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1 [The R.M.C. 803 session was called to order at 0935, 17  
2 February 2016.]

3 MJ [COL POHL]: The commission is called to order.  
4 General Martins, any change in the members of the prosecution  
5 from the last time we recessed?

6 CP [BG MARTINS]: Good morning, Your Honor. Counsel and  
7 paralegals remain the same. We have the addition of Detective  
8 Patrick Lantry of the New York City Police Department, Special  
9 Agent Patrick O'Malley of the Federal Bureau of Investigation  
10 and Brianna Hearn and Molly Scullin, also of the FBI.

11 MJ [COL POHL]: Mr. Nevin, any changes?

12 LDC [MR. NEVIN]: Your Honor, the same as yesterday except  
13 Major Poteet is not in the courtroom right now, he will be  
14 shortly.

15 And I would just recite again that because of our  
16 position on 406, at this point Mr. Mohammad is without  
17 counsel.

18 MJ [COL POHL]: Okay. I got it.

19 Ms. Bormann, the same people?

20 LDC [MS. BORMANN]: Judge, Major Schwartz -- Mr. Schwartz  
21 and Major Seeger are both present, as am I.

22 MJ [COL POHL]: Mr. Schwartz? Just a housekeeping thing I  
23 should have done yesterday. You are the formerly

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1 Major Schwartz who was part of this defense team, correct?

2 DDC [MR. SCHWARTZ]: I am.

3 MJ [COL POHL]: Okay. I just wanted to put it on the  
4 record. You are now a GS employee for OMC defense?

5 DDC [MR. SCHWARTZ]: Military Commissions Defense  
6 Organization.

7 MJ [COL POHL]: But you still have not acted in any manner  
8 to disqualify you?

9 DDC [MR. SCHWARTZ]: I have not.

10 MJ [COL POHL]: Just a continuity of counsel issue?

11 DDC [MR. SCHWARTZ]: Yes, sir.

12 MJ [COL POHL]: Mr. Harrington?

13 LDC [MR. HARRINGTON]: The same as yesterday, Judge.

14 MJ [COL POHL]: Mr. Connell?

15 LDC [MR. CONNELL]: Your Honor, the same personnel as  
16 yesterday. One housekeeping matter I should have taken care  
17 of yesterday was when I submitted 407A, the memorandum from  
18 the Convening Authority, it was on the topic of the ex parte  
19 pleading in 407. That 407A should also be ex parte under  
20 seal.

21 MJ [COL POHL]: Okay. It will be treated as such.

22 Mr. Ruiz?

23 LDC [MR. RUIZ]: No changes, Judge.

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1 MJ [COL POHL]: And I believe all the accused are here  
2 except for Mr. Binalshibh.

3 Trial Counsel? Mr. Swann.

4 CP [BG MARTINS]: Major, could you please come to the  
5 witness stand and raise your right hand for the oath?

6 Do you swear that the evidence you shall give in the  
7 case now in hearing shall be the truth, the whole truth and  
8 nothing but the truth, so help you God?

9 WIT: I do.

10 CP [BG MARTINS]: Please take your seat.

11 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
12 was sworn, and testified as follows:

13 DIRECT EXAMINATION

14 Questions by the Trial Counsel [MR. SWANN]:

15 Q. Major, you are now the deputy staff judge advocate  
16 that addresses issues with Camp VII; is that correct?

17 A. That is correct.

18 Q. All right. Did you have occasion this morning to  
19 Mr. Binalshibh of his rights to attend this morning?

20 A. I did.

21 Q. And did he indicate that he wanted to come or not  
22 come?

23 A. He indicated that he did not want to come this

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1 morning, that he may want to come this afternoon, and that's  
2 noted on the advisement.

3 Q. All right. I have in front of me what's marked as  
4 Appellate Exhibit 408 consisting of two pages. It's the  
5 English version of the right to be present at commission  
6 proceedings, and it indicates that at 5:44 this morning you  
7 advised Mr. Binalshibh of these rights.

8 A. I did. I read both pages.

9 Q. And did you do this in Arabic or did you do it in  
10 English?

11 A. I asked him if he needed an interpreter; he indicated  
12 he did not. He indicated that he would hear it in English.

13 Q. All right. And that's his signature that's contained  
14 on page 2?

15 A. That is his signature.

16 Q. All right. And do you believe he understood his  
17 rights to be present?

18 A. I do.

19 TC [MR. SWANN]: I have no further questions, Your Honor.

20 MJ [COL POHL]: Mr. Harrington, any questions?

21 LDC [MR. HARRINGTON]: No, sir.

22 MJ [COL POHL]: Major, just to let you know that if he  
23 decides to come this afternoon, I anticipate the afternoon

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1 session beginning at about 1330.

2 WIT: Got it. Thanks, Judge.

3 MJ [COL POHL]: Thank you.

4 WIT: Thanks, Judge.

5 [The witness was excused from the courtroom.]

6 MJ [COL POHL]: Since we met yesterday, I have received  
7 Mr. Bin'Attash's last letter. Just to be clear for the  
8 record, the first one was 380EE. The second letter is 380FF.  
9 One thing with EE, it refers to an attachment 8. There was no  
10 attachment 8 with the copy provided to me, so it's not  
11 missing; it just never was provided.

12 Also this morning I received a declaration from  
13 General Baker dated 17 February 2016 addressing this issue,  
14 and to summarize it, it is that he finds no good cause in his  
15 view for Ms. Bormann and Mr. Schwartz to be released. He  
16 indicated to me -- or also included, and this will be 380GG,  
17 attached to it is a letter to Mr. Bin'Attash dated 11 February  
18 2016 -- which I don't know whether he has gotten or not -- but  
19 in it, it tells him that in his view, there is not good cause  
20 to excuse Ms. Bormann or Mr. Schwartz.

21 Also attached, for reasons unknown to the commission,  
22 is a memorandum for the Convening Authority entitled Initial  
23 Assessment of the Military Defense Commission Operations; and,

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1 again, I read it, I just have no idea what's it got to do with  
2 the issue before me which deals simply with Mr. Bin'Attash's  
3 his counsel issue.

4           Okay. Mr. Bin'Attash, I just want to make sure that  
5 you know what I have on your issue. And like I said, I have  
6 got this thing from General Baker today, and basically he says  
7 he does not find good cause for you to release Ms. Bormann and  
8 Mr. Schwartz.

9           Now, that's just his opinion. Do you understand  
10 that?

11          ACC [MR. BIN'ATTASH]: Yes.

12          MJ [COL POHL]: And so, quite frankly, he does what he  
13 does and I do what I do, and the issue is decided on what I  
14 think the law says and what evidence you have given me. Do  
15 you understand that?

16          ACC [MR. BIN'ATTASH]: Yes, but to understand, as for  
17 General Baker ----

18          MJ [COL POHL]: I'm sorry?

19          ACC [MR. BIN'ATTASH]: I would like to clarify a point  
20 relating to General Baker. His response before twice was not  
21 matching to what was in the letter. Twice I met with him and  
22 he asked for more time.

23          MJ [COL POHL]: Mr. Bin'Attash, in his letter to you, did

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1 you get -- by the way, did you receive the letter dated the  
2 11th of February to you? Have you received that yet?

3 ACC [MR. BIN'ATTASH]: Yes.

4 MJ [COL POHL]: Okay. In there he indicates that he will  
5 be in Guantanamo on the 20th of February, next week, and the  
6 way I read it it is that -- well, he says, "I look forward to  
7 seeing you soon. I will not arrive at Guantanamo until 20  
8 February." So before this two-week session is done, I am  
9 assuming, the way I am reading it, he will be available to  
10 meet with you to clear up any type of issue you may have with  
11 him.

12 And, again, that's got nothing to do with me. That's  
13 between you and General Baker. Do you understand that?

14 ACC [MR. BIN'ATTASH]: Yes.

15 MJ [COL POHL]: Okay. Trial Counsel, do you have anything  
16 you wish to add on this subject one way or the other?

17 TC [MR. RYAN]: Good morning, Your Honor.

18 MJ [COL POHL]: Good morning.

19 TC [MR. RYAN]: Judge, at this point, no. However,  
20 depending upon which -- depending upon the next steps the  
21 commission decides to take, we may very well ask the  
22 commission to be heard on various matters. Specifically, I  
23 guess the thing that I would highlight is to say if there is

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1 going to be a good cause discussion and what goes into it and  
2 cases and so on, we would have argument about that at some  
3 point.

4 MJ [COL POHL]: Okay.

5 TC [MR. RYAN]: But before I would be prepared to do that,  
6 I would first have to address to the commission having access  
7 to the information before the commission.

8 MJ [COL POHL]: I understand that. Thank you, Mr. Ryan.

9 TC [MR. RYAN]: Yes, sir.

10 MJ [COL POHL]: I just want to make it clear to all  
11 parties, this is not the normal way litigation is done, where  
12 the accused sends letters directly to the judge and the other  
13 side doesn't get to see them and it puts the commission in the  
14 position of having to do its own legal analysis and then send  
15 rulings back just to the defense in order to let them be  
16 informed of what it is, but the government -- which, as I said  
17 yesterday, does have a dog in this fight -- is really kind of  
18 left in the dark.

