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1 [The R.M.C. 803 session was called to order at 1041,  
2 19 October 2015.]

3 MJ [COL POHL]: The commission is called to order. All  
4 members of the defense teams are again present that were  
5 present when the commission recessed. The Special Review Team  
6 has left the courtroom and the regular prosecutors have shown  
7 up.

8 General Martins, please account for your parties.

9 CP [BG MARTINS]: Good morning, Your Honor. Present for  
10 the prosecution are myself, Brigadier General Mark Martins,  
11 Mr. Robert Swann, Mr. Ed Ryan, Mr. Clay Trivett, Ms. Nicole  
12 Tate, Ms. Danielle Tarin. Mr. Jeff Groharing, who is also on  
13 my most recent detailing memo, is absent. Also at the  
14 prosecution tables are Mr. Dale Cox, LN1 Juanita Passwater,  
15 and Mr. Pascual Tavaréz. And also in the courtroom is  
16 Detective Patrick Lantry.

17 Your Honor, if it wasn't announced previously, these  
18 proceedings are being transmitted by closed-circuit television  
19 to locations in the Continental United States pursuant to your  
20 order.

21 MJ [COL POHL]: Thank you. Okay.

22 Just to bring the prosecutors up to speed of where we  
23 are at, during the session with the SRT, we never got to the

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1 SRT issues. I accounted for Ms. Lachelier and swore her in.  
2 I gave the accused their rights to be present and their  
3 ability to waive said right.

4 An issue then came up for Mr. Bin'Attash in that he  
5 indicated that he may want to go pro se and represent himself.  
6 After a recess and discussing with his counsel, Ms. Bormann --  
7 and correct me if I am wrong on any of these summaries --  
8 indicated that, for a number of reasons, that Mr. Bin'Attash  
9 may have lost trust in his counsel. And my question to her,  
10 which is really where I want to kind of focus kind of where we  
11 are at now is, what are his pro se rights; are they any  
12 different than they were in federal court. Ms. Bormann's  
13 response to me was I don't know under these circumstances,  
14 given the lack of access to Internet capability and other  
15 things.

16 So that's kind of where we are at. We are at the  
17 point where Mr. Bin'Attash wants to be reformed of his pro  
18 se rights -- I guess informed of his pro se rights. Now, I  
19 want to focus us now on that issue and that issue alone.

20 Ms. Bormann, since they were not here, could you  
21 articulate your concerns -- I'm talking about only the pro se  
22 rights, not why we got here -- of what your concern is that  
23 you feel you are unable to inform Mr. Bin'Attash of his pro se

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1 rights.

2 LDC [MS. BORMANN]: This commission is designed very  
3 differently than any court I have ever participated in. In  
4 this system the United States Government has taken the  
5 position that the United States Constitution doesn't apply, so  
6 the Sixth Amendment analysis that would normally occur in a  
7 pro se situation may or may not apply; I don't actually know.  
8 And the logistics of and the denial of my client's basic  
9 rights to communicate to the outside world completely  
10 obliterate any pro se rights that any of my former clients may  
11 have had.

12 You asked about the Moussaoui case and I said to you  
13 the following. Mr. Moussaoui represented himself -- and I am  
14 going to summarize again. Mr. Moussaoui represented himself  
15 at the guilt-innocence phase, but he actually had access to  
16 his counsel by picking up a telephone so he could ask them a  
17 question. He actually had access to computers that he could  
18 compile information on. He had access to a legal library  
19 where he could do research. He had access to people with whom  
20 he could consult. He had access to the outside world. Here  
21 that's been denied by the United States.

22 So I don't have a clue, frankly, about what his pro  
23 se rights are. And I know Mr. Bin'Attash has questions for

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1 the court, the same questions I have, frankly, but he is the  
2 one who should be answering and listening going forward.

3 MJ [COL POHL]: Okay. Thank you.

4 Trial Counsel?

5 CP [BG MARTINS]: Your Honor, our position is at this  
6 point you should read him his pro se representation colloquy  
7 that's in the Judges' Benchbook, paragraph 2-7-2 and proceed  
8 in that fashion.

