

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 [The R.M.C. 803 session was called to order at 0908, 20 July  
2 2016.]

3 MJ [COL POHL]: Commission is called to order. Trial  
4 Counsel, who is here on behalf of the United States?

5 CP [BG MARTINS]: Good morning, Your Honor. On behalf of  
6 the United States, myself, Brigadier General Mark Martins,  
7 Mr. Robert Swann, Mr. Edward Ryan, Mr. Clayton Trivett,  
8 Ms. Nicole Tate ----

9 MJ [COL POHL]: Excuse me. Excuse me. Mr. Bin'Attash.  
10 Mr. Bin'Attash.

11 ACC [MR. BIN'ATTASH]: [Microphone button not pushed; no  
12 audio.]

13 MJ [COL POHL]: Please sit down. Sit down and I will talk  
14 about it in a minute.

15 ACC [MR. BIN'ATTASH]: [Microphone button not pushed; no  
16 audio.]

17 MJ [COL POHL]: Sit down. We will talk about it in a  
18 minute.

19 LDC [MS. BORMANN]: Judge, can I move here?

20 MJ [COL POHL]: Yes. Yeah. Okay.

21 General Martins.

22 CP [BG MARTINS]: Continue to say, Ms. Danielle Tarin,  
23 also Major Christopher Dykstra, Mr. Dale Cox, Ms. Heather

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Fulmines, Sergeant Jesus Banks. And then sitting along the  
2 side, Patrick O'Malley, Kimberly Walsh, and Brianna Hearn  
3 representing the Federal Bureau of Investigation.

4 MJ [COL POHL]: Mr. Nevin, who is here on behalf of  
5 Mr. Mohammad?

6 LDC [MR. NEVIN]: Your Honor, David Nevin. Major Poteet,  
7 Ms. Leboeuf, and Mr. Sowards on behalf of Mr. Mohammad, who is  
8 present.

9 MJ [COL POHL]: Ms. Bormann.

10 LDC [MS. BORMANN]: On behalf of Mr. Bin'Attash, Cheryl  
11 Bormann, Major Schwartz, and Mr. Edwin Perry and Major Matthew  
12 Seeger. I ask your permission to sit toward the back.

13 MJ [COL POHL]: You can for now, given what the issue is.  
14 Mr. Harrington.

15 LDC [MR. HARRINGTON]: James Harrington and Alaina  
16 Wichner.

17 LDC [MR. CONNELL]: James Connell and Lieutenant Colonel  
18 Sterling Thomas.

19 MJ [COL POHL]: Mr. Ruiz.

20 LDC [MR. RUIZ]: Lieutenant Colonel Williams and Sean  
21 Gleason and myself on behalf of Mr. Hawsawi.

22 MJ [COL POHL]: And all of the accused are present.

23 Again, we have done this each time, so I think all of the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 accused understand this. At this time I'm going over your  
2 rights to be present or not -- or to waive that right at  
3 subsequent hearings.

4 Each of you has a right to be present during all  
5 sessions of the commission. If you request to absent yourself  
6 from any session, such absence must be voluntary and of your  
7 own free will. Your voluntary absence from any session of the  
8 commission is an unequivocal waiver of the right to be present  
9 during that session.

10 Your absence from any session may negatively affect  
11 the presentation of the defense in your case. Your failure to  
12 meet with and cooperate with your defense counsel may also  
13 negatively affect the presentation of your case.

14 Under certain circumstances, your attendance at a  
15 session can be compelled regardless of your personal desires  
16 not to be present. Regardless of your voluntarily waiver --  
17 excuse me, your voluntary waiver to personally attend the  
18 session of the commission, you have the right to attend any  
19 subsequent session. If you decide not to attend the morning  
20 session but wish to attend the afternoon session, you must  
21 notify the guard force of your desires. Assuming there's  
22 enough time to arrange your transportation, you will be  
23 allowed to attend the afternoon session. You will be informed

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 of the time and date of the session to afford you the  
2 opportunity to decide whether you wish to attend that session.

