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1 [The R.M.C. 803 session was called to order at 0904,
2 7 November 2017.]

3 MJ [Col SPATH]: All right. This commission is called to
4 order. For the government, all the same parties who were
5 present for the last session are again present, except that
6 General Martins has again joined us.

7 For the defense, Lieutenant Piette is present. Three
8 civilian counsel are still not present, and other detailed
9 available defense counsel apparently aren't present as well.
10 But the same party is present who was present for our last
11 session.

12 For any interested people in the back, our kind of
13 the road ahead today, we're going to start with just some
14 administrative notes in an open session. Then we're going to
15 break for ----

16 [Conferred with courtroom personnel.]

17 MJ [Col SPATH]: ---- then we're going to break for -- I'm
18 sorry, there's some feedback somewhere in here.

19 We're going to break for the al Darbi deposition.
20 That's a closed session. I think everybody knows that. By
21 all accounts, it's going to be pretty short. However, it
22 takes about 40, 45 minutes to close the session, and then it's
23 going to take another 30 to 40 minutes to reopen the session.

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1 So my goal would be to -- what we'll probably do,
2 once we go out of this open session, we'll just break, and
3 I'll give you time to be back for the next open session after
4 everyone has a chance to move things around and have an early
5 lunch. So my guess is we'll be back on the record at 12:30,
6 after we close this open session.

7 Now, in regard to the way ahead after that, I assume
8 that Special Agent McFadden will be ready at 12:30. If that's
9 the case, we'll have him testify at 12:30. And then we'll
10 move to any 207 witnesses who are available, if any are
11 available, be it in person or by VTC. And I'll check with you
12 all, Government, to find out where we're at.

13 All right. I'm doing my best to multitask. I don't
14 know if you can hear the noise in the back, but it sounds like
15 it's me on another device playing in the courtroom when I
16 talk.

17 So for the weekend, kind of where we're at, there was
18 a filing from the defense that I'll talk about, 389K. There
19 was an order from the commission, 389L, for the production of
20 two witnesses to assist with good cause on the record, because
21 counsel haven't been released yet, as I think I've made clear
22 multiple times. Then there was 389M, a government filing, in
23 relation to this issue as well.

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1 I will give verbal findings of fact before we depart
2 here sometime either late this week or next week, but my
3 position remains the same; and that is that the defense team
4 has significant resources that they have chosen not to bring
5 to court, and they continue to choose not to bring to court by
6 choice.

7 Despite every effort that I have made to get
8 Mr. al Nashiri his learned counsel and the two detailed DoD
9 civilians, plus another military counsel who is cleared and
10 available, plus two more military lawyers who, while not
11 cleared, are available to do work, plus expert assistance,
12 mitigation assistance, and everything else I can do -- and
13 I'll continue to make that effort to ensure the defense,
14 particularly the client, gets the resources that he's got at
15 his disposal right now that the defense community continues
16 not to provide.

17 And it certainly seems like it is voluntary,
18 intentional, and a strategy. And I'm going to make sure that
19 that is all reflected in the findings when I issue them on the
20 record. But in the short term, we're moving forward in the
21 way that I have discussed.

22 Hopefully, objective observers recognize why. If you
23 have an agenda, I can't fix it, so you'll continue to say

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1 whatever you want to say about it. But this process is going
2 to go forward in noncapital matters and we're going to issue
3 an order as well about, apparently, a second learned counsel
4 who is heading our way so that we are kept apprised of that
5 status. But that doesn't release the first outside appointed
6 learned counsel. He's still a party of record. If we have to
7 sever that relationship at some time for good cause shown on
8 the record, we'll talk about it, but it hasn't been done yet.

9 So after those orders and the 389K series were issued
10 and occurred, the government sent an e-mail asking if we were
11 going to go on Monday -- or if we could go on Monday is
12 probably more accurate. I sent an e-mail -- I didn't; my
13 staff did. They sent an e-mail to all the parties, as the
14 government had done, indicating that we were not going to go
15 on Monday because I'm going to continue to give the defense
16 team time, and that we're going to go on Tuesday, just like I
17 said last week. So here we are going through that process.

