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1 [The R.M.C. 803 session was called to order at 1342,  
2 22 August 2019.]

3 MJ [LtCol LIBRETTO]: This commission will come back to  
4 order. All parties present when the commission last recessed  
5 are again present. Lieutenant Ball is back in the courtroom.  
6 The accused is not present.

7 Ms. Hensler.

8 DDC [MS. HENSLER]: Yes, Your Honor. Mr. al-Tamir is not  
9 present today. Our understanding is that when he was last  
10 viewed by the guards, he was asleep. He has not had anything  
11 to eat for almost 48 hours, and we ask the court to make a  
12 finding as to whether or not his absence is voluntary or  
13 explicitly decline to make such a finding.

14 MJ [LtCol LIBRETTO]: What is the -- well, let me ask you  
15 this: Had he been informed of the start time for today's  
16 session in light of the commission granting, to a certain  
17 extent, to postpone this morning's session?

18 DDC [MS. HENSLER]: No, Your Honor, because he was asleep  
19 when I attempted to meet with him.

20 MJ [LtCol LIBRETTO]: So you have not met with him today?

21 DDC [MS. HENSLER]: No, sir.

22 MJ [LtCol LIBRETTO]: Ms. Hensler, what is the defense's  
23 position as to whether or not Mr. Hadi's absence this

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1 afternoon is voluntary?

2 DDC [MS. HENSLER]: It is not.

3 MJ [LtCol LIBRETTO]: We are going to stand in recess for  
4 five minutes. During this recess the guards will wake  
5 Mr. Hadi, inform him that there's a commission session  
6 ongoing, and that we will be returning to this session in  
7 15 minutes.

8 At that time, Ms. Hensler, you will discuss the  
9 matter with Mr. Hadi and come back and provide information to  
10 the commission as to Mr. Hadi's state and whether or not he is  
11 waiving his appearance.

12 DDC [MS. HENSLER]: Understood.

13 MJ [LtCol LIBRETTO]: This commission's in recess.

14 [The R.M.C. 803 session recessed at 1344, 22 August 2019.]

15 [The R.M.C. 803 session was called to order at 1403,  
16 22 August 2019.]

17 MJ [LtCol LIBRETTO]: This commission will come back to  
18 order. All parties present when the commission last recessed  
19 are again present. The accused remains absent.

20 Ms. Hensler, did you have an opportunity to discuss  
21 these matters with Mr. Hadi?

22 DDC [MS. HENSLER]: Yes, sir, I did.

23 MJ [LtCol LIBRETTO]: And was Mr. Hadi informed that the

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1 commission was about to go in session?

2 DDC [MS. HENSLER]: Yes.

3 MJ [LtCol LIBRETTO]: And is he planning on attending?

4 DDC [MS. HENSLER]: Sir, he was in his bed. He asked to  
5 go back to sleep. He looked very disheveled which is ----

6 MJ [LtCol LIBRETTO]: Ms. Hensler, is Mr. Hadi currently  
7 getting ready to come to participate in these proceedings?

8 DDC [MS. HENSLER]: No. He is currently praying and then  
9 plans to ask for more medication.

10 MJ [LtCol LIBRETTO]: Okay.

11 Ms. Hensler, you may be seated. Thank you.

12 ATC [MR. SPENCER]: Your Honor.

13 MJ [LtCol LIBRETTO]: Yes.

14 ATC [MR. SPENCER]: The -- for the commission's awareness,  
15 the staff judge advocate that normally reads him his rights  
16 with respect to attendance, as she did yesterday, did just a  
17 moment ago and is available for testimony if the commission  
18 desires it.

19 MJ [LtCol LIBRETTO]: Did just a moment ago what?

20 ATC [MR. SPENCER]: Read him the same rights advisement  
21 that would normally be done in Camp VII.

22 MJ [LtCol LIBRETTO]: Okay. And the result of that?

23 ATC [MR. SPENCER]: As before, Your Honor, the accused

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1 refused to sign it, said he intended to rest, and would not be  
2 coming.

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

4 Before proceeding with informing the parties how we  
5 will finish the remainder of the day, I want to capture on the  
6 record at this time an R.M.C. 802 conference that was held  
7 this morning. Trial counsel, defense counsel, and the  
8 military judge were present. The 802 conference was held in  
9 order to address a request by the defense sent via e-mail to  
10 the senior clerk this morning.

11 Before taking up the matter that was at the heart of  
12 the e-mail and the request by the defense, I did address with  
13 Ms. Hensler a statement that was contained within the e-mail  
14 indicating that Mr. Hadi had not eaten for a period of time.  
15 The commission first inquired with Ms. Hensler as to whether  
16 or not he was provided the opportunity to eat or whether or  
17 not it was a decision on his part not to. And it was made  
18 clear to the commission that the government did provide him  
19 the opportunity to eat and provided him food to eat; however,  
20 it was Mr. Hadi's decision not to eat.