19 But, given the nature of this issue, I am unaware of  
20 any other way to do it that balances the protection of the  
21 accused's right to counsel -- just a second, Mr. Bin'Attash --  
22 and to protect the attorney-client privilege and the work  
23 product privilege, and so that's the way we have done this.

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1 But understand, this is an extraordinary circumstance that we  
2 are doing it this way, and there will have to be extraordinary  
3 circumstances that would warrant this type of procedure on any  
4 other issue or again on this issue.

5 Mr. Bin'Attash, before I tell you what I am going to  
6 do, you want to say something?

7 ACC [MR. BIN'ATTASH]: Yes. I don't have a problem if all  
8 attorneys get a copy of my letter. Also the prosecution can  
9 get the copy. I do not have an issue with that.

10 MJ [COL POHL]: Okay. Just ----

11 ACC [MR. BIN'ATTASH]: The decision is left up to the  
12 court or to the attorneys, but I would like to make my voice  
13 heard.

14 MJ [COL POHL]: Okay. Just so -- I want to make something  
15 clear here. You have provided two letters to me. Okay? In  
16 those letters, they discussed privileged material. Do you  
17 understand what that is?

18 ACC [MR. BIN'ATTASH]: Yes.

19 MJ [COL POHL]: Okay. Just to make sure that you and I  
20 understand, that means things you tell your attorney, they  
21 can't tell anybody and you can't tell anybody, okay, unless  
22 you decide to let them see it. So the right, the privilege,  
23 belongs to you, not to the attorneys.

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1           And what you are telling me is on those two letters  
2 that you provided to me, and all the attachments, you have no  
3 problem with the other side, the prosecution, seeing them?

4           ACC [MR. BIN'ATTASH]: Yes. I'm talking about the letter  
5 that I have sent yesterday. I do not have any issues if the  
6 government or the rest of the team to get a copy of it.

7           MJ [COL POHL]: Okay. I want ----

8           ACC [MR. BIN'ATTASH]: I would like to clarify for the  
9 record, the first letter, the attorneys have attached the  
10 wrong attachment to the letter. It could have been a  
11 misunderstanding between both sides. There was an attachment  
12 that should not have been attached, but it was attached at any  
13 rate. But the things as well that I wanted the judge to have  
14 a look at was also there.

15          MJ [COL POHL]: Okay.

16          ACC [MR. BIN'ATTASH]: Until this is corrected for the  
17 letter yesterday, I don't have any problem releasing it.

18          MJ [COL POHL]: Mr. Bin'Attash, I am going to tell you how  
19 I'm going to rule, and when I get through with that I am going  
20 to come back to this privilege issue. Okay? So just listen  
21 and then I will make sure you understand what I am going to  
22 do.

23           I have read your letters. I have considered AE 380EE

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1 and 380FF to be requests that I reconsider my ruling of 380BB  
2 dated 4 December denying your request to release Ms. Bormann.  
3 You now also request that Mr. Schwartz be released.

4 I believe I understand your concerns for counsel. As  
5 I told you in October, I will only authorize a severing of the  
6 attorney-client relationship of Ms. Bormann or Mr. Schwartz if  
7 you establish good clause -- good cause under the law for  
8 their release. After reviewing the material you've submitted,  
9 including rereading the transcript of our discussion on  
10 28 October 2015, I find again that you have not currently  
11 established good cause to release Ms. Bormann or Mr. Schwartz.  
12 As such, they will continue to represent you at this  
13 commission. In addition, you will have the service of Major  
14 Seeger.

15 Now, as you pointed out yesterday, it would be  
16 difficult for your current lawyers to assist you in filing a  
17 motion for their own removal. I understand that. On the  
18 other hand, you are not a lawyer and I would not expect you to  
19 be able to file a legal brief and decide appropriate legal  
20 authorities to assert your position for the removal of your  
21 attorneys. I do think you need the assistance of a lawyer who  
22 is not part of your defense team. Accordingly, I am going to  
23 order the Chief Defense Counsel to appoint an independent

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1 counsel to advise and assist you on this issue and this issue  
2 only. He or she will have a duty to you and you alone as a  
3 client. She will not work for or with Ms. Bormann or any  
4 other member of the defense team. She will provide you -- or  
5 he will provide you independent advice on the best way to  
6 address this issue.

7           Once you have had the opportunity to consult with  
8 this independent counsel and together you have decided the  
9 best way to proceed, you will be given an opportunity to raise  
10 this issue to me again in a properly filed motion by the  
11 independent counsel. Now -- and this independent counsel will  
12 be able to advise you on whether or not you really should  
13 waive your attorney-client privilege on any matter. So for  
14 now we are going to keep everything, the orders and the  
15 letters, only with you and your defense team. And after you  
16 talk to this other lawyer and he or she tells you, no, this is  
17 the way we need to go, whatever he or she says, if you still  
18 want to release the information, then we can release it.

19           The motion for reconsideration is granted. The  
20 motion for the removal of Ms. Bormann or Mr. Schwartz is  
21 denied. A written order will be drafted and published. The  
22 order will be ex parte and under seal provided only to members  
23 of Mr. Bin'Attash's defense team. A translated copy of the

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1 order will be provided to Mr. Bin'Attash. A separate order  
2 will go to General Baker relating to the independent counsel  
3 issue.

4 Do you have any questions about the court's ruling,  
5 Mr. Bin'Attash?

6 ACC [MR. BIN'ATTASH]: Yes. It's not a question, it's  
7 just a clarification for the judge.

8 MJ [COL POHL]: Sure.

9 ACC [MR. BIN'ATTASH]: From now on, I will not meet with  
10 my current defense team. I will not communicate with them at  
11 all, whether it is sending letters or receiving letters. The  
12 order regarding the independent counsel, I have no idea how  
13 long that's going to take until there is an attorney  
14 appointed, and the judge is aware of the problems regarding  
15 the clearances that the attorneys face. This problem could  
16 take forever.

17 Regarding the defense team, that I have no  
18 communication with them at all. I ask the judge that I leave  
19 the session. I will not attend the sessions or the court from  
20 this day on even if I have to sign every morning that I  
21 voluntarily waive my right. As a matter of fact, I would like  
22 to attend the court, but I don't really want to waive my right  
23 to attend. The reason for my unattendance is the current

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1 attorneys. And my signature for voluntary unattendance is  
2 just so that I can avoid violence and face extraction ----

3 UNIDENTIFIED SPEAKER: Forced.

4 INT: I'm sorry, cell forced extraction. Sorry.

5 MJ [COL POHL]: Mr. Bin'Attash, two points. One is how  
6 you choose to cooperate or communicate with your lawyers, that  
7 is your choice. Okay? So it's on you. If you don't want to  
8 talk to them, it's on you.

9 Now, as far as whether or not you wish to attend the  
10 sessions, okay, you, as I have said, have a right to  
11 voluntarily choose not to attend, but it's got to be an  
12 unequivocal voluntary waiver. By that I mean is that when  
13 they come to you in the morning -- or let's say right now, it  
14 is you say you want to leave right now; is that correct?

15 ACC [MR. BIN'ATTASH]: Yes.

16 MJ [COL POHL]: Okay. Are you telling me that you are  
17 voluntarily choosing to leave?

18 ACC [MR. BIN'ATTASH]: I would like to stay, but the  
19 reason why I want to leave is because the attorneys are  
20 staying with me on the team and that's -- I want to clarify  
21 this. For that reason, I want to leave. Even tomorrow, when  
22 I sign my voluntary not to attend the session, it's because I  
23 don't want to be with the attorneys.

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1 MJ [COL POHL]: Okay. Mr. Bin'Attash, let's make  
2 something very clear here, is that as I sit here today, I made  
3 a ruling that I'm not severing the attorney-client  
4 relationship. That's the state of the law in this case right  
5 now. Okay? You may not like that ruling, and I can tell you  
6 probably don't. Okay? If because of that ruling you are  
7 voluntarily choosing to leave, that's your choice. Okay? I  
8 treat that as a voluntary waiver, that you got a ruling that  
9 you don't like and therefore you are not going to be here.  
10 But that's going to be considered a voluntary waiver of your  
11 presence here.

12 No one is forcing you to leave. No one is forcing  
13 you to go anywhere. But you cannot say, I don't like a ruling  
14 of the court and therefore I am being forced to go anywhere.  
15 So if you choose not to attend or you choose to leave now  
16 because you don't like the ruling of the court, that is what I  
17 consider a voluntary waiver of your right to be present. Do  
18 you understand that?

19 ACC [MR. BIN'ATTASH]: Yes. The court might consider that  
20 voluntary, but as for me, I'm sure you know the reason. And  
21 you know that I would like to stay and I would like to be  
22 present.