9 MJ [COL POHL]: Let me ask you this. Do you believe --  
10 why don't you come to the podium, General Martins. Do you  
11 believe the starting point -- I know what's in the colloquy,  
12 okay?

13 Is the starting point the normal Sixth Amendment  
14 analysis?

15 CP [BG MARTINS]: Your Honor, there's ----

16 MJ [COL POHL]: Without saying this applies, but is that  
17 the analytical framework that should be applied?

18 CP [BG MARTINS]: I think rights to counsel are  
19 established in the statute, and the rule-making authority of  
20 the Secretary of Defense under the statute and the apparatus  
21 that's set up in the Military Commissions Act gives a firm  
22 frame of reference. The Benchbook is the approach. It  
23 provides ----

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1 MJ [COL POHL]: Which Benchbook are you referring to?

2 CP [BG MARTINS]: The Military Judges' Benchbook.

3 MJ [COL POHL]: The DA Pam.

4 CP [BG MARTINS]: The DA Pam, that's aligned with the  
5 crimes and offenses, the different rights, that's the  
6 appropriate colloquy to give.

7 MJ [COL POHL]: Now, in a normal case when an accused --  
8 if we are going to use the military context since you are  
9 referring to that as your context, the accused would have the  
10 Internet capability. The accused would have the ability to  
11 talk to outside people. The accused would ----

12 CP [BG MARTINS]: Your Honor, I have heard that from  
13 counsel, but there are special administrative measures,  
14 communications management units in the federal system, when  
15 the national security privilege is invoked appropriately,  
16 there are all kinds of restrictions on that. So let's have  
17 that conversation. In fact, there are standing motions for  
18 that.

19 But we certainly resist the characterization that  
20 these individuals don't have a right to counsel if they like  
21 it, if they want it, an ability to participate in their own  
22 defense. The standard is not that everyone gets a high-end  
23 computer and ability to pick up the phone and call their

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1 counsel when you are dealing with a national security case.

2           So a lot of averments have been made about standards  
3 and how those are violated here, which we oppose certainly.  
4 But we do stand by this ----

5           MJ [COL POHL]: Do you think the same communications  
6 standards or lack thereof of the detainee as an accused would  
7 also be -- would be the same if the detainee was representing  
8 himself, all the current limitations on their ability to  
9 communicate?

10          CP [BG MARTINS]: Your communications management order for  
11 this case is tracked pretty closely with how the detention  
12 facility commander is using that for everyone with regard to  
13 legal communications. Pro se representation may give rise to  
14 a bit of a different analysis with regard to co-accused or  
15 coordinating defense. And in this case in 2008 there were  
16 some arrangements for joint meetings and so forth that had to  
17 accommodate the fact that for a period of time the accused  
18 were pro se. But it doesn't give them additional ability, no,  
19 to send out materials. They are still subject to your order  
20 and to the camp commander's prerogative of security and review  
21 of the material and prevention of contraband from getting in  
22 and out.

23          MJ [COL POHL]: So it is your position that the -- if an

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1 accused were to represent himself, that there would be no  
2 change in the current communication system, for want of a  
3 better term? Or did you just tell me that there could be an  
4 adjustment based on what happened in a prior iteration of this  
5 case?

6 CP [BG MARTINS]: I mean, the basic standards of ensuring  
7 he has the ability to participate in his defense, an  
8 ability -- if you were to go through the colloquy and find a  
9 knowing, voluntary, intelligent waiver of counsel rights, the  
10 overall standards of the ability to defend himself would be  
11 there, access to witnesses and evidence and so forth. But how  
12 those play out is going to be a case fact-intensive inquiry.

13 MJ [COL POHL]: Would a detainee who represents himself be  
14 permitted to talk to the other detainees in the course of that  
15 representation?

