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1 [The R.M.C. 803 session was called to order at 0908,
2 14 August 2017.]

3 MJ [Col RUBIN]: The commission is called to order. All
4 parties present when the commission last recessed are again
5 present. The accused has voluntarily waived his presence for
6 this session of the commission. The defense has provided AE
7 092A, which is a written waiver of the accused, executed in
8 the presence of his defense counsel, prior to this session in
9 accordance with AE 074C. The commission finds this waiver to
10 be voluntary and grants the accused's request to be absent
11 from this session.

12 Trial Counsel, who is here to represent the
13 government?

14 TC [CDR SHORT]: Good morning, Your Honor. All members of
15 the government who were present when the commission recessed
16 are once again present. Representing the government today are
17 Douglas Short, Commander, United States Navy; Commander Kevin
18 Flynn, United States Navy; Lieutenant Commander Vaughn
19 Spencer, United States Navy; Lieutenant Commander David
20 Lincoln, United States Navy; and welcoming today is also
21 Captain Johnathan Rudy, United States Marine Corps; Captain
22 Eric Depue, United States Marine Corps.

23 Captains Depue and Rudy, Your Honor, both with the

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1 United States Marine Corps, have been detailed to the
2 government and are now present.

3 MJ [Col RUBIN]: Captain Depue, good morning. This is
4 your first time appearing on the record. Can you both state
5 by whom you have been detailed and your legal qualifications
6 and status as to oath and whether you have acted in any
7 disqualifying manner in this case.

8 ATC [Capt RUDY]: Good morning again, Your Honor. Captain
9 Johnathan Rudy. I have been detailed to this military
10 commission by the Chief Prosecutor in accordance with Rule for
11 Military Commissions 503. I am qualified under Rule for
12 Military Commission 502(d) and have been previously sworn in
13 accordance with Rule for Military Commissions 807. I have not
14 acted in any manner which might tend to disqualify me in this
15 proceeding. The detailing document has been marked as
16 Appellate Exhibit 003H.

17 MJ [Col RUBIN]: Thank you. Captain Depue.

18 ATC [Capt DEPUE]: Good morning, Your Honor. Captain Eric
19 Depue for the government. I have been detailed by the Chief
20 Prosecutor in accordance with Rule for Military Commissions
21 503. I am qualified under Rule for Military Commissions
22 502(d), and I have previously been sworn under Rule for
23 Military Commissions 807. I have not acted in any

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 disqualifying manner, and the detailing memorandum has been
2 marked as Appellate Exhibit 003H.

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

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

6 MJ [Col RUBIN]: Good morning.

7 DC [CDR COOPER]: All counsel present when the last
8 session recessed are again present.

9 MJ [Col RUBIN]: Thank you.

10 On 13 August 2017, I conducted an R.M.C. 803 session
11 with all counsel present. The counsel and I discussed the
12 anticipated order of motions during this session and new
13 counsel put their qualifications on the record. We discussed
14 whether the parties anticipated classified argument on AE
15 070FFF and the possible need for an M.C.R.E. 505(h) hearing.

16 The defense informed the commission that they did not
17 desire to litigate AE 085 during this session of the
18 commission. The defense brought up a pending motion they
19 recently filed that has not yet been accepted for filing. The
20 defense stated they intend to object to the deposition of
21 Ahmed al Darbi occurring this week and the commission's ruling
22 on the third-party motion to reconsider AE 070GGG.

23 The defense indicated that the accused intended to

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1 voluntarily waive his presence today but intended to be
2 present at the deposition scheduled for this week.

3 Additionally, the defense informed the commission
4 that the accused has been dealing with some medical issues.
5 We discussed some ground rules and administrative issues
6 related to the deposition specifically related to how
7 objections would be handled, swearing of translators,
8 preservation of visual exhibits, camera views, and whether
9 translation would be simultaneous or consecutive. We also
10 discussed the anticipated length of the deposition.

11 Finally, we discussed the best time to hold an
12 M.C.R.E. 505(h) hearing this week related to the AE 070
13 series. The counsel were in agreement that it would be best
14 to conduct the 505(h) hearing after the government's direct
15 examination of Mr. al Darbi. The commission concurs.

16 Do counsel for either side have anything to add or
17 correct based upon the commission's summary of our 802
18 conference?

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

20 MJ [Col RUBIN]: Defense?

21 ADC [MR. THURSCHELL]: It will be easier if I do this at
22 the end. First, I wanted to put on the record our discussion
23 of some of the deposition mechanics, just to make our

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1 positions clear. We would -- we discussed and we have decided
2 we would in fact like to voir dire -- have the opportunity to
3 voir dire the interpreter. Trial counsel informed me this
4 morning that we will be supplied, under seal, with the CVs for
5 the interpreters as I understand it, and that actually may
6 obviate the need for it. We won't do it unless we feel like
7 there are additional questions that need to be asked, but we
8 would -- we would request that. It would not be intrusive to
9 preserve the identity of the interpreter, which is classified.
10 We may need to go briefly, I think, into a closed session to
11 handle that.

