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1 [The Military Commission was called to order at 1312, 24 April
2 2014.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present with the exception of the accused.

5 Mr. Kammen, obviously Mr. Nashiri knew when we were
6 going to start. He knew of his right to ----

7 LDC [MR. KAMMEN]: He was here.

8 MJ [COL POHL]: Did he voluntarily choose to return to the
9 camp for this afternoon?

10 LDC [MR. KAMMEN]: Yes.

11 MJ [COL POHL]: All right. That's all I wanted to know.

12 And then on the doctor, we are going to do him
13 tomorrow, if at all?

14 LDC [MR. KAMMEN]: Yes.

15 MJ [COL POHL]: Okay. Do you still wish him to come?

16 LDC [MR. KAMMEN]: Yes.

17 MJ [COL POHL]: Okay. Thank you.

18 LDC [MR. KAMMEN]: And if I may?

19 MJ [COL POHL]: Sure.

20 LDC [MR. KAMMEN]: In light of the -- your rulings this
21 morning, we'd like to revisit AE 229 and 230, which we sort of
22 tabled depending on the motion and how that unfolded, and so
23 if we may, I'd like to discuss those.

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1 MJ [COL POHL]: Okay. Just -- you know, as I said this
2 morning, you may be right and I may be wrong. I'm not about
3 to say I was wrong and you were right, but I did review what I
4 see as the relevant case law in the area.

5 And just so there's no misunderstanding of what I
6 view the rule to be, when an expert offers an opinion, the
7 proponent is allowed to give a limited factual basis of what
8 that opinion is based on so the weight of the opinion can be
9 given, okay?

10 Where perhaps you and I part company is that -- and
11 correct me if I'm wrong, you believe that factual predicate
12 could also include anything -- any particulars that are
13 contained in there. For example, as I permitted Major Hurley
14 to do, what did you base it on? Conversations with the
15 accused? To me, that's permissible. What did he say? That's
16 where I draw the line.

17 LDC [MR. KAMMEN]: Well ----

18 MJ [COL POHL]: So I -- go ahead.

19 LDC [MR. KAMMEN]: I'm sorry.

20 MJ [COL POHL]: You go ahead.

21 LDC [MR. KAMMEN]: In this case, of course, we wouldn't
22 have gone there because what he says is classified.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. KAMMEN]: But the impact of your rulings went far
2 beyond that.

3 MJ [COL POHL]: Well, I want to make sure that we
4 understand, so there's no misunderstanding, not that we're
5 going to agree? Where do you think it went far beyond to what
6 I just said?

7 LDC [MR. KAMMEN]: Well, I think that had -- it would have
8 gone into -- one of the reasons that she has reached the
9 present opinion that she has is because of his current
10 physical ailments. As she attempted to testify to, he has a
11 number of current physical ailments and she believes and it is
12 her opinion those are sequelae of the torture related to the
13 post-traumatic stress disorder from which he currently
14 suffers. She would have described in detail those current
15 injuries and how they relate to things that would have been
16 within the boundaries of classification, but things that
17 relate to -- you know, to things that happened before.

18 MJ [COL POHL]: Okay.

19 LDC [MR. KAMMEN]: She also would have gone into -- beyond
20 her understanding of the atmosphere under which doctors
21 practice in Guantanamo, and specifically that the camp
22 commander exercises control over the medical care in -- and
23 she knows this based upon her work with the Defense Ethics

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1 Board -- based upon -- in ways that are inappropriate and
2 limit the ability of the doctors to perform adequate medical
3 care. All that was limited.

4 She also limited -- was limited in the fact that he
5 has not received, in detail, the way in which -- even the sort
6 of attempts at care that he has received are inadequate given
7 the magnitude of his current diagnosis. So, you know, even on
8 the most superficial level her opinion is based upon far more
9 than even the superficial facts that you heard. She's still
10 available, and we'd be happy to recall her.

11 MJ [COL POHL]: Okay. Mr. Kammen, and you have been doing
12 this for quite a while and you may not believe it, but I have
13 been doing this for quite a while, too.

14 LDC [MR. KAMMEN]: I believe it.

15 MJ [COL POHL]: And sometimes in the course of
16 discussions -- and it happens, that we talk across each other
17 and it's just as much perhaps my fault as other people's
18 fault. The road I thought he was going down was not the road
19 that you're discussing. Okay. A medical doctor, if she
20 wanted to come in to say here's what I observed of injuries,
21 that's perfectly permissible, okay, and if you -- and maybe we
22 got wrapped around the axle and we didn't get there.

23 If she wants to come in to say about the -- medical

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1 treatment generically, again, I was focusing on something
2 completely different than what you just told me. Okay.

3 LDC [MR. KAMMEN]: I mean, if somehow it got off that you
4 were afraid that we were going into classified
5 information ----

6 MJ [COL POHL]: And, again ----

7 LDC [MR. KAMMEN]: ---- that was not ever ----

8 MJ [COL POHL]: So with that understanding, as I
9 understand what you said -- and that's why, like I said,
10 thinking it through over the lunch period, is I wanted to give
11 you an opportunity to kind of give me a proffer where this was
12 going, which is, quite frankly -- and, again, it may have been
13 my fault as I interpreted it, not where I thought you were
14 going with this discussion, if you thought my ruling was going
15 to prevent a medical doctor from describing injuries.

16 LDC [MR. KAMMEN]: Yes.

17 MJ [COL POHL]: Then if I said that, I did not mean that.
18 Okay.

19 If you thought my restriction was going to say
20 that -- about her view of the camp because she's of the --
21 controlled by the camp commander or the medical team, that's
22 not what I meant to say, if that's how it was interpreted. So
23 what I'm saying is I still think it's the same rule, now about

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1 specific facts underlying an opinion -- and, again, there's a
2 difference between before a fact-finder and what. But again,
3 that's -- I don't -- I don't want to say I don't disagree with
4 myself, but that makes no sense. I still think there's a
5 limitation ----

6 LDC [MR. KAMMEN]: Sure.

7 MJ [COL POHL]: ---- on that fact pattern.

8 LDC [MR. KAMMEN]: And we just think the limitation came
9 way, way, way early.

10 MJ [COL POHL]: Okay. And that's why I wanted to give you
11 an opportunity to -- if you wish, to recall her to go down
12 those areas, feel free to do it.

13 LDC [MR. KAMMEN]: We do. We have to round her up ----

14 MJ [COL POHL]: Yes, ma'am.

15 LDC [MR. KAMMEN]: ---- because ----

16 MJ [COL POHL]: Commander.

17 TC [CDR LOCKHART]: If I understood what Mr. Kammen was
18 saying is that they wanted the doctor to testify about current
19 medical diagnosis, suffers from this, that or otherwise. They
20 certainly were not limited in her diagnosis. In fact, she
21 said he has certain illnesses, PTSD, injury, other things.
22 She specifically was allowed to get into that. What the
23 government believes the defense, again, wants to get into

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1 which your judge -- Your Honor, in our opinion, properly
2 limited to is exactly those specific instances for which the
3 opinion is based upon. And multiple times Major Hurley tried
4 to get into the past or specific interactions that they had
5 that had nothing to do with what injury he had, which then
6 would -- she could use to say this is the treatment plan. The
7 government does not believe that was limited in any way.

8 MJ [COL POHL]: But, Commander, I understand your
9 position, okay, and I'm -- I understand -- I think I
10 understand what I believe the law to be. Okay.

11 But she was called to do two things, current
12 diagnosis, okay, and -- which would mean current injuries,
13 physical and mental, okay?

14 TC [CDR LOCKHART]: Yes, sir.

15 MJ [COL POHL]: Okay. And the inadequacy of the
16 treatment.

17 TC [CDR LOCKHART]: And she provided both of those
18 opinions, and the government did not contest, object, ask her
19 any questions. She provided the answers to both of those
20 uncontested by the government.

21 MJ [COL POHL]: Okay. I hear what you're saying, and,
22 again, quite frankly, it's an interlocutory matter anyways, so
23 the inadmissibility rules do not apply necessarily. What I'm

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1 saying is I want to give the defense a fair opportunity. They
2 believe that they were unable to go to a way they were going
3 to go. Because what I'm hearing them tell me is that when I
4 stopped Major Hurley, and I believe when I stopped him, I
5 was -- quite frankly, my view was he was going to the specific
6 instances that were -- that we already had.

7 TC [CDR LOCKHART]: He was.

8 MJ [COL POHL]: But what they're telling me now is, well,
9 we want to talk about his current physical condition, and if
10 you said they've already done it, they can do it twice. And
11 the level of medical treatment she is -- he is not receiving
12 because of the systemic barriers to it, which is one of the
13 reasons she was called.

14 TC [CDR LOCKHART]: And the government doesn't have any
15 objections to Dr. Crosby talking to any physical diagnosis
16 that he currently has today, or within the last however long
17 that this motion has been pending, and any treatment that
18 either, A, she believes should be provided that hasn't been
19 provided that goes to that second category.

20 What the government still asserts, because the basis
21 for opinion has not been challenged, is the defense is not to
22 go into anything from the past, anything that laid the
23 foundation for that opinion.