16 CP [BG MARTINS]: Yes.

17 MJ [COL POHL]: Without monitoring?

18 CP [BG MARTINS]: Yes. I mean ----

19 MJ [COL POHL]: I'm not ruling. I am just trying ----

20 CP [BG MARTINS]: The sphere of privilege, sure. There  
21 would be a sphere of privilege.

22 MJ [COL POHL]: Do you think the Military Judges'  
23 Benchbook can be taken, is that the government -- that that

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1 covers the entire situation and if I did that colloquy that  
2 would apply to here with no change?

3 CP [BG MARTINS]: We believe that an appropriate standard  
4 is to go through those lines of inquiry to ensure it's  
5 knowing, voluntary, intelligent. Do you know something about  
6 the Rules of Evidence? Give them a sense of ----

7 MJ [COL POHL]: I understand. I'm talking about, you  
8 indicated earlier that there had been some alteration of that  
9 in the '08 iteration of this case.

10 CP [BG MARTINS]: Not particularly in regard to the  
11 colloquy, in regard to how to ensure the accused has an  
12 ability to coordinate certain matters that make sense with  
13 co-accused, how to accommodate a need for both camp security  
14 but also a sphere of privileged communication during meetings  
15 and so forth. Those kinds of things maybe require more  
16 refined definition than you have right now in an order that  
17 contemplated five accused with attorneys. But the basic  
18 standards are the same. And we certainly resist this notion  
19 that there is no standard out there for you to use.

20 MJ [COL POHL]: But going forward, it seems to me there  
21 are two issues. One issue is an informed choice to go pro se.  
22 The other issue is the logistics of how that's actually  
23 implemented. And as I have found, sometimes what we say in

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1 here does not always get translated with fidelity to the camp.

2 CP [BG MARTINS]: The camp reads your orders carefully and  
3 tries very hard to comply with them, and your Communications  
4 Management Order 18 is followed and ----

5 MJ [COL POHL]: So it is the government's position then  
6 that the Military Judges' Benchbook -- what paragraph number  
7 was that again, please?

8 CP [BG MARTINS]: The instruction is -- or the colloquy is  
9 at 2-7-2, Your Honor.

10 MJ [COL POHL]: That's the DA Pam.

11 CP [BG MARTINS]: 27-9.

12 MJ [COL POHL]: And then subsequent to that, if he were to  
13 go pro se, there would be the order to the camp of how it  
14 would be implemented?

15 CP [BG MARTINS]: Your Honor, we can provide you  
16 additional information on that now that we know your area of  
17 interest on this.

18 MJ [COL POHL]: I understand you are somewhat blindsided  
19 by this.

20 CP [BG MARTINS]: Just reading -- having read the  
21 communications management order last night in preparation for  
22 various motions, it occurs to me that you may need to adjust  
23 some of that guidance.

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1 MJ [COL POHL]: But I would need to know what that  
2 adjustment is before I discuss it with Mr. Bin'Attash,  
3 wouldn't I, for him to make an informed decision?

4 CP [BG MARTINS]: I think the general lines of inquiry are  
5 in 2-7-2, and you could convey to him that there are some  
6 uncertainties precisely about how he is going to go through  
7 his day preparing his case. But that doesn't prevent you from  
8 having that informed -- trying to inform that discussion and  
9 do the things that the Benchbook colloquy requires.

10 MJ [COL POHL]: Okay.

11 LDC [MR. CONNELL]: May I be heard just on the Sixth  
12 Amendment question that the general raised?

13 LDC [MS. BORMANN]: I would welcome that.

14 MJ [COL POHL]: Well, it is not really your issue,  
15 Mr. Connell.

16 LDC [MR. CONNELL]: Certainly Mr. Bin'Attash's  
17 representation, self-representation or otherwise, I have no  
18 comments on that whatsoever. But the question of whether the  
19 Sixth Amendment applies in this proceeding is one we litigated  
20 in AE 057, left for another day, and it appears that today is  
21 that day. The general had some comments on that topic, and I  
22 do as well.

23 MJ [COL POHL]: For the sake of this discussion, without

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1 ruling on that, we are going to assume the Sixth Amendment  
2 framework, analytical framework will apply, okay?