12 We also discussed the question of the camera coverage
13 of the deposition, and we requested, and now request formally
14 on the record, that the camera, there be a dual screen; one
15 camera on the witness, one on the questioning attorney and/or
16 the defense table when the defense is questioning, or as I
17 understand it's currently done -- I haven't actually looked at
18 the video feed for a very long time -- at least a shifting
19 back and forth in response to questions so that you capture
20 some of the actual dynamics in the courtroom.

21 We think this is very important and it will certainly
22 be an issue if it is not done that way when it comes time to
23 question the admissibility of the deposition. If this is in

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1 fact a trial deposition, and the government has gone a little
2 back and forth on how they want to characterize this -- is it
3 trial or is it discovery pretrial -- then I think the question
4 of how much it conveys to the panel, the actual experience of
5 the courtroom, should be an issue and we will make that an
6 issue. So our request is that we handle the camera work in
7 that manner.

8 A couple of other issues. We have not received yet
9 the al Nashiri al Darbi direct transcript or video. That's
10 clearly 914. I don't think the government contests that. I
11 would appreciate it if the government could let us know on the
12 record when we could expect to receive that. I assume it will
13 be well before cross. My understanding is also, and this is
14 hearsay and rumor, that it may be caught up in some
15 classification review limbo, but I would appreciate them
16 speaking to that for our planning purposes.

17 Finally, I would like to speak to the objection to
18 going forward with the deposition this week that you
19 mentioned, and I want to -- we have reconsidered that
20 objection in light of the discussion at the 802 to the effect
21 that all objections will be reserved to the questions and
22 testimony of Mr. al Darbi until trial, with the exception of
23 objections that go to the form of the question. So if in fact

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1 we are able to reserve, without waiver, all objections other
2 than to the form of the question, we anticipate that we will
3 be able to go forward with the deposition because we will have
4 the opportunity to consult with Mr. al Darbi -- I'm sorry,
5 Mr. Al-Tamir, prior to formulating our objection strategy.

6 And just to give the background on that, because it's
7 important and leads into the larger question that we should
8 try to address as soon as possible, the government delivered
9 35 exhibits or so at 1630 in the afternoon this past Friday --
10 in other words, right -- the Friday afternoon before we all
11 left to come down for this hearing. And prior to that we had
12 carefully considered whether, under current conditions and the
13 current issues that have arisen with respect to the
14 attorney-client relationship, we could go forward with the
15 deposition. We had concluded that we could.

16 When we received these exhibits, we realized that
17 without being able to speak to Mr. Al-Tamir about these
18 exhibits, about which we had no prior knowledge -- and I would
19 just pause for a moment. The government mentioned at the 802
20 yesterday that in fact we do have that. We have not been able
21 to locate at least many of these. If you -- and you have said
22 we received them in discovery. It would be very helpful if
23 you could give us the actual Bates numbers for that so we can

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 confirm that and we can put them in context.

2 But having now suddenly received exhibits that were
3 going to be admitted in evidence, we believed, at this
4 deposition, we did not think we responsibly could decide what
5 was admissible, what was not, what was strategically helpful
6 to not to object to, what were the possible bases for the
7 admission and so on, and so that was our basis for the
8 objection to going forward. After the discussion yesterday,
9 we have decided -- we hope and expect that we will at some
10 time before trial be able to actually consult with him and do
11 that.

12 So based on and in reliance on a ruling that all
13 objections except for objections to the form of the question
14 are reserved without waiver until the time of trial, we
15 withdraw our objection to the deposition going forward this
16 week.

17 That said, that does not address the really big issue
18 that we still have to deal with. To be perfectly clear, we
19 cannot go forward with the cross-examination until this
20 attorney-client confidentiality issue is resolved. It is one
21 thing to say we can talk later about the admissibility of the
22 exhibits; it's another to say how we formulate a
23 cross-examination strategy with a witness who claims to have

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1 met our client, claims to have personal knowledge of our
2 client's activities, without first discussing in detail the
3 truth or untruth of those allegations, explanations or lack of
4 explanations for those allegations and so on.

5 So to require us to go forward with cross-examination
6 without resolution of this issue will violate Mr. Al-Tamir's
7 right to counsel.

8 We should have been able to begin resolving this
9 issue in this session. In fact, my recollection -- and I
10 could not find a reference on the record, but I believe it was
11 said -- and Judge, you will correct me if I am
12 misremembering -- that we all agreed, including you, that this
13 was an issue of primary importance that we would need to
14 resolve and put first on the agenda for this session. And we
15 promised that we would file a motion.

16 We did file a motion, a detailed motion, setting
17 forth all of the relevant facts and the highly relevant prior
18 history of these kinds of problems in other commissions cases,
19 all of which is necessary background for you to understand and
20 resolve the issue, and more importantly, for our client to be
21 able to make an informed decision about whether he is willing
22 to engage in substantive decisions with us under present
23 conditions.

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1 And we set out more recent facts and we asked for
2 various forms of relief, but -- and laid out our -- the case.
3 We thought we had filed this motion. In fact, as you
4 mentioned in your summary, it remains, as far as we know, in
5 classification review limbo. It was over two weeks ago that
6 it was filed, in plenty of time for the government to respond
7 and for us to begin resolving this, at least.