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1 And, again, if they simply want her to say -- I'm
2 using a hypothetical example -- he has a wrist injury and he
3 has a broken bone, that's a current medical diagnosis.
4 Government has no objection to that. He's not receiving
5 adequate care because they've left it unattended for X amount
6 of days. That's a current issue with medical treatment.

7 But the government strongly believes based upon both
8 the pleadings and Major Hurley's questioning of the doctor
9 that they intend to get into much more than that, and the
10 government believes that Your Honor was absolutely correct in
11 limiting the focus on what the defense's motion is, current
12 diagnosis, lack of adequate medical care.

13 MJ [COL POHL]: Mr. Kammen?

14 LDC [MR. KAMMEN]: Yes, sir.

15 MJ [COL POHL]: You indicated, I believe, three areas that
16 you believe you wanted to explore?

17 LDC [MR. KAMMEN]: Well, I mean, you know, I was trying to
18 be responsive to your questions.

19 MJ [COL POHL]: Okay.

20 LDC [MR. KAMMEN]: I mean, there are -- let me give you an
21 example. Okay. One of the current areas of complaint that is
22 what she described as colon and rectal problems ----

23 MJ [COL POHL]: Okay. Just hold for a second. Where is

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1 Dr. Crosby physically?

2 LDC [MR. KAMMEN]: We're trying to locate her. She -- you
3 know, she was perhaps on her way to the camps, and we're
4 trying to round her up.

5 MJ [COL POHL]: Okay. Okay. That was kind of my question
6 is, whether somebody is working that issue ----

7 LDC [MR. KAMMEN]: Yes.

8 MJ [COL POHL]: ---- while we're discussing here. Go
9 ahead.

10 LDC [MR. KAMMEN]: Now, that is a condition that exists
11 today. I believe she would testify that that is in existence
12 based on her review of the record -- a condition based on her
13 review of the records that has really existed since.

14 MJ [COL POHL]: For a while.

15 LDC [MR. KAMMEN]: Well, just -- as reflected in the
16 Guantanamo Bay records.

17 MJ [COL POHL]: Right.

18 LDC [MR. KAMMEN]: Since 2006.

19 MJ [COL POHL]: Right.

20 LDC [MR. KAMMEN]: It relates to classified stuff.

21 MJ [COL POHL]: Okay.

22 LDC [MR. KAMMEN]: So, I mean, there are other -- that's
23 one of many areas of physical -- present physical complaints

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1 that have this long history.

2 MJ [COL POHL]: Yeah. Okay.

3 LDC [MR. KAMMEN]: And, again, you know, you can't just
4 focus on the care today -- and I'm told she'll be here in ten
5 minutes.

6 MJ [COL POHL]: Okay.

7 LDC [MR. KAMMEN]: You can't just say the care this week
8 is inadequate. I mean, what she is saying is that
9 systemically, based upon the records, this week is no
10 different than, you know, the last seven years.

11 MJ [COL POHL]: Okay. Okay. I mean -- but, again, what
12 we discussed -- and, again, I want to be fair to both sides
13 here, so let's -- so there's no confusion, is if she were
14 to -- if you believe that I prevented her from saying he's got
15 longstanding problems that have not been cared for over a long
16 period of time and, therefore, the current treatment plan is
17 inadequate, as it has been, I don't believe my ruling -- I did
18 not mean to say you couldn't do that.

19 And why I'm discussing this with you ----

20 LDC [MR. KAMMEN]: I understand.

21 MJ [COL POHL]: ---- is I think there was a
22 miscommunication, and that's why I want to make it clear.

23 LDC [MR. KAMMEN]: Absolutely. And I'll accept that. But

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1 I just don't want to -- I want to be clear where I understand
2 Major Hurley's going to go, because I don't want to, you
3 know -- let's do this. Let's have it go ----

4 MJ [COL POHL]: Yeah.

5 LDC [MR. KAMMEN]: ---- smoothly and then we are where we
6 are, because, again, you have to look at this as a whole,
7 recognizing that there is a line because of the classification
8 issues which absolutely she'll stay away from, but you
9 can't -- you know, these things are all related.

10 MJ [COL POHL]: Okay.

11 LDC [MR. KAMMEN]: And so in a -- you know, that's ----

12 MJ [COL POHL]: Okay. Okay. Let's do it this way. Okay.
13 And, again, I want to make sure that there's -- when I -- if
14 I'm going to exclude a question or an answer, I want to make
15 sure I understand what they're asking for.

16 LDC [MR. KAMMEN]: Okay.

17 MJ [COL POHL]: And I think what you want is her to --
18 current injuries, current inadequate treatment for
19 longstanding problems.

20 LDC [MR. KAMMEN]: And what she understands to be some of
21 the systemic issues regarding the -- you know, the ----

22 MJ [COL POHL]: Okay.

23 LDC [MR. KAMMEN]: ---- that affect the ability of doctors

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1 to provide medical care.

2 MJ [COL POHL]: Okay. But we're -- not such-and-such
3 event occurred on a certain day.

4 LDC [MR. KAMMEN]: Unrelated to treatment.

5 MJ [COL POHL]: Unrelated to treatment.

6 LDC [MR. KAMMEN]: Yeah. I mean, we're not going ----

7 MJ [COL POHL]: Treatment is an issue.

8 LDC [MR. KAMMEN]: We're not going into classified
9 information.

10 MJ [COL POHL]: And I understand, and because you're
11 asking about treatment -- and treatment is going to get
12 obviously into potentially into specific instances because
13 it's wrapped up in the treatment.

14 LDC [MR. KAMMEN]: Yeah, well ----

15 MJ [COL POHL]: He's not getting this anti-psychotic drug
16 he deserves. I don't know whether he needs it or not. Okay.
17 So with that understanding, I will give ----

18 LDC [MR. KAMMEN]: It's not about what for the most part
19 did happen. For the most part, it is about what hasn't
20 happened.

21 MJ [COL POHL]: Okay. Okay. Commander, I think the
22 easiest way to do this is we're just going to recall the
23 witness, and if there's an objection, go ahead and object.

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1 Major Hurley. Oh, well -- is Dr. Crosby back?

2 LDC [MR. KAMMEN]: I was just handed a note -- the note a
3 minute ago. She's not here yet, I don't believe.

4 MJ [COL POHL]: Well, in the meantime we're going to do
5 something productive, not that what we have done has not been
6 productive, and just go to the next motion on the list, which
7 I believe is 234.

8 TC [CDR LOCKHART]: 235, sir.

9 MJ [COL POHL]: 235.

10 Major Danels, we'll discuss this one, and then we'll
11 bring back Dr. Crosby. Go ahead.

12 DDC [Maj DANELS]: Good afternoon, Your Honor.

13 MJ [COL POHL]: Good afternoon.

14 DDC [Maj DANELS]: In this particular motion the defense
15 is requesting that the commission dismiss Charge VIII,
16 attacking civilians. Because the defense's position is that
17 it's multiplicitious in that it is subsumed by Charge IX,
18 hazarding a vessel.

19 The defense's belief is this in proving Charge IX,
20 hazarding a vessel, the government has to prove an attack on a
21 civilian object and, therefore, because the attack on a
22 civilian object is a subset of the elements in the defense's
23 position of hazarding a vessel, the defense believes that it's

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1 multiplicitious.

2 MJ [COL POHL]: Well, this may sound repetitious, but let
3 me ask it anyway. Do they have the same elements?

4 DDC [Maj DANELS]: Similar to the discussion we had
5 yesterday, Your Honor, if you do an element-by-element
6 comparison of the elements as alleged for Charge VIII and
7 Charge IX, the defense's position is that essentially by
8 proving Charge IX, you prove Charge Number VIII. He has to be
9 guilty of attacking a civilian object in order to be guilty of
10 hazarding a vessel.

11 MJ [COL POHL]: You've just repeated your first point,
12 your -- what I'm calling your subsuming point. I think maybe
13 the proper term would be fairly embraced, but whatever. That
14 wasn't the question I asked you.

15 My question I asked you is: Do these have the same
16 elements?

17 DDC [Maj DANELS]: The defense's belief is that, based on
18 the way that they are charged, if you do an element-by-element
19 comparison, that the elements are essentially the same.

20 MJ [COL POHL]: One moment.

21 DDC [Maj DANELS]: The defense's position is also that --
22 it's not just that they have the -- it's not just that they
23 have identical elements. As the court said in Foster, if

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1 proof of a greater offense proves all of the elements of
2 another offense and more, then the other offense is a subset
3 of the elements. And the defense's position is that's what we
4 have here, attacking civilian -- attacking the MV Limburg, the
5 civilian object, is a subset of the elements of hazarding a
6 vessel; and it's the same vessel, the MV Limburg.

7 MJ [COL POHL]: One moment. Okay. Thank you.

8 Trial Counsel.

9 TC [CDR LOCKHART]: Thank you, Your Honor. The
10 examination is not whether one charge is subsumed, as Major
11 Daniels says, by the other, but whether or not they have
12 identical elements. And it's very clear, if you pull out the
13 manual on each of the charges, the hazarding a vessel and
14 attacking civilians, that they in fact do have different
15 elements. There's different intent involved in both. One has
16 an intent of attacking civilians. The other has an intent of
17 endangering the safe navigation of a vessel.