3 I will hear from Ms. Bormann and then there are some  
4 other issues I want to ----

5 LDC [MS. BORMANN]: A couple of comments on what  
6 General Martins said. First of all, the proper analysis is  
7 not whether or not whatever framework has come up, that  
8 somebody comes up with allows Mr. Bin'Attash to participate in  
9 his defense. That's what he does with counsel. The test is  
10 whether or not he can conduct his own defense. Very different  
11 issue.

12 And when you have to determine and advise him on his  
13 pro se rights, if it's coexistent with the Sixth Amendment,  
14 you must give him a list of advantages and disadvantages to  
15 going pro se versus not going pro se. And that's why I  
16 couldn't do it, because I don't know what those are.

17 And so when you are talking about a Benchbook  
18 framework, that Benchbook framework doesn't come close to  
19 what's required for advice on a knowing and intelligent waiver  
20 of counsel that has to be voluntary.

21 What you heard from me earlier, and General Martins  
22 missed, was the following: Mr. Bin'Attash doesn't believe  
23 that anything he is doing right now is voluntary. He believes

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1 that it's a result of a continuation of the torture. So when  
2 you are advising him, you must take into consideration the  
3 fact that nothing he does right now he believes is voluntary.

4 MJ [COL POHL]: Ms. Bormann, how do we get there then?

5 LDC [MS. BORMANN]: I don't know, Judge. I am just  
6 advising you of the situation.

7 MJ [COL POHL]: What I am saying is this -- what I am  
8 simply saying is this, is that if we get to the point -- I get  
9 to the point where I am going to advise him of his pro se  
10 rights, and you stand there and say he can't do that because  
11 it's not voluntary, then why am I doing it?

12 LDC [MS. BORMANN]: Judge ----

13 MJ [COL POHL]: Is this a competency to stand trial issue?  
14 Is that what you are telling me?

15 LDC [MS. BORMANN]: Judge, I didn't devise the system.

16 MJ [COL POHL]: No ----

17 LDC [MS. BORMANN]: Here is the real issue. The real  
18 issue is what's happening outside of this courtroom and what's  
19 happening with the interference in his ability to communicate  
20 with his counsel is making -- is pushing this issue forward.  
21 That's not voluntary. He has no control over it, and,  
22 frankly, neither do I.

23 MJ [COL POHL]: But, Ms. Bormann, you can't ----

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1 LDC [MS. BORMANN]: I understand the frustration. I can  
2 see it in your face.

3 MJ [COL POHL]: I try not to get frustrated. I just try  
4 to get a wrong -- or fashion a remedy if there is a wrong, if  
5 there is a wrong here or a remedy that he wants. I am not  
6 saying there is a wrong, that he wishes to appear pro se and  
7 that no matter what I tell him it will not be a voluntary  
8 choice, then he can't voluntarily go pro se, then there is no  
9 need to discuss the issue further, is there?

10 LDC [MS. BORMANN]: I don't know how to answer that. All  
11 I can say to you ----

12 MJ [COL POHL]: Wait a minute. You can't stand up there  
13 and on the one hand say that he wants to talk about pro se and  
14 on the other hand tell me that he can't voluntarily make that  
15 decision.

16 LDC [MS. BORMANN]: I didn't tell you that.

17 MJ [COL POHL]: You are saying, Judge, ask him A, but he  
18 can't tell you B, and that's all your problem, Judge, and I'm  
19 just standing here.

20 LDC [MS. BORMANN]: Judge, I informed you, pursuant to  
21 your questioning of me earlier, about what my client's  
22 position is. I told you that his position is nothing is  
23 voluntary. That is his position, not mine.

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1 MJ [COL POHL]: Then why would I do a pro se inquiry then,  
2 if it's not voluntary?

3 LDC [MS. BORMANN]: Judge, I'm asking -- I mean, maybe you  
4 should direct that question to Mr. Bin'Attash. Because  
5 frankly, it seems to me that when you have somebody who has  
6 been victimized by the United States over a long period of  
7 time and suffered psychological trauma, that that's a question  
8 that has to be addressed regularly, right?