3 Mr. Mohammad, do you understand what I just told you?

4 ACC [MR. MOHAMMAD]: Yes.

5 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I  
6 just said?

7 ACC [MR. BIN'ATTASH]: Yes, but I have two things that I  
8 would like to put on the record.

9 MJ [COL POHL]: We're going to come back to that. Just  
10 hold that thought.

11 Mr. Binalshibh, do you understand what I just said?

12 ACC [MR. BINALSHIBH]: [Microphone button not pushed; no  
13 audio.]

14 MJ [COL POHL]: Mr. Binalshibh, do you understand what I  
15 just said?

16 ACC [MR. BINALSHIBH]: Yes, I did understand.

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

18 Mr. al Baluchi.

19 ACC [MR. AZIZ ALI]: Yes.

20 MJ [COL POHL]: And Mr. Al Hawsawi?

21 ACC [MR. AL HAWSAWI]: Yes.

22 MJ [COL POHL]: Okay. Now, Mr. Bin'Attash, okay, I  
23 understand you may have an issue about your attorneys, and I'm

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 going to give you an opportunity to explain to me what you  
2 think your problem is, but we're going to keep this in the  
3 decorum of this trial. Do you understand that?

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

5 MJ [COL POHL]: Now, just -- I want to start where we  
6 ended up last time. When we were here last, you indicated you  
7 did not want Mr. Schwartz as your attorney. Is that still  
8 your position?

9 ACC [MR. BIN'ATTASH]: Could you please repeat?

10 MJ [COL POHL]: Okay. When we were here last, you  
11 indicated you did not want Mr. Schwartz as your attorney; is  
12 that correct? Is that still what you want, him to be excused?

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

14 MJ [COL POHL]: Okay.

15 ACC [MR. BIN'ATTASH]: **[Speaking in English]** I do not want  
16 him.

17 MJ [COL POHL]: Okay. Now, you said you wanted -- do you  
18 have something else you wanted to tell me about your  
19 attorneys?

20 ACC [MR. BIN'ATTASH]: **[Interpretation resumed]** Yes,  
21 three points I would like to put on the record.

22 The first point is since last February, there is  
23 not -- there is no legal mail between me and my legal team. I

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 do not send any mail. I do not receive any mail. I know that  
2 this is my choice, but I would like for this to be on the  
3 record.

4           The second point is also there is no meetings -- any  
5 legal meetings between me and my attorneys since last  
6 February. Sometimes I meet with the analyst and the paralegal  
7 only. However, the lawyers have a new rule where the  
8 paralegal and the analyst are not allowed to speak about any  
9 issue -- any legal issue.

10           The third point: In the last session, May 30, I did  
11 not put anything on the record because there was a meeting  
12 between me and General Baker before the session, and he told  
13 me he will try to resolve the problem with the team.

14           There is nothing new. What I -- what really I want  
15 to put on the record today: In the session before the last on  
16 February 17, before I left the courtroom, I have looked at the  
17 letter that I sent to the judge with a couple of attachments,  
18 and I told the court that there is an error with the  
19 attachment. I told the court that I am not sure if this was  
20 done on purpose or it's just a misunderstanding by the  
21 attorneys.

22           At that day you told me, or maybe the day before,  
23 that I have to convey whatever I need to the court through my

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 attorneys. And because of the issue or the situation I have  
2 with Attorney Bormann and Attorney Schwartz, you said that I  
3 can convey anything I want through Seeger.

4 I sat with him that day and I told them about the  
5 errors in the attachments, and he wrote that down. And I have  
6 told the court that he is under the control of the female  
7 attorney. To my knowledge, there has not been any correction  
8 to the record as far as Attorney Seeger.