18 It's possible that you could have a conviction on
19 both and they could be merged for sentencing, but they're
20 certainly two different offenses and they're charged in this
21 case as two different offenses with two different intents and
22 two different purposes. So the government does not believe
23 that these are multiplicitous.

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1 MJ [COL POHL]: So the government would say if convicted
2 of both, at a minimum, they would be merged for sentencing?

3 TC [CDR LOCKHART]: They could be. And it would depend on
4 how the facts played out at trial and what specific facts came
5 out. They certainly could.

6 MJ [COL POHL]: Well, wouldn't it depend -- you say the
7 facts, but wouldn't it depend on the verdict?

8 TC [CDR LOCKHART]: It's actually both, sir. I mean,
9 obviously, they could convict of both, and if ----

10 MJ [COL POHL]: That's my only question. If they convict
11 on both ----

12 TC [CDR LOCKHART]: Correct.

13 MJ [COL POHL]: ---- the government's position is, without
14 committing to it, substantial chance they would be merged for
15 sentencing?

16 TC [CDR LOCKHART]: Not necessarily. Potentially. I
17 mean, I think that's the argument we're going to get into on
18 reasonable multiplication of charges. The courts are very
19 clear that if there's a specific congressional intent to
20 protect a criminal interest, that society and Congress has the
21 right to punish somebody for the same conduct if there's a
22 specific intent and an interest that needs to be protected.
23 It happens all the time, solicitation, conspiracy.

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1 And that's an argument that I know we're going to
2 get into in 244 and 245, and that has to do with unreasonable
3 multiplication of charges. The purpose of multiplicious, the
4 test, is whether or not it has the same elements, and
5 obviously, clearly, here it does not, sir.

6 MJ [COL POHL]: Major Danel's.

7 DDC [Maj DANELS]: The presence of multiplicious charges,
8 Your Honor, skews things in favor of death. So the fact that
9 it -- the assumption that it could be just handled in
10 sentencing by saying that they're multiplicious for sentencing
11 doesn't change the fact that they're -- the jury will have
12 found him guilty of -- potentially guilty of both charges.

13 MJ [COL POHL]: What if the members found him guilty of
14 only one? I mean, the government charges two offenses with
15 different elements, even though they may reflect the same
16 conduct. If the members come back with a -- doesn't the
17 government have the exigencies of proof to permit the members
18 to come back with a finding of guilty on one and not guilty on
19 the other one, and if I dismiss them -- if you dismiss them
20 prior to that, those exigencies of proof are no longer
21 available to the government? Or you don't believe they should
22 be available to the government?

23 DDC [Maj DANELS]: Correct, Your Honor, because in order

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1 to be guilty of hazarding a vessel, you have to be guilty of
2 attacking a civilian object. There's no point in being found
3 guilty of attacking a civilian object independent of the
4 hazarding a vessel.

5 MJ [COL POHL]: Okay. I understand. Thank you.

6 DDC [Maj DANELS]: Thank you, Your Honor.

7 MJ [COL POHL]: Nothing further from the government?

8 That didn't take very long. I don't -- we don't
9 know whether Dr. Crosby is here or not?

10 ADDC [MAJ HURLEY]: Sir, I have been given to understand
11 that when Dr. Crosby has returned to this location, that a
12 defense paralegal will come into this room.

13 MJ [COL POHL]: Okay.

14 ADDC [MAJ HURLEY]: And she hasn't returned.

15 MJ [COL POHL]: Thank you. Okay. That brings up 236.

16 ADDC [MAJ HURLEY]: Sir, good afternoon.

17 MJ [COL POHL]: Good afternoon.

18 ADDC [MAJ HURLEY]: Sir, the defense requests relief in
19 Appellate Exhibit 236 with respect to an 18 July 2013
20 memorandum signed by the Secretary of Defense, Secretary
21 Hagel. Specifically, if Your Honor will direct his attention
22 to the first page of AE 236, there's the relief requested
23 there. There's a lot of verbiage that Your Honor you can read

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1 for yourself, and then once you've completed that ----

2 MJ [COL POHL]: I got it. Go ahead.

3 ADDC [MAJ HURLEY]: So, sir, what occurred, just to give
4 you -- reiterate the facts, on 18 July the Secretary of
5 Defense signed this memorandum incorporating by reference a
6 2008 memorandum signed by Under Secretary England regarding
7 the defense's access to certain communications platforms,
8 namely JWICS and SIPRNet. And in the 18 July 2013 memorandum,
9 it indicates that individuals like the defense team in U.S. v.
10 Nashiri are not eligible to get on JWICS and SIPRNet because
11 they're -- the information that they are to discover is to
12 come through the discovery process, and that is consistent
13 with the 2008 memorandum previously signed.

14 What the defense requested from the government
15 first, that request was ultimately denied in August of last
16 year. What we requested was this information. Now, you will
17 see that this information with respect to AE 236 is
18 information about the procedures that were established in that
19 memorandum. Primarily, the procedures that exist to protect
20 attorney-client privileged information in the event that the
21 defense wishes to submit a need-to-know justification.

22 Obviously, this is a novel -- there was a 2008 memo,
23 but this memorandum signed by Secretary Hagel in 2013

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1 established a novel framework. And what the defense seeks is
2 more information as to how potentially confidential
3 attorney-client information will be protected if we are
4 seeking an exception to policy -- or if an exception to policy
5 is sought.

6 Secondly, sir, again, given the novel nature of
7 this -- or the -- it's not novel, it's just new -- the new
8 nature of this order, we are looking to see what procedures
9 have been established by the director of the Washington
10 Headquarters Service to comply with this order from the
11 Secretary of Defense. It's as simple as Army Regulation
12 27-10, an Army regulation that with which we are somewhat
13 familiar, talks about the handling of what the Army refers to
14 as an Article 15, and it sets out how that works, and what
15 we're looking -- and how that Article 15 may be appealed and
16 how that is to be handled in the future.

17 And that's just what we're looking for here, is
18 similar guidance as to what procedures are in place, what
19 procedures were in place in August, if they were in place in
20 August, and I can't imagine they've been changed in eight
21 months. That's what we're looking for.

22 Sir, do you have a question?

23 MJ [COL POHL]: Yeah. You talked about in your motion

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1 about protecting -- and I'm a little confused here, which
2 apparently is not unusual.

3 But in the -- in your requested relief, you talk
4 about we want to protect attorney-client privilege as we seek
5 some type of exception.

6 ADDC [MAJ HURLEY]: Yes, sir.

7 MJ [COL POHL]: And who would you send this to?

8 ADDC [MAJ HURLEY]: Sir, we would send the -- we would
9 follow the guidance that Secretary Hagel set forth, and we
10 would initially send the exception to the director of the
11 Washington -- the director of the WHS, which I believe stands
12 for the Washington Headquarters Service. I could be wrong.

13 So that's -- that's who we would send it to
14 initially, but a fair reading of Secretary Hagel's memo
15 indicates that because of who we are, as a team that is
16 entitled to discovery, we wouldn't -- that request -- the
17 director of the WHS would look at our request and look at who
18 we were and who we represented and say, well, according to
19 this memo I have to deny it because this is a team that's
20 entitled to discovery.

21 And that's why we need to know, okay, this initial
22 request that we submit to the director of WHS, which on its
23 face would appear to be deniable, where do we go then? To

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1 what authority do we go if we're seeking an exception to this
2 particular memorandum? Take it straight to Secretary Hagel?

3 MJ [COL POHL]: If you read the memorandum, and one could
4 of course read documents different ways, you have something
5 signed by the Secretary of Defense saying defense counsel in
6 OMC will not have access to JWICS and SIPRNet, right?

7 ADDC [MAJ HURLEY]: Yes, sir.

8 MJ [COL POHL]: And he says, but if you have a need to
9 know, go talk to the WHS, when you -- the whole document
10 already says you don't get it.

11 I'm not sure what you would go to the director of
12 WHS. What is she going to do?

13 ADDC [MAJ HURLEY]: Well, in this ----

14 MJ [COL POHL]: Or do you interpret this to be a need to
15 know on an individual basis as opposed to a systemic basis?

16 ADDC [MAJ HURLEY]: Well, sir ----

17 MJ [COL POHL]: I suspect that you want a systemic access.

18 ADDC [MAJ HURLEY]: Right.

19 MJ [COL POHL]: Which has already been denied by the
20 Secretary of Defense.

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: But -- so going to the director of WHS
23 would accomplish what?

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1 ADDC [MAJ HURLEY]: Well, going to the director of the WHS
2 is what we would perceive to be the first step in our process.

3 So the memorandum sets up a framework in that, come
4 what may, we would have to follow the framework that is
5 established by the Secretary in his July 2013 memorandum. So
6 what we're looking for with respect to this is, one, if we
7 submit this to you, what procedures are in place to protect
8 this attorney-client information; and two, how -- what is the
9 following step? Because a fair reading of this, you're right,
10 sir, says that we're denied.

11 So this delegated authority from the Secretary of
12 Defense will probably result in a denial. Well, what then?
13 Are we to take our grievances directly to the Secretary of
14 Defense if we feel we have any, or is there another authority
15 that's been established by appropriate order or regulation
16 that we can take these sorts of requests to?