8 We believed, after consultation with our DSO, that
9 none of the facts and the other information or the arguments
10 in that document, AE 094, was classified, but it remains in
11 limbo. We cannot -- we cannot go forward with it today,
12 apparently. We did everything properly. We marked it
13 following the trial judiciary's instructions and so on, but it
14 has not yet been accepted.

15 So here we are again, Judge, over a month later, a
16 new session, and we have the same issue hanging over this
17 proceeding, and in fact hanging over the entire commissions
18 process, except that now that issue has gotten much, much
19 worse. And although we believe discussion of that development
20 is properly unclassified too, once again I cannot talk about
21 it, just as I cannot talk about AE 094 because it has not yet
22 gone through the classification review. I cannot talk about
23 it in this public setting because of instructions by trial

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 judiciary at the behest of the original classifying authority
2 that it is classified. So the information is contained in AE
3 095 that was filed last week and accepted for filing at the
4 SECRET level.

5 The impact of these classification decisions, and
6 inexcusably delayed classification decisions, is that this
7 process is on the verge of stalling. This is nothing new to
8 this system. Every commission case has been impeded by
9 classification problems in ways that are really unimaginable
10 in any other system of criminal justice outside of this one,
11 but what is most egregious here is that the public is being
12 misled. The public is being misled about a fundamental issue
13 that goes to the heart of the legitimacy of this system as a
14 whole, because today the state of the public record stands as
15 follows.

16 On the 29th of April 2017, trial counsel stood here
17 in a public session and made the following statements, read
18 the following statements, and I will read what they said
19 because I am reassured that they are unclassified because they
20 made those statements after consultation with the original
21 classifying authority, as we cannot do when we stand up in
22 court, on the basis, no doubt, of the actual classification
23 guidance, which helps determine these kinds of questions where

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the line is drawn. We do not have access to that, the
2 official classification guidance. It's been denied us for the
3 nine years that I have been working on the commissions. So I
4 am quite -- I feel confident that what I am about to say, what
5 I quote from them is unclassified.

6 They stood up and said, "The confidential nature of
7 attorney-client communications is strictly observed by the
8 military guard force in this location. They did admit that
9 recently, efforts to accommodate attorney-client meetings in a
10 location other than the normally designated meeting rooms
11 resulted in a small number of detainees, none of them
12 currently in contested military commission trial proceedings,
13 unintentionally being overheard in their communications with
14 their attorneys. And upon learning this was occurring, the
15 commander of the facility put a stop to it and self-reported
16 the situation."

17 And they went on to say, "Appropriate remedial
18 actions are being taken, including the offer to the defense
19 counsel of an opportunity to inspect their meeting rooms to
20 satisfy themselves that no overhearing is occurring."

21 Very reassuring. "There was a problem, we are on
22 it."

23 That was the state of the public record when they

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 stood up and made that statement. That is still the state of
2 the public record, except that "redacted," and I will say
3 "redacted" to save the original classifying authority censors
4 the trouble of redacting what I would say otherwise.
5 "Redacted." That is not on the public record. What I just
6 said was redacted. It has been filed, information regarding
7 it in AE 095 that is before you. But the public does not
8 know, and the last thing the public knows about the situation
9 we are confronting now is trial counsel's statement from the
10 last session. That is an egregious situation, and I can't say
11 more than that.

12 I also can't say -- make recommendations on ways to
13 resolve this in this setting even though in federal court it
14 is handled very, very differently, and I can't say more than
15 that either without risk of crossing the line, a line that I
16 don't know where that line is. They do. They have the line
17 to the OCA. But I will say that it's not how it's handled in
18 federal court. We know that for sure. And I would direct you
19 to one of the attachments in the defense response to AE 070LL,
20 which is classified, under seal, that you have before you.

21 So we object. We object to what we think is an abuse
22 of Executive Order 13526. We object to the public being
23 misled. And we absolutely object to further substantive

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 proceedings going on until we get this problem resolved. It
2 is real. It has gotten much, much realer, and until that is
3 resolved, we object.

4 We are willing to go forward per your statement in
5 the 802 summary with the motions we discussed; but beyond
6 that, we cannot commit to much, other than the strong desire
7 to see AE 094, in light now of AE 095, addressed at the
8 earliest possible moment.

9 MJ [Col RUBIN]: Mr. Thurschwell, just to clarify, the
10 defense is prepared to go forward on the three motions?

11 ADC [MR. THURSCHELL]: Yes, we are, Judge.

12 MJ [Col RUBIN]: We discussed, and to the extent the
13 objections were handled in the manner in which you described,
14 you are prepared to go forward on the government's direct
15 examination of Mr. al Darbi?

16 ADC [MR. THURSCHELL]: Yes, we are, Judge.

17 MJ [Col RUBIN]: All right. Counsel, let's discuss some
18 of the deposition mechanics now. It seems like an appropriate
19 time.

