to review what had just happened in the commission.  
18 And that's true whether the accused waived -- voluntarily  
19 waived his presence or not, which he did in the second day of  
20 the commission -- of the deposition. The defense would be in  
21 the same position that -- they're in the same position now  
22 that they would have been in prior, yet they have had an  
23 additional six months to prepare.

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1           The Supreme Court, and this is briefed in -- more  
2 fully in AE 102F, Your Honor, the Supreme Court in 2003 in the  
3 case of Overton v. Bazzetta, 539 U.S. 126, made clear in the  
4 context of access to counsel that written communication is  
5 sufficient. The Supreme Court said it doesn't have to be  
6 ideal. Face-to-face interaction, while desirable and  
7 understandable, is not the standard, it's not required, it  
8 doesn't have to be ideal. Written communication is  
9 sufficient.

10           So the defense has had six months or more,  
11 notwithstanding the lead-up to the deposition in which they  
12 had ample time to prepare, but it has had six months or more  
13 to communicate with their client through a variety of methods.  
14 I -- I don't know how many total letters were passed back and  
15 forth, Your Honor, and I would request that if that matters to  
16 the commission, you can certainly request -- ask that question  
17 of defense counsel without going into specifics, but I would  
18 wager that it was well over 50 -- 50 communications -- 50  
19 written communications since then.

20           Even if AE 101 were a legitimate issue, which it is  
21 not, their concerns under that issue would have been resolved  
22 by just written communications with their client. And again,  
23 no requests for a reclassification to transmit things to their

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1 client were made, as far as we could tell, prior to  
2 14 January.

3           So the feet dragging is their job, Your Honor, I get  
4 it. I was a defense counsel for seven years, I have been a  
5 prosecutor for eight years. It is the defense's job when it  
6 is in their client's best interest to delay things, it is the  
7 government's job to try to move things forward, and it is the  
8 judge's job to try to figure out the fair outcome. I'm not  
9 suggesting that they are doing anything unethical, but this is  
10 a tactical effort by the defense, which is understandable.  
11 And again, the government has always said that the accused has  
12 a legitimate medical condition.

13           Now, the defense has accused, inferred, implied a  
14 number of times that this is a problem of our own creation;  
15 that we are the reason that he is in the hospital chair as  
16 opposed to a regular chair. Your Honor, and there is simply  
17 no evidence of that. In fact, the opposite is true. There is  
18 ample evidence, and the defense is well aware of it, that this  
19 has been a degenerative condition that the accused was  
20 diagnosed with long before he was in U.S. custody. Before he  
21 was in U.S. custody, he was told by surgeons in a different  
22 country that he was not a surgical candidate. The irony of  
23 that -- and this information is within the defense's

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1 possession, Your Honor. The irony of that, of course, is that  
2 since this became an emergent issue, he has been receiving  
3 outstanding medical care, ongoing medical care. And if the  
4 defense has an issue with that, they can certainly -- they  
5 have raised in the habeas context. I am quite certain at some  
6 point we will see a civil suit in Federal District Court for  
7 medical malpractice. All of that is a red herring, all of  
8 that is chaff in this context, Your Honor.

9 MJ [Col RUBIN]: Trial Counsel, if you could, the defense  
10 counsel provided a proposed way forward. What is the  
11 government's proposed way forward?

12 ATC [MR. SPENCER]: Your Honor, the government's proposed  
13 way forward is that we continue to -- if it is -- if all that  
14 the accused can take is the half days, the government does not  
15 object to continued half days as we have been doing.

16 When it comes to the deposition piece of it,  
17 technically under 702, the defense -- the accused does not  
18 have a right to be present under 702 for a deposition. We  
19 were obviously hoping to avoid that and we, the government --  
20 in the government's initial request asked that the accused be  
21 present. There has been a shift, as you may recall. It's  
22 kind of a flip of positions; maybe the government should be  
23 sitting on the left side. But early on, the defense was

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1 saying, well, he doesn't have to be there, and the government  
2 says, no, we really want him there, Your Honor. And  
3 eventually we came down to we really want him there, if  
4 nothing else, for the in-court identification which he was  
5 there for. But it was the government's position from the very  
6 beginning that the accused be present for the deposition to  
7 avoid any potential future issues, which I am sure the defense  
8 will raise in a confrontation context.

9 MJ [Col RUBIN]: What's the government's position -- and I  
10 think all sides would agree with me that taking of the  
11 deposition, or at this point completing of the deposition, is  
12 different than ultimate -- ultimate admissibility of the  
13 deposition?

14 ATC [MR. SPENCER]: Yes, sir, that's absolutely true. As  
15 we have argued many times, there are multiple additional steps  
16 that the government will have to go through to demonstrate  
17 that deposition's admissibility.

18 MJ [Col RUBIN]: What is the government's proposed way  
19 forward regarding the deposition? So if the commission denies  
20 the continuance and proceeds forward, is the government's  
21 intent to essentially go eight hours per day or to have half  
22 days?

23 ATC [MR. SPENCER]: Your Honor, with -- well, it would

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1 depend on the commission's rulings. Obviously there are a  
2 couple of other outstanding issues. If the commission is  
3 ready to proceed to the deposition as in your capacity as the  
4 deposition officer and defer those rulings, that would change  
5 my answer slightly. However, I think we could certainly go  
6 half days for the deposition. I don't know that the  
7 cross-examination will be, you know, three or four full days  
8 or half days spread out over six or eight days.