23 MJ [COL POHL]: It's your choice, Mr. Bin'Attash. Do you

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1 want to stay or do you want to go?

2 ACC [MR. BIN'ATTASH]: I would like to leave.

3 MJ [COL POHL]: Okay. Guards, please -- I find  
4 Mr. Bin'Attash has voluntarily waived his right to be present  
5 and accordingly will be escorted back into the holding cell  
6 and transported back to the camp.

7 LDC [MS. BORMANN]: Judge, I would like to address the  
8 court.

9 MJ [COL POHL]: Don't -- do this: Take him back to the  
10 holding cell, but don't take him back to the camp until I tell  
11 you in case things change. Okay?

12 LDC [MS. BORMANN]: I am going to be moving to withdraw.

13 ACC [MR. BIN'ATTASH]: Until when?

14 MJ [COL POHL]: Until I decide.

15 TC [MR. RYAN]: Excuse me, Your Honor, in light of what  
16 she is saying [Microphone button not pushed; no audio] in the  
17 courtroom at least for the next several minutes.

18 MJ [COL POHL]: Go ahead and be seated.

19 Mr. Bin'Attash, perhaps the landscape has changed.

20 Ms. Bormann.

21 LDC [MS. BORMANN]: Thank you. And I would ask that we  
22 turn on -- I don't know what it's called, activate that thing  
23 up there, whatever it's called.

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1 MJ [COL POHL]: The big TV screen?

2 LDC [MS. BORMANN]: Yes, and the laptop so we can talk  
3 about these issues. It has already been cleared by  
4 Mr. Chalmers.

5 I have to tell you that when I walked into this  
6 courtroom yesterday, I didn't think I would be standing here  
7 moving to withdraw because I examined the writings that you  
8 examined and I agree with you, there is no basis. There is no  
9 reasonable cause.

10 But after listening to what happened yesterday and  
11 reflecting on the history of the case, I don't really have a  
12 choice. I'm going to get some water. So I'm going to lay out  
13 for you the basis for my motion to withdraw so you can make a  
14 decision regarding whether or not it's reasonable.

15 The handling of this particular issue has led me to  
16 believe that I might need to withdraw, and it's compounded by  
17 the history of this case. The -- and just to be very clear,  
18 up until just now Mr. Bin'Attash and I have been  
19 communicating. I met with him at the end of January down here  
20 and we have had meetings and we have exchanged communications  
21 and letters. We have been filing motions. We have gathered  
22 information from him. We have done all of that. We operate  
23 as a team, as a singular indivisible team, and that's the way

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1 capital defense teams have to work because that's what has to  
2 happen when you represent somebody over a long period of time  
3 charged with something so serious.

4           But what happened in this case is from the inception,  
5 and so what I've reflected on that's brought me to this point  
6 is the history compounded by what's been happening in the last  
7 couple of days. Mr. Bin'Attash has been held basically  
8 incommunicado detention except for being brought to court and  
9 legal meetings since 2003, during several of those years being  
10 tortured. So when I met him in 2011, he was already a damaged  
11 human being, already had trauma inflicted upon him, and I  
12 realized that and I sought to provide to him the kind of  
13 representation that he would need, the kind of resources he  
14 would need.

15           TC [MR. RYAN]: Judge, I object to the argument. This is  
16 part of other motions not before the commission at this time.  
17 It's a repetition of speaking points. The issue right now  
18 concerns withdrawal of counsel, which she is bringing in out  
19 of the blue. If she wishes to speak to that, I say we get to  
20 that particular subject.

21           LDC [MS. BORMANN]: These are the bases for my motion to  
22 withdraw.

23           MJ [COL POHL]: The objections are overruled. I will give

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1 you some leeway.

2 LDC [MS. BORMANN]: Thank you.

3 MJ [COL POHL]: But Ms. Bormann, the focus has got to be  
4 your basis for withdrawal.

5 LDC [MS. BORMANN]: We will get into it. In order for you  
6 to be informed on how to rule on this, you need to know where  
7 I am because if I can't continue, then you have to take that  
8 into consideration.

9 Early on in this case I made several representations  
10 for Mr. Bin'Attash about how cases proceed. One of those  
11 representations was that the conversations that he and I have  
12 remain privileged. So when I met with him in Echo II, there  
13 was no possibility that what he said to me or what I said to  
14 him would not remain privileged.

15 I also explained to him that what he wrote to me and  
16 what I wrote to him would also remain privileged. Those two  
17 promises that I made to him turned out not to be true. It  
18 turned out, in his mind, to be lies. And when we brought  
19 those issues to the commission's attention, no resolution and  
20 no remedy has been forthcoming.

21 MJ [COL POHL]: Well, that's how it works, isn't it?

22 LDC [MS. BORMANN]: Pardon?

23 MJ [COL POHL]: Isn't that how it works? What I am saying

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1 is on any issue, you bring the issue to the attention of the  
2 judge and the judge does what he does. You may not like it,  
3 but that's the way it works.

4 LDC [MS. BORMANN]: Judge, no, but in this particular case  
5 what happened was JTF-GTMO seized privileged communication,  
6 read them, translated them and then -- and absorbed their  
7 contents. And then while we were litigating that very issue  
8 before you, with the SJA on the stand, they did the same exact  
9 thing while Mr. Bin'Attash was in court. And we sought  
10 to ----

11 MJ [COL POHL]: Wait a minute, Ms. Bormann, I got it. I  
12 got it you have had complaints about this issue, but I'm  
13 trying to wrap my head around the idea, you asked for a  
14 remedy. Maybe you didn't get what you wanted.

15 LDC [MS. BORMANN]: It's not about what I got, it's about  
16 what Mr. Bin'Attash perceives. You have seen letters in the  
17 last two days that say that he can't trust us, he can't  
18 believe us. What I am laying out for you is why that is.  
19 It's because what I have said to him about 30 years -- 20 -- I  
20 don't want to make myself older than I am, but 27 years of  
21 criminal practice, I made representations to him which in  
22 every other court of law, in every other scenario, would have  
23 been true that turned out not to be true.

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1           One of those other things was "You get to look at the  
2 discovery with me. We'll proceed with it together and be able  
3 to determine what's useful and what's not." But because of  
4 the classified -- the classification of everything related to  
5 torture in this case, Mr. Bin'Attash is not even permitted to  
6 know what the evidence of his torture is.

7           MJ [COL POHL]: Were you unaware -- were you unaware going  
8 in that there would be limitations in providing classified  
9 discovery to your client?

10          LDC [MS. BORMANN]: I was not unaware. However ----

11          MJ [COL POHL]: So if you told him something to the  
12 contrary, is that what you are telling me?

13          LDC [MS. BORMANN]: What I said was we would attempt to  
14 overcome that because I believed it didn't fit within the  
15 executive order on the definition of what should be  
16 classified. We litigated that; we lost that. Each of those  
17 chipping away, each of those expectations of a criminal  
18 defendant to be able to share in his own defense have slowly  
19 been eroded, to the point where Mr. Bin'Attash no longer  
20 trusts me.

21                 Now, when we actually are -- let's move on to the  
22 next thing. So we talked about classified information. Then  
23 the next thing that happens is we find out that the Federal

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1 Bureau of Investigation has infiltrated one of the defense  
2 teams, asking about all of the defense teams; and that  
3 resulted in a criminal investigation which reached the highest  
4 levels of the United States Government and was finally --  
5 there was a declination to prosecuted. But ultimately  
6 Mr. Bin'Attash looks at everybody on his team like many of his  
7 brothers do, and that is, which one of them is working for the  
8 United States Government?

9 MJ [COL POHL]: You know, but Ms. Bormann, the problem I  
10 am having here is you are making this global attack on the  
11 system; and I got it, I understand your position. Each one  
12 was addressed accordingly. The issue about the investigation  
13 of the defense team is -- it was explored and the issue was  
14 there was concerns that they had acted improperly and the FBI  
15 looked into it. I don't know how much detail has been shared  
16 with everybody, so I want to keep it kind of on a generic  
17 level. I mean, don't they have a responsibility to do that?  
18 Wouldn't that happen in every case? Didn't that happen to  
19 Lynne Stewart?

20 LDC [MS. BORMANN]: It did happen to Lynne Stewart.

21 MJ [COL POHL]: What I am saying is this nefarious reason,  
22 and I don't know what their motives are. I am just saying  
23 what was presented to me was there was an allegation of

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1 misconduct that had to be investigated, and it was, and we sat  
2 around for a year plus while it was being done to make sure  
3 that it was fully investigated and there was no conflict.  
4 That's how the process works. Your client gets frustrated by  
5 it or doesn't like it or has a different perception of it, is  
6 that ----

7 LDC [MS. BORMANN]: I understand that, but understand me  
8 here. So we are talking about little pebbles, each little  
9 pebble being added into a glass of water so eventually there  
10 is no more water left. So that's just one more pebble.