20 TC [CDR SHORT]: Your Honor, if we may have a minute to
21 address, to clarify a couple of issues.

22 MJ [Col RUBIN]: You may.

23 ATC [LCDR SPENCER]: Good morning, Your Honor. Lieutenant

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Commander Spencer for the government.

2 MJ [Col RUBIN]: Good morning.

3 ATC [LCDR SPENCER]: I just want to clear up a few
4 concerns from Mr. Thurschwell. First of all, the public has
5 not been misled. That's simply not true. At best, it's
6 grandstanding and inaccurate.

7 AE 094, which presumably you have seen but not yet
8 been accepted, contain possible classified information and it
9 was filed as an unclassified filing. Having said that -- and
10 I understand that's being in the process of being resolved,
11 which is why the government hasn't responded to it because it
12 has not been accepted for filing yet. So there has been no
13 delay by the government, there has been no bad faith by the
14 government. It's the defense, apparently in consultation with
15 their DSO, not properly marking something or not erring on the
16 side of caution on something that should have been properly
17 classified.

18 Having said that, the government is prepared this
19 week to waive our response to AE 094 and litigate that in a
20 closed session should the commission desire to do that. That
21 would best resolve, I believe, the defense's concerns. And I
22 am not saying the defense's concerns about the attorney-client
23 relationship are illegitimate, but the government believes

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that they can be fairly easily resolved, agrees with the
2 defense that they should be resolved sooner rather than later,
3 certainly to keep the deposition on track with the
4 cross-examination in October. So the government is prepared
5 to litigate that issue in a closed session this week, waiving
6 our written response and moving directly to oral argument in a
7 closed session.

8 Lastly, with the 35 exhibits, Your Honor, as we
9 discussed yesterday in the 802 and as Mr. Thurschwell
10 referenced, virtually all of those documents, if not 100
11 percent of them, have been in the defense counsel's possession
12 for the better part of two years, some as great as four years.
13 So it's not something that they should have been surprised by.
14 However, based on Mr. Thurschwell's request, we will work to
15 get them the Bates numbers so they can directly
16 cross-reference those, understanding now the defense has
17 withdrawn their objection and is willing to proceed with the
18 direct examination but I wanted to put that piece of it on the
19 record.

20 MJ [Col RUBIN]: Thank you.

21 Counsel, if we could address some of the mechanics of
22 the deposition raised by Mr. Thurschwell.

23 TC [CDR SHORT]: Yes, Your Honor. And one of the things

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1 is regarding the interpreters also I just need to clarify.
2 The interpreters, it's not a classification issue, it's
3 under -- their CVs will be under seal under the protective
4 order, which is AE 014A, Your Honor.

5 MJ [Col RUBIN]: Yes. Trial Counsel, who can clarify some
6 of the -- the government's position regarding the deposition
7 mechanics: Translator, voir dire of translator, camera
8 angles, objections? It seems like an appropriate time now
9 that it's been raised. We need to do this at some point, so
10 it seems best to do it now.

11 TC [CDR SHORT]: Yes, sir.

12 MJ [Col RUBIN]: Let's start with the translators.
13 Obviously they are going to be administered the oath.
14 Mr. Thurschwell indicated that the CVs will be provided to the
15 defense.

16 TC [CDR SHORT]: That's my understanding. They are going
17 to be provided to the court under seal, as I think it was
18 brought up in the 802 briefly yesterday. And, with respect,
19 there was some back and forth; that is in fact the way it's
20 going to do. They will be marked as an appellate exhibit.

21 MJ [Col RUBIN]: It obviates the need for any voir dire.
22 What's the government's position regarding whether the defense
23 should be afforded the opportunity to voir dire the

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 translators?

2 TC [CDR SHORT]: That would be fine, sir. I just want to
3 make sure we follow the protective order and protect the
4 personal information of the interpreters, Your Honor.

5 MJ [Col RUBIN]: Mr. Thurschwell, do you intend to voir
6 dire regarding qualifications only as opposed to identity?

7 ADC [MR. THURSCHELL]: Qualifications only, Judge. We
8 are not interested in identity.

9 MJ [Col RUBIN]: Very well. The commission will give you
10 that opportunity, if you deem necessary, after review of the
11 CVs. I believe those are AE 008.

12 Trial Counsel, if you would address the camera,
13 camera or cameras. It's the defense's desire to have a camera
14 both on the deponent as well as the counsel asking the
15 question. What's the government's position?

16 TC [CDR SHORT]: Yes, sir. First of all, I would like to
17 state that it is my understanding that -- I know they haven't
18 seen the video from the al Nashiri, and I will address that as
19 well regarding the transcript and the video; we are going get
20 that to them as soon as possible, Your Honor, we hope, within
21 a day or so.

22 MJ [Col RUBIN]: All right.

23 TC [CDR SHORT]: Regarding the camera angles, the camera,

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the way they did it in the al Nashiri case, it worked, Your
2 Honor. They had a camera on the deponent and they actually
3 used a backup camera as well, a standalone, and that worked,
4 Your Honor. I understand, you know, we want to try to put
5 forth the courtroom experience as best as possible. I fully
6 agree that we can do that. However, the actions or inactions
7 of trial counsel or defense counsel are not evidence and I
8 want to make sure that that's clear, that that may actually
9 create an issue. Mr. Thurschwell says if they are not taped,
10 that could create an issue. What the counsel is doing and
11 acting is not evidence. Their words and questions are the
12 evidence that will be put into the record, Your Honor. So I
13 just want to make sure that that is clear on the record, no
14 matter how you want to proceed.