9 MJ [Col RUBIN]: So at least right now, the government,  
10 you don't have a definitive way forward? It depends on if the  
11 deposition were to go?

12 ATC [MR. SPENCER]: Your Honor, the definitive way forward  
13 is, at least for the remainder of the court sessions, half  
14 days. From a deposition standpoint, we could do half days,  
15 and then if it -- if it seems, as the commission alluded to a  
16 couple of days ago, if doing it, you know, two hours every  
17 other day is going to take out until April, then obviously the  
18 government would reassess its position.

19 But as I stated, even if the accused weren't here,  
20 the deposition could proceed without him being present because  
21 702 -- R.M.C. 702 does not afford the accused a right to be  
22 present for the deposition. So the government has tried to  
23 remain flexible, Your Honor, and tried to accommodate the

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1 accused whenever possible.

2 MJ [Col RUBIN]: Is the government requesting a  
3 modification to the deposition conduct order, which I believe  
4 has language to the effect that the accused shall be present?

5 ATC [MR. SPENCER]: Yes, sir. The -- I believe it's 090I,  
6 Your Honor. As I stand here, I don't know that the government  
7 requires that at this stage. To keep the record consistent,  
8 were the government to say this portion of the deposition  
9 will -- the government would like to conduct whether the  
10 accused is present or not, then that would actually require a  
11 modification of 090I, I believe it's paragraph 6.b.,  
12 Your Honor, in response to our request at the time that the  
13 accused be present, the commission ordered it -- ordered his  
14 presence, unless he voluntarily waives.

15 Now, coming back to my earlier point, it's the  
16 government's position that not feeling well and therefore not  
17 being here is a voluntary waiver. So from that standpoint, a  
18 modification of that order isn't necessarily required. Were  
19 the commission to rule against the government on the issue of  
20 what equals a voluntary waiver, then we would have to  
21 reassess. But that's been our consistent position,  
22 Your Honor, and it's consistent with what the other  
23 commissions do.

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1           As you know, when 9/11 defendants don't feel well,  
2 they -- the SJA then comes on the stand and relays what they  
3 said, there is a written waiver, and the proceedings go  
4 forward, just like any other criminal jurisdiction anywhere in  
5 the world, Your Honor.

6           MJ [Col RUBIN]: But that requires a written waiver.

7           ATC [MR. SPENCER]: It would require -- yes, sir, it would  
8 require a written waiver. But the defense has made clear in  
9 this instance that any such written waiver would -- would  
10 claim or exclude or purport to exclude voluntariness as a  
11 piece of it.

12           As we have said, the defense -- if the accused is  
13 cleared to be in court and participate medically, which he is,  
14 his choice not to come because he doesn't feel well, because  
15 he is in pain, which we believe he is in pain, that is a  
16 voluntary choice, Your Honor. That is a voluntary choice to  
17 absent himself. And R.M.C. 804, as he has probably heard in  
18 excess of 50 times now, says he can do that, he can  
19 voluntarily absent himself, but that doesn't delay the  
20 proceedings and doesn't stop us from going forward.

21           MJ [Col RUBIN]: How would the commission know if that's  
22 the case, whether it's pain or something different? For  
23 example, let's say he fell and reinjured himself.

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1           ATC [MR. SPENCER]: Yes, sir. And that's what I  
2 understood our colloquy at the very end of yesterday's session  
3 to mean. And it's a valid concern. Under 099I, Your Honor,  
4 we are required to apprise the court of any significant change  
5 in the accused's medical condition. So certainly if he were  
6 to have a fall or to have some significant change in his  
7 underlying medical condition that impacts his ability to be  
8 here, then in that circumstance I presume that's what the  
9 commission was referring to when you said, I'll need to hear  
10 from the SMO, I'll need to hear from the SJA.

11           That's a perfectly reasonable scenario and we are  
12 required under 099I to provide you with that information, you  
13 know, not necessarily even -- so if that were to happen  
14 tonight, Your Honor, our reading of 099I means we need to  
15 notify the commission immediately that this is what happened.  
16 And we have complied with 099I since it was issued.

17           The -- in the -- on the other side of the coin, short  
18 of a change in the accused's medical condition, the government  
19 proposes that the commission do what the other commissions do,  
20 which is hear from the SJA; you know, have him sign -- provide  
21 a form similar to the many ones that he has been provided by  
22 his counsel that he signed waiving his presence. The SJA  
23 could provide him with that; the SJA could get on the stand

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1 and testify, just as what happens in the other commissions,  
2 Your Honor.

3           There's no question that the accused is fully aware  
4 of his rights to be present. He's been advised of it by this  
5 commission, by two military judges, and by his counsel  
6 probably over a hundred times at this point. The government  
7 is asking for a ruling on whether, absent a change in his  
8 medical condition, consistent with the doctor's testimony  
9 where he is cleared to be here, that if he chooses to come --  
10 chooses not to come, that that is a voluntary waiver,  
11 Your Honor. And, of course, we will meet the requirements of  
12 the voluntary waiver, just as we always have.