11 The next pebble is a former CIA interpreter placed on  
12 another defense team, which re-traumatized my client and so  
13 he, again, is looking around and thinking to himself, what's  
14 going to happen next?

15 So when you have a colloquy with Mr. Bin'Attash,  
16 understand that he has -- this is what he is thinking in his  
17 mind.

18 MJ [COL POHL]: So he takes all this nefarious government  
19 misconduct ----

20 LDC [MS. BORMANN]: Well, this ----

21 MJ [COL POHL]: ---- all these pebbles and more pebbles  
22 and blames you, and therefore you can withdraw?

23 LDC [MS. BORMANN]: Well, the question is whether or not I

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1 can be effective. So the question is that, right? So in this  
2 system where -- and let me just talk a little bit about 254,  
3 which is on the docket for this week. 254C -- and I have  
4 gotten used to military acronyms, Charlie -- was a filing we  
5 filed in December of 2013, some two-plus years ago, and in  
6 that filing we were litigating the denial of access to  
7 counsel. So JTF-GTMO had denied my ability to meet with  
8 Mr. Bin'Attash over a weekend, and they had claimed that they  
9 couldn't facilitate weekend meetings on the 3rd and 4th of  
10 December, 2013, because I had made the request 13 days before  
11 the suggested dates and not 14. And when that happened, the  
12 government fixed it, and we have had a series of those  
13 situations over and over and over. But we warned in that  
14 pleading, way back when, that, and I'm going to quote from it  
15 because I don't understand why it's not up on the ----

16 TC [MR. RYAN]: Objection, Judge.

17 MJ [COL POHL]: Basis?

18 TC [MR. RYAN]: Far afield of the motion or request  
19 counsel is bringing to the court.

20 MJ [COL POHL]: I will give her some leeway. Go ahead.  
21 Objection overruled.

22 LDC [MS. BORMANN]: We state, and it's at the top of  
23 page 6, 254C, "Ill will created by JTF-GTMO's interference in

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1 the attorney-client relationship could have lasting and  
2 unqualifiable impact upon the relationship."

3           Now, I'm here to tell you that I was prescient. I  
4 didn't know this was going to be happening two years ago, but  
5 it's been -- the trust has been completely eroded, not through  
6 actions of mine -- we are attempting to practice law here --  
7 but by actions of other outside bodies I had no control over.  
8 And then when we brought those issues to the court, the court  
9 ruled as the court ruled, but Mr. Bin'Attash saw those as his  
10 counsel being ineffective, being unable to persuade a court of  
11 Mr. Bin'Attash's plight.

12           The -- there are a litany of motions still pending.  
13 We've requested telephone access to Mr. Bin'Attash so he can  
14 call us when he has a problem. That has yet to be heard; the  
15 government has opposed it. We asked to get their laptops back  
16 so that he can access Word documents and manipulate discovery  
17 to help us prepare for the case going forward. That's been  
18 denied and blocked by the government. Though the laptop was  
19 eventually given back, no ability to actually do anything with  
20 it exists.

21           There have been rulings that have made Mr. Bin'Attash  
22 not trust me to ask you to help intervene in getting medical  
23 care. And what Mr. Bin'Attash takes from what's been

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1 happening is that Mr. al Hawsawi, who is an ill man, has not  
2 been given adequate medical care and the judge says he can't  
3 do anything about it. So Mr. Bin'Attash looks at me and says,  
4 "Well, Ms. Bormann, if you can't help me get access to my  
5 legal materials, you can't promise me that there is a  
6 privilege, you can't help me get adequate medical care, you  
7 can't argue effectively and win my motions for me, what good  
8 can you do?"

9           And I say to him, "Well, you know, we are working  
10 toward" ----

11           TC [MR. RYAN]: Objection, Your Honor. She is now quoting  
12 conversations with her client, which is privileged  
13 information, yet we are precluded from having other privileged  
14 information upon which the commission will ultimately have to  
15 make this decision.

16           LDC [MS. BORMANN]: It was rhetorical.

17           MJ [COL POHL]: I'm going to over -- I'm overruling the  
18 objection, but I am reserving the right if we need to go into  
19 privileged information later on ----

20           LDC [MS. BORMANN]: Certainly.

21           MJ [COL POHL]: ---- because, again, I am not sure where  
22 you are going. I am going to give you some leeway,  
23 Ms. Bormann, because of this issue, so go ahead.

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1 LDC [MS. BORMANN]: I appreciate it.

2 The system also affects Mr. Bin'Attash in a very  
3 different way, less directly as it relates to my  
4 representation to him. Because he has been held  
5 incommunicado, he has absolutely no face-to-face or voice  
6 contact with his family members. The only -- up until very  
7 recently, even the only attempts by anybody to have  
8 communication between Mr. Bin'Attash and his family were  
9 monitored letters through the International Committee of the  
10 Red Crescent.

11 We filed motions that are currently pending before  
12 this commission to try and get some sort of visitation. This  
13 is the only penal institution in the world that doesn't allow  
14 face-to-face visits with family members of detainees. And it  
15 has affected Mr. Bin'Attash in a very serious way. Recently  
16 as the court is aware, because it has been published,  
17 Mr. Bin'Attash's mother passed. May her soul rest in peace.  
18 And that brought to a head an entire situation that caused  
19 grief and resulted in immediate filings requesting family  
20 visitation, because no -- none of these men wants to miss any  
21 further contact with their family members.

22 So we have that, and he says to me, "Well, you  
23 couldn't even get me a visit with my family," and I say, "No,

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1 I can't. I can't even get you a phone call with your family.  
2 I can't get you a Skype that works with your family." I can't  
3 be effective.

4           Recently, the last couple of days, and going back to  
5 October, that -- these problems have been exacerbated. In  
6 October, Judge, let me start, early on in this case a lawyer,  
7 a capital lawyer, all lawyers, tried to explain to their  
8 clients, who come from different cultural backgrounds, what  
9 the American legal system looks like and how it works. And  
10 one of the main points when you're dealing with a client who  
11 is unfamiliar with the legal system is what decisions a client  
12 makes and is entitled to make and what types of decisions a  
13 lawyer makes. And so early on we had this conversation and  
14 sometimes, you know, there would be back and forth and we  
15 might disagree about things, but we would get to a point where  
16 we could -- where we could work together, and we have for four  
17 and a half years.

18           But in October, Judge, you misstated the law, and you  
19 told Mr. Bin'Attash that he could simply order his counsel to  
20 file motions or not to file motions; and that is an  
21 out-and-out misstatement of the applicable law. I couldn't  
22 stand up and say that at the time, but Mr. Connell did and  
23 Mr. Nevin began to. Mr. Connell has since filed a motion.

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1 But this court has left that impression out there, and so what  
2 I have said to my client has been directly undermined by you,  
3 with absolutely no correction of it. And so now ----

4 MJ [COL POHL]: Now it's my fault?

5 LDC [MS. BORMANN]: Well, no. Now my client doesn't  
6 believe me because the judge said one thing and I have said  
7 another and clearly I must have been lying.

8 MJ [COL POHL]: My discussion with Mr. Connell, it's not  
9 quite as clear as you make it out to be. If we want to go  
10 down this road, we can. This idea that the client can make  
11 the five big decisions but that the lawyer can file motions  
12 without his knowledge, I don't dispute that. I don't dispute  
13 that. That's what the law says. But I'm not sure it's as  
14 clear, and you may tell me, if you want to file a motion, your  
15 client says "I don't want that motion filed," do you still  
16 file it? Is that your position?

17 LDC [MS. BORMANN]: It depends.

18 MJ [COL POHL]: Okay. That's what I am saying.

19 LDC [MS. BORMANN]: It depends.

20 MJ [COL POHL]: Right.

21 LDC [MS. BORMANN]: I don't want to leave the impression  
22 that clients can make allegations or force lawyers to file  
23 motions that are not well pled or that violate the rules of

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1 professional conduct or a statement of fact.

2 MJ [COL POHL]: You are right, you don't have to file  
3 frivolous motions. I have got it. But when you say I  
4 misstated the law, what I'm saying is the client does have a  
5 role in which motions are filed.

6 LDC [MS. BORMANN]: Of course it is a rule of  
7 consultation. Absolutely, positively ----

8 MJ [COL POHL]: So let's go on from there.

9 LDC [MS. BORMANN]: Absolutely, positively, that's true.  
10 And then yesterday Major Seeger, who I have worked with for  
11 seven months at this point on a daily basis, and who has  
12 worked side by side with Mr. Schwartz and Mr. Perry, is called  
13 up to the podium and it is suggested that he should be filing  
14 a motion to -- to allege what in fact would be his own  
15 ineffective assistance of counsel.

16 MJ [COL POHL]: Okay. You want to take it that way,  
17 that's fine, Ms. Bormann. That's not the way it was intended.  
18 What I was simply saying at that point was -- is that  
19 Mr. Bin'Attash had expressed criticism of you and Mr. Schwartz  
20 and he did not say that about Major Seeger, so I wanted to get  
21 Major Seeger's view of how he fit in the defense team. I  
22 don't know how long Major Seeger has been on this case. I  
23 have a motion about his security clearance, I got that. I got

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1 something from the client that he just met him two days ago.