15 The other thing is ----

16 MJ [Col RUBIN]: Hold on one second. Mr. Thurschwell, how
17 do you anticipate -- if there were two cameras, how would that
18 ultimately be played to panel members? Split screen, one on
19 the counsel and one on the deponent?

20 ADC [MR. THURSCHELL]: Ideally split screen, and we are
21 thinking more about cross-examination where what is in
22 evidence is the demeanor of the witness in response to the
23 questioning that he is undergoing. That is very much in

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 evidence and so yes, what the counsel says technically is not
2 in evidence unless it's adopted or agreed to by the witness.
3 But I think that for purposes of the admissibility question,
4 the similarity or dissimilarity of the substitute for live
5 trial testimony is critical to or is a critical element of the
6 admissibility decision. We think it will significantly
7 detract from its -- both the information that's imparted to
8 the panel and also to the legitimacy of the substitution of
9 the deposition for the live testimony.

10 MJ [Col RUBIN]: Trial Counsel, is it possible to have a
11 camera out-facing, whether it's the camera that's located
12 behind me filming the counsel also in question?

13 TC [CDR SHORT]: Your Honor, this morning I spoke to the
14 courtroom technology people. There is -- it is possible. It
15 creates some difficulties. And my understanding is when it is
16 going back and forth, we may lose something, so we would
17 like to finalize it.

18 MJ [Col RUBIN]: Not to go back and forth, but I'd like to
19 have one camera focused exclusively on the deponent, another
20 camera perhaps facing outboard.

21 TC [CDR SHORT]: With a split screen, Your Honor.

22 MJ [Col RUBIN]: Split screen.

23 TC [CDR SHORT]: I will check with the courtroom

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 technology folks and make sure that is a possibility and
2 report back to you after the next recess, Your Honor.

3 MJ [Col RUBIN]: Mr. Thurschwell, is your desire more for
4 the cross-examination?

5 ADC [MR. THURSCHELL]: Certainly it's our major concern
6 is the cross-examination, but that raises a good point. At
7 this stage it seems likely, since objections will have to be
8 resolved later, there is going to be editing of this video in
9 any event. And I find it difficult to believe that with
10 modern technology, if we have two recorded camera feeds
11 trained exactly as you suggested, one outward and one on the
12 witness, that there couldn't be splices, split screens that
13 were implemented after the fact that we could come to some
14 agreement on, you know, down the line. I mean, there is going
15 to be a lot of discussion down the line of the proper editing
16 of the video in any event at this point. That is a solution
17 also.

18 MJ [Col RUBIN]: Trial Counsel, if you could check on
19 the technology ----

20 TC [CDR SHORT]: I will check, Your Honor, but at some
21 point I guess I need to emphasize that I believe, you know,
22 what Mr. Thurschwell was saying, that the demeanor and I guess
23 even ultimately the theatrics of a cross-examination or an

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 attorney is not evidence, Your Honor. I don't see how that
2 would be evidence. The evidence is the -- and as will be in
3 the jury instructions -- what you hear from the witness and
4 the witness stand.

5 MJ [Col RUBIN]: I think it's more to capture the full
6 effect of the hearing.

7 TC [CDR SHORT]: Okay. I will find out for you, Your
8 Honor, and I will report back.

9 MJ [Col RUBIN]: The commission's ruling will be the
10 following: There will be a camera on the deponent and I want
11 to get as much of his face, and as big as possible, because
12 obviously his credibility and his mannerisms are paramount for
13 a panel assessing his credibility.

14 To the extent there may be another camera available
15 to film the counsel, I will permit it, provided the technology
16 will permit that.

17 TC [CDR SHORT]: Okay. Yes, Your Honor.

18 MJ [Col RUBIN]: So whether that's the camera behind me
19 filming while there is a separate camera facing towards the
20 deponent, but ----

21 TC [CDR SHORT]: If we can film it at split screen, is
22 that ----

23 MJ [Col RUBIN]: Any way you can do it, whether it's two

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 different cameras or split screen, but my primary concern is
2 if and when this deposition is played to the members, they
3 have to have a large viewing of the deponent's face and body.

4 TC [CDR SHORT]: Absolutely, Your Honor, and that's how it
5 was done two weeks ago.

6 MJ [Col RUBIN]: It is my understanding there were
7 multiple cameras -- I think it was done in the courtroom,
8 multiple cameras. What I am envisioning is two cameras, one
9 definitely on the deponent and the other, if possible, on the
10 counsel asking the question.

11 TC [CDR SHORT]: Your Honor, I believe there was the
12 overhead camera was on the deponent here and the secondary
13 camera was a standalone tripod camera for backup purposes.