13           Your Honor, with respect to the request by the  
14 defense that the -- this commission somehow poll the Executive  
15 Branch to find out whether they -- what they really meant when  
16 they negotiated in good faith with Mr. al Darbi years ago,  
17 whether -- which was ratified by a military commission -- is  
18 an amazing request, Your Honor, to be fair. The suggestion  
19 that the commission even has the authority to override that is  
20 even more amazing, and certainly with no legal basis of which  
21 I am aware.

22           MJ [Col RUBIN]: Trial Counsel, from your perspective,  
23 your team's perspective, are you aware of any information that

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1 would lead to a conclusion or belief that Mr. al Darbi will  
2 not be released on the date set forth in his pretrial  
3 agreement?

4 ATC [MR. SPENCER]: Your Honor, here's what I can say to  
5 that. From our perspective, from the U.S. Government's  
6 perspective, we have done everything consistent with the PTA  
7 to achieve that result. As you know, this is a diplomatic  
8 arrangement requiring a foreign country to take action. I  
9 can't say whether -- I can't say whether what Saudi Arabia is  
10 required to do may not ultimately -- Saudi Arabia, for  
11 example, could say, well, we're changing our mind from the  
12 diplomatic notes that have been provided to the defense.

13 MJ [Col RUBIN]: Is the government aware of an executive  
14 order that was recently promulgated -- it may not be directly  
15 on point, I believe it was within the last week -- basically  
16 words to the effect that the United States Government will not  
17 prevent transfer ----

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

19 MJ [Col RUBIN]: ---- based on a previous court -- you  
20 know, a court agreement?

21 ATC [MR. SPENCER]: Correct. Your Honor, our reading of  
22 that executive order -- and when that executive order came  
23 out, it was useful, and I'm sure the defense will explore this

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1 line of questioning with Mr. al Darbi -- we were encouraged by  
2 it because there was some concern on Mr. al Darbi's part that,  
3 you know, a decision of a previous president might not be  
4 honored by the United States Government. And we had insisted  
5 all along that we were -- firmly believed that it would, for  
6 obvious reasons. To me, that executive order ratified our  
7 faith that the U.S. Government is standing behind its  
8 commitment made in good faith as part of the pretrial  
9 agreement.

10 MJ [Col RUBIN]: So to clarify the question, the  
11 government has -- you, the prosecution team, you have no  
12 independent evidence right now to conclude that Mr. al Darbi  
13 will not be transferred?

14 ATC [MR. SPENCER]: Sir, what I have only is speculation,  
15 and I can't go into it beyond that because it involves  
16 diplomatic discussions.

17 But what I can say is that the U.S. Government has  
18 fully upheld our end of the pretrial agreement, and we have --  
19 we do not have control or ability to affect, you know, a  
20 foreign sovereign's decisions. We are hopeful that that will  
21 all be worked out in a very short period of time. Beyond  
22 that, what I have is speculation, Your Honor.

23 MJ [Col RUBIN]: Understood.

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1           ATC [MR. SPENCER]: Your Honor, I believe I've hit the  
2 points I wished to make. Certainly if the commission has  
3 additional questions ----

4           MJ [Col RUBIN]: Just one question. Understanding and  
5 agreeing that admissibility is separate and apart from  
6 conducting the deposition, if everything raised by the defense  
7 would -- I guess have you considered the impact of all of  
8 these items? If the commission denies the continuance request  
9 and the deposition is concluded, conducted and concluded, have  
10 you considered -- has the government considered the impact of  
11 all these issues, which I believe would be litigated anew if  
12 and when the government moves to admit that deposition?

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

14          MJ [Col RUBIN]: What I am asking is: How much risk is  
15 the government willing to take, and have you considered that?

16          ATC [MR. SPENCER]: Your Honor, the government has; we  
17 have as a prosecution team, from a tactical standpoint. I  
18 believe that it's fair to say that were the commission now to  
19 rule that we're now to deny the continuance, that the basis  
20 for not being prepared is decided.

21                 In other words, the defense -- well, or potentially,  
22 from the government's perspective, the court is in a bit of  
23 a Hob- -- is facing a bit of a Hobson's choice: Proceed where

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1 the defense is saying they're not prepared, despite them  
2 having had six months to prepare, more than that; or, you  
3 know, bake into the appellate record potential IAC on the back  
4 end, because the defense chose tactically to only have  
5 discussions about medical issues instead of the underlying  
6 facts about the cross-examination or, conversely, whether  
7 the -- the whole presence issue. So the government  
8 appreciates the conundrum.

9           It's the government's position that, should the  
10 continuance be denied, that that settles the question of  
11 whether the accused has adequately prepared counsel.  
12 Your Honor, as we've seen, you know, Mr. Thurschwell is an  
13 outstanding advocate. He has a large team of highly qualified  
14 attorneys who have had all of this information, in terms of  
15 the cross-examination piece of it and the testimony of  
16 Mr. Darbi, since June, mostly, and a little bit in early  
17 August. That's more than enough time for them to prepare.  
18 They would not get the luxury that they've been afforded; in  
19 any other setting, they would be rolling right into  
20 cross-examination.

21           And, you know, as Mr. Thurschwell so eloquently  
22 stated yesterday, you know, he intends to explore -- in his  
23 argument on the psychologist, he intends to explore a long

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1 line of questioning on lots of different issues with  
2 Mr. Darbi. He's clearly prepared to do that. That doesn't  
3 necessarily, even at this point, require any additional  
4 conversations with his client.