2 LDC [MS. BORMANN]: That's right.

3 MJ [COL POHL]: So whether you say it is the ineffective  
4 assistance or not, the question is can he get legal advice and  
5 I have just seen where Major Seeger was a potential person to  
6 give him legal advice. Do you have an objection to me doing  
7 that?

8 LDC [MS. BORMANN]: Well, I have an objection to the  
9 public spectacle of a junior lawyer being told that he should  
10 in some way, by a superior officer, be forced to file a motion  
11 that would implicate his own legal judgment.

12 MJ [COL POHL]: Did I tell him that? Did I order him to  
13 do that?

14 LDC [MS. BORMANN]: You didn't order that, you asked  
15 him ----

16 MJ [COL POHL]: I wanted to explore his relationship to  
17 see whether he was so much part of the Bormann team that he  
18 could not advise Mr. Bin'Attash independently.

19 LDC [MS. BORMANN]: Judge, this is a capital defense team.  
20 Our job is to operate as a single, indivisible team.

21 MJ [COL POHL]: Okay. I got it. I got it.

22 LDC [MS. BORMANN]: That is what capital defense teams do.

23 MJ [COL POHL]: I got it.

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1 LDC [MS. BORMANN]: And then you asked Major Seeger if a  
2 rule of having two people was somehow inappropriate,  
3 suggesting that there was something inappropriate.

4 MJ [COL POHL]: Your client raised that issue.

5 LDC [MS. BORMANN]: I understand that. But instead of  
6 jumping on the issue, the question should have been why, and  
7 the answer is this: In capital cases in general, that is  
8 often the way we prevent miscommunication. Because when you  
9 have to meet with a client over and over, you want to make  
10 sure that you are understanding exactly what the client is  
11 saying. And in a situation in this system where we can't  
12 bring an audio recorder into a meeting or in any other way  
13 take verbatim notes, having two sets of ears listen to what's  
14 going on is essential. So I ----

15 MJ [COL POHL]: Even though -- even though in the words of  
16 your own client, this indicates a lack of trust?

17 LDC [MS. BORMANN]: Well, my client is, unfortunately,  
18 right now in a position where he is struggling, and I think we  
19 all see that, and I understand why. But we want to make sure  
20 that we are in -- all on the same page, and the best way to do  
21 that in almost all capital teams I have ever worked on, to  
22 avoid miscommunication, you have more than one set of ears.  
23 And in this case, with Major Seeger, the extra set of ears was

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1 a support person. It wasn't me and it wasn't Mr. Schwartz,  
2 and that's what we do. We generally send in some support  
3 person so they can take notes and do what they have to do.

4 But the suggestion from the commission that was  
5 somehow inappropriate, and substituting -- you know, kind of  
6 suggesting that your vision of how a capital team should be  
7 run versus mine ----

8 MJ [COL POHL]: Ms. Bormann, that's not what I said.

9 LDC [MS. BORMANN]: That's how it came off.

10 MJ [COL POHL]: Your client said it, and if you read his  
11 most recent letter, he is the one who says "This reflects  
12 distrust with me just like when I am interrogated by the FBI  
13 and the CIA." So you can blame me if you like, that's fine; I  
14 understand that your client is. And what you said earlier,  
15 this isn't mandatory. You have to adjust your tactics.

16 LDC [MS. BORMANN]: Sometimes we have three people,  
17 sometimes four.

18 MJ [COL POHL]: I got it.

19 LDC [MS. BORMANN]: Right.

20 MJ [COL POHL]: I got it. If you want to blame me for  
21 that, fine. Go ahead. What else have you got?

22 LDC [MS. BORMANN]: I am saying that the system itself is  
23 the problem, and as much as I would like to be able to say to

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1 you that I can be effective, given what we have to work with,  
2 I don't think I can. And so I am, unfortunately, going to be  
3 moving to withdraw.

4 I do want to bring the court's attention to one  
5 thing. I don't want to talk about the Chief Defense Counsel's  
6 memo, because you asked about that. The Chief Defense Counsel  
7 attached that memo so that the commission would be aware of  
8 his opinion that additional learned counsel are necessary  
9 because of the types of issues I've just addressed.

10 MJ [COL POHL]: Okay. But Ms. Bormann, you know, if there  
11 is an issue for additional resources, the Chief Defense  
12 Counsel attaching his client -- his command climate survey  
13 to another issue altogether is not the way to raise it to me.  
14 Quite frankly, I understand it could impact other things. I  
15 got that. I got that. Quite frankly, I am somewhat resentful  
16 that un -- an irrelevant document attached to that that, quite  
17 frankly, I see has nothing to do with this case with this  
18 issue but apparently may impact something else down the road  
19 implicitly that if I do something on this issue that impacts  
20 something else, you just see it as an irrelevant document, and  
21 quite frankly getting affidavits without motions attached to  
22 them of why they are relevant, getting letters from the  
23 accused by their own is not the way I practice law as a

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1 general rule.

2 LDC [MS. BORMANN]: I agree with you.

3 MJ [COL POHL]: So looking at it at face value, I read it  
4 and then I moved on.

5 LDC [MS. BORMANN]: I agree with you. I agree with you.  
6 This has been an unusual circumstance, and I believe my  
7 standing here is an incredibly unusual circumstance.

8 Yesterday the -- one of the things that  
9 Mr. Bin'Attash said was, he talked about -- and I think he  
10 accused Mr. Schwartz of misrepresenting something, and I  
11 wanted to tell you, so that you understand where that came  
12 from and how that impacts my motion to withdraw.

13 In denying 380P, you did that from the bench. That  
14 was an ex parte motion you denied from the bench. It was a  
15 motion to continue for various depositions, if you will  
16 remember, and you denied it from the bench, and you denied it  
17 from the bench way back in October of -- October 28 of 2015.  
18 It's found at page 8849 of the transcript.

19 TC [MR. RYAN]: Objection to relying on items not made  
20 known to the United States.

21 MJ [COL POHL]: Actually, I believe the ruling from the  
22 bench was done.

23 TC [MR. RYAN]: The ruling, Judge, doesn't help us to

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1 understand what she is talking ----

2 MJ [COL POHL]: I understand, Mr. Ryan, and understand  
3 this, is that if this needs to be fleshed out to both sides,  
4 it will be. Let's see where it goes and we will go from  
5 there. Okay?

6 TC [MR. RYAN]: Yes, sir.

7 LDC [MS. BORMANN]: So you ruled from the bench on  
8 October 28. When you did that, Major Schwartz -- then  
9 Major Schwartz, turned to Mr. Bin'Attash and said, "380P is  
10 done. We are moving on."

11 But unfortunately because of the way things  
12 developed, the written opinion didn't come out until December,  
13 and then because of the hoops that we have to jump  
14 through ----

15 MJ [COL POHL]: I got it.

16 LDC [MS. BORMANN]: ---- to get Mr. Bin'Attash a copy, it  
17 has to be marked according to AE 018U, he didn't get his copy  
18 until January, so he mistakenly believed that 380P had not  
19 been ruled upon, it had been pending from October through  
20 January, when in fact it hadn't been, it had been ruled on  
21 from the bench and denied in October, the very date that  
22 Major Schwartz told him it had been denied.

23 These are the types of problems that we have and

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1 misunderstandings that we have that are exacerbated by a  
2 system that I have no control over, that Mr. Bin'Attash  
3 doesn't have any control over, and I don't believe I can be  
4 effective.

5 MJ [COL POHL]: Are you done?

6 LDC [MS. BORMANN]: I am. I am asking to withdraw.

7 MJ [COL POHL]: Okay. What you have told me so far is all  
8 this -- your pebbles, all this government problems and then I  
9 don't -- and understand, I don't take anything personally.

10 LDC [MS. BORMANN]: I don't intend it personally.

11 MJ [COL POHL]: And some things I have done, okay, is your  
12 client thinks that because of this he can't trust you, but  
13 there is nothing that you have done to indicate the lack of  
14 trust.

15 LDC [MS. BORMANN]: I have tried my very hardest.

16 MJ [COL POHL]: Okay. Let me ask you this, is if this  
17 amounts to -- well, of course, I have no pleadings on this, I  
18 have no legal standard of this, we have nothing from the other  
19 side -- so to tell you the truth, I'm not going to decide  
20 right now anyway, because again, I don't have a motion, I  
21 don't know what it is, so --

22 But just as a starting point, since you have raised  
23 this issue, your basis, if it is a sufficient basis for you to

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1 withdraw, would not that apply to anybody defending any client  
2 in a military commission?