14 MJ [Col RUBIN]: That will work.

15 If you will address now the objections. Counsel, I
16 did reread R.M.C. 702(h), which deals with objections,
17 particularly (h)(2). What's the government's position
18 regarding objections made or not made by defense counsel?
19 Obviously there were some concerns by the defense counsel
20 regarding waiver of any objections.

21 TC [CDR SHORT]: Your Honor, I think we gave our position
22 last night in the 802, but I think that was the basis of the
23 government -- I mean, the defense withdrawing their objection.

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1 As long as they have withdrawn their objection, any objections
2 that can be remedied at the time we need, they would waive if
3 they don't make that objection at the time.

4 MJ [Col RUBIN]: I guess what is the government's
5 interpretation, any objections that could be waived? Are we
6 talking about leading questions, form of the questions, or are
7 you talking more substantive issues?

8 TC [CDR SHORT]: The form of the question, Your Honor, is
9 what will be waived.

10 MJ [Col RUBIN]: All right. Form of the question ----

11 TC [CDR SHORT]: The substantive they can make later.

12 MJ [Col RUBIN]: Very well. Mr. Thurschwell, the
13 commission will accept your interpretation of the objections
14 as you articulated during the 802 summary. The commission
15 will have a liberal view of objections if and when those
16 issues are raised regarding admissibility of any of the
17 matters. So as far as form of the questions, whether leading,
18 confusing, misleading, and you can correct that at the time,
19 please make that objection and the deposition officer, myself,
20 will rule on that. As far as other objections, more
21 substantive objections, those will not be waived even though
22 they are not made when the deposition takes place.

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

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1 TC [CDR SHORT]: Judge, the only other thing the
2 government would like to address is you have accepted the
3 waiver for the accused's presence. It is our understanding
4 that the defense had made contact with the office this morning
5 and may be able to put some additional information on the
6 record as to that waiver.

7 MJ [Col RUBIN]: Commander Cooper.

8 DC [CDR COOPER]: Yes. As of this morning, Mr. Al-Tamir
9 continues to waive his appearance today, voluntarily and
10 freely.

11 MJ [Col RUBIN]: Mr. Thurschwell, as far as consultation
12 with Mr. Hadi prior to the deposition, I am amenable if you
13 desire to have a slightly later start time to the deposition,
14 perhaps if Mr. Hadi is here sometime at 09 or earlier, holding
15 off the government's direct to maybe 1000 to give you an hour
16 with Mr. Hadi, if you would like, if that would ameliorate
17 some of the issues regarding speaking with him.

18 ADC [MR. THURSCHELL]: Judge, at this stage, given that
19 nothing has been litigated or put on the record, we would
20 appreciate that opportunity. I cannot say that it would
21 ameliorate the concerns we articulated in AE 094, but it would
22 be helpful for many reasons. I tried, because of other
23 concerns that we raised at the 802 -- I wanted to see him last

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1 night and was unable to. It would be good for me to be able
2 to talk to him for a bit about those other concerns prior to
3 the deposition.

4 MJ [Col RUBIN]: Very well. Trial Counsel, for the
5 members of the guard force, assuming we start the deposition
6 tomorrow morning, we will start at 1000. I would like
7 Mr. Hadi here no later than 09 to give the defense a full hour
8 with him.

9 TC [CDR SHORT]: Yes, sir.

10 ADC [MR. THURSCHELL]: Thank you, Judge.

11 MJ [Col RUBIN]: As far as AE 094, if and when that is
12 accepted, Trial Counsel, is it the government's position that
13 this motion needs to be litigated and ruled upon before the
14 cross-examination of Mr. al Darbi could take place?

15 TC [CDR SHORT]: You are talking about AE 094, Your Honor?

16 MJ [Col RUBIN]: Correct.

17 TC [CDR SHORT]: Your Honor, the government is ready to
18 proceed and it is important to litigate that prior.

19 MJ [Col RUBIN]: Counsel, any more issues with the
20 deposition mechanics, start time?

21 TC [CDR SHORT]: No, sir, Your Honor.

22 MJ [Col RUBIN]: Defense?

23 ADC [MR. THURSCHELL]: I was distracted.

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1 MJ [Co1 RUBIN]: Any other deposition-related issues that
2 we need to address?

3 ADC [MR. THURSCHELL]: Let me just inquire briefly.

4 Judge, the issue I -- you mentioned, but I neglected
5 to amplify when I stood up in relationship to the 802 summary,
6 was our motion to reconsider your ruling cutting off the video
7 feed to the mainland and other public areas here. That motion
8 is going to be filed sometime later this morning, we hope,
9 early afternoon at the latest. Our position is that that
10 should be resolved before the deposition takes place, and so
11 that's the only other issue we would, we would ----

12 MJ [Co1 RUBIN]: All right. It is the commission's intent
13 to start the deposition tomorrow, so you have until close of
14 business to file that. I can address that tomorrow morning
15 prior to the deposition.