5           So from the government's -- will there be other  
6 issues with respect to admissibility in the future in light of  
7 702(d), 702(d)'s discussion stating that the accused is not  
8 entitled to be present? The government anticipates, if he's  
9 not present, litigating that issue at some point in the  
10 future. I'm certain the defense will claim that his  
11 confrontation rights, from wherever they derive, have not  
12 been -- have not been afforded him and therefore the  
13 deposition won't be admissible. I don't believe I'm putting  
14 words in the defense's mouth when I'm stating that.

15           You know, will the availability of the witness at the  
16 time of trial be litigated? Absolutely it will. So there is  
17 inherent risk in attempting to do what we're doing. But the  
18 reason that we're trying to preserve his testimony is because  
19 we believe it is likely, and certainly within the realm of  
20 real possibility, that Mr. Darbi will be unavailable for  
21 trial. That prompted the government's desire to preserve his  
22 testimony because of -- you know, we've stated this a couple  
23 of times -- all of which was prompted by a shift in defense

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1 tactics for them to allege, after two years of being on the  
2 merits, that all of a sudden now we have the wrong guy.

3 So that's why Mr. Darbi became a very important  
4 witness for us. Is he our star witness, as Mr. Thurschwell  
5 says? That's perhaps an overstatement, but maybe not an  
6 unfair one. But certainly he is an important witness given  
7 the shift in defense tactics.

8 MJ [Col RUBIN]: All right. Thank you, Trial Counsel.

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

10 MJ [Col RUBIN]: No further questions.

11 Mr. Thurschwell, I'm going to give you the last word  
12 on this.

13 ADC [MR. THURSCHWELL]: There are numerous points that I  
14 need to respond to, Judge. We are covering a lot of territory  
15 and I'm going to try to keep it short, but I may fail to keep  
16 it as short as I'd prefer.

17 I asked, given the current political situation and  
18 various -- the new EO and so on, for the government to produce  
19 a declaration by the SECDEF to the effect that they will, in  
20 fact, be transferring Mr. al Darbi on February 20th, in order  
21 to clarify the basis for the need for all of this, to put the  
22 stress on Mr. -- primarily put the medical stress on  
23 Mr. Al-Tamir that going forward, plowing through would, but

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1 also the orderly process of this commission, according to its  
2 original schedule with the opportunity to actually litigate  
3 issues as they arise. We should need to know that that is  
4 actually going to happen.

5           What I heard, Judge, at the end of the day, two  
6 things. Bottom line, all I have is speculation about whether  
7 this is -- this transfer is actually going to happen. Judge,  
8 the prosecution is here as the representative of the United  
9 States Government. They should be in a position -- I would  
10 like to see a declaration by the SECDEF, who is the one who is  
11 authorized to make it. But at a bare minimum, the government  
12 here represent -- the prosecution team represents the United  
13 States Government. It's their client, and if their client has  
14 a position that's relevant and necessary for this commission  
15 to be aware of in order to proceed, they ought to be in a  
16 position to provide it. And the fact that they can't, I  
17 think, speaks volumes.

18           They have said that we have done everything  
19 consistent with the plea agreement in order to make the  
20 February 25th transfer happen. Let me -- excuse me one  
21 moment. I don't have the cite in front of me, but if you look  
22 at the language in the PTA, and I can find it for you later,  
23 the promised transfer date is, I quote, on or about February

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1 20th. It's not even a date certain in the strict sense.

2           The delay we are requesting is not extraordinary, and  
3 the language -- I think it would be fully consistent under  
4 these circumstances with the PTA itself to transfer him six to  
5 eight weeks later if that's what it turns out to be. And I  
6 can't promise anything because Mr. Al-Tamir's medical  
7 condition is unstable. But I will say that -- and I will come  
8 back to this, you know, our efforts to date have been, again,  
9 entirely good faith. And in particular, his efforts to be  
10 here and assist in the forward movement of this proceeding  
11 have been absolutely clear. And so -- and I will come back to  
12 that when I talk about some of the government's other  
13 suggestions about what's wrong with the current way forward.

14           So "on or about February 20th" is good enough under  
15 the pretrial agreement. They say we have done everything  
16 consistent with the agreement. Well, are they committing to  
17 the -- are they committing -- they clearly are not committing  
18 the SECDEF to transferring because we have no guarantee now at  
19 all that he is going to be transferred.

20           And I will leave aside the -- you know, the sudden  
21 changes of policy, particularly of a political nature, that  
22 are made by the President himself by informal means suddenly  
23 at the last second. I won't address those, but that's hanging

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1 out there, as long as -- at least as long as we don't have a  
2 declaration from the authorized official that this is going to  
3 happen.

4           But beyond that "on or about February 20th," has the  
5 government made any effort to contact/discuss via the State  
6 Department with Saudi Arabia whether a two-month delay would  
7 be acceptable in order to accommodate the constitutional  
8 proceedings that are going on in Guantanamo right now? I  
9 haven't heard that. Maybe they have, but I haven't heard them  
10 say that. All we have is speculation.

11           And so as a minimum baseline, I think that's a reason  
12 enough to say, we can get done what we can get done in the  
13 scheduled time we have for this scheduled session according to  
14 our proposed way forward; and then anything we don't get done,  
15 and that would specifically, for all the reasons I have said,  
16 should include not getting the deposition done, can happen at  
17 the next scheduled session, until we know that this is going  
18 to happen -- that there is an actual reason to change this  
19 commission's set schedule.