17 MJ [COL POHL]: Okay.

18 ADDC [MAJ HURLEY]: So, sir, the third thing is all
19 documents and information containing or referencing any
20 intelligence community need-to-know determination regarding
21 OCDC personnel, and that's obviously the Office of the Chief
22 Defense Counsel, and finally, the policy and review procedures
23 established by the director of the WHS.

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1 Again, all of this information, we believe, would
2 better inform any specific requests that we formulate, and
3 then once those requests are formulated, describe for us the
4 individuals and the entities to whom we would direct these
5 requests. And, sir, this is ----

6 MJ [COL POHL]: What do you mean by all documents and
7 information containing or referencing any IC need-to-know
8 determination regarding OCDC personnel? I'm sure it's in
9 here, but --

10 ADDC [MAJ HURLEY]: Sir, generally what we mean is what --
11 if the intelligence community -- because what started the
12 process of this memorandum or this order from the Secretary of
13 Defense was, according to the order itself, concerns by the
14 Office of the Director of National Intelligence regarding
15 defense counsel access to JWICS and SIPRNet.

16 So if there have been any -- are there any -- what
17 documents and information from the intelligence community
18 containing these need-to-know decisions, would we want those
19 with respect to OCDC personnel, and under the belief that that
20 information is going to help us better formulate, well, this
21 is what the intelligence community, who is a voting member of
22 this according to the text of the Secretary's order -- what
23 are they looking for? What were their determinations? Do we

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1 know in advance that the request that we're making is not
2 going to be sufficient for these members of the intelligence
3 community?

4 And that information, again, will help inform our
5 decision as to what we do administratively to obtain access to
6 these communication platforms or, you know, what we would do
7 administratively to seek relief from the July 2013 order of
8 the Secretary of Defense.

9 MJ [COL POHL]: Conceptually, what you're asking for is
10 unfettered access to classified information?

11 ADDC [MAJ HURLEY]: Sir, we haven't ----

12 MJ [COL POHL]: No, I'm just trying to figure out if you
13 get this -- let's go to the end state that you want, not the
14 procedural state.

15 ADDC [MAJ HURLEY]: Right.

16 MJ [COL POHL]: The end state is you want access
17 to classified Internet and JWICS, independent of the
18 prosecution?

19 ADDC [MAJ HURLEY]: Sir, I've got to say I'm not ----

20 MJ [COL POHL]: Is that what your want?

21 ADDC [MAJ HURLEY]: ---- to tell you it's not what I want.
22 What I want is the relief we seek in this.

23 MJ [COL POHL]: No, but I'm saying is you were asking for,

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1 as I read it, procedural relief. Tell us how we can establish
2 the need to know and everything else.

3 ADDC [MAJ HURLEY]: Right.

4 MJ [COL POHL]: And if you get the procedural relief, and
5 you establish -- you go through the wickets and you get your
6 answer, it's all designed, is it not, in order to get access
7 to these two systems?

8 ADDC [MAJ HURLEY]: Right.

9 MJ [COL POHL]: So I understand what you are asking me for
10 now. But if you win, if you prevail all the way up, you end
11 up with access to these two systems.

12 ADDC [MAJ HURLEY]: Yes, sir.

13 MJ [COL POHL]: Okay. Independent of any filtering
14 mechanism. Is that what you want?

15 What I'm saying is, say you got access to the JWICS
16 system or the SIPRNet. Okay?

17 ADDC [MAJ HURLEY]: Well, sir, prior to July 2013, we had
18 that access to the JWICS and SIPRNet.

19 MJ [COL POHL]: Okay. Okay. So that would give you --
20 you could reach in to classified documents?

21 ADDC [MAJ HURLEY]: Well, we would have access to those
22 communication platforms and we would use them under
23 the guide -- this particular team would use them along with

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1 the guidance of the protective order and whatever appropriate
2 directives are out there, use those in the advance of the
3 representation of Mr. Nashiri.

4 Now, I don't mean to dodge your question, sir, but
5 we would have access to those platforms to be sure, but the
6 owners of the information that put the information on the
7 platform, they still control it. And if they wanted to
8 control that information or limit its access in whatever way,
9 that's still up to them.

10 MJ [COL POHL]: So at the end of the day, access to the
11 platforms doesn't give you access to the information unless
12 the stakeholder consents?

13 ADDC [MAJ HURLEY]: Yes, sir. It just depends on how they
14 hold that information on those platforms.

15 MJ [COL POHL]: Okay.

16 ADDC [MAJ HURLEY]: That is my extraordinarily limited
17 understanding of the computing networks.

18 MJ [COL POHL]: Okay. Okay. I understand.

19 ADDC [MAJ HURLEY]: Yes, sir.

20 And, sir, we've talked about globally where this may
21 be headed. What we're talking about specifically with this
22 motion is exactly what we want. You will see in the
23 government's response how they perceive this to be some sort

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1 of a fact-checking or a deep dive into this information, and
2 that concern may be true in the global sense that you and I
3 just discussed, but not with respect to this motion. With
4 respect to this motion, we just want the information that
5 we're looking for in order to better inform our administrative
6 procedures going forward.

7 MJ [COL POHL]: Do you think you can provide the request
8 for an exception without divulging attorney-client privileged
9 information?

10 ADDC [MAJ HURLEY]: You know, sir, I -- there's always
11 that temptation, if we have this huge vat of information that
12 is both protected and attorney-client and it's probably
13 classified as well.

14 MJ [COL POHL]: Sure.

15 ADDC [MAJ HURLEY]: As we're trying to justify what we're
16 doing, we would rather know in advance how this information is
17 going to be protected and what -- how these appeals are going
18 to be treated and these requests for information are going to
19 be treated.

20 MJ [COL POHL]: Sure.

21 ADDC [MAJ HURLEY]: So that informs whether or not we're
22 going to ask in the first place.

23 MJ [COL POHL]: Okay.

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1 ADDC [MAJ HURLEY]: Do you have any other questions, sir?

2 MJ [COL POHL]: No, I don't. Thank you.

3 Trial Counsel.

4 LDC [MR. KAMMEN]: Your Honor, I don't mean to interrupt,
5 but I understand that Dr. Crosby is here.

6 MJ [COL POHL]: Okay. Okay. I don't think this will take
7 us too long, but I ----

8 LDC [MR. KAMMEN]: I'm also told she would like to meet
9 very briefly with one of the defense lawyers, probably to find
10 out what's going on.

11 MJ [COL POHL]: Okay. Since Major Hurley has got this
12 motion, would one of the other ones ----

13 LDC [MR. KAMMEN]: Commander Mizer could perhaps meet with
14 her.

15 MJ [COL POHL]: Commander Mizer, you are excused.

16 TC [CDR LOCKHART]: Sir, isn't she sort of still in
17 mid-testimony? I understand if it's just a procedural thing,
18 but I just want to make sure that she is not talking about her
19 testimony.

20 DDC [CDR MIZER]: Your Honor, I will cancel my previous --
21 [Microphone button not pushed; no audio].

22 MJ [COL POHL]: Just tell her she is just being recalled
23 and we will explain why when she shows up.

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1 DDC [CDR MIZER]: Yes, Judge.

2 MJ [COL POHL]: Thank you. Thank you.

3 ATC [MR. SHER]: Good afternoon, Your Honor.

4 MJ [COL POHL]: Good afternoon.

5 ATC [MR. SHER]: You're correct, the defense having access
6 to the search functions on JWICS and on SIPRNet equates to
7 them having unfettered access to government files, classified
8 information in government files, a right that they don't have.

9 MJ [COL POHL]: Well, Major Hurley said they used to have
10 it. Is he incorrect?

11 ATC [MR. SHER]: I don't believe he's incorrect, but that
12 doesn't change that they are not entitled to it. They perhaps
13 never should have been. And the Secretary pursuant to his
14 authority and response under Executive Order 13526,
15 Sections 4.1(f), 4.1(g), and 5.4(c), require the secretary to
16 ensure that there is not uncontrolled access to classified
17 information stored on classified government systems.

18 And upon developing concerns that there was
19 uncontrolled access, he directed those people responsible
20 for -- he directed people responsible to make sure that there
21 was no longer unauthorized access to those search functions
22 where classified information resides.

23 That changes no effect on the defense's right to

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1 discovery in this case. The defense remains entitled to the
2 same discovery, classified or unclassified. And as the
3 parties have discussed at length, probably over several years
4 now, the government understands its discovery obligations,
5 Your Honor. The government is responsible for producing all
6 discoverable information. And as the Supreme Court said in
7 Pennsylvania v. Richie, 480 U.S. 39, page 59, a defendant's
8 right to discover exculpatory evidence does not include the
9 unsupervised authority to search through the government's
10 files.

11 Recognizing that not every person at OMC can access
12 classified information through the discovery process, which is
13 what the secretary's policy requires, he left some flexibility
14 in for those OMC personnel, and I quote, "for whom discovery
15 procedures do not apply to seek access to the search functions
16 on these systems, a determination that will be made on a
17 case-by-case basis."

18 The defense team in this case has access to
19 discovery. Its access is based on the statute. It's based on
20 the rules. They've gotten a lot of discovery, and they
21 continue to get discovery, but they don't have the right to
22 just access classified information at will on government
23 classified systems.

