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1 [The R.M.C. 803 session was called to order at 0830,
2 6 February 2018.]

3 MJ [Col RUBIN]: This military commission session is
4 called to order. The parties who were present at the close of
5 the last R.M.C. 803 session on 5 February are once again
6 present. The accused is present.

7 The counsel and I had a brief 802 conference outside
8 the presence of the accused that took place yesterday
9 afternoon, 5 February 2018, at approximately 1535. Counsel
10 and I discussed whether the parties were ready to proceed with
11 the scheduled M.C.R.E. 505(h) hearing. The parties agreed
12 that there was material that could be covered, but that there
13 may need to be another subsequent hearing. Counsel and I did
14 conduct the 505(h) hearing yesterday afternoon.

15 The purpose of today's session is to provide the
16 parties my decisions on several motions currently pending
17 before the commission. In each instance, a written ruling or
18 order will be forthcoming.

19 In light of the commission's ruling in AE 101J and
20 101P on the insufficiency of the defense's M.C.R.E. 505(g)
21 notices filed at AE 101C and 101C (Amend), further argument on
22 AE 101, AE 101D, and AE 101E will not be heard. The defense
23 did incorporate aspects of AE 101 into its argument on

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1 AE 107A.

2 Taking the recitation of facts provided by the
3 defense in various pleadings in the AE 101 series at face
4 value, the commission finds there is no evidence or even an
5 allegation of any intrusion into the attorney-client
6 relationship in this case. The commission further finds the
7 defense is not operating under an ethical constraint in
8 meeting with their client. The various requests for relief
9 requested in AE 101, AE 101D, and AE 101E are denied.

10 In light of my decision in AE 101, the commission
11 will not hear oral argument on AE 106. The relief requested
12 by the defense in AE 106 is denied.

13 The commission heard testimony from the accused's
14 neurosurgeon that the accused is medically cleared and able to
15 attend the proceedings. The doctor testified there is no
16 danger that transportation to the proceedings or attendance at
17 the proceedings will cause further neurological damage. The
18 doctor testified that the accused's subjective level of pain
19 is also a factor to be considered.

20 The commission has offered to make accommodations for
21 the accused, including shorter sessions, more frequent and
22 longer breaks, and in fact, such accommodations have been made
23 for the accused based on his assertions of pain. The

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1 commission has taken the accused's assertion of pain and
2 discomfort at face value.

3 When the accused refused to attend the session
4 scheduled for 1 February 2018, the commission did not proceed
5 with the session in the accused's absence, did not hold the
6 hearing scheduled for 1 and 2 February, and waited for the
7 results of the neurosurgeon's evaluation of the accused.
8 Having received those results and hearing testimony from the
9 accused's neurosurgeon, there is no evidence the accused's
10 attendance at this commission session will endanger his health
11 or further aggravate his medical condition.

12 Furthermore, there is no evidence the accused is
13 unable to participate in his own defense. When the accused
14 has attended sessions, he has been alert and responsive to
15 questions. He has asserted that he understands his rights and
16 in fact voluntarily waived rights, including the presence of
17 certain counsel. He has also declined to waive rights,
18 including on Thursday morning when he refused to attend the
19 session and also refused to expressly waive his attendance.
20 The accused has written letters that have been entered into
21 the record in support of his own defense. These letters have
22 been reasoned and articulate.

23 Finally, the commission finds the defense has had

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1 adequate time to prepare for the deposition of Ahmed al Darbi.
2 The commission granted the government request to take the
3 deposition almost one year ago, on 21 February 2017. The
4 direct examination occurred six months later, in August 2017.
5 The defense has now had over five months since the government
6 conducted the direct examination. For most of this time, they
7 have had a verbatim transcript of the deposition in their
8 possession from which to prepare for the cross-examination
9 portion of the deposition.

10 During this time there have been no other trial
11 milestones set by the commission. The accused has had an
12 experienced and competent defense team representing him
13 throughout this time and has four of these counsel
14 representing him here today.