16 ADC [MR. THURSCHELL]: Thank you, Judge.

17 MJ [Co1 RUBIN]: Okay. We would need to have an open
18 session prior to that.

19 ADC [MR. THURSCHELL]: I understand, Judge.

20 MJ [Co1 RUBIN]: In AE 092, the commission's docketing
21 order, it lists four motions for the commission to receive
22 evidence and hear argument on as required. These motions
23 include Appellate Exhibits 070CC, 070FFF, 085 and 091. We

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1 will not litigate AE 085 during this session pursuant to the
2 defense's request.

3 Defense, I am going to ask you that -- I am not going
4 to docket 085 for litigation absent an affirmative request by
5 the defense. This is the second commission in which it has
6 appeared on the Docketing Order and not litigated. So moving
7 forward I'm not going to list it absent an affirmative
8 request.

9 ADC [MR. THURSCHELL]: Understood, Your Honor, and we
10 will be sure to make the affirmative request when we can, as
11 soon as we can do so.

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

13 All right. Counsel, let's start with AE 091. In
14 AE 091, the defense requests that the commission enter an
15 appropriate order compelling the government to provide the
16 accused with a write-enabled laptop computer. The government
17 opposes the defense motion as set forth in AE 091A. The
18 commission previously litigated a defense motion on this
19 matter. Oral argument was presented to the commission during
20 the November 2016 session. The commission will consider that
21 prior oral argument to the extent desired by the parties.
22 Nevertheless, counsel, feel free to provide oral argument to
23 the extent you may desire; and if you want me to consider any

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1 prior matters, just please let me know.

2 Defense, do you wish to be heard on AE 091?

3 DDC [LCDR LOFLAND]: Good morning, Your Honor. Lieutenant
4 Commander Keith Lofland representing Mr. Al-Tamir regarding
5 AE 091.

6 As with AE 062, the defense has the burden both as to
7 matters of fact and persuasion by a preponderance. As
8 previously stated in AE 062 and in our motion AE 091,
9 Mr. Al-Tamir respectfully requested this commission compel the
10 government to provide Mr. Al-Tamir an appropriate
11 write-enabled laptop computer for purposes of both access to
12 this court, this commission, and to further vindicate his
13 rights to effective assistance of counsel.

14 We note that in the government's response to AE 091A,
15 the government attached an e-mail to the Chief Defense
16 Counsel, Brigadier General Baker, regarding the convening
17 authority's position regarding providing laptops to detainees
18 generally. We note that this was not a specific response to
19 Mr. Al-Tamir's specific concerns previously raised. However,
20 if this commission treats that as a constructive notice to the
21 defense regarding its position regarding Mr. Al-Tamir's
22 request, we recognize that that would moot the alternative
23 requested in AE 091.

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1 Accordingly, the defense would request, in the
2 further alternative, that this commission enter a further
3 order allowing for the defense to provide Mr. Al-Tamir an
4 appropriate laptop consistent with the practices engaged in
5 Mr. Mohammad, et al.'s case.

6 Turning to the government's arguments in their
7 response, those arguments ignore the specific context and the
8 unique conditions of Mr. Al-Tamir's confinement and
9 misconstrues the law as to what constitutes meaningful access
10 to the courts and effective assistance of counsel in these
11 circumstances. The right to access to the courts and
12 effective assistance of counsel are inextricably intertwined
13 with broadly recognized due process rights in our system of
14 justice. AE 091 and 062 read together clearly implicate those
15 rights. In these circumstances, access must implicate a
16 meaningful opportunity for Mr. Al-Tamir not only to access,
17 review, comment upon the evidence in his case, but to also
18 meaningfully communicate that with counsel.

19 The correct analog for analyzing those rights is
20 reference to other commissions cases; in other words, this
21 jurisdiction. Those rights are not constrained to the most
22 onerous procedures that are referenced in the government's
23 response, and that's why we must look to what procedures were

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1 implemented in Mr. Mohammad's case in those 9/11 cases and why
2 those procedures were instituted.

3 The defense has subsequently submitted a reply to the
4 government's response that further expounded upon the
5 procedural background of those cases, and that background is
6 illustrative of why a similar right attaches to Mr. Al-Tamir.
7 At all relevant periods of the representations of those
8 detainees, they were represented by counsel. Initially when
9 the decision for some of those detainees to go pro se was
10 made, standby counsel was assigned. The reason for the order
11 in those cases was to facilitate communication with that
12 standby counsel in order to guarantee the due process rights
13 of those individual detainees.

14 In the intervening years since that litigation began,
15 the pro se status of those detainees has changed; nonetheless,
16 the mandate from that commission in those cases to either
17 return the previously provided laptop computers or to provide
18 those detainees with adequate substitutes as specified in the
19 order referenced in the motions, vindicates the same purposes,
20 to facilitate communication with counsel in an effort to
21 protect both the access rights and the effective assistance of
22 counsel rights of those detainees.

23 Related, those laptops as referenced in the

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1 litigation in those cases were provided due to the significant
2 volume of evidence in those cases. Similarly, in this case,
3 there is an ample amount of both documentary and multimedia
4 evidence that is involved. Just referencing the unclassified
5 materials that have been provided thus far, we are now well in
6 excess of 33,000 pages of just documentary evidence.