21 Ms. Hensler represented earlier today -- or just a  
22 moment ago, that it was -- had been 48 hours since Mr. Hadi  
23 had last left. It was my understanding, based on our

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1 conversation during the 802, that he had, in fact, eaten  
2 yesterday morning prior to coming over to the commission.

3           The purpose of the 802 conference, however, was to  
4 discuss the substance of the e-mail sent by the defense  
5 earlier in the morning wherein Mr. Hadi, through counsel,  
6 expressed a proposed course of action moving forward that  
7 would permit him to attend and participate in commission  
8 proceedings. The proposal was to allow Mr. Hadi to be  
9 transported on a daily basis to the commission proceedings  
10 from the JTF detention facility and hold sessions of the  
11 commission from 0-8 to 1200 daily and on consecutive days.

12           Mr. Hadi expressed that he often wakes early, takes  
13 medication, starts out feeling good, but feels progressively  
14 worse as the days go on. Mr. Hadi represented, through  
15 counsel, that he has had better success when starting earlier  
16 in the day.

17           At the start of the R.M.C. 802, I made it clear that  
18 the R.M.C. 802 conference, nor my entertainment of the  
19 request, should be construed as a negotiation of any sorts. I  
20 made it equally clear that this commission sets the schedule  
21 for when we will be on the record. I make it equally clear  
22 now that absent justification and legal authority to do so, I  
23 will not direct the JDG on where or how their detention

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1 operations are to be conducted.

2 That said, I remain committed -- and I expressed this  
3 during the 802 conference -- to ensuring that this commission  
4 moves forward in a productive manner, while at the same time  
5 accounting for and making reasonable adjustments for  
6 Mr. Hadi's medical conditions.

7 Accommodations implemented over the past year, based  
8 on complaints or requests by the accused, include those  
9 discussed extensively yesterday related to the jumbo cell.  
10 They include also taking extended recesses in the middle of  
11 the day, providing multiple transportation platforms to make  
12 Mr. Hadi's movements less aggravating, alternating the days we  
13 are on the record and in the commission session, having  
14 medical personnel continuously onsite to administer medication  
15 or aid to Mr. Hadi, encouraging and authorizing Mr. Hadi to  
16 change positions throughout the hearings, placing a hospital  
17 bed and a hospital chair in the courtroom, and beginning the  
18 sessions later in the morning to account for the time the  
19 accused would have to get up to travel to the commission and  
20 meet with his attorneys.

21 In support of these accommodations, in addition to  
22 biweekly medical updates the commission receives on Mr. Hadi's  
23 health, the commission has, on numerous occasions, received

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1 up-to-date testimony from treating physicians, to include the  
2 neurosurgeon responsible for Mr. Hadi's care, to ensure that  
3 they meet his medical needs.

4           Yet, as recently as yesterday, despite these  
5 accommodations, this commission was only able to get a  
6 fraction of what we intended to accomplish completed with  
7 Mr. Hadi present in the courtroom for a mere two hours and one  
8 minute on the record.

9           The new proposal by Mr. Hadi indicates he can travel  
10 on consecutive days, attend for four hours on the record at a  
11 time, and start earlier than previously requested. This  
12 appears to contradict past practice, a practice put into place  
13 based on the very complaints and requests for which the  
14 accommodations were implemented.

15           Perhaps this seeming contradiction can be explained,  
16 in part, by the increasing time between his last surgery and  
17 now and by what is described by his physicians as a successful  
18 recovery.

19           In any event, in light of this commission's  
20 commitment to ensuring these hearings proceed in a productive  
21 manner, while taking into account Mr. Hadi's medical  
22 conditions and subjective feelings of discomfort, the  
23 commission is willing, and expresses to the counsel once

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1 again, to entertain an attempt as best it can to accommodate  
2 Mr. Hadi's request.

3           This commission does so by viewing his requests -- or  
4 did so by viewing his requests and representations through the  
5 lens that they were made in good faith as to what Mr. Hadi  
6 believes will assist him with attending and participating in  
7 productive sessions.

8           The commission informed counsel during the R.M.C. 802  
9 conference that the commission's decision in this regard or  
10 any decision in this regard shall not be construed as an  
11 agreement of any sort, nor again will this commission dictate  
12 how or where the JDG detains the accused. As such, this  
13 decision is not contingent upon the JDG agreeing to Mr. Hadi's  
14 request; that is to say, this commission having agreed already  
15 through e-mail to the counsel and informing counsel that we  
16 would proceed 0-8 to 1200 on days moving forward was not  
17 contingent upon Mr. Hadi's requests to be transported back to  
18 the JTF detention facility being granted.