15 The defense was not able to meet with the accused
16 from August until early December 2017. However, they were
17 able to communicate with the accused by letter during this
18 time and the accused has been cleared to meet with defense
19 counsel since the beginning of December 2017, although they
20 did not meet with him until last week, on or about 26 January
21 2018.

22 The commission ruled that the government demonstrated
23 a substantial likelihood Mr. al Darbi will not be available

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1 for trial and that his testimony is material to the
2 government's case in AE 070I. The commission will not
3 reconsider that ruling at this time and require the government
4 to provide evidence of Mr. al Darbi's transfer. As the
5 commission has noted, the government will have to demonstrate
6 unavailability at the time of admission.

7 As to AE 107A, the relief requested by the defense,
8 that motion is granted in part and denied in part. The
9 commission finds good cause to continue the deposition of
10 Mr. Ahmed al Darbi for a limited period of time. The
11 deposition will resume not later than 0800 Saturday,
12 10 February 2018. The commission directs the deposition
13 officer to, at a minimum, conduct half-day sessions for two
14 consecutive days and then allow a day off to allow the accused
15 to rest and for the parties to continue to prepare for
16 additional sessions. This pattern will continue until the
17 deposition is complete or the military judge directs
18 otherwise.

19 At a minimum means a half-day session starting no
20 later than this Saturday and Sunday starting at 0800 each day,
21 followed by no session on Monday, half-day sessions on Tuesday
22 and Wednesday starting at 0-8, followed by no session on
23 Thursday.

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1 The government will take the following steps to
2 assist in ensuring successful conduct of the deposition going
3 forward:

4 One, no later than noon, 7 February 2018, a copy of
5 the direct examination of the deposition in this case will be
6 appropriately marked and provided to the defense to allow the
7 accused to retain a copy. The commission notes that the
8 accused was present for the first day of the direct
9 examination. Note, I am not directing the release of
10 classified information.

11 Two, upon the completion of today's R.M.C. 803
12 session, the defense, if they desire, can meet with their
13 client in the courtroom to start preparation for the
14 deposition to begin on 10 February.

15 Three, all government entities will facilitate
16 reasonable meetings between defense counsel and the accused
17 during times when the deposition is not occurring.

18 Due to the recommendations of the senior medical
19 officer in the most recent declaration filed in AE 099KK,
20 Attachment B, neither the deposition officer nor the
21 commission will order the accused's presence be compelled at
22 the deposition by use of a forced cell extraction.

23 If the accused chooses not to attend a deposition

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1 session, as the commission noted in AE 070I and reiterated in
2 AE 070III, the deposition may occur in the accused's absence.

3 This determination that the deposition may occur in
4 the accused's absence will not influence any subsequent
5 determinations on the voluntariness of any waiver or the
6 admissibility of the deposition at a later time.

7 If any of the requirements that I listed are not met,
8 the military judge may continue the deposition.

9 Trial Counsel, are there any questions about
10 anything that I just stated?

11 TC [CDR SHORT]: Your Honor, just one thing I wanted to
12 alert the court to. Your requirements for the government's
13 steps, the first one, the proper classification and
14 markings -- of handling markings for the deposition has
15 occurred and it is -- the deposition is in the hands of the
16 defense counsel, Your Honor.

17 MJ [Col RUBIN]: Is the accused able to retain a copy of
18 this transcript?

19 DC [CDR COOPER]: Your Honor, the defense team has already
20 printed off the transcript and taken it to the PRT team to
21 have it marked and it will be provided to Mr. Al-Tamir at that
22 time.

23 MJ [Col RUBIN]: Thank you, Commander Cooper.

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1 Trial Counsel, any additional clarification needed?

2 TC [CDR SHORT]: Your Honor, I believe we have a 505(h)
3 this afternoon scheduled?

4 MJ [Col RUBIN]: Yes, we can. Trial Counsel, what time do
5 you believe we can productively hold the session? I was
6 assuming maybe 14- or 1500?