20           Okay. I heard the government -- let me -- let me  
21 take a quick look through my notes, Judge, for the moment.  
22 Let me -- let me address -- try to address the government's  
23 points one by one in order so I can keep them organized.

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1           The government began by saying our position is that  
2 any criminal defendant in any criminal proceeding could  
3 subjectively complain and shut down the proceedings. Judge,  
4 our position is based on the only evidence, expert evidence in  
5 front of the commission now, which is the neurosurgeon's  
6 testimony. And I have tried to link our argument to that --  
7 his testimony.

8           Our argument that Mr. Al-Tamir's subjective  
9 expressions of pain are the only legitimate basis, medically  
10 and legally, for determining how far he can go is not based on  
11 some broad thesis. I was -- I obtained -- I based that on the  
12 testimony of a surgical expert testifying about the advice he  
13 would -- medical advice he would give a patient in a post --  
14 immediate post-operative setting about the limits on their  
15 activity. That's what we are talking about.

16           The fact that 9/11 defendants -- that a judge in the  
17 9/11 case says that not feeling well is not good enough and  
18 constitutes a voluntary waiver, well, Judge, the answer is the  
19 9/11 defendants haven't had four emergency surgeries in the  
20 past four months, and the testimony from the neurosurgeon  
21 wasn't addressing their situation, and my argument wasn't  
22 addressing their situation. So let's put that aside, first of  
23 all.

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1           Second of all, AE 101. I am more than happy to agree  
2 with the government's contention that AE 101 is a fish that's  
3 rotting in the Guantanamo sun right now. I won't call it a  
4 red herring; it's some other kind of fish and it stinks and  
5 it's there and it has to be resolved. We are attempting to  
6 resolve it in an orderly fashion and have been since last  
7 July.

8           The government's characterization of it as a  
9 speculative tactical decision on the part of the greater  
10 defense organization, that is the Military Commissions Defense  
11 Organization, is a clear swipe at the leadership of that  
12 organization, Brigadier General Baker, who, based on his  
13 review of the evidence, and fully, fully within his designated  
14 role under the Regulation for Trial by Military Commissions,  
15 issued certain cautious advice that is of a public nature that  
16 is unclassified in the form of the e-mail that's attached to  
17 AE 101 about this.

18           I don't think we need to impugn General Baker's  
19 integrity or the suggestion -- he represents no party. When  
20 he issued that e-mail, he was not representing a party, he is  
21 not entitled to, he doesn't represent a defendant under the  
22 regulation. He made that ruling based on his best judgment of  
23 his statutory role and regulatory role. So let's leave

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1 Brigadier General Baker and this notion of a conspiracy by --  
2 on the part of defense counsel generally to stop things. We  
3 are not -- the al Nashiri team did what it did. We are not  
4 the al Nashiri team. We are doing what we need to do.

5           And the main point about AE 101 which the government  
6 did not address is that it is -- it is a more than legitimate  
7 basis for us -- if we could have met with Mr. Al-Tamir, which  
8 we could not until very recently, for why we could not have  
9 discussed the things we need to discuss in connection with the  
10 deposition. Okay. Now, the government says that we have had  
11 since August to prepare for this deposition. They say that --  
12 and let's start with that. And they suggest that we have been  
13 twiddling our thumbs somehow or, you know, we have been using  
14 this -- these events tactically as a way of preparing.

15           Judge, you have in front of you exhaustive AE 505 --  
16 M.C.R.E. -- excuse me, M.C.R.E. 505(g) submissions,  
17 M.C.R.E. 505(h) arguments, ex parte submissions about the work  
18 we have been doing. We have not been sleeping on our -- on  
19 the requirements of preparing for this massive deposition that  
20 is based on a thousands-and-thousands-of-page record. I'm not  
21 going to go into how long they held Mr. al Darbi and all the  
22 interviews they did with him, but we have hardly been  
23 twiddling our thumbs.

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1           The problem is a defendant is entitled to consult  
2 with his attorney about a government witness who the  
3 government believes is key to their case who testifies  
4 directly based on that witness' claimed knowledge of the  
5 activities and observed activities of our client. We have to  
6 be able to talk to our client about that, about that  
7 testimony. We have been unable to do so. That is what we're  
8 here talking about. We have not been sleeping on any other  
9 rights -- or, I'm sorry, any other obligations to execute our  
10 duties as defense counsel.

11           Now, let me come back, and the -- also mentioned that  
12 as of December 5th, we could have been meeting with the  
13 client. I addressed this, and I'm not going to go into it in  
14 detail. December 5th, we get this notice from JTF saying, in  
15 an e-mail, "Hey, you can come meet with your client," right?

16           And we're like, "What? That's not what we've been  
17 hearing from him." He's in a subjective -- having subjective  
18 levels of pain and symptoms that -- you know, we're shocked.  
19 But -- and so no medical opinion at all that that can be --  
20 that that can take place.