9 MJ [COL POHL]: If the issue is that, is that an issue --  
10 what's the normal legal vehicle you do to address that?

11 LDC [MS. BORMANN]: Well, we file motions. But  
12 unfortunately in this case, because of the delay occasioned by  
13 FBI infiltration into a defense team and the concurrent  
14 investigation, nothing on this case has gone forward for a  
15 year and a half. So we have motions on the docket that would  
16 actually help to remedy the issues that Mr. Bin'Attash faces  
17 on a daily basis that haven't been heard.

18 MJ [COL POHL]: And so because they have not been heard,  
19 then where do we go from here?

20 LDC [MS. BORMANN]: But that's where we find ourselves,  
21 right? We find ourselves ----

22 MJ [COL POHL]: No. Where we find ourselves here is you  
23 start out this discussion with me was about pro se

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1 representation. I discussed it with General Martins. We have  
2 come back. We have talked about how that format should work.  
3 Then you say no matter what you say, Judge, it won't be  
4 voluntary.

5           So basically what you are telling me is, if I assume  
6 what you are telling me -- excuse me. The logical conclusion  
7 of where you are going with this is there could be no trial  
8 because it has taken too long, and any decisions now are  
9 involuntary, and he doesn't have me as his lawyer. That's  
10 what you are asking me to do. You want me to abate the  
11 proceedings because it's taken too long.

12           LDC [MS. BORMANN]: That is not my position, and that is  
13 not what I have argued. However, I will tell you that if you  
14 are going to advise him of his pro se rights, they need to be  
15 thorough, and they need to talk about what the ramifications  
16 are, not generally, but in this case specifically. And then  
17 you need -- as the court, need to make a determination about  
18 whether or not that waiver is voluntary. It's not -- that is  
19 not my job, and I don't pretend to have it be my job.

20           Right now I was just advised that my client may want  
21 to go pro se. I am not in the position to be able to  
22 determine whether or not that's voluntary. That is, frankly,  
23 the commission's job.

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1 MJ [COL POHL]: Okay.

2 LDC [MS. BORMANN]: Now, all of that being said,  
3 Mr. Bin'Attash has questions, and I don't know if you want to  
4 address them with him or whether you want me to raise them,  
5 but one of the questions that he has, that he wrote me a note,  
6 he wants to know if he will be able to tell his counsel when  
7 he wants them to argue and not when he wants them to argue on  
8 motions if he is pro se.

9 MJ [COL POHL]: Okay.

10 LDC [MS. BORMANN]: He wants to know, for instance, you  
11 know, if he writes a motion, can he make me, you know, say I  
12 want Cheryl to argue that, not to argue that. He wants to  
13 know if he can argue classified information himself, and he  
14 wants to know if he can receive the classified motions.

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: So those are some of the questions he  
17 has. I don't know the answers to those questions.

18 MJ [COL POHL]: Let's do this in a process-oriented way.  
19 You have got the government's position, what they think the  
20 pro se advice is, okay? You have got some questions from the  
21 client of what he wants, okay? You have your own view of what  
22 the pro se advice should be.

23 LDC [MS. BORMANN]: Well, actually I don't. This is not

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1 something I was prepared to do, and I'm ----

2 MJ [COL POHL]: I'm not going to ask you for it right now.

3 LDC [MS. BORMANN]: I am being frank with you when I say  
4 to you that, given how this system operates or fails to  
5 operate, it is unclear to this lawyer, who has practiced in  
6 courts throughout the country for almost 30 years, what to  
7 tell my client. I have no idea.

8 And I have sat through pro se admonishments before  
9 involving very particularized questions and answers that are  
10 required, if we are going to be consistent with the  
11 Constitution. But, frankly, I don't know what those are.

12 MJ [COL POHL]: You would have, as a starting point, what  
13 you base on your experience, correct?

14 LDC [MS. BORMANN]: I would have a starting point in a  
15 system that was set and where a client actually had access to  
16 the materials.