9 Last point: I gave the attorneys one more chance to  
10 resolve the problem that we are in. They don't want to  
11 resolve any problem. Because the judge gave an order to keep  
12 them on the team, the attorney, Cheryl, they began feeling so  
13 powerful that they can do whatever they want. I told the SJA  
14 this morning, any attorney who approaches me at Camp Echo or  
15 over here, I might lose control over myself. Any attorney  
16 that comes to meet with me, I could just lose control. I  
17 don't want to create any problems, but I cannot bear their  
18 behaviors. This is all I have.

19 MJ [COL POHL]: Mr. Bin'Attash, just so I'm clear, you  
20 currently have four attorneys. Mr. Perry is new, and although  
21 he hasn't appeared on the record, I have been told that he has  
22 been detailed to your case.

23 Now, I want you to understand something: Attorneys

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 in court will argue various positions. That's their view of  
2 things, but they don't necessarily get to decide these issues.  
3 Until I make a decision about the proper way forward, there is  
4 no decision made. Do you understand that?

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

6 MJ [COL POHL]: Okay. So as a starting point, I just want  
7 to ask you a very simple question: Do you want Ms. Bormann on  
8 your case?

9 ACC [MR. BIN'ATTASH]: My answer did not change since  
10 before. I don't want her in the case.

11 MJ [COL POHL]: Okay. Do you want Mr. Schwartz on the  
12 case?

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

14 MJ [COL POHL]: Do you want Major Seeger on the case?

15 ACC [MR. BIN'ATTASH]: It's hard for me to give an answer  
16 now because you asked me in February and I told you yes, but  
17 he is like -- he does whatever the female attorney tells him.

18 MJ [COL POHL]: Okay. And, again, we've made no decision  
19 about the composition of your team necessarily, so don't --  
20 don't make assumptions.

21 And how about Mr. Perry?

22 ACC [MR. BIN'ATTASH]: I cannot make a decision as long as  
23 they're working under female attorney Cheryl. Seeger might be

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 good. Perry might be good. I don't know.

2 MJ [COL POHL]: Okay. Thank you. Okay. That brings us  
3 to -- what we're going to do now, Mr. Bin'Attash, just to let  
4 you know, is we're going to discuss the legal issues that you  
5 have raised, okay? So just sit back and listen, and we'll go  
6 from there.

7 That brings us to the 380 issue. Ms. Bormann, it's  
8 the commission's understanding that at this point you want to  
9 rest on your pleading; is that correct? I would note for the  
10 record that Ms. Bormann is not sitting at counsel table by her  
11 choice.

12 LDC [MS. BORMANN]: Correction. I'm sitting in the back  
13 of the courtroom at Mr. Bin'Attash's request.

14 MJ [COL POHL]: Okay.

15 LDC [MS. BORMANN]: At this point, we have no argument on  
16 the pleadings, and -- unless the commission has questions, and  
17 those would be directed to Mr. Perry.

18 MJ [COL POHL]: Okay. I did not notice Mr. Perry in the  
19 courtroom because I believe he's all the way in the back.

20 LDC [MS. BORMANN]: He's in back.

21 MJ [COL POHL]: Okay. Let's get him on the record and  
22 then we'll continue with 380.

23 Mr. Perry, please put your qualifications on the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

1 record.

2 DC [MR. PERRY]: Good morning, Your Honor.

3 MJ [COL POHL]: Good morning.

4 DC [MR. PERRY]: My name is Edwin Perry. I am licensed to  
5 practice in Maryland and D.C., a member of good standing. I  
6 have been detailed to the case to represent Mr. Bin'Attash by  
7 the Chief Defense Counsel, Brigadier General John Baker. My  
8 detailing memo has been previously entered into the record as  
9 AE 006C. I'm qualified to act as defense counsel in  
10 accordance with Rule for Military Commission 502, and I've  
11 acted in no way that would tend to disqualify me from these  
12 proceedings. I'm a United States citizen.

13 MJ [COL POHL]: Okay. Please raise your right hand.

14 [Counsel was sworn.]