21           Eventually, shortly thereafter, the government files  
22 a -- their notice, and I don't have the -- it's in the AE 099I  
23 sequence, in which the government says, "Hey, you can see your

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1 client, come on down," and doesn't attach a medical  
2 declaration to that effect, okay? So that's -- in the  
3 meantime, we are getting these letters from our client that we  
4 subsequently explain and attach in AE 099AA why we are deeply  
5 concerned. There's no medical opinion here. This looks  
6 driven by the commission's decision on December 5th, you know,  
7 saying, "I'm taking into account an inability of the defense  
8 to meet in my further rulings," and -- but mostly we're  
9 getting these -- this information from the client that says,  
10 you know, "I'm in pain. I'm not ready to meet."

11           And so, nevertheless, we begin the process, to the  
12 extent we can, of -- of going to meet with him. But I -- I  
13 need to emphasize again, because I want to stick with the  
14 testimony in front of the commission and -- and not -- try not  
15 to rely on speculation, okay, to quote the government. The  
16 neurosurgeon made it clear that, even when we did get a  
17 declaration on December 15th, I think was the date or  
18 thereabouts, we finally received the declaration from the SMO,  
19 I think it was -- I can't remember if it was him or herself --  
20 that he was medically cleared for transport to attorney-client  
21 meetings. We now know, based on the expert neurosurgeon's  
22 testimony, that all that meant was that he was not going to be  
23 harmed physically. Finally, we had a medical testimony that

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1 moved -- simply moving him to an attorney-client meeting  
2 wasn't going to harm him physically.

3           That testimony did not mean, as the neurosurgeon  
4 testified, that he was going to be in anything but extreme  
5 pain, or not; be able to participate and pay attention to his  
6 attorneys in that attorney-client meeting, or not; and so  
7 the -- and the subjective expressions of his symptoms, which  
8 we tried to attach all of the relevant ones in that relevant  
9 time period to AE 099AA, because that's all we had, the  
10 subjective symptoms were making it clear that this was -- this  
11 was not going to be productive. Nevertheless, we moved  
12 forward. So I just -- and finally did get to see him.

13           With respect to his ability to meet with clients -- I  
14 mean, meet with his attorneys, I think it is notable that,  
15 notwithstanding that notice on December 5th originally and  
16 then the subsequent SMO declaration ten days later, that  
17 Mr. Al-Tamir was not actually moved from the hospital facility  
18 where he was then held until January 16th. And so whatever  
19 the medical determination about where he could safely be held  
20 with the appropriate accommodations, I mean, that was not --  
21 and they're saying we can -- in December 5th, they're saying,  
22 "Oh, yeah, he's good to go, go meet with him." They -- the  
23 determination of where they were willing to let him actually

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1 be out of the hospital didn't occur until January 16th. And  
2 that is the background of our recent efforts to meet him as  
3 soon as we could. Okay. I don't want to belabor that. I  
4 just -- it needs to be clear that we have made every effort to  
5 meet with him when he was capable of actually meeting with us,  
6 at least to talk about his medical condition.

7           Let me now come -- this -- I found this argument  
8 astonishing. The government essentially does not deny that we  
9 pointed out in pleadings -- at least two pleadings in November  
10 that there is a problem; that we can't even send the most  
11 relevant material to our client, who we're not allowed to meet  
12 with, to him so that he can at least begin to try to prepare  
13 because of their marking of the documents. Two notices.  
14 Judge. You noticed it in the commission's ruling in AE 099Y,  
15 which was -- I don't have the date, but I think it was in  
16 December, the commission pointed that out to them that we have  
17 not been able to meet because of their markings.

18           So did we directly request that they do that? My  
19 recollection is that there was some oral discussion of it. I  
20 don't -- we couldn't find an e-mail either. We looked. But  
21 there's no question that we were -- they were -- we raised it,  
22 they were on notice. But far more important -- one moment,  
23 Judge.

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1 [Pause.]

2 ADC [MR. THURSCHELL]: DoD Instruction 5200.01, Volume 4,  
3 dated February 24th, 2012, is the version I have, at  
4 paragraph 4 -- I'm going to say 2 -- I'm doing this on the  
5 fly, Judge, indulge me. It's on -- it's on, I'm just going to  
6 say, paragraph 6 on page 16 of enclosure 3, paragraph 2.d.(2),  
7 access to FOUO information, and I will just talk about, for  
8 these purposes, the deposition transcripts, direct testimony,  
9 Mr. Al-Tamir's case and Mr. al Nashiri's case.

10 (2) says, "The final responsibility for determining  
11 whether an individual has a valid need for access to  
12 information designated as FOUO rests with the individual who  
13 has authorized possession, knowledge, or control of the  
14 information, not with the prospective recipient."

15 Judge, we're not in a position -- you know, this is  
16 their job. Their job is to mark infor- -- they know what it's  
17 for. It's their job. They were on notice. The notion that,  
18 by our failure to notify them by an e-mail, when they've been  
19 notified by other means that were sufficient for the  
20 commission to take note of the problem, you know, as of  
21 November, does not explain the fact that we still have not  
22 received them.

23 The government mentions that they now have been

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1 making ongoing efforts to remark those documents. That's  
2 great. I don't know, but I'm not sure why the deposition  
3 wasn't the very first thing they, now that they're trying,  
4 that they did; but we haven't gotten it yet.