18 After that e-mail exchange, the government made a --
19 the government -- the defense made a filing, 389K, where they
20 renewed the request for me to abate these proceedings. After
21 that filing came in, I directed my staff, particularly
22 Mr. Potter, the senior trial lawyer now for this case, to send
23 an e-mail to both parties and ask the government if we're

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1 going to get a response to that filing. There's no
2 requirement they respond, so I was just curious on Saturday,
3 while I was working, if the government was going to respond --
4 or maybe it was Sunday. It was Sunday, sorry. It doesn't
5 matter. I can look down at my e-mail. It was Monday.

6 And we got -- the defense filed on Monday. The
7 government then we sent an e-mail on Monday, are you going to
8 respond? And we sent that e-mail out at 11:11 -- I'm sorry,
9 at 11:03.

10 Soon after that the government responded by e-mail,
11 appropriately to all the parties, and they said yes, we're
12 going to respond. And we got that at 11:05, just a couple
13 minutes after.

14 At 11:11, again at my direction, Mr. Potter sent out
15 an e-mail and asked the government, again copying all the
16 parties, and just said a response today would be greatly
17 appreciated. And it was greatly appreciated. We got it at
18 1800.

19 At 11:41, Mr. Potter got an e-mail from the defense
20 counsel, the detailed military defense counsel, with no copy
21 to the government, which is why I'm disclosing it because it
22 is an ex parte contact to the commission, that copied Brandi
23 Janes and Michel Paradis. And the e-mail to Mr. Potter was,

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1 "Good morning. I'm curious as to why the defense wasn't asked
2 if we wanted an opportunity to reply to the e-mail that the
3 government sent stating their position as to the way forward.
4 Is that e-mail going to be included on the record? I was
5 almost held in contempt for trying to do exactly what the
6 government has done here. Very respectfully, Lieutenant
7 Piette."

8 We received the government response. So now,
9 Government, you know of that contact. We received the
10 government response at 5:59 p.m. last night. And then another
11 e-mail came in, but this did copy both parties, from
12 Lieutenant Piette. It arrived at 7:31. And Lieutenant Piette
13 indicated his filing, 389K, "...wasn't a motion. It was just
14 meant to be the equivalent of the government's email stating
15 their position on the way forward. I only put it in a
16 pleading because I risk contempt by doing what the government
17 did."

18 So the record is complete. The e-mails are in the
19 record.

20 Lieutenant Piette, that's not why you were almost
21 held in contempt. And it's important to be accurate and to
22 have candor towards both the tribunal and not to engage in
23 ex parte contact.

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1 You were almost held in contempt because I ordered
2 you to file a pleading; totally different than asking if
3 someone is going to file a pleading. And it was the first day
4 we were here, and the defense counsel's absence was obvious,
5 the learned counsel and two civilians. And I wanted the
6 defense's position on what they thought the way forward was in
7 a pleading. The government filed one; the defense chose not
8 to.

9 And so on our first day on the record, many of you
10 will remember, I asked pretty clearly to get the pleading
11 formally, and I made clear -- maybe it was my mistake at the
12 802 session and I might not have been clear. I think I was
13 clear, but we all make mistakes and maybe I wasn't very clear
14 in the 802. And I expected it to be in a filing, because
15 e-mails don't typically go in the record. We engage in
16 administrative e-mails amongst ourselves frequently through my
17 staff and both sides, and you're all welcome to do that.

18 The situation was different; we all know that.
19 Mr. Potter was trying to figure out if the government was
20 going to file when they didn't have to. They could have
21 chosen not to file. And then if they were going to file, I
22 think Mr. Potter expected it would probably show up in a
23 pleading, which it did.

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1 I have attempted -- I think I have reasonably --
2 there are certainly moments over the last three-plus years
3 that I wasn't as civil as I would like to have been, but I
4 certainly try every moment to treat all of the parties and all
5 of the participants with respect. And I'm going to continue
6 to do that, which is why I'm making the effort I am to get
7 Mr. al Nashiri's attorneys here.

8 But in responding to the staff, I do expect the same
9 civility and decorum we'd expect in any tribunal anywhere, be
10 it through the federal court system, a state court system, or
11 any kind of Article I court, of which the numbers of those are
12 so many it's too obvious to talk about. We all know they
13 exist. Civility is important.