17 MJ [COL POHL]: If we had a starting point that you had  
18 your normal -- what you consider ----

19 LDC [MS. BORMANN]: The normal case.

20 MJ [COL POHL]: The normal case.

21 LDC [MS. BORMANN]: Uh-huh.

22 MJ [COL POHL]: You drafted that up.

23 LDC [MS. BORMANN]: I don't believe, that given

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1 information that a client wishes to possibly go pro se, that  
2 it is appropriate for the defense counsel that will no longer  
3 maybe be representing him to provide to the court the pro se  
4 admonishments. I think that is a recipe for disaster.

5 MJ [COL POHL]: So let me see if I understand it, then.  
6 You can get up before the court and criticize, suggest what  
7 the pro se advice would be, but if I ask for your input on it,  
8 that would be inappropriate. Isn't that what you have just  
9 done?

10 LDC [MS. BORMANN]: What I am saying to you is -- no.  
11 What I am saying to you is I don't know the answer. I mean, I  
12 wish I did.

13 MJ [COL POHL]: But you have a lot of questions. My point  
14 being is you say that I have done this before.

15 LDC [MS. BORMANN]: Right.

16 MJ [COL POHL]: I'm not -- okay. I understand. I am just  
17 trying to get to the point here so whenever we get to  
18 Mr. Bin'Attash I have addressed all your concerns.

19 LDC [MS. BORMANN]: Sure.

20 MJ [COL POHL]: But I can't address concerns you don't  
21 know about. You have articulated a number of concerns. I  
22 said give me in writing what you think it ought to be, and  
23 then you said no, I am not going to do that. I don't

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1 understand.

2 LDC [MS. BORMANN]: I think it's in Mr. Bin'Attash's best  
3 interests to be represented. So when you ask me how to  
4 admonish a client who wants to go pro se, you put me in a  
5 conflicted position.

6 MJ [COL POHL]: Why? No, let me ask you this ----

7 LDC [MS. BORMANN]: I would rather not answer that on the  
8 record. It's a conversation I have to have with my client.

9 MJ [COL POHL]: No, I don't want to talk about  
10 Mr. Bin'Attash.

11 LDC [MS. BORMANN]: Right.

12 MJ [COL POHL]: On a theoretical perspective, you are now  
13 in federal court -- I know we are not in federal court. I  
14 know that.

15 LDC [MS. BORMANN]: No, we're not.

16 MJ [COL POHL]: You are in federal court and you are  
17 advising your client of his pro se rights. That's all I am  
18 asking from you. What would you normally tell your -- what  
19 does a judge need to tell your client? I'm not saying  
20 Mr. Bin'Attash specifically or -- that's what I am asking.  
21 You are saying you don't do that. Wouldn't you do that in  
22 federal court?

23 LDC [MS. BORMANN]: No, I would not participate in the

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1 admonishments in federal court.

2 MJ [COL POHL]: Not the admonishments. But in federal  
3 court you would tell the client what his pro se rights were,  
4 wouldn't you?

5 LDC [MS. BORMANN]: I would advise him on his pro se  
6 rights, and I would know what those were, and they vary from  
7 case to case and the complexity of each case and the  
8 capability of each particular defendant. Because, of course,  
9 you know how each person processes information and is able to  
10 respond to what happens in an open courtroom, they -- each  
11 varies.

12 MJ [COL POHL]: I was trying to address your point that I  
13 think he ought to continue being represented; therefore, I  
14 can't advise him of his pro se rights.

15 LDC [MS. BORMANN]: I'm not saying that.

16 MJ [COL POHL]: Okay.

17 LDC [MS. BORMANN]: I feel, you know ----

18 MJ [COL POHL]: But have you had an opportunity to  
19 review -- okay. Is it your position that the defense will  
20 provide nothing on what should be in the admonishment?

21 LDC [MS. BORMANN]: I haven't, frankly, thought about  
22 that. I mean, you said General Martins is blindsided. So am  
23 I.

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1 MJ [COL POHL]: Okay.