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1 MJ [COL POHL]: In essence -- if the defense was going to
2 prepare a need-to-know justification to WHS, they would
3 provide -- potentially they didn't -- if they provided the
4 exact same thing to you as a discovery request, doesn't that
5 amount to the same thing?

6 ATC [MR. SHER]: Well, I think what the defense is getting
7 at is they want to prepare an application to regain access to
8 these classified systems. And the way they go about doing
9 that is the way a team not involved in litigation with access
10 to discovery under the statute and rules would go about
11 preparing a need-to-know application.

12 MJ [COL POHL]: Okay.

13 ATC [MR. SHER]: The defense can't have a need to know
14 because if there's something discoverable out there, they ask
15 for it and they get it. This idea that they're not trying to
16 fact-check or double-check the government's work is just
17 inaccurate.

18 Their motion on page 2 says right at the top, and I
19 quote, "using unrestricted access to JWICS, the defense team
20 was able to obtain underlying documents that were different
21 than the summaries that had been provided by the government in
22 discovery."

23 They're double-checking the government's work when

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1 it comes to classified information. Those are summaries the
2 government produced through the statute, through the rules,
3 going through the court, as the MCA requires, as CIPA would
4 require in federal civilian court. So what they did was they
5 went and looked for the underlying documents and they tried to
6 double-check the government's work. If they want discovery,
7 they can ask for it.

8 MJ [COL POHL]: Thank you.

9 ATC [MR. SHER]: Thank you.

10 MJ [COL POHL]: Major Hurley.

11 ADDC [MAJ HURLEY]: Colonel Pohl, sir, you're right. It
12 says that in -- or Mr. Sher is right. Sure enough, says that
13 in the motion. That is offered to indicate why, as we're
14 preparing our need-to-know memorandum, because Secretary
15 Hagel, the Secretary of the United States Department of
16 Defense, to whom I am subject to his orders, and we all are in
17 various ways, has taken away our access. So we're offering to
18 the court, you know what, this has worked in the past, this
19 thing has worked in the past, so as we're preparing this
20 need-to-know justification, we would like this other
21 information.

22 It's not the same ----

23 MJ [COL POHL]: Do you have a right to access --

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1 unfettered access to government files? I mean, let's go --
2 and, again, you don't want to get to the end state.

3 ADDC [MAJ HURLEY]: Right.

4 MJ [COL POHL]: I mean, how is this any different than
5 walking into a government office and going through all of
6 their filing cabinets to see what they've got, that they may
7 have something useful to you? Do you have a right to do that?

8 ADDC [MAJ HURLEY]: Well, no, sir. And, again, these are
9 multifaceted. JWICS and SIPRNet, a huge function on those
10 computer platforms, again, I'm beginning to understand with my
11 limited capability, is document retrieval. Got it. But there
12 are other functions that are performed, as I understand it, by
13 those -- by those computer platforms.

14 MJ [COL POHL]: In other words, are there any other
15 functions that you are concerned about, or just document
16 retrieval?

17 ADDC [MAJ HURLEY]: Sir, it is what we want -- and, again,
18 I'm loathe to get into this ultimate argument, or I would
19 rather not.

20 MJ [COL POHL]: Yeah, but I'm not letting you not, so go
21 ahead.

22 ADDC [MAJ HURLEY]: Well, sir, then I thank you for the
23 opportunity.

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1 If we're going all the way to the ultimate argument,
2 what we would -- what we would want -- do we have a right to
3 unfettered access? No. But if we're on the topic, and we are
4 on this topic, and this is a topic over which I have thought a
5 great deal over the last two years of my life, so I have a
6 personal animus.

7 MJ [COL POHL]: Okay.

8 ADDC [MAJ HURLEY]: I'm an Army officer. That's an Army
9 computer system. Let me use it in a way that I think is best.
10 Are there rules that exist in the world that are going to
11 limit me? Sure. Will I abide by them? Yes.

12 Colonel Pohl, you've indicated just yesterday that,
13 typically speaking, Army officers follow the rules and the
14 directives they're given. We had a directive in 2008, and we
15 would comply with that directive where it's appropriate. I
16 would comply with that directive. As a team, we're restricted
17 in what we do by the protective orders that exist in this case
18 and by everything else.

19 And if my status as an Army officer is to mean a
20 thing, that you -- then we have to be treated -- given the
21 tools to use in a way that is appropriate.

22 MJ [COL POHL]: But what I -- okay.

23 ADDC [MAJ HURLEY]: So obviously ----

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1 MJ [COL POHL]: I'm not disputing military people and,
2 quite frankly, civilians also, will follow the rules. That's
3 not my question.

4 ADDC [MAJ HURLEY]: Yes, sir.

5 MJ [COL POHL]: My question is ----

6 ADDC [MAJ HURLEY]: Yes, sir.

7 MJ [COL POHL]: Let me bring it back to a 20th Century
8 nondigital example.

9 ADDC [MAJ HURLEY]: Sure, sir.

10 MJ [COL POHL]: Walk into the government office, whomever,
11 the filing cabinets are there that contain information. Do
12 you have a right to go through that as a defense counsel?

13 ADDC [MAJ HURLEY]: Sir, I do not. I think the Supreme
14 Court precedent ----

15 MJ [COL POHL]: But let's -- but as discovery ----

16 ADDC [MAJ HURLEY]: Right.

17 MJ [COL POHL]: Okay. Now, bring me back to the 21st
18 Century.

19 ADDC [MAJ HURLEY]: Yes, sir.

20 MJ [COL POHL]: Is this any different than that analogy?

21 ADDC [MAJ HURLEY]: Sir, let's go back to your
22 hypothetical governmental office building.

23 MJ [COL POHL]: Okay.

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1 ADDC [MAJ HURLEY]: It might have a cipher lock on it, in
2 the ----

3 MJ [COL POHL]: No, but you want the cipher lock code.

4 ADDC [MAJ HURLEY]: No, I don't want the cipher lock code,
5 sir. I want to know where the building is, and I don't
6 necessarily want the cipher lock code. The individuals in
7 that building can still protect the information. They can.
8 And if they choose to protect the information, that's a choice
9 that they make ----

10 MJ [COL POHL]: You would say ----

11 ADDC [MAJ HURLEY]: ---- on JWICS and SIPRNet.

12 MJ [COL POHL]: So if they choose to protect the
13 information, what information would you have access to, then?
14 The unprotected information?

15 ADDC [MAJ HURLEY]: We would have unfettered access to the
16 system, you're right. But we as Army officers -- and I spoke
17 globally when I shouldn't, for I'm the only one on this side
18 of the room.

19 MJ [COL POHL]: I know.

20 ADDC [MAJ HURLEY]: We as Department of Defense officers
21 and learned counsel civilian would follow -- what are the
22 protective orders? We've got them, great. We're going to
23 follow all of the guidelines that we have and only use ----

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1 MJ [COL POHL]: I don't understand how saying you're going
2 to follow protective orders. What you're asking for is access
3 to government information with no filters by the prosecution,
4 correct?

5 ADDC [MAJ HURLEY]: With no filters by the
6 prosecution ----

7 MJ [COL POHL]: I mean -- okay.

8 ADDC [MAJ HURLEY]: ---- right.

9 MJ [COL POHL]: And do you you -- can you point me to any
10 discovery rule or case that -- and, again, we're talking about
11 a digital world, as to the old world, that somehow there's a
12 discovery right that's being implicated by restricting that
13 access only through the normal discovery process?

14 ADDC [MAJ HURLEY]: Sir, I can't ----

15 MJ [COL POHL]: You can think about that. And if you want
16 to supplement your pleadings, you may.

17 ADDC [MAJ HURLEY]: Yes, sir, and, again, sir, this
18 will ----

19 MJ [COL POHL]: But I know that's the end state, and
20 that's not necessarily what's before me now ----

21 ADDC [MAJ HURLEY]: Yes, sir.

22 MJ [COL POHL]: ---- but if the end state is
23 nonachievable ----

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [COL POHL]: ---- then the steps to get to the end
3 state become somewhat moot.

4 ADDC [MAJ HURLEY]: Well, that's where -- if I may take a
5 second to disagree with that idea that you just said, sir.

6 We still have the right -- what we want is this
7 information that we seek in 236, in order to inform any
8 memorandum that we send to the director of the WHS or the
9 Secretary of Defense for him to give us an exception to
10 policy. He can still do that. The Secretary of Defense is
11 still capable of changing his mind. I recognize that is a
12 hope that is a shimmer at best, but it's still possible.

13 MJ [COL POHL]: Okay.

14 ADDC [MAJ HURLEY]: So in the event of that possibility,
15 recognizing that we may or may not satisfy you when it comes
16 to what you would consider unfettered access to government
17 files, again, we would have a disagreement as to whether or
18 not it's unfettered. But even if you're disinclined to give
19 us that, in your formulation or mine, we would still like the
20 request that we seek in 236.

21 MJ [COL POHL]: No, you are correct, is that the -- I will
22 address the issue that's before me. Thank you.

23 ADDC [MAJ HURLEY]: Thank you, sir.

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1 MJ [COL POHL]: Trial Counsel, anything further?