14 The record is clear why we had an issue last week.
15 Lieutenant Piette, you chose to issue a filing after the
16 order. I told you I appreciated that, but this was clearly a
17 different situation. And again, anyone who objectively reads
18 the traffic will know that. If you're not objective and you
19 have an agenda, you'll take it as you will, and I can't help
20 that either.

21 I'm going to continue to move on, as I said. So
22 we're going to go right through the process we've already
23 discussed. And that means in January, too, we're going to

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1 continue with preadmission. My plan was to discuss with the
2 government and the defense if we needed to do preadmission for
3 a year, if there was a way to move this to trial faster than
4 that. But if the learned counsel refuses to show up, and it
5 takes time to get the next learned counsel here, we're going
6 to move through preadmission of real evidence in the short
7 term, while we continue to work the attorney issue. Because
8 this case -- a lot of money has been spent on the defense team
9 and resourcing.

10 Again, I recognize Lieutenant Piette's at the table
11 by himself. An objective observer knows that there are three
12 civilian counsel who should be there, at least another
13 military counsel who should be there, and two military counsel
14 who can be helping. But if you have an agenda, you will just
15 discuss the fact that it's Lieutenant Piette by himself.
16 That's fine. But it isn't. And the defense community needs
17 to work to get Mr. al Nashiri his attorneys down here to help
18 him. All right. Again, I'll do lots of findings as we move
19 forward.

20 Lieutenant Piette, I think it's Major -- is it
21 Robinson, the other defense attorney who's been cleared?

22 DDC [LT PIETTE]: Yes, Your Honor.

23 MJ [Col SPATH]: Has he met with Mr. al Nashiri yet?

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1 DDC [LT PIETTE]: No, Your Honor.

2 MJ [Col SPATH]: Is he on island?

3 DDC [LT PIETTE]: Yes, Your Honor.

4 MJ [Col SPATH]: Are any other detailed defense counsel on
5 island?

6 DDC [LT PIETTE]: No, Your Honor.

7 MJ [Col SPATH]: All right. Thank you.

8 I guess -- let me ask this: When did Major Robinson
9 arrive on island?

10 DDC [LT PIETTE]: 29 October.

11 MJ [Col SPATH]: I know one of the other detailed defense
12 counsel, not cleared yet, is Major Fewell. For the government
13 to the extent -- again, I know that there are some limitations
14 on security clearances and getting there. To the extent that
15 you can assist by just asking people if they can move this
16 forward -- she is a former senior defense counsel in the Air
17 Force; she has a significant amount of experience; she's been
18 a trial lawyer for a number of years in the Air Force. And
19 while I know she could do work on this case, we all know that
20 she can't meet with her client until she gets cleared, so to
21 the extent we can assist with that, I know we will.

22 But Major Robinson is here on island, as I believe
23 was the case. I wasn't sure. All right. So that's where we

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1 are at today.

2 I know for everyone in the back, I'm sorry, it's
3 going to be -- you were here for 20 minutes, or whatever it
4 was, and then we don't have you back here for a little while.
5 I can't help how long it takes to change it for a deposition
6 and then change it back to an open session. But to do that
7 will get us to 11:30, between the two movements of court
8 reporters and the like. And so what I am going to do is just
9 add our lunch break into that, and we'll come back at 12:30 in
10 an open session, and we'll start with Special Agent McFadden.

11 For everybody else, you need to remain here. We'll
12 get Mr. al Darbi in here for the cross-examination in the
13 closed deposition, and we'll move through that as well.

14 Trial Counsel, is Mr. McFadden going to be available
15 when we ----

16 TC [MR. MILLER]: Yes, Your Honor.

17 MJ [Col SPATH]: Okay. And for the 207 witnesses -- I
18 know I indicated I thought some were traveling down -- do you
19 have an idea of the numbers who are coming or are here, where
20 we're at?

21 TC [MR. MILLER]: Colonel Wells has been our travel
22 director.

23 MJ [Col SPATH]: I understand.

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1 MATC [COL WELLS]: Your Honor, good morning.