7 As a reference point of why the volume of evidence
8 matters in this case, we can reference a dispute that has come
9 up frequently in this commission regarding the basic identity
10 and name Mr. Al-Tamir. In the AE 070 series later, the
11 government avers that they were shocked and amazed that we
12 raised this issue last year. However, referencing just two of
13 the unclassified documents that the government has provided in
14 discovery -- for Trial Counsel's benefit, referencing pages
15 Hadi 1-027919 and Hadi 1-027932 for your reference -- those
16 are respective an International Red Cross letter written by
17 Mr. Al-Tamir dated 22 August 2007, the second document is a
18 letter that he wrote to the District of Columbia Circuit Court
19 dated 29 May 2008, both referencing and signed Nashwan
20 Al-Tamir or some derivative of that name. Those are just the
21 references in the unclassified discovery that the government
22 has provided.

23 If, in all the volume of evidence that the government

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1 has provided to date they missed that basic fact, it's
2 patently unreasonable to hold Mr. Al-Tamir to a standard of
3 assimilating, processing, reviewing the same volume of
4 information in any meaningful form without the assistance of
5 the similar mechanical means by which we were able to
6 eventually untie this very basic, you know, knot.

7 Further, the government distinguishes -- attempts to
8 distinguish the federal cases cited in our motion and ignores
9 a salient point of each of those cases, that in each of those
10 cases there was an underlying state policy or statutory right
11 to access computers or some other mechanical means of
12 accessing their case materials that was conferred by either
13 statute or policy.

14 While federal courts have not addressed the specific
15 question of whether or not a constitutional right in those
16 that it have -- we agreed that the government have tended not
17 to find a specific constitutional right, that issue is largely
18 overcome by events because in each of these cases there is an
19 underlying right in that jurisdiction, either by
20 administrative policy or clear statutory enactment, that does
21 convey such a right, which raises the question, what is the
22 right that has been conferred in this jurisdiction.

23 In light of that question, the government's frame of

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1 analysis is clearly wrong. It is not appropriate to look just
2 to the federal cases. This is not a federal district court.
3 This is in many respects a *sui generis* procedure, and the most
4 analogous cases to look to are the other active referred
5 commissions cases.

6 For the reasons laid out in our reply, there are
7 reasons why the laptop has been determined to be a necessary
8 adjunct to the access and counsel rights of those detainees.

9 Similarly, Mr. Al-Tamir stands in a very similar
10 posture to those detainees. The government makes a great deal
11 about the pro se status of the detainees when those laptops
12 were initially issued. That status and distinction has been
13 overcome by events in that litigation and should not inform
14 this commission's analysis of Mr. Al-Tamir's rights.

15 Salient points of comparison are Mr. Al-Tamir stands
16 before this commission, with the referred charges for military
17 commission, in a similar volume of information that requires a
18 mechanical means to properly assess, review, communicate with
19 counsel.

20 I'm taking a pause just to be certain. I don't want
21 to bleed over into some of the classified information we will
22 discuss later that are also intertwined with this.

23 I will conclude my argument by just referencing that,

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1 as we have stated in our previous motions and arguments on
2 both AE 062 and the current motion before this commission,
3 Mr. Al-Tamir, as a matter of right in this jurisdiction, is
4 entitled to a laptop computer in order to assist him not only
5 with effectively accessing this court, this commission, but
6 also to effectively communicate the issues involving the
7 discovery that -- not only the ones that have come up to date,
8 but are fairly -- we fairly anticipate will come up in the
9 future that require some means to analyze a significant volume
10 of data.

11 If this commission deems that it is not going to
12 compel the government to produce a laptop, we reiterate our
13 alternative relief that we be permitted as a defense to
14 provide Mr. Al-Tamir with a similarly capable laptop computer
15 consistent with the procedures in Mr. Mohammad, et al.'s case.

16 As noted in the government's response, there aren't
17 any, you know, procedural penological limitations to the
18 ability of the government to allow the provision of a laptop.
19 The government's cited basis for, outside of just not wanting
20 to, extend to bases of mere convenience for the government.
21 They cite that the laptops were secondarily provided as an
22 incentive to induce pleas from other detainees. That
23 administrative convenience for the government is not and it

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1 should not be construed as an impediment to Mr. Al-Tamir
2 vindicating his rights or the defense facilitating him
3 vindicating those rights in the absence of an order for the
4 government to provide that laptop.

5 With that, that concludes my argument, barring any
6 questions from Your Honor.

7 MJ [Col RUBIN]: No questions. You have answered them.
8 Thank you.

9 Trial Counsel?

10 ATC [LCDR LINCOLN]: Your Honor, Lieutenant Commander
11 Lincoln. I will be arguing for the government. However,
12 although I do recognize those documents, we were not provided
13 notice, and I would just like the opportunity, I believe if
14 Commander Lofland had a copy, just to take a look at them.

15 MJ [Col RUBIN]: You may.

16 ATC [LCDR LINCOLN]: Could we have a five to ten-minute
17 recess, Your Honor?

18 MJ [Col RUBIN]: Very well. Let's take a ten-minute
19 recess. Please everyone carry on.

20 [The R.M.C. 803 session recessed at 1003, 14 August 2017.]

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