5           Okay. So -- and -- two last points. The first is  
6 this -- the sufficiency in a kind of last-ditch, I'll call it,  
7 effort to try to explain how we actually could have prepared  
8 if we really were trying to prepare, the government points to  
9 the fact that we have been corresponding with our client, and  
10 they cite to Overton. Judge, for Overton, I don't -- and I  
11 don't recall the exact facts, but I will be surprised if it  
12 dealt with a situation comparable to this in terms of the need  
13 and the specific issues that were -- that were ongoing,  
14 ongoing production of discovery by the government over this  
15 period; you know, extremely important government witness;  
16 right to confrontation at issue in this -- in this possibility  
17 of us -- I don't think it applies.

18           But even if argument -- I mean, if it did, we  
19 still -- what would we be writing to him about? We can't even  
20 send him the transcript because of this other problem. So the  
21 notion that correspondence is a substitute is -- is absurd.  
22 It's absurd.

23           I think I addressed the question of whether a

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1 voluntary waiver -- you know, not feeling good is a  
2 voluntary -- enough for a voluntary waiver. It's not, I mean,  
3 and we -- we -- you know, that's perfectly clear from the  
4 neurosurgeon's testimony and from, I think, the order, the  
5 basic idea that this is about -- not about medical clearance,  
6 you know, in the medical sense. But I want to -- I want to --  
7 the government subjected -- at the request of the commission,  
8 the government offered that it could inform the government  
9 through these ongoing 099I notices about the medical condition  
10 of the defendant, and that should be good enough, as opposed  
11 to his reports of his own symptoms.

12 I mean, the answer is, first, they can't -- I know  
13 they tried to feel his pain, and we appreciate that, but they  
14 don't. And so as the -- as the neurosurgeon's testimony made  
15 clear, it's reliant on the patient's good faith description --  
16 no question that these are all good faith from Mr. Al-Tamir --  
17 description of his level of pain that you make those decisions  
18 on.

19 And finally, all we have gotten from the government  
20 so far in the 099I series are declarations that include the  
21 statement that I discussed with the neurosurgeon that he is  
22 medically cleared for transport. Now, maybe they will start  
23 modifying that to make another decision, but -- make some

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1 other language, but that -- those 099I notices, pursuant to  
2 the neurosurgeon's testimony, do not answer the question of  
3 whether he is actually medically fit, as a legal matter, to  
4 participate in what he needs to participate in his defense.  
5 They are not adequate for the commission to make any decisions  
6 like that.

7           Last -- last point, Judge, and then I will ask to  
8 consult with my team just to see if I missed anything. The  
9 government now raises -- urges you to -- to essentially agree  
10 that this deposition can proceed in the absence of the -- of  
11 Mr. Al-Tamir. And two points about that.

12           One is the government noticed that they would be  
13 filing a motion requesting that. That is an enormously  
14 questionable procedure. We absolutely object to a decision  
15 based on their oral request here without a full opportunity to  
16 respond in writing to that suggestion. If they want to file  
17 the motion that they said, they can. If they don't, we  
18 request a full opportunity in writing to respond to that  
19 request. That's point one.

20           Point two is, okay, if the judge is -- if you are  
21 inclined to entertain that possibility, I think it would make  
22 sense -- I mean, we can litigate that. We are still here. We  
23 are here this week. We will do our best to respond in

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1 whatever way we can, but -- but we would ask for a reasonable  
2 amount of time to brief it.

3           But it -- the -- the upshot of this will be, I think,  
4 that it is futile to hold a deposition outside the presence of  
5 the defendant. I'm not going to argue, you know, that the  
6 language that they put in the discussion section there, which  
7 is not even legally operative about the defendant not being  
8 present -- I'm not going to argue the fact that our current  
9 order states that he will be present, or that the government  
10 itself, clearly worrying at that time about the confrontation  
11 clause issues, asked that you insert in that order that the  
12 defense be present for the deposition. Let's leave that aside  
13 for the argument we end up having.

14           I think at the end of the day it's going to prove to  
15 be absolutely futile, the notion that we can litigate their  
16 right to hold it in front of him and we will talk about the  
17 admissibility of it later.

18           I mean, this is -- we will certainly include an  
19 argument that -- it is -- I mean, this will never be admitted  
20 and this case will be -- if this is their lead witness, this  
21 case will be overturned on appeal if they go -- you know, if  
22 you, you know, go forward with a trial deposition of the only  
23 witness that they say is a key witness in the absence of the

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1 defendant, that they intend to use as a trial deposition and  
2 to ----

3           So I ask for the opportunity, A, to brief that; and  
4 B, you know, suggest strongly to the commission that it's  
5 going to be futile down the line and that -- saying let's just  
6 try it and see what happens. The impact on Mr. Al-Tamir's  
7 health, the impact on the orderly proceedings that we have  
8 been arguing should be respected so far in the schedule and  
9 could be accommodated reasonably by the government, given  
10 their own plea agreement, on or about February 20th, it simply  
11 makes no sense to try to push this thing forward now.

12           And that's -- let me have one moment to consult and  
13 then I think I am done, Judge.

14           MJ [Col RUBIN]: Yes.

15           ADC [MR. THURSCHELL]: Judge, if you have no questions, I  
16 will stop talking.

17           MJ [Col RUBIN]: I have no questions. Thank you, sir.

18           ATC [MR. SPENCER]: Your Honor, may I be heard on just a  
19 couple of quick points?

20           MJ [Col RUBIN]: Yes. I am going to give you about two  
21 minutes.

22           ATC [MR. SPENCER]: Your Honor, the defense grossly  
23 mischaracterizes what I said about General Baker. I did not

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1 impugn his integrity. In fact, what I said was that it was a  
2 tactical choice; and I acknowledge the defense, that's the  
3 type of tactical choices the defense should be doing. So if  
4 anything, I applauded his efforts. The defense has done an  
5 excellent job in their representation of the accused.