2 MJ [Col SPATH]: [Pause] Good morning. Sorry. I was
3 drinking coffee.

4 MATC [COL WELLS]: We have a number of witnesses
5 attempting to arrive on the rotator today to be available to
6 testify at the commission's direction Wednesday, Thursday or
7 Friday or Saturday and Sunday as needed. Some of them have
8 missed their flights, and so we're trying to scramble to see
9 if we can get them on the Thursday rotator.

10 We may utilize the VTC, but I will say for the
11 commission I think that's extremely difficult when the
12 witnesses need to look at the evidence bags and handle them.
13 We're still coming up with a process on that to accommodate.

14 So, sir, we have planned three witnesses for
15 Wednesday, three witnesses for Thursday, two witnesses for
16 Friday.

17 MJ [Col SPATH]: That works. And then you have some for
18 the following week or no?

19 MATC [COL WELLS]: Yes, sir.

20 MJ [Col SPATH]: Okay.

21 MATC [COL WELLS]: In response to Lieutenant Piette's
22 submission, which you addressed just recently, he did include
23 an expert opinion with that, so obviously that would be

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1 appropriate for a filing to bring it to the commission's
2 attention and not an e-mail.

3 But you also directed that we attempt to produce
4 Mrs. Yaroshefsky and Ms. Olson-Gault, so we're making contact
5 with them. So we targeted for Monday was your direction.

6 Then on Tuesday, Wednesday, and Thursday -- Tuesday
7 we have three witnesses. Wednesday we have three witnesses.
8 Thursday we have three witnesses. And Friday, the final day,
9 we have two witnesses.

10 MJ [Col SPATH]: And so with the two that we asked for
11 late, the ones related to the 389, if Monday doesn't work, we
12 can move them into the days of the week if need be. I was
13 just trying to give a target date, if need be.

14 MATC [COL WELLS]: Yes, sir. We'll keep you apprised.

15 MJ [Col SPATH]: Okay.

16 MATC [COL WELLS]: Thank you, sir.

17 MJ [Col SPATH]: And then let the defense team, to include
18 learned counsel and the two DoD military counsel and Major
19 Robinson, and anyone else you want to copy on the defense
20 team, know the order of witnesses who you are going to be
21 calling for the evidence. Thank you.

22 MATC [COL WELLS]: Yes, sir.

23 TC [MR. MILLER]: We will, Your Honor.

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1 MJ [Col SPATH]: Lieutenant Piette.

2 DDC [LT PIETTE]: Yes, Your Honor. I just wanted to take
3 this opportunity, first, to apologize to the court, your
4 staff, and the government. I think I was confused and upset
5 and I let the stress get to me, and I absolutely shouldn't
6 have sent those e-mails in the manner I did. So I wanted to
7 apologize to the court for that, and that incivility will not
8 happen again.

9 MJ [Col SPATH]: And I will tell you this. I appreciate
10 that, and I have been there, both as a defense counsel, as a
11 trial counsel, and as a trial judge. You are not the first,
12 believe me. And I have done it.

13 DDC [LT PIETTE]: Yes, Your Honor.

14 MJ [Col SPATH]: Even last week there are comments I made
15 on the record, as I read it, that I would like to go back and
16 draw through. We all can't -- I wish we could be a hundred
17 percent. I don't get that opportunity and neither do the rest
18 of us, so.

19 DDC [LT PIETTE]: Absolutely, Your Honor.

20 And I also wanted to put on the record, I think I
21 said this last week, but Major Robinson is here, he is
22 cleared; but because we don't have learned counsel here
23 present, for whatever reason, to advise and assist

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1 Mr. al Nashiri in accepting a new counsel, we -- that's, you
2 know, just consistent with our position that we cannot act
3 because we're not qualified in manners like that. Thank you,
4 Your Honor.

5 MJ [Col SPATH]: Thank you. All right. We'll get set
6 up -- for everyone in the back, we'll see you at 12:30. For
7 everybody here, we'll get in here as soon as we can with
8 al Darbi's deposition.

9 We're in recess. Thanks.

10 [The R.M.C. 803 session recessed at 0925, 7 November 2017.]

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