19           Moving forward, with the exception of today, I had  
20 expressed to the counsel, through informal communications, the  
21 commission planned to begin at 0-8 with daily sessions and,  
22 with the exception of Sunday, as best we can, limit our  
23 sessions to four hours. The schedule is going to be subject

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1 to change at any point and should not be construed or  
2 considered a long-term arrangement.

3           However, rather -- given the nature and number of  
4 issues that we intended to take up this session, it appeared  
5 feasible to proceed with that schedule, and the commission was  
6 willing to entertain it.

7           Future sessions of this commission in coming months  
8 will likely not support that schedule but, as this commission  
9 has always done, will make reasonable accommodations to ensure  
10 the accused's presence and participation at any future  
11 sessions.

12           Given Mr. Hadi's absence from today's proceeding and  
13 Ms. Hensler's representation that the defense does not believe  
14 it is a voluntary absence, the commission is canceling the  
15 testimony scheduled for today. Whether or not Lieutenant  
16 Colonel Martin is recalled at a later date will be determined,  
17 in part, on whether this commission finds that Mr. Hadi's  
18 absence today is deemed to be voluntary or involuntary.

19           With respect to the anticipated testimony of  
20 Mr. Flinn, the commission intends to direct interrogatories be  
21 completed by Mr. Flinn, or another knowledgeable official,  
22 answering the limited number of questions still remaining for  
23 the commission to resolve the outstanding matters presented by

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1 the defense.

2           At this time, the commission is going to stand in  
3 recess, and within approximately a 15- to 20-minute period of  
4 time, the government is going to notify the commission as to  
5 when they will be ready to proceed with presenting evidence.  
6 And the evidence that the commission expects and anticipates  
7 receiving is -- includes the following:

8           The commission would like to hear from witnesses who  
9 can generally, over the last 30 days, describe their personal  
10 observations of Mr. Hadi back at the JTF detention facility,  
11 to include what his daily activities are normally and  
12 typically like, and whether and to what extent he experiences  
13 excruciating back spasms or pain, and to what extent his  
14 medical condition interferes with the tasks associated with  
15 daily activity.

16           The commission also wants to hear from witnesses who  
17 have had personal observation of the accused beginning at the  
18 time he woke up yesterday morning before being transported to  
19 these commissions, all the way up until this very moment. It  
20 is not necessary to recall the senior medical officer as the  
21 commission has already received relevant testimony from her.

22           With respect to the other witnesses that the  
23 government intends to produce on that matter, they should have

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1 personal -- again, personal observation and be able to speak  
2 to firsthand knowledge of their interactions of or with and  
3 observations of Mr. Hadi for that extended period of time.

4           Along with informing the commission within the next  
5 period of time, you will -- of those witnesses and when you  
6 will be ready to proceed, you will also inform the commission  
7 as to whether or not any of their testimony will implicate  
8 classified matters that we will need to take up in a closed  
9 session.

10           The purpose, again, of receiving this evidence is to  
11 make a determination as to whether or not Mr. Hadi's absence,  
12 both yesterday afternoon as well as today, will be determined  
13 to be voluntary or involuntary. That evidence will also be  
14 informative to the commission's determinations in sessions  
15 moving ahead if the accused is also absent.

16           Does the government have any questions about the  
17 commission's direction in that record?

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

19           DDC [MS. HENSLER]: Sir ----

20           MJ [LtCol LIBRETTO]: Ms. Hensler ----

21 [The military judge conferred with courtroom personnel.]

22           MJ [LtCol LIBRETTO]: Ms. Hensler?

23           DDC [MS. HENSLER]: Yes, sir. During your reasoning on

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1 the record, you mentioned that I had represented to the court  
2 that Mr. al-Tamir had not eaten for 48 hours, and that was  
3 before I had an opportunity to go back and meet with him.

4 Your Honor is correct; he represented to me at that  
5 time that he did, in fact, eat breakfast yesterday, but he has  
6 not eaten since then.

7 MJ [LtCol LIBRETTO]: Okay. I understand. And perhaps it  
8 was a misunderstanding on my part; however, I recalled that  
9 same information being told to me during the 802 conference  
10 this morning; that is to say that you informed me that he had  
11 eaten yesterday morning. But in any event, perhaps it was a  
12 misunderstanding on my part.

13 With that said, we will wait until such time as the  
14 government informs the commission as to when they will be  
15 ready to proceed with those witnesses. The expectation is  
16 that we do so as soon as possible within a reasonable time  
17 today, if at all possible; if not, we will reconvene tomorrow  
18 to take this matter up.

19 With that, the commission -- and just so it is clear,  
20 both witnesses from the Mark Center are free to go back to  
21 their normal duties.

22 The commission is in recess.

23 [The R.M.C. 803 session recessed at 1419, 22 August 2019.]

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