3 LDC [MS. BORMANN]: Yes. At least of the five men in this  
4 room, I believe that's the case.

5 MJ [COL POHL]: So they just couldn't be tried?

6 LDC [MS. BORMANN]: Well, maybe somebody else would be  
7 more effective.

8 MJ [COL POHL]: No, I said you -- your litany of things  
9 are primarily systemic things?

10 LDC [MS. BORMANN]: They are systemic. And losing  
11 battles.

12 MJ [COL POHL]: I want to make something very clear here.  
13 I am just a judge. I didn't pass the MCA; two Congresses did,  
14 and two Presidents signed it. I didn't promulgate the rules,  
15 the Secretary of Defense did. Okay? So I want to make this  
16 very clear. I take the rules they have and my job as a judge  
17 is to do the best I can. I am not vouching for the system or  
18 criticizing the system. The system is, from my perspective,  
19 as the system is. And so by saying that, I want to make sure  
20 those are decisions made by other people.

21 But it is your position that given this system, it is  
22 that no counsel can be effective, then your position, which is  
23 kind of what I am hearing you telling me, is that therefore

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1 these men cannot be tried under a military commission system  
2 at all?

3 LDC [MS. BORMANN]: I should tweak that, so let me tweak  
4 that. What I would say is that my client would not  
5 anticipate, given the history of this case, that any lawyer  
6 who had argued the things I argued, filed the motions I filed,  
7 lost the issues I lost, advised him of the things I thought  
8 were true and turned out not to be, would be effective.

9 So I can't speak -- maybe Mr. Nevin told his client  
10 that attorney-client privilege didn't apply.

11 MJ [COL POHL]: No, we are only ----

12 LDC [MS. BORMANN]: I mean, I can't speak to that. I  
13 mean, I use that as an example, but ----

14 MJ [COL POHL]: I understand this is a -- we are just  
15 talking about Mr. Bin'Attash.

16 LDC [MS. BORMANN]: Right.

17 MJ [COL POHL]: And although I said nobody could be tried  
18 and you said none of these five men could be tried, but let's  
19 just keep the issue that's before me ----

20 LDC [MS. BORMANN]: Sure.

21 MJ [COL POHL]: ---- Mr. Bin'Attash cannot be tried.

22 LDC [MS. BORMANN]: Yes. Because of what I advised him  
23 and the fact that I can't help him.

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1 MJ [COL POHL]: Okay. And just before I hear from the  
2 government, we also -- there are other facts that you  
3 submitted ex parte that impact on this issue that you never  
4 mentioned. True?

5 LDC [MS. BORMANN]: 380P.

6 MJ [COL POHL]: Yes.

7 LDC [MS. BORMANN]: Yes. Yes, I didn't mention that.  
8 They aren't really relevant to this issue, because that wasn't  
9 really a systemic problem; that was an individual problem.

10 MJ [COL POHL]: Okay. And, again, I want to be somewhat  
11 opaque about this, but those -- because Mr. Bin'Attash has  
12 raised them too, about ----

13 LDC [MS. BORMANN]: Yes.

14 MJ [COL POHL]: ---- about causing a friction within  
15 members of the defense team. It's got nothing to do with the  
16 government.

17 LDC [MS. BORMANN]: No, absolutely, and it has nothing to  
18 do with the system here.

19 MJ [COL POHL]: Okay. Trial Counsel, wish to be heard?  
20 Understand -- and as you all know, you probably can anticipate  
21 this may slide into requests for briefing, so -- but go ahead.

22 TC [MR. RYAN]: Yes, sir.

23 MJ [COL POHL]: I am not going to penalize or reward

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1 either side for a last-minute, unnoticed ----

2 TC [MR. RYAN]: Understood, Your Honor.

3 MJ [COL POHL]: Go ahead, Mr. Ryan.

4 TC [MR. RYAN]: Let me get back to what, if I can find it,  
5 is a legally cognizable issue before this military commission.  
6 Other than complaints from counsel as to how the United States  
7 treats, chooses in its discretion -- in its military  
8 discretion to treat her client, a self-avowed enemy of the  
9 United States and one of the biggest mass murderers in  
10 history, I ask what basis -- I ask it rhetorically, of  
11 course -- what basis has counsel identified under the law that  
12 would allow her to withdraw at this time. If it is just that  
13 she doesn't like the system that she agreed in writing to work  
14 within, that's just not good enough.

15 Judge, in the strongest possible manner, I implore  
16 this court, this commission at this time, to not consider her  
17 withdrawal from the case, although I have other things to say  
18 about it. But as to withdraw itself, I have several reasons  
19 for that.

20 First, as we said, counsel committed to this  
21 representation. Regulation for Military Commissions 9-5 and  
22 accompanying 9-2, counsel agreed to remain on the case through  
23 the circumstances, through the hardships, to its conclusion,

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1 to do what was necessary.

2           Number two, there is already a longstanding  
3 relationship in this case that must be considered in great  
4 detail. First, we are now at four years, Judge. In the  
5 course of that time, counsel, Ms. Bormann, was -- has been,  
6 for the most part, the only attorney that has spoken in this  
7 courtroom on behalf of the accused. Counsel has met with the  
8 accused many, many times; and on occasions that she alluded  
9 to, when she couldn't, she demanded, in very pointed terms,  
10 first that the prosecution intervene on her behalf, which we  
11 did on many occasions, and on other times when she didn't  
12 receive the satisfaction she wanted, she went to the court.

13           Counsel has dedicated great effort to the accused,  
14 even going to the extraordinary step of wearing attire that is  
15 sensitive to the accused's religion.

16           The United States, as well, has invested greatly in  
17 this long-term relationship. Ms. Bormann has led a team of  
18 lawyers, investigators, paralegals, mitigation experts, DIVOs  
19 and translators, all of which has resulted in great expense in  
20 both dollars and in time over the course of four years.

21           Also, Judge, I would submit, number three, that we  
22 are now moving into a new, I think as other counsel for the  
23 defense are saying, critical juncture in this case. We are

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1 past the point of the SRT. We are past the point of MOUs  
2 being signed.

3 As General Martins has said on previous occasions and  
4 as we are going to take up, we intend now to be moving into an  
5 area where the defense will be receiving large batches, large  
6 volumes, after 505 analysis, of discovery that will go a great  
7 way towards providing them the information that they have  
8 demanded for a long time, that being regarding the RDI  
9 program.

10 Next, if counsel is allowed to withdraw, and this is  
11 very significant, it will greatly infringe upon the accused's  
12 right to learned counsel as established under Rule of Military  
13 Commission 506(b). There is no evidence, there is no  
14 information -- in fact, it's not even been said to you, sir --  
15 as to whether a replacement exists, is waiting outside or has  
16 never been identified. This is a very significant point.

17 You have heard it over and over, Judge, just how  
18 difficult it is to work in this case, representation of these  
19 accused. The events of the last few days probably highlight  
20 it more. The accused Bin'Attash has spoken about the  
21 differences in culture, et cetera.

22 If there is such a replacement that was to exist,  
23 there is no evidence or information before this commission as

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1 to how long it would take to identify, to hire such a  
2 replacement, to obtain a clearance, for the person to travel,  
3 for the person to meet with Mr. Bin'Attash and ultimately gain  
4 his confidence, if possible, to review the record, to  
5 reexamine, to reconsider, to relitigate, et cetera, when, I  
6 submit, there is counsel in place.

7           For four years, no one in this courtroom -- no one  
8 can say she has not been a very zealous and competent counsel  
9 on behalf of Mr. Bin'Attash.

10           Lastly, Judge, allowing it under these circumstances,  
11 where there has been no showing of good cause, there has been  
12 no showing of extraordinary circumstances, where Your Honor  
13 points out there is nothing different than what anybody else  
14 would be going through, would be creating a tremendous  
15 disincentive for delay. It would simply send a message that  
16 take whatever lawyer shows up, spend a few years, then  
17 announce "I don't like you, I won't talk to you," and  
18 manipulation of the system would become inherent.

19           Judge, we did a lot of research yesterday as a result  
20 of the events regarding the good cause standard, which I think  
21 Your Honor, I am sure, has as well. There are a few matters I  
22 do wish to bring to the court, to the commission's  
23 consideration about it.

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1           First, as general principles, there is no right to a  
2 meaningful relationship between a client and his counsel.  
3 Good cause for substitution of counsel cannot be determined  
4 solely according to the subjective standard of what the  
5 defendant perceives. In short, he doesn't get to decide when  
6 he is being properly represented just based on what he feels  
7 inside.

8           Also, the defendant's unwillingness to communicate  
9 with counsel does not constitute good cause in itself.

10          LDC [MR. RUIZ]: Judge, may we have some cites for that if  
11 he has it, authorities that are cited?

12          TC [MR. RYAN]: I am about to, Judge. The cases that I  
13 wanted to specifically bring to the commission's attention  
14 include United States v. Barrow, this is an Eighth Circuit  
15 case 287 F.3d 733 in 2002. This is, as I said, an Eighth  
16 Circuit case, Judge. Among the things the court says there  
17 are several factors the commission should consider: The need  
18 to ensure effective legal representation, the need to thwart  
19 abusive delay tactics, and the reality that a person accused  
20 of a crime is often genuinely unhappy with appointed counsel  
21 who is nonetheless doing a good job. The court must consider  
22 an adequate inquiry -- must conduct an adequate inquiry into  
23 the nature and extent of an alleged breakdown in

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1 attorney-client communications.