15 MJ [COL POHL]: Thank you. You may return back.

16 DC [MR. PERRY]: Thank you.

17 MJ [COL POHL]: Ms. Bormann, just to kind of tell you  
18 where we're at with this thing, General Baker had filed an  
19 amicus pleading, and in the court's discretion is going to let  
20 him present that and then I'm going to hear from the  
21 government. And then at that point, if you wish to make  
22 additional remarks, you will be given the opportunity. If you  
23 wish to be available for questions, that's going to be your

*UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT*

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 call because I'm sure I'll have some, but if you want to rest  
2 on pleadings, I don't want to require you to make an oral  
3 argument if you do not wish to make one. Understand?

4 LDC [MS. BORMANN]: Judge, as I informed you in the 802,  
5 we don't intend to argue this issue unless you have questions.

6 MJ [COL POHL]: Okay. Thank you. That being said,  
7 General Baker, as the Chief Defense Counsel, you filed an  
8 amicus pleading and asked to be heard. In the court's  
9 discretion, I have granted you that. You may be heard.

10 CDC [BG BAKER]: Good morning, Your Honor.

11 MJ [COL POHL]: Good morning.

12 CDC [BG BAKER]: Boiled down to a single question, the  
13 issue before you is: In an appointed counsel situation in a  
14 capital case, can a client fire a subordinate counsel over the  
15 lead counsel's objection and after the appointing authority  
16 and the court each independently found no good cause to sever  
17 the attorney-client relationship between the accused and  
18 either the lead counsel or the subordinate counsel? To answer  
19 this question, Your Honor, we need to start with the accused's  
20 right to counsel.

21 Under the Military Commissions Act in this capital  
22 case, the accused has the right to civilian counsel at no  
23 expense and defense counsel detailed -- or military counsel of

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 the accused's own choice and also has the right to learned  
2 counsel. The accused, of course, Your Honor, can also waive  
3 his right to counsel and elect to represent himself.  
4 Mr. Bin'Attash has not exercised his right to civilian counsel  
5 or military counsel of his own selection or has not elected to  
6 represent himself, but instead he has elected to be  
7 represented by appointed counsel.

8           Once the accused -- once an accused such as  
9 Mr. Bin'Attash elects to be represented by appointed counsel,  
10 that accused needs good cause before the appropriate authority  
11 can excuse or properly appoint counsel, and the framework for  
12 that decision is set forth in Rule for Military Commission  
13 505. The deciding authority needs to make the decision  
14 whether a defense counsel, an assistant defense counsel or an  
15 associate counsel with the accused -- with whom the accused  
16 has formed an attorney-client relationship, whether there's  
17 good cause.

18           Your Honor, this is a permission-asking process. If  
19 you look at R.M.C. 505, it begins with "Upon the request from  
20 the accused." It's not upon the demand of the accused, it's  
21 not upon the order of the accused, but it's upon the request  
22 of the accused. 505 as written talks about the detailing  
23 authority, but, Your Honor, you also have -- the similar

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 process applies for the military judge.

2           The detailing authority in this case, Your Honor,  
3 you, as the military judge, may change counsel. Not must  
4 change counsel, not shall change counsel, but may change  
5 counsel. To use your words, Your Honor, from page 4 of  
6 AE 380KK, to sever an attorney-client relationship with a  
7 defense counsel, an accused must establish good cause. Stated  
8 differently, when an accused who has exercised his right to  
9 counsel to be represented by appointed counsel, he cannot just  
10 fire that counsel appointed to represent him, to use the  
11 government's words, for no reason whatsoever. Instead, the  
12 law requires good cause before a counsel could be excused.

13           When the deciding authority is making that good cause  
14 determination, Your Honor, the deciding authority must seek  
15 the input of lead counsel. That is the way it is done in  
16 state and federal practice, and I have, if you are interested,  
17 some documents that I can mark as an appellate exhibit that  
18 provides statements from the federal public defender of  
19 Northern Ohio, the federal public defender for Arizona, a  
20 capital resource counsel with the defender services of the  
21 Office of -- Administrative Office of the United States.

22           MJ [COL POHL]: General Baker, 505(d)(2)(B)(1) says an  
23 authority may excuse or change only upon request of the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 accused.