2 LDC [MS. BORMANN]: I mean, if you ask me the question  
3 now, I'm going to say I don't know. I need to confer with my  
4 client, I need to confer with my co-counsel, and ----

5 MJ [COL POHL]: And you probably ----

6 LDC [MS. BORMANN]: --- people much smarter than me. So  
7 that's the answer I can give you.

8 MJ [COL POHL]: Just as a starting point, you have seen  
9 what the government position is, what the colloquy should  
10 entail.

11 LDC [MS. BORMANN]: I see that they want to use the  
12 Benchbook as a framework.

13 MJ [COL POHL]: Military Benchbook as a framework.

14 LDC [MS. BORMANN]: That's not -- that doesn't really tell  
15 me much.

16 MJ [COL POHL]: That tells you what they think. If you  
17 pick it up, you will see what they think we should say.

18 Trial Counsel, was the colloquy when this went  
19 through the first iteration sufficient?

20 CP [BG MARTINS]: The judge found it sufficient,  
21 Your Honor.

22 MJ [COL POHL]: I know the judge did because he gave it.  
23 Is it the government's position now, seven years later ----

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1 CP [BG MARTINS]: It is sufficient.

2 MJ [COL POHL]: The same sufficiency.

3 CP [BG MARTINS]: You have the ability to determine  
4 whether it's a knowing, voluntary, intelligent ----

5 MJ [COL POHL]: Do you have a copy of that colloquy?

6 CP [BG MARTINS]: We do, Your Honor.

7 MJ [COL POHL]: Make copies for the defense and provide it  
8 to me. That will be the starting point. You will have an  
9 opportunity to discuss it with your client. We will recess  
10 until tomorrow morning and, if we need to, we will address it  
11 at that time. Given the nature of all the issues, I know  
12 there is concern about delay, but this is something that will  
13 not be rushed through. Therefore, I have one other issue I  
14 want to discuss. But do you understand the way ahead until  
15 tomorrow morning at 9:00? Okay.

16 Now, the other issue I want to raise to the other  
17 four counsel, given the nature of it being a joint defense --  
18 and I don't need an answer now, but do you have anything you  
19 wish to add on the fact that Mr. Bin'Attash may be going pro  
20 se? I throw it out to you. I don't know if it implicates  
21 your approach or not, but I just want to put that on the  
22 record that theoretically it may impact.

23 Mr. Nevin?

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1 LDC [MR. NEVIN]: Yes, Your Honor, I can tell you that I  
2 would like a chance to talk to counsel about it, but I think  
3 we would like the opportunity to speak to that issue.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: And the second -- just in terms of the  
6 court's planning.

7 And the second thing I wanted to ask you is whether  
8 we might be allowed to meet with Mr. Mohammad here in the  
9 courtroom for the rest of the day, as we have on previous  
10 occasions when we have stopped proceedings before the end of  
11 the day.

12 MJ [COL POHL]: Trial Counsel, any objection?

13 TC [MR. SWANN]: Your Honor, we will make it happen.

14 MJ [COL POHL]: Okay. Maybe it's the military person in  
15 me, but I would like to define the term "end of the day"  
16 rather than end of the day.

17 LDC [MR. RUIZ]: Judge, I need a moment to confer with  
18 Mr. Hawsawi before you go off the record.

19 MJ [COL POHL]: All right. I will give you an  
20 opportunity, Mr. Ruiz.

21 What time is the end of the day for you, Mr. Nevin?  
22 I see prayer is at -- afternoon prayer is at 4:07. 4:00.

23 LDC [MR. NEVIN]: End of the day to me meant 4:00 -- end

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1 of the day today to me meant 4:30.

2 MJ [COL POHL]: Okay. The end of the day for the  
3 attorneys will be 4:00. The end of the day for the detainees,  
4 if they wish to pray, they can pray and then as soon as prayer  
5 is done they go, or they go back and prayer there.

6 So 1600 is the end for the attorneys.

7 LDC [MR. NEVIN]: Thank you.

8 MJ [COL POHL]: Mr. Ruiz?

9 LDC [MR. RUIZ]: We don't have any position on  
10 Mr. al Hawsawi with respect to Mr. Bin'Attash's current issue.  
11 However, for purposes of the record we want to just indicate  
12 that Mr. al Hawsawi's defense team is prepared to proceed with  
13 the scheduled docket, and we ask the court once again to  
14 consider to sever Mr. al Hawsawi's case so that we could  
15 proceed with the motions that are currently scheduled.