2           The focus of the justifiable dissatisfaction inquiry  
3 is the adequacy of counsel in the adversarial process, not the  
4 accused's relationship with his attorney. Justifiable  
5 dissatisfaction includes an irreconcilable conflict or  
6 complete breakdown in communication. It does not include a  
7 defendant's frustration with counsel who does not share  
8 defendant's tactical opinions. But despite that counsel  
9 provides zealous representation.

10           "As Barrow's motion," that's the name of the  
11 defendant in this case, "failed to demonstrate any deficiency  
12 in appointed counsel's representation, the District Court  
13 properly concluded there was no total breakdown, only  
14 unwillingness on Barrow's part to communicate with counsel.

15           Another case I would ask the court to consider, if it  
16 has not already done so, Stenson v. Lambert, 504 F.3d 873, a  
17 Ninth Circuit case. This is a significant consideration for  
18 the commission because it is a capital case. And in that, it  
19 went to both the state Supreme Court of the state of  
20 Washington as well as the Ninth Circuit, both courts approved  
21 what occurred.

22           Now, the one I just -- the Barrow case which I just  
23 cited to Your Honor stands for the Eighth Circuit's idea that

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1 as long as there is zealous representation going on, it's  
2 really kind of the end of the inquiry; it's their sort of  
3 linchpin test. So if counsel is doing their job, no matter  
4 how much -- in the Eighth Circuit's view no matter how much  
5 the accused is unhappy with it, it does not require  
6 substitution of counsel. I point this out because in the  
7 Ninth Circuit they take a very slightly different look at it  
8 in the sense that they say, "Although we have held that a  
9 complete breakdown of communication may occur even where  
10 counsel is providing competent representation," so they allow  
11 for the possibility, they say we have done so only in extreme  
12 circumstances.

13 In that case the senior lawyer in the case, what they  
14 call the first chair, had no communication of any significant  
15 degree with a defendant on trial for his life. On the other  
16 hand, another lawyer, what they call a second chair, was  
17 involved in the case and did have communication with the  
18 client. The court spoke approvingly of that.

19 It said at some point, although Stenson and  
20 Leatherman disagreed about Leatherman's approach to the  
21 defense, he being the lawyer, Leatherman -- he never stopped  
22 preparing for trial and never let up his vigorous defense.  
23 When Stenson required substitute counsel -- requested

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1 substitute counsel, the court held a hearing, found the  
2 dispute was over strategy which did not warrant granting  
3 Stenson's request.

4 Now, in this case, Judge, the accused Bin'Attash has,  
5 as we have already heard, Ms. Bormann, Mr. Schwartz, Mr. --  
6 I'm sorry, Major Seeger, Mr. Perry, and I note also  
7 Mr. Hatcher.

8 MJ [COL POHL]: Mr. Ryan?

9 TC [MR. RYAN]: Yes, sir.

10 MJ [COL POHL]: Please slow down for the translator,  
11 please, sir.

12 TC [MR. RYAN]: Will do, sir.

13 MJ [COL POHL]: Borrow Mr. Ruiz's microphone.

14 LDC [MS. BORMANN]: I object to reference of Mr. Hatcher  
15 being an attorney. In this case he is not. So Mr. Hatcher is  
16 present, as Mr. Ryan says, in a very different support  
17 capacity and not practicing law.

18 MJ [COL POHL]: Okay. Fine. Objection sustained.

19 TC [MR. RYAN]: The point is well taken, Judge, which I  
20 was just wanted to explain. Mr. Hatcher is not detailed as an  
21 attorney in this case; however, he is an attorney and he has  
22 also been detailed as an attorney in this case, the 9/11 five  
23 since as far back as 2008.

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1           My point being between all of those people, in regard  
2 to the case I just cited, the Stenson case, there is plenty of  
3 grounds, there is plenty of avenues by which the accused  
4 Bin'Attash can find somebody he likes, can find somebody he  
5 can talk to.

6           MJ [COL POHL]: Does he have to?

7           TC [MR. RYAN]: No, sir, he does not. But up to the point  
8 that the commission is concerned, I would say we are always --  
9 the commission could always be rightfully concerned that there  
10 is some communication going on, between all of those people,  
11 not to mention paralegals and analysts and anybody else who is  
12 out there.

13          MJ [COL POHL]: Let me ask you a different question,  
14 Mr. Ryan. I don't want to ----

15          TC [MR. RYAN]: Yes. That's okay.

16          MJ [COL POHL]: You focused on the good cause of the  
17 client severing the relationship, and again we are not going  
18 to get to this issue because it just came up. Is it the same  
19 standard for the attorney's withdrawal?

20          TC [MR. RYAN]: I would submit yes, Your Honor. I mean,  
21 counsel's -- in short, what counsel came to Your Honor about  
22 is she doesn't like what's happening. She doesn't like the  
23 system. She doesn't like the commission's rulings. Even

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1 allowing that if there is a slightly different standard  
2 somehow as to what the lawyer has to show, it can't be that.  
3 It can't be a case of well, Judge, I don't like the way you  
4 are doing this case, or I don't like the system we are living  
5 under, it would have to come back ultimately to the  
6 relationship, to something that's severing the relationship,  
7 an objective factor -- conflict of interest, counsel is doing  
8 something that's in opposite interests to the client -- not  
9 something counsel feels is in the client's interests, but  
10 something counsel feels is outside of the client's interests.  
11 I would submit it has to be in that regard.

12           But back to the commission's question, counsel says  
13 let me withdraw after four years, after all this expense,  
14 after all this time. There must be some reason, and I would  
15 submit whatever that reason is that lets a lawyer out of the  
16 case, it's going to sooner or later come back to this question  
17 of what is good cause. And granted, the cases have said it's  
18 a hard thing to define, that's why I wanted to bring some of  
19 these to the commission's attention.

20           The last case I just wanted to cite for Your Honor's  
21 attention, an Eighth Circuit case also, is Hunter v. Delo,  
22 62 F.3d 271. I wanted to bring this one to the court's  
23 attention because it does concern disagreements over both

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1 motions and tactics, and although I don't know all the  
2 details, it did sound to me like to some extent there is some  
3 disagreement between the accused Bin'Attash and his lawyers as  
4 to what goes into motions, what facts are alleged and so on.  
5 In that case the court states "Thus, even if Hunter wanted to  
6 dismiss so he could seek a different venue," this was a motion  
7 for venue, "Moran's opposition to that ploy was consistent,"  
8 this is the lawyer, "with her obligations to provide Hunter  
9 with vigorous legal representation. Her opposition to  
10 Hunter's motion to dismiss was based on her professional  
11 opinion that the motion was not in his best interests.

12           An important line here, "A defendant is entitled an  
13 appointment of an attorney with whom he can communicate  
14 reasonably but has no right to an attorney who will docilely  
15 do as she is told."

16           I prepared these cases and much of this argument for  
17 the expected discussion we were going to have today about  
18 Mr. Bin'Attash's submission of what I believe he felt was good  
19 cause for Your Honor to sever the relationship. I've changed  
20 it now to address counsel's out-of-the-blue request to simply  
21 withdraw from the case.

22           It brings me though, now, Judge, to this point. We  
23 have now had this issue for three straight sessions, and two

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1 of them have been significantly interrupted as a result of  
2 this issue. There is a request to dismiss two counsel pending  
3 and I also note, Judge, that there is, that going way back to  
4 the point of arraignment, the accused Bin'Attash did not  
5 participate in the initial colloquy by this commission  
6 regarding counsel and who they are and so on. I'm going to  
7 submit that this would be a good -- a good solution, if not  
8 solution, a good measure to be taken at this point in the  
9 proceedings in light of what has been going on.

10 MJ [COL POHL]: To do what?

11 TC [MR. RYAN]: I would suggest, sir, that the commission  
12 address Mister -- the accused Bin'Attash as it did and as it  
13 would if he was appearing in the commission for first time.

14 MJ [COL POHL]: Didn't I give him his rights to counsel in  
15 October?

16 TC [MR. RYAN]: You did, Judge. He elected not to  
17 participate.

18 MJ [COL POHL]: So now I am going to ask whether he wants  
19 to have Ms. Bormann? I think I know what his answer is.

20 TC [MR. RYAN]: Here is what can be done, Judge. Right.

21 MJ [COL POHL]: Go ahead.

22 TC [MR. RYAN]: Because it was a default the last time,  
23 you can explain to him -- let me put it this way: We are dead

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1 set against withdrawing of counsel or severing the  
2 relationship for all of the reasons we have stated; however,  
3 the commission can explain to the accused all of his rights --  
4 that is, to be represented or not to be represented -- so that  
5 he does not have to accept the representation of the various  
6 counsel, and it would require the commission to explain to  
7 each person, the detailed military counsel and learned counsel  
8 what the rights are to each and so on, but also explain to him  
9 that if he does not want them, that is his right, but he  
10 cannot expect a substitute. He has the ability to decline  
11 that representation. If anything, he is in a better position  
12 now because we are much -- four years further down the road.