6 MJ [Col RUBIN]: The commission did not take this as a  
7 personal or professional attack involving the general.

8 ATC [MR. SPENCER]: Thank you, sir.

9 Additionally, Your Honor, the defense  
10 mischaracterized what I said about -- in the context of the  
11 diplomatic discussions that are ongoing, bilateral  
12 international discussions. It might surprise the defense,  
13 but, you know, Mr. Spencer, the prosecutor, is not part of  
14 State Department discussions with Saudi diplomats. So I can  
15 speculate as to what those discussions are. What I can say is  
16 that we have upheld our end of the bargain from the  
17 U.S. Government's perspective.

18 I do agree with Mr. Thurschwell that the "on or about  
19 20 February" date is an on or about and there is some  
20 flexibility from the government's -- the Executive's ability  
21 to transfer him and Saudi's ability to pick him up; and, of  
22 course, that's because of the logistics involved in that  
23 transfer. That is irrelevant to the question of whether the

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1 judge should move, the commission should move forward. It is  
2 irrelevant to the question of whether the defense is prepared,  
3 and that's again in the context of a continuance request.  
4 That's what we are talking about, is are they prepared.

5           Finally, Judge, I would say with respect to their --  
6 their suspect -- or suspicion of the lack of information being  
7 provided by the -- by the doctors in the December time frame,  
8 the defense itself actually submitted what I believe is  
9 appellate -- or Exhibit 11 to AE 099AA, a letter from their  
10 client on 6 December talking about how the doctor had cleared  
11 him medically to meet with them. So they were well aware that  
12 this was a medical decision, based on consultations with the  
13 surgeon; the accused himself talks about the surgeon being  
14 present.

15           Now, it's clear from Exhibit 11 of 099A that the  
16 accused didn't like that decision and was arguing with them  
17 about that decision, but clearly the defense was aware. So at  
18 that point when the judge did -- when the commission did  
19 reference their only ability to use the deposition in the  
20 presence of their client, based on the information that the  
21 government had been provided, we were hopeful that they would  
22 meet with their client that month because they had ample  
23 opportunity to do so.

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1           Had the defense said, no, we can't, we need this to  
2 be remarked, then the government would have gotten on that  
3 immediately. And the defense did not.

4           Thank you, sir.

5           MJ [Col RUBIN]: Mr. Thurschwell, any additional argument?

6           ADC [MR. THURSCHELL]: Judge, we believe it's highly  
7 relevant to your decision about the continuance of the  
8 deposition whether this transfer is going to happen and when  
9 it is going to happen. The government, who I will refer to as  
10 the government, as we always do, is the government. They are  
11 the lawyers for the United States of America. It is the  
12 United States of America in whose hands and in whose official  
13 hands lies the decision about whether and when that transfer  
14 will happen.

15           If they can't tell you, nobody can. And if nobody  
16 can, there is no reason to change the -- the -- the schedule  
17 that this court has set and is consistent with Mr. Al-Tamir's  
18 constitutional rights, statutory rights, and medical needs.

19           MJ [Col RUBIN]: Thank you. Counsel, I'm going to extend  
20 today's session just a little bit. I don't anticipate a  
21 lengthy session when we go back on the record. I do note  
22 we're getting close to prayer time. I would like to take a  
23 recess until 1300. If the defense believes that it would be

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1 helpful to the accused to return to the pod, lie down, we  
2 could go later. If not, I propose 1300.

3 ADC [MR. THURSCHELL]: Can I ask what you anticipate  
4 happening at 1300 and how long you anticipate it going on?

5 MJ [Col RUBIN]: I anticipate being on the record probably  
6 less than ten minutes.

7 ADC [MR. THURSCHELL]: Okay. Judge, if we can consult  
8 with our client, that will be helpful.

9 MJ [Col RUBIN]: Yes.

10 [Pause.]

11 ADC [MR. THURSCHELL]: Judge, if I can inquire, because  
12 it is relevant. We're talking to Mr. Al-Tamir. We don't have  
13 a definite answer yet, but I think it's relevant. If we are  
14 going to be doing -- you anticipate argument when we return or  
15 simply -- it would be one thing; or just announcing rulings,  
16 that would be another.

17 MJ [Col RUBIN]: What I anticipate right now is announcing  
18 a ruling, and that's it for the rest of the day. No more  
19 argument.

20 DC [CDR COOPER]: Your Honor?

21 MJ [Col RUBIN]: Yes.

22 DC [CDR COOPER]: Mr. Al-Tamir is at his breaking point,  
23 but he has said that he will go back, lie down, and come back

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1 in if it's for a brief period of time on the record at 1300.

2 MJ [Col RUBIN]: 1300.

3 DC [CDR COOPER]: Yes, sir.

4 MJ [Col RUBIN]: Very well. Again, I don't anticipate --  
5 it will be relatively short.

6 DC [CDR COOPER]: Yes, sir.

7 MJ [Col RUBIN]: All right. The commission is in recess  
8 till 1300.

9 [The R.M.C. 803 session recessed at 1144, 5 February 2018.]

10 [END OF PAGE]

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