16 MJ [COL POHL]: Okay. Thank you.

17 Mr. Harrington?

18 LDC [MR. HARRINGTON]: Judge, this is a matter that came  
19 up this morning and it involves 292, but it also involves the  
20 prosecution team. I'm not going to address anything of  
21 substance about 292 other than giving the court a little bit  
22 of a background.

23 But Major Wichner and I met with Mr. Binalshibh on

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1 Saturday. He was having problems with his back during the  
2 meeting, but it seemed to be okay. On Sunday Lieutenant  
3 Colonel Pitvorec was supposed to meet with him to discuss her  
4 representation of him as independent counsel.

5 On Saturday, after the visit, on Mr. Binalshibh's way  
6 back to the camp, apparently he fell at some point in time in  
7 the transport thing and aggravated the problem that he had  
8 with his back. They did provide him some medical treatment.  
9 He got two apparently very painful shots in his arm which gave  
10 some relief to his back, but he was not able to come to the  
11 visit yesterday with either Lieutenant Colonel Pitvorec or  
12 with my team.

13 And then this morning there was some delay in terms  
14 of our ability to meet with our clients this morning because  
15 of some transportation problem or something, so we only had a  
16 matter of a couple of minutes to meet with him. During the  
17 recess you have had over Mr. Bin'Attash's situation,  
18 Lieutenant Colonel Pitvorec did have a brief opportunity to  
19 talk to him. She can take part of today, obviously, to  
20 continue to talk to him, so that alleviates one of the  
21 problems.

22 But Mr. Binalshibh brought the issue to our attention  
23 again, which is the recurring issue about -- and it happens

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1 and gets aggravated every time we come to the hearings, about  
2 what happened last night. And in the facility he claimed that  
3 overnight constant vibrations, totally unable to sleep. His  
4 eyes are all bloodshot this morning. He has not slept all  
5 night.

6           The same kind of things that Ms. Bormann raised about  
7 what led Mr. Bin'Attash to be in the position that he is in  
8 are the same things that are occurring with Mr. Binalshibh,  
9 and he has requested that I ask the court again to direct the  
10 camp to stop this behavior.

11           I understand what you did before. You did it once on  
12 the record, and I know the government will say we will  
13 investigate it. I know they will come back and the camp will  
14 deny that they are doing anything or that it's happening.

15           But when Mr. Binalshibh says the judge told the camp  
16 not to do these things, they either laugh at him or say we do  
17 what we want, we don't care what the judge says. But this  
18 impacts on the proceedings that are here right now.

19           It puts us in a position which leads us to be close  
20 to the position that Mr. Bin'Attash was, and it's entirely  
21 frustrating for Mr. Binalshibh and it impedes him, certainly,  
22 with the issues that you have to resolve with respect to his  
23 case right now, which deal with this conflict issue and

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1 potentially him exercising some waivers. And he is in a very  
2 bad situation right now. And we also have to -- on the docket  
3 is to resolve that competency issue. And I am not raising  
4 this to say he is not competent. He is perfectly competent.

5 MJ [COL POHL]: I got it. My suggestion, Mr. Harrington,  
6 because this issue does come up again and again, and at least  
7 it is your position that whatever I said in court is not being  
8 conveyed properly to the commander and/or they are not  
9 following anyway. So do this: Draft an order for my  
10 signature consistent with what my ruling was, and I will send  
11 them a piece of paper. I'll serve the government. Give to me  
12 what you think it says, and then they can visibly have a piece  
13 of paper saying what they are supposed to be doing, okay?

14 LDC [MR. HARRINGTON]: Thank you, Judge.

15 MJ [COL POHL]: Got it. Anything else? Apparently not.

16 The commission is in recess until 0900 tomorrow.

17 [The R.M.C. 803 session recessed at 1116, 19 October 2015.]

18 [END OF PAGE]

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