7 TC [CDR SHORT]: 1400, Your Honor.

8 MJ [Col RUBIN]: 1400.

9 Defense, any clarification requested?

10 ADC [MR. THURSCHELL]: Yes, Judge, thank you. With
11 respect to your order, what I heard you say was that there
12 would be no forced cell extractions requiring Mr. Al-Tamir to
13 attend the deposition session. Is that ----

14 MJ [Col RUBIN]: That's correct. Neither in my capacity
15 as a military judge or in my capacity as a deposition officer.

16 ADC [MR. THURSCHELL]: Well, Judge, in that case,
17 AE 099HH, the defense motion to prohibit the use of forced
18 cell extractions for any purpose pending further order of the
19 commission, is still pending and I think we need to -- we need
20 to resolve that in the near future.

21 There was -- the order is -- does not -- your order
22 does not cover the return from a deposition session that he
23 chooses to attend or is medically able to attend, and it

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1 doesn't cover the attorney-client meetings that you are
2 contemplating we have and we agree we need to have. So we
3 would ask that that be argued and resolved. We also -- the --
4 the -- the problem with the markings extends beyond the
5 deposition, the deposition testimony. I am not clear -- if I
6 could inquire of the government whether their -- what they
7 provided to us is the al Nashiri direct testimony as well?
8 Has that been -- have the markings on that been -- been
9 changed so that we can -- they're marked RELEASE TO DETAINEE?

10 TC [CDR SHORT]: I take that as a request for the Nashiri
11 deposition to be marked the same? I mean ----

12 MJ [Col RUBIN]: I guess a status update. Has that
13 occurred? My order only involves the direct in this case, not
14 in the Nashiri case. So I'm not aware of the status of that.
15 Trial Counsel, could you provide an update?

16 TC [CDR SHORT]: Sir, this is -- this is the first request
17 we're getting for it to be marked that way, so we will try to
18 do it. I don't know, you know, the timing on it, but we will
19 try to do it if it's a request.

20 ATC [MR. SPENCER]: Your Honor, it's obvious why the
21 defense would want their own -- this -- the testimony in this
22 case to be able to provide it to their client. Certainly the
23 government is aware that the defense possesses the Nashiri

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1 deposition; presumably it's not in a form that can be given to
2 the accused. The rationale behind having the Nashiri
3 deposition would be to deconflict -- or conflict, look for
4 conflict in testimony between the two. That's not something
5 that the accused would even be involved with. Normally that
6 would be an attorney evaluation.

7 MJ [Col RUBIN]: I understand. I am not ordering that. I
8 was ordering the release of the direct. I am not continuing
9 the deposition to allow this to happen. Government, if you
10 receive a request, which I believe you've now received a
11 request, process it in the ordinary course of business. If
12 you can expedite it, please do so. But again, my ruling and
13 order today that I announced only affects the direct in this
14 case.

15 TC [CDR SHORT]: Yes, Your Honor. And the other thing
16 that may -- may just affect this request is that, as in this
17 case, it may take a judicial order from Judge Spath in the
18 Nashiri case. So I think the request has to go through there,
19 but we will check the record and find out what Judge Spath has
20 said about that record.

21 MJ [Col RUBIN]: Very well.

22 ADC [MR. THURSCHELL]: Judge, just to respond, we
23 appreciate the government's advice on how we work with our

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1 client to prepare for the cross-examination of the
2 government's main witness, but we actually have our own
3 purposes.

4 This is the under-oath testimony of the government's,
5 as far as we know, main witness for identification purposes
6 against our client. It doesn't -- it isn't rocket science,
7 frankly, to think that the defense needs to be able to talk to
8 their client meaningfully about the -- their witness' prior
9 statements, and I -- so we request now the marking pursuant to
10 the DoD instruction we asked for before that places the
11 responsibility on the -- their side for this, to mark FOR
12 RELEASE TO DETAINEE all of the documents that directly pertain
13 to Mr. al Darbi's prior statements, all of those statements.