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

3 MJ [COL POHL]: Okay. Dr. Crosby is here?

4 DDC [CDR MIZER]: Out the hatch.

5 MJ [COL POHL]: That's very Navy of you, but we call them
6 doors.

7 DDC [CDR MIZER]: Thank you.

8 MJ [COL POHL]: And Commander Mizer has rejoined us.
9 Please call the witness.

10 ADDC [MAJ HURLEY]: Dr. Crosby, would you please return to
11 the witness stand, and you can go ahead and have a seat.

12 MJ [COL POHL]: I'll take this part. Please be seated.

13 You are the same Dr. Crosby who was here earlier?

14 WIT: Yes, I am.

15 MJ [COL POHL]: I know you are, but the court reporter has
16 to put it on the record. I'm reminding you that you are still
17 under oath.

18 WIT: Yes, I am.

19 MJ [COL POHL]: When you got done with your testimony, an
20 issue came up and there's additional questions that you are
21 going to be asked, okay?

22 WIT: Okay.

23 MJ [COL POHL]: But the same rules apply as about the

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1 classified evidence that we discussed earlier, okay?

2 WIT: Okay. Thank you.

3 MJ [COL POHL]: Major Hurley.

4 ADDC [MAJ HURLEY]: Thank you, sir.

5 SONDR A CROSBY, civilian, was recalled as a witness for the
6 defense, was reminded of her oath, and testified as follows:

7 **DIRECT EXAMINATION**

8 **Questions by the Assistant Detailed Defense Counsel**

9 [MAJ HURLEY]:

10 Q. Dr. Crosby?

11 A. Yes, sir.

12 Q. We're going to talk about your review of
13 Mr. Nashiri's -- strike that.

14 The first thing that we're going to talk about,
15 Dr. Crosby, is your evaluation of Mr. Nashiri, all right?

16 A. Yes, sir.

17 Q. Now, no need to go over all of the components of a
18 forensic evaluation as you described them before. Safe to say
19 one of them is a physical evaluation?

20 A. Yes, sir.

21 Q. And that evaluation is a complete examination from
22 head to toe, front to back?

23 A. Yes, sir.

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1 Q. In that physical examination, did you -- the
2 physical examination, what I'm talking about specifically is
3 when you were looking at Mr. Nashiri, your observation of him,
4 did you find anything consistent with ultimately your
5 diagnosis of torture?

6 A. I take all of the components together. So
7 observation, physical examination of the body, the joints,
8 demeanor, all of these things are part of the physical
9 examination.

10 Q. All right. So did you ever see anything that -- see
11 anything that comported with your diagnosis of torture?

12 A. Yes. Am I allowed to say what my observations are?

13 Q. Yes, just say what were the things ----

14 MJ [COL POHL]: Talking about physical injuries?

15 Q. ---- the physical injuries that you observed we'll
16 go with first what you observed, and then in the palpation
17 part of the physical exam.

18 A. Can I start with demeanor or ----

19 Q. Yes, start with demeanor.

20 A. Yes. Mr. al Nashiri displayed a wide range of
21 emotions, depending on the content of what we were discussing
22 from irritability, to anger to extreme emotional intensity,
23 including crying, to silence, to wanting a timeout. These are

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1 all things that are consistent with somebody who is under
2 duress and stress and consistent with a history of trauma.

3 On my physical examination, I observed shoulder pain
4 to palpation.

5 Q. So palpation is what, briefly?

6 A. Touching.

7 Q. And when you say you observed shoulder pain to
8 palpation, without discussing classified information, can you
9 describe how that process went? You touched Mr. Nashiri?

10 A. Yes, I examined all of his joints.

11 Q. You touched him on the shoulder?

12 A. In a manner that we would do a standard
13 musculoskeletal exam.

14 Q. And when you touched him in certain of his joints,
15 he gave you a pain response?

16 A. Right. So he had some tender spots in his shoulder,
17 in his back, his buttocks and his legs ----

18 Q. And that ----

19 A. ---- most prominently.

20 Q. That process that you went through is typical of a
21 process that you go through when you are doing -- the
22 palpation part of the physical evaluation?

23 A. Yes. It's musculoskeletal exam that is standard in

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1 medicine, yes.

2 Q. You've done this particular part of an evaluation,
3 as you testified before, literally hundreds of times?

4 A. Probably thousands.

5 Q. Was that pain that you diagnosed, is it consistent
6 with your ultimate diagnosis of torture?

7 ATC [LT DAVIS]: Your Honor, the government has an
8 objection. The diagnosis isn't torture. The diagnosis would
9 be, as the doctor has testified before, post-traumatic stress
10 disorder or some other medical condition.

11 MJ [COL POHL]: Well, we have already elicited testimony
12 that he has exhibited symptoms consistent with being tortured.
13 That's already before me. We're just kind of repeating the
14 same thing.

15 So the objection is overruled on those grounds, but
16 it's been asked and answered, I think a number of times, that
17 his constellation of symptoms is consistent with having been
18 tortured, okay?

19 ADDC [MAJ HURLEY]: Yes, sir.

20 Questions by the Assistant Detailed Defense Counsel

21 [MAJ HURLEY]:

22 Q. Doctor, let's talk about the -- Doctor ----

23 A. I finished the physical.

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1 Q. ---- was there anything more that you wanted to
2 discuss regarding the physical examination?

3 A. Yes. I'd like to finish the physical exam.
4 Mr. al Nashiri also had a number of scars on his wrists, his
5 legs, his ankles, that -- I can't tell you what the
6 allegations were for either the musculoskeletal pain in the
7 shoulders and the back or the scars, but I can say that they
8 are consistent with the allegations and the history that he
9 gave me.

10 Q. Thanks, Doctor.

11 Doctor, now let's -- what I want to do is direct
12 your attention -- just hold on just one second. I need to
13 organize my notes again. Thank you, ma'am, for bearing with
14 me.

15 Let's talk about the -- again, the medical records.
16 Did you find any, in your review of the medical records, red
17 flags or items that would be consistent with your evaluation
18 and your diagnosis of Mr. Nashiri?

19 A. Yes, I did.

20 Q. What -- can you briefly list some of those red
21 flags?

22 A. I can. And let me explain this. Survivors of
23 torture and trauma often don't come forward and offer a

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1 history of what has happened to them. They will often exhibit
2 psychological distress through physical symptoms, and that's
3 called somatization. That's very common. I see it every day.

4 MJ [COL POHL]: Doctor, can you do the court reporter a
5 favor and spell somatization.

6 WIT: S-O-M-A-T-I-Z-A-T-I-O-N.

7 MJ [COL POHL]: Thank you. Go ahead.

8 A. So I -- we'll go through all of the red flags. So
9 the first wave of red flags I saw were multiple complaints of
10 somatic illness, joint pains, back pain, shoulder pain,
11 headache, chest pain, knee pain. These are all very common.
12 And when I reviewed the doctor's examination, the -- of course
13 I did not examine Mr. al Nashiri during this time -- the
14 physical findings -- the distress, the level of pain seemed
15 out of proportion to the physical findings, and this is also
16 very common in survivors of torture and trauma.

17 When people come to the office and they have
18 multiple complaints but not a lot of physical findings, I am
19 very concerned that there is a somatic component and there
20 might be trauma happening in the background. Those are red
21 flags.

22 Other red flags in Mr. al Nashiri are his persistent
23 and chronic anal-rectal complaints, difficulty defecating,

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1 bleeding, hemorrhoids, pain with sitting for prolonged periods
2 of time. This is very common in survivors of sexual assault.
3 And I did review physical exam findings by multiple doctors at
4 GTMO which documented different things at different times --
5 they may have looked different to different people --
6 including scarring, perianal keloid scarring, hemorrhoids,
7 skin tags, and a fissure. So those were all diagnoses that I
8 saw when Mr. al Nashiri was being evaluated for these
9 anal-rectal complaints.

10 Q. Doctor, let me stop you there. I want to -- I know
11 we have talked about two things, the first set of red flags
12 and the second set. So if I could direct your attention back
13 to the first set of red flags.

14 As you saw those red flags come up in the medical
15 records, the corresponding histories that you would see -- or
16 the records that you would see written out by what apparently
17 are doctors, did they fully develop what may have been the
18 causes of these red flags or problems?

19 A. There was no trauma history taken in any of the
20 records that I read. And the -- in the records that I read,
21 the physicians pursued the ailments and the complaints, I
22 mean, I think to -- as best as they could, but without --
23 without uncovering the underlying cause. They treated the

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1 symptoms without -- without treating the cause.

2 Q. And that same problem, treating the symptoms without
3 treating the cause, did that come up with the second red flag,
4 which was the anal-rectal problems that Mr. Nashiri suffers
5 from?

6 A. In my opinion, yes.

7 Q. Was there an adequate history taken on this
8 particular problem?

9 A. I did not see any history taken of a sexual assault.

10 Q. Continuing on with the red flags, Dr. Crosby, did
11 you see any others in your review of the medical records?

12 A. I did see multiple behavioral psychological symptoms
13 that Mr. al Nashiri exhibited that would alert me to the
14 possibility of post-traumatic stress disorder, and I can list
15 some of those.