13 MJ [COL POHL]: Okay. Ms. Bormann, I will let you be  
14 heard when Mr. Ryan is done.

15 TC [MR. RYAN]: And the last thing, Your Honor, that I am  
16 compelled I have to bring to the commission's attention, is we  
17 would oppose -- in light of Mr. Bin'Attash's playing word  
18 games with Your Honor as to his presence, we would oppose him  
19 being allowed to absent himself in light of the conditional  
20 nature of his absence. Simply saying "I'd like to stay, but I  
21 can't stay because of the lawyers," is simply a ploy on his  
22 part.

23 MJ [COL POHL]: Yes, but if he says -- what I am hearing

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1 him say is -- he didn't say the lawyers, but the bottom line  
2 is "I don't like your ruling, Judge, and therefore I am going  
3 to leave."

4 TC [MR. RYAN]: Agreed, Judge.

5 MJ [COL POHL]: That's really what he is saying to me and  
6 if he doesn't want to listen to my rulings or doesn't like  
7 them and wants to leave, I made the issue whether it's  
8 voluntary or not, but I'm not ----

9 TC [MR. RYAN]: I don't disagree with Your Honor's  
10 assessment. It could be spun another way, he's being forced  
11 to stand next to an attorney he doesn't want. In any  
12 event ----

13 MJ [COL POHL]: I would just note for the record, so it is  
14 clear, that for this hearing and yesterday's hearing, no  
15 counsel has been sitting at the table with Mr. Bin'Attash, the  
16 three defense counsel have all been sitting at another table  
17 in the back of the room so they are not physically sitting  
18 next to him in any way.

19 TC [MR. RYAN]: Thank you, sir. Good point. The ultimate  
20 point or conclusion of it, though, is what we submit he is  
21 saying to Your Honor is "I am not knowingly and voluntarily  
22 waiving my right, I would love to be here but there is this  
23 matter and as a result" -- he was given the options to not

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1 absent himself, but with certain conversation which apparently  
2 he is not willing to follow.

3 MJ [COL POHL]: I understand.

4 TC [MR. RYAN]: Thank you, Your Honor. That's all I have.

5 MJ [COL POHL]: Mr. Bin'Attash?

6 ACC [MR. BIN'ATTASH]: I have a question to what the  
7 prosecution have said.

8 MJ [COL POHL]: I want you to understand something. I am  
9 going to let you ask your question, but understand this, and I  
10 want to be sure everybody understands what the rules are, that  
11 normally this only comes through your counsel and currently  
12 you have counsel, but I am going to let you ask this question.  
13 What's your question?

14 ACC [MR. BIN'ATTASH]: Does the law allow that another  
15 attorney get assigned temporarily to represent me until  
16 somebody fulfills the job, in case if there is a withdrawal on  
17 an attorney?

18 MJ [COL POHL]: If you are unrepresented -- okay.

19 ACC [MR. BIN'ATTASH]: [In English] Translation not  
20 completed.

21 [Interpretation resumed.]

22 ACC [MR. BIN'ATTASH]: The defense lawyer from the other  
23 five, that he can represent me at the same time while he is

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1 representing one of the other gentlemen.

2 MJ [COL POHL]: Okay.

3 ACC [MR. BIN'ATTASH]: Would the law allow this or not?

4 MJ [COL POHL]: Mr. Bin'Attash, you have a right to  
5 counsel. If those counsel are excused, okay, your rights to  
6 additional counsel I will explain to you, but as a general  
7 rule, you will not have the right to pick, by name, an  
8 additional counsel, but we are not at that place and I don't  
9 want to get into the details of it. Do you understand that?

10 ACC [MR. BIN'ATTASH]: I'm not asking, but if somebody --  
11 if an attorney volunteers to represent me. I am not asking if  
12 I hire an attorney. The reason for my question, please, the  
13 government have showed their worry about the delay and about  
14 the issue that's going to move forward when this happens, when  
15 a new attorney would get hired and their clearances, in case  
16 if the attorney does withdraw. For that reason I'm asking  
17 this question. So that there would not be any delay if the  
18 law would allow for a temporary attorney being assigned and,  
19 for example, with the approval of one of my brothers, in this  
20 case would the law allow or would not allow?

21 MJ [COL POHL]: Mr. Bin'Attash, I am not going to give you  
22 an opinion on that at this point because it's a lot of  
23 different variables. This is why I want somebody to advise

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1 you on the implications of your request, because if you remove  
2 your current defense team, okay, you have to understand what  
3 that means as an implication of who you get.

4 Now, you are asking me whether or not one of the  
5 other defense counsel in this case can also defend you and  
6 then -- as some type of temporary fix until somebody gets up  
7 to speed, well, that presents interesting issues that I am not  
8 going to address right now. That's all I am going to tell  
9 you. Okay?

10 Ms. Bormann.

11 LDC [MS. BORMANN]: A couple of things. One, for the  
12 record, which is that Mr. Bin'Attash asked us not to sit at  
13 counsel table, which is why we are sitting in the back and we  
14 don't take anything from that. It is still within the  
15 courtroom. We can hear everything and so that's fine by us.

16 The other -- the other thing I wanted to respond to  
17 was something Mr. Ryan alluded to, and that is the rereading  
18 of the rights. And it was clear from Mr. Ryan's argument to  
19 you that he wants to incentivize Mr. Bin'Attash to go pro se,  
20 to waive his right to counsel, and I understand why the  
21 government wants that because it is much easier to execute a  
22 man who doesn't have counsel. But I object strenuously.

23 MJ [COL POHL]: Okay. Ms. Bormann, I don't know whether

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1 it is correct -- if your answer -- if your motion to me is to  
2 withdraw today ----

3 LDC [MS. BORMANN]: Yes.

4 MJ [COL POHL]: ---- that motion is denied.

5 LDC [MS. BORMANN]: Thank you.

6 MJ [COL POHL]: Understand that I don't like unbriefed  
7 motions. You know this. This is a different area of the law,  
8 and therefore it's denied without prejudice. You may file a  
9 motion to withdraw with appropriate legal cites and evidence  
10 that you wish me to consider and the normal briefing cycle  
11 will apply. But until you file a proper motion in the proper  
12 format and the government has an opportunity to respond, I  
13 don't intend to permit you to withdraw at this time.

14 LDC [MS. BORMANN]: Thank you.

15 MJ [COL POHL]: Mr. Bin'Attash, again, I know you are not  
16 a lawyer so I want to make sure you understand this.  
17 Ms. Bormann has requested to withdraw as your attorney. I  
18 told her that today the answer to that request is no. I told  
19 her she can file a motion and I will litigate it in the normal  
20 course of business. So as we sit here right now, you still  
21 have the same attorneys; and again, you will get somebody else  
22 to assist you in discussing this issue. So we are back to  
23 that point.

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1           You indicated earlier that you wanted to leave. As I  
2 said to you earlier, despite what the government has said, if  
3 you disagree with the court's ruling, you are free to stay,  
4 you are free to leave, but that's got to be your choice.

5           ACC [MR. BIN'ATTASH]: The same thing I have said before  
6 so that I would not create any problems, then yes, I would  
7 like to leave.

8           MJ [COL POHL]: Okay. And each morning you will be  
9 advised like we normally do, and you have your choice, but you  
10 have got -- if you tell the guard something that causes the  
11 guard not to believe you are voluntarily not showing up, then  
12 you are going to be here. Do you understand that?

13          ACC [MR. BIN'ATTASH]: [No translation].

14          MJ [COL POHL]: I'm sorry? Do you understand that?

15          INT: Yes. I'm sorry.

16          MJ [COL POHL]: I should realize that means yes after  
17 this.

18                Okay. But one other thing so there is no  
19 misunderstanding between me and you, is that our next sessions  
20 are currently scheduled for April. Okay? I believe they are  
21 April. In that first day, you are going to have to be here,  
22 but if you come in that day and after I give you your right to  
23 be present, your right to waive your presence, if you say

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1 "Your Honor, I got it, I would like to leave now," you will be  
2 permitted to leave. But you are going to have to be here the  
3 first day of every session or group of sessions. Do you  
4 understand that?

5 ACC [MR. BIN'ATTASH]: Yes.

6 MJ [COL POHL]: Thank you. We will recess for 15 minutes.  
7 Mr. Bin'Attash will be escorted to the trailers outside and we  
8 will continue at 1115.

9 The commission is in recess.

10 [The R.M.C. 803 session recessed at 1100, 17 February 2016.]

11 [END OF PAGE]

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*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*