14 The Nashiri direct testimony that went on for days
15 about subject matter that is going to be the subject of
16 cross-examination needs to be seen by our client. Right now
17 he can't, and so we request that and we will -- are happy to
18 work with the government afterwards to be more specific about
19 those documents, and we will. But we reiterate our objections
20 to being able to prepare under these circumstances, with this
21 belated disclosure, in a form that let's us actually prepare
22 for the deposition.

23 The -- so, Judge, there's also the A -- I mentioned

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1 AE 099HH. I believe that AE 099CC, the discovery motion, is
2 pending. I need to look at that to see if there's any -- if
3 there's anything that is immediately pressing, given your
4 rulings today, but there may be material that is -- that we
5 need to argue. We will need to argue it at some point, I am
6 absolutely certain of that. Whether we need to do it before
7 the deposition, I need to -- I need to go back and look.

8 MJ [Col RUBIN]: Right now, I don't intend to litigate
9 those matters. My goal is to give the defense a maximum
10 amount of time with their client. He is here today. I
11 encourage and authorize, to the extent that I can, that you
12 use this courtroom as an attorney-client meeting area to meet
13 with your client as long as he is able to stay here, which I
14 would assume would be around the noon hour, so I don't want to
15 take up any more commission time.

16 My intent is to end this session, give the defense
17 the time that they need to prepare. We will take up other
18 motions that are still pending, provided we have the time to
19 do so, but I am not going to take any more commission time. I
20 think there are no other additional matters that need to be
21 resolved now. Again, my intent is to give the defense a
22 maximum amount of time with Mr. Hadi while he is present in
23 the courtroom.

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1 ADC [MR. THURSCHELL]: I understand, Judge. We -- our --
2 to be clear, we are -- and I neglected to mention AE 102E,
3 which remains potentially relevant, especially in this -- in
4 the current situation, so we are ready and prepared to argue
5 those motions. AE 099HH is urgent, to be resolved as quickly
6 as possible -- that is the FCE motion -- given his health
7 situation.

8 AE 102E is ripe, ready, and it would be potentially
9 extremely helpful for preparation purposes to get that
10 resolved now. And AE 099CC, as I mentioned, I need to go back
11 and look. So our position is they should be argued as soon as
12 possible; today, in fact. We are prepared to go forward.
13 They are ripe.

14 MJ [Col RUBIN]: Trial Counsel?

15 TC [CDR SHORT]: Your Honor, we'll defer to you and have
16 nothing to add.

17 DC [CDR COOPER]: Your Honor, I have one administrative
18 matter. On August 15, 2017, the first day of the deposition,
19 Mr. Al-Tamir took extensive notes of that deposition. He was
20 in the detainee hospital when the hurricane came and those
21 notes were somewhere -- put somewhere in a safe place. I
22 would just ask the government to help us get those notes back
23 so we can use them to prepare.

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1 MJ [Col RUBIN]: All right. Trial Counsel, if you could
2 assist the defense with that.

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

4 MJ [Col RUBIN]: All right. Counsel, that's all the
5 matters I want to cover today. Again, the commission's ruling
6 that the deposition will start no later than 0-8 on Saturday.
7 If for any reason the defense is prepared to proceed prior to
8 that, let me know. Right now, I have no intent to start prior
9 to 0-8. I understand that there is another commission
10 starting their session next Monday. I believe we will be able
11 to deconflict and you'll be able to have access to the
12 courtroom 0-8 to 1200 during the days.

13 ADC [MR. THURSCHELL]: Judge, I'd request a brief 802 to
14 discuss -- discuss the new scheduling realities, if I can put
15 it that way, given our extension of time and the matters ----

16 MJ [Col RUBIN]: When we finish here today. Very well.
17 The commission is in recess.

18 [The R.M.C. 803 session recessed at 0852, 6 February 2018.]

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