16 Q. Please.

17 A. I don't have my notes in front of me. Severe sleep
18 dysregulation; sleep disturbance; irritability, anger
19 outbursts; sadness; decreased concentration, energy; avoidance
20 behavior. Avoidance behavior is one of the clusters of
21 symptoms we see in post-traumatic stress disorder, and there
22 was evidence in the record that is unclassified that he
23 avoided coming to appointments because of ear coverings and

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1 eye coverings. And I can't really go into the basis for why
2 he was avoiding that, but that was documented in the record.

3 He also at times avoided rec time. That was in the
4 record.

5 Q. Doctor, let me stop you right there.

6 ATC [LT DAVIS]: Your Honor, I have an objection. The
7 issue again before the commission is the state of his current
8 treatment. And I know that defense hasn't put this in any
9 kind of time frame, but in my familiarity with the medical
10 record, we seem to be going way back in time.

11 So the appropriate issue before the commission is is
12 he currently -- what are the current observations. I believe
13 that was one of the limitations that the court had put on this
14 testimony, what are the current issues, and whether they're
15 adequately being treated right now. We're not talking about
16 2009, 2010, 2011. That's not relevant to 205.

17 MJ [COL POHL]: The issue before me is -- one of the
18 issues is adequacy of current treatment, but adequacy of
19 current treatment is predicated on past treatment. You've
20 established your record as to flags and things like that, but
21 it seems to me is, if the issue is did he ever get adequate
22 treatment as a background to the current treatment, go into
23 that. But I think we need to get into -- this is relevant to

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1 that.

2 Are you with me on this, Major Hurley?

3 ADDC [MAJ HURLEY]: Yes, sir, I am.

4 MJ [COL POHL]: So the objection is overruled in the sense
5 that past treatment is irrelevant to current treatment, but on
6 the other hand, let's move this into the treatment phase of
7 it, because that's its only relevance.

8 ADDC [MAJ HURLEY]: Yes, sir.

9 MJ [COL POHL]: Go ahead.

10 Questions by the Assistant Detailed Defense Counsel

11 [MAJ HURLEY]:

12 Q. Dr. Crosby, remind me, what was the last red flag
13 that we were talking about? It's -- as we were having this
14 legal discussion, it slipped my mind. I'm sorry.

15 A. I don't recall which was the last one.

16 Q. Dr. Crosby, just one second.

17 Thanks. My recollection has been sufficiently
18 refreshed.

19 Dr. Crosby, we were talking about the avoidance.

20 Now, that avoidant behavior, is that -- does that
21 contribute -- did that contribute to your diagnosis, your
22 current diagnosis with respect to Mr. Nashiri?

23 A. It corroborated my current evaluation that I can't

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1 discuss because it's classified.

2 Q. Doctor, is avoidant behavior, that is not only
3 avoidant of rec time, but also avoidant of -- avoidant of
4 medical treatment, is that consistent with the other victims
5 of torture that you've treated in your career?

6 A. It is part of a cluster of symptoms that comprise
7 post-traumatic stress disorder. It's part of a syndrome. It
8 contributes to my opinion.

9 Q. That avoidant behavior, was it ever and is it now
10 being developed appropriate -- was there ever an appropriate
11 history taken from Mr. Nashiri of the avoidant behavior, like
12 why -- essentially why are you avoiding these treatments?

13 A. No, there was no history relating to his past trauma
14 that I saw ----

15 MJ [COL POHL]: Dr. Crosby, just so we cannot hear the
16 same question again and again, there is no trauma history in
17 the records?

18 WIT: Right.

19 MJ [COL POHL]: So regardless of what the symptom is,
20 there's no history of it in the records, correct, ma'am?

21 WIT: [Witness nods affirmatively.]

22 MJ [COL POHL]: No, you need to ----

23 WIT: Yes, there's no trauma history throughout the

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1 records.

2 ADDC [MAJ HURLEY]: Yes, sir, we'll move on from that
3 topic.

4 MJ [COL POHL]: Go ahead.

5 **Questions by the Assistant Detailed Defense Counsel**

6 [MAJ HURLEY]:

7 Q. Ma'am, I don't know if you've noticed, but
8 Mr. Nashiri is not present in court today. Have you noticed
9 that, present in court right now?

10 A. Actually, I did notice that.

11 ATC [LT DAVIS]: Objection. Relevance.

12 ADDC [MAJ HURLEY]: I'm going to talk about the thing that
13 occurred this week, Your Honor, which is part of what informed
14 Dr. Crosby's -- and continues to inform her current diagnosis
15 and the current level of treatment that Mr. Nashiri is
16 getting.

17 ATC [LT DAVIS]: And, Your Honor, this is exactly the
18 limitation that we discussed. These are the underlying facts
19 for the opinion.

20 MJ [COL POHL]: I got it. I'll reserve ruling on the
21 objection until I hear a question.

22 You said -- your place was, did you notice he's not
23 here.

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1 ADDC [MAJ HURLEY]: Right.

2 MJ [COL POHL]: The answer is yes. Okay.

3 ADDC [MAJ HURLEY]: Yes, sir.

4 **Questions by the Assistant Detailed Defense Counsel**

5 [MAJ HURLEY]:

6 Q. Without talking about anything that Mr. Nashiri ever
7 said to you, has anything happened this week or -- let me
8 rephrase that question.

9 Have you ever observed -- this week, have you
10 observed Mr. Nashiri in a hyperaroused state -- his physical
11 affect to you, like he was agitated, anxious, things like
12 that?

13 ATC [LT DAVIS]: Objection, Your Honor. These are
14 specific acts that inform the opinion. This is the limitation
15 that we talked about.

16 MJ [COL POHL]: Well, I'm going to give him a little
17 leeway because it's asking for a medical opinion about a
18 medical condition. But, Major Hurley, we're -- okay. So the
19 objection is overruled, but let's move to the issue before me.

20 ADDC [MAJ HURLEY]: Yes, sir.

21 MJ [COL POHL]: Okay. She has a current diagnosis. I
22 have heard the current diagnosis.

23 You said this activity they observed that they just

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1 talked to you about -- Major Hurley just talked to you about,
2 Doctor, is that consistent with your current diagnosis.

3 WIT: Yes, it is, consistent with my current diagnosis,
4 and I can't give any details about it.

5 ADDC [MAJ HURLEY]: Colonel Pohl, may I have a moment?

6 MJ [COL POHL]: Sure.

7 Questions by the Assistant Detailed Defense Counsel

8 [MAJ HURLEY]:

9 Q. Doctor, what's a flashback?

10 A. A flashback is part of a symptom of post-traumatic
11 stress disorder, part of the cluster of symptoms of
12 post-traumatic stress disorder, re-experiencing where
13 something triggers you, a person, an object, a sound, a noise,
14 an object, and you immediately get flooded with a previous
15 traumatic experience.

16 Q. Have you ever observed Mr. Nashiri have what you
17 would say, to a reasonable degree of medical certainty, is a
18 flashback?

19 ATC [LT DAVIS]: Objection, Your Honor. This does not go
20 to the diagnosis. It doesn't go to the inadequacy of the
21 treatment. These are just the specific facts underlying the
22 opinion of the diagnosis that the doctor has already given.

23 MJ [COL POHL]: Thank you. Objection overruled.

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1 ADDC [MAJ HURLEY]: That was it, sir. That's the last
2 question.

3 MJ [COL POHL]: Let's wait for an answer.

4 **Questions by the Assistant Detailed Defense Counsel**

5 [MAJ HURLEY]:

6 Q. Have you ever observed Mr. Nashiri suffer from a
7 flashback, to a reasonable degree of medical certainty?

8 A. Yes, I have, sir.

9 Q. Let's talk about one of the red flags that you
10 talked about was the sleep disorder that was -- that
11 Mr. Nashiri suffers from.

12 A. Yes.

13 Q. Now, did you review the treatment for this sleep
14 disorder, the treatment that Mr. Nashiri was given for the
15 sleep disorder?

16 MJ [COL POHL]: Rather than -- let me make sure I
17 understand. Dr. Crosby, you see these things as -- you used
18 the term "cluster" -- I think I used the term "constellation,"
19 but a cluster of symptoms. So would it be fair to say that if
20 you had a treatment plan, in your opinion an effective
21 treatment plan, it would address the cluster of symptoms, not
22 individual symptoms, although there may be individual symptom
23 components of the cluster?

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1 WIT: Right. You would target individual symptoms that
2 may be prominent. For instance, if somebody had PTSD and
3 their prominent symptom was sleep disorder, you would pick a
4 medication or a therapy that would really work on that sleep.
5 But to make the diagnosis of PTSD, you would have to have
6 other symptoms as well.

7 MJ [COL POHL]: Okay. But if you had PTSD with a sleep
8 disorder, the treatment plan would not just be the sleep
9 disorder. That may be a component of the treatment plan.

10 WIT: That's exactly right, sir.

11 LDC [MR. KAMMEN]: Your Honor, could you just ask the
12 witness to speak up. I'm thinking the court reporter is
13 having a problem.

14 MJ [COL POHL]: I think when she turns to me, she turns
15 away from the mic.

16 WIT: I'm sorry.

17 MJ [COL POHL]: So let me -- okay. In reviewing the
18 medical records, okay, did you ever see, in your opinion, an
19 adequate treatment plan for the cluster of symptoms that
20 Mr. Nashiri exhibited to you?

21 WIT: I need to explain that answer, sir.

22 MJ [COL POHL]: Okay.

23 WIT: Mr. Nashiri was seen by many, many psychologists,

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1 psychiatrists, behavioral health specialists here at GTMO, and
2 he was offered some treatment plans, although he was never
3 diagnosed with PTSD. Many of the treatment plans he was
4 offered targeted his symptoms, and the symptoms that are in
5 the nonclassified records, I'm going to pick one that was very
6 prominent, and that is sleep. And yes, Mr. al Nashiri was
7 offered medication, according to the records, for his sleep.

8 He was not diagnosed with PTSD, so he was not
9 treated for the whole syndrome. He was treated for other
10 diagnoses that were given to him by doctors, and he was
11 offered targeted treatment for sleep.

12 MJ [COL POHL]: Okay. So in answer to my question about
13 if this was a normal -- I'm not sure that you have normal
14 patients, but just a patient that you would see, and if
15 diagnosed correctly, in your view, with PTSD with this cluster
16 of symptoms, effective medical treatment would be to address
17 the cluster with perhaps some targeted strategies; would that
18 be a fair statement?

19 WIT: That is correct.

20 MJ [COL POHL]: Okay. Now -- now -- okay.

21 WIT: He was not treated for PTSD.

22 MJ [COL POHL]: Okay. So in your opinion -- and he's not
23 currently being treated for PTSD?

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1 WIT: That is correct.

2 MJ [COL POHL]: So in your opinion has he received
3 adequate medical treatment -- and I'm using "medical" in the
4 broadest sense -- for his current condition?

5 WIT: He has not received adequate treatment for his
6 current condition, in my medical opinion.

7 MJ [COL POHL]: Okay. I think you answered this earlier.
8 Just to be clear so I understand, in your view it would
9 require a team approach with psychologists, psychiatrists,
10 plus other medical professionals, and perhaps some people who
11 address various targeted things, with continuity of care over
12 a period of time?

13 WIT: With continuity of care and with experience treating
14 traumatized individuals with trauma experience, yes, sir.

15 MJ [COL POHL]: Okay. Major Hurley, do you have anything?
16 Go ahead.

17 ADDC [MAJ HURLEY]: Sir, I do have some additional
18 questions.

19 MJ [COL POHL]: Go ahead.

20 **Questions by the Assistant Detailed Defense Counsel**

21 [MAJ HURLEY]:

22 Q. And, again, just to orient you, Dr. Crosby, to the
23 testimony that we want to talk about now, do you recall our

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1 discussion this morning about the systemic problems that you
2 see in the treatment in Guantanamo Bay for detainees?

3 A. I do recall the conversation we had.

4 Q. And those systemic problems included lack of trauma
5 history, which we have discussed before. Do you recall that?

6 A. Yes, sir.

7 Q. Lack of continuity of care?

8 A. Yes, sir.

9 Q. And then presumed -- your presumed lack of -- or no
10 evidence of special training with respect to taking trauma
11 histories?

12 A. And I have no knowledge of the training. I can just
13 tell you there's no trauma histories in the medical record.

14 Q. Now, with respect to the treatment plans that you've
15 seen, do these systemic problems that we discussed earlier --
16 do they bear on the adequacy of treatment that Mr. Nashiri has
17 received?

18 A. The fact that there's no trauma history in the chart
19 bears on the fact that he was not diagnosed correctly and is
20 not receiving the proper treatment. You cannot diagnose
21 somebody with post-traumatic stress disorder unless you have a
22 trauma, a significant trauma, and there's no such history in
23 the record. So yes, it does bear.

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1 Q. Dr. Crosby, do you have any reason to believe that
2 the leadership at the camp, the JTF, has ever attempted to
3 influence the clinical process for the caregivers at the camp?

4 ATC [LT DAVIS]: Objection, Your Honor, relevance.

5 MJ [COL POHL]: Overruled.

6 ATC [LT DAVIS]: Your Honor, if I may, just briefly, the
7 relevant issue would be if the doctor is aware of any
8 influence directed toward the treatment of Mr. Nashiri as
9 opposed to just in general. Whether there was influence on
10 somebody else is simply not before this commission or the
11 subject of this motion.

12 MJ [COL POHL]: Overruled. Go ahead.

13 Questions by the Assistant Detailed Defense Counsel

14 [MAJ HURLEY]:

15 Q. So, ma'am, my question was: Do you have any
16 knowledge of interference from the camp leadership on the
17 treatment process for the doctors in Guantanamo Bay?

18 A. I don't have direct knowledge of that, sir, no.

19 Q. Can you describe the nature of your indirect
20 knowledge?

21 ATC [LT DAVIS]: Objection, calls for speculation.

22 ADDC [MAJ HURLEY]: I'm asking how she -- like how -- she
23 doesn't have direct knowledge of it. Well, what's the source

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1 of this indirect knowledge?

2 Or, ma'am -- Dr. Crosby, let me first ask you this
3 question.

4 So, sir, I know that you have an objection pending
5 before you, may I --

6 MJ [COL POHL]: Well, I'm assuming that you're withdrawing
7 the first question.

8 ADDC [MAJ HURLEY]: I'm withdrawing the first question.

9 MJ [COL POHL]: Okay. I don't need to rule on the
10 objection.

11 Questions by the Assistant Detailed Defense Counsel

12 [MAJ HURLEY]:

13 Q. You said you don't have direct knowledge, ma'am.

14 A. Of camp leadership directly interfering with
15 Mr. al Nashiri's care.

16 Q. Yes.

17 A. Yeah, I don't have direct knowledge. I have told
18 you what I think some of the systemic problems are that I've
19 observed in his care.

20 Q. And -- but you don't have any direct knowledge that
21 that comes as a result of the interference of leadership from
22 the camp?

23 A. I don't have direct knowledge of that.

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1 Q. Okay.

2 ADDC [MAJ HURLEY]: Sir, just one second.

3 MJ [COL POHL]: Sure.

4 Q. You testified earlier today, Dr. Crosby, about your
5 participation in the Defense Health Board?

6 A. Yes, sir.

7 Q. And that your participation was about the medical
8 treatment here in Guantanamo Bay?

9 A. Yes, focused on hunger strikes and management of
10 hunger strikes.

11 Q. And you presented to the board with respect to that?

12 A. Yes, sir.

13 Q. In preparing for this presentation -- or for that
14 presentation, did you understand what, if any, wall separated
15 the leadership of the camp from the medical staff? Was there
16 one?

17 A. Are we talking about the hunger strike policy here
18 at Guantanamo Bay?

19 Q. For this topic, yes.

20 A. This topic.

21 ATC [LT DAVIS]: Objection, Your Honor, relevance.

22 ADDC [MAJ HURLEY]: Just goes to institutional control and
23 what, if any, control may have been exerted -- may be exerted

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1 by the camp leadership on the medical practitioners at the
2 camp.

3 MJ [COL POHL]: Well, that's a different question than
4 what you asked. Just to make this move along, I'll give you a
5 little leeway and give it the weight it deserves, but let's
6 not get too tangential here. Objection overruled.

7 Q. So yes, this was -- what was your observation with
8 respect to the hunger strike policy here in Guantanamo Bay?

9 A. All right. I do have a background in hunger
10 strikes, doing research on hunger strikes ----

11 MJ [COL POHL]: Ma'am, I'm sorry, the question he asked
12 you isn't really the one you need to answer. The answer is
13 this -- the question is ----

14 WIT: I'm sorry.

15 MJ [COL POHL]: ---- during your time on the board -- and
16 you were dealing with the hunger strike issue. I've got that.
17 But the issue is not necessarily that.

18 The issue is: Did you observe the relationship of
19 the camp -- nonmedical camp leadership's control, or lack
20 thereof, with the medical community treating the detainees.

21 WIT: Yes. And that has nothing to do with the Defense
22 Health Board. That has to do with my professional activities.
23 My concern in studying the SOPs here at Guantanamo is that the

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1 SOPs -- the doctors are instructed to force-feed competent
2 hunger strikers when it is against medical ethics and, in
3 fact, most of the western medical world. So yes, there is
4 influence on doctors to perform this function.

5 ADDC [MAJ HURLEY]: Dr. Crosby, thank you.

6 Nothing further.

7 MJ [COL POHL]: Trial Counsel, any questions?

8 ATC [LT DAVIS]: Your Honor, just a brief moment, please.

9 MJ [COL POHL]: Sure.

10 ATC [LT DAVIS]: Nothing from the government, Your Honor.

11 MJ [COL POHL]: Thank you. Dr. Crosby, you are again
12 excused. I want to thank you for your testimony.

13 WIT: Is this the last time?

14 MJ [COL POHL]: I think so.

15 WIT: Thank you.

16 [The witness was excused and withdrew from the courtroom.]

17 MJ [COL POHL]: We'll recess for 15 minutes. And just for
18 planning purposes, we'll probably go to approximately 1700
19 today.

20 Commission is in recess.

21 [The Military Commission recessed at 1440, 24 April 2014.]

22 [END OF PAGE]

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