2 CDC [BG BAKER]: It does, Your Honor, but ----

3 MJ [COL POHL]: The good cause is in (B)(2).

4 CDC [BG BAKER]: Your Honor, if you look at the case law,  
5 if you look at your own ruling on this issue, there's a  
6 built-in good cause requirement. The accused can't just  
7 decide -- when the accused has elected to be represented by  
8 counsel, the accused can't just decide which counsel represent  
9 him. It's my decision as the detailing authority to determine  
10 who is on his defense team, and then there's a  
11 permission-asking process to make change to that. This ----

12 MJ [COL POHL]: So it's your position that the accused has  
13 two choices -- an indigent accused because that's the analysis  
14 here, basically. It's not a case where the accused has  
15 purchased or is securing his own counsel. It's an indigent  
16 accused case.

17 So what you're saying is in this scenario, the  
18 accused has two choices: He takes everybody that is detailed  
19 to his case, or he goes pro se?

20 CDC [BG BAKER]: Yes, sir, but with a caveat. He takes  
21 everybody that's detailed to represent him, and if he's got a  
22 problem, there's a process with which to change that or he  
23 represents himself. The government's third category of this

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 waiver for a subordinate counsel does not exist.

2 MJ [COL POHL]: If the ----

3 CDC [BG BAKER]: Your Honor, if you look at AE 380UU, I  
4 think is the appellate exhibit, which is a pleading by  
5 Mr. Connell that lays out what are strategic choices for  
6 counsel, what are strategic choices that an accused can make  
7 and what are the choices -- excuse me, that counsel can make  
8 and what are the choices that the accused can make.

9 One of those choices is whether to be represented by  
10 counsel; the accused absolutely gets to make that decision.  
11 But once the accused elects to be represented by counsel, the  
12 accused gets who he gets. And, again, there's a process with  
13 which he can go to an appropriate authority to make that -- to  
14 make a change.

15 MJ [COL POHL]: But if he wants to make a change of,  
16 say -- say an accused has four defense counsel and he wants to  
17 get rid of one, and it's an informed decision of how that  
18 would impact on the case, you're saying he doesn't have that  
19 right?

20 CDC [BG BAKER]: No, sir. Your Honor, once he's -- as you  
21 wrote in AE 380CC, the right to counsel includes the right to  
22 effective representation by appointed counsel. It's my  
23 decision who's detailed to these cases and how big they need

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 to be. That's my call. The regulation provides the Chief  
2 Defense Counsel the ability to detail detailed counsel and  
3 assistant defense counsel as appropriate.

4 And you have, Your Honor, a document that was  
5 attached to -- it's Attachment E to 380II. It's a document  
6 that I provided the convening authority that lays out the size  
7 of the defense team that these cases require. And, you know,  
8 in their pleading, the government talks about, well -- that  
9 this isn't a substitution of counsel issue. It absolutely is.  
10 Because if Mr. Schwartz is excused from this case, I have to  
11 replace him.

12 MJ [COL POHL]: If any accused -- and I don't like to --  
13 if any accused chooses to -- with a knowing waiver saying that  
14 somebody is excused, you know, that means you may get a  
15 replacement, you may not, but the case is going forward at the  
16 current pace, can they make that informed choice?

17 CDC [BG BAKER]: Not if that informed makes the defense  
18 team ineffective, Your Honor.

19 MJ [COL POHL]: But can't the accused waive that issue?

20 CDC [BG BAKER]: If there's good cause.

21 MJ [COL POHL]: No, but what I'm saying is in the pro se  
22 scenario ----

23 CDC [BG BAKER]: Yes, sir.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 MJ [COL POHL]: ---- the accused basically waives  
2 ineffectiveness.

3 CDC [BG BAKER]: That's exactly right.

4 MJ [COL POHL]: As a general rule. But in this scenario,  
5 you're saying the accused, for example, is told that by  
6 excusing a counsel that's been on the case for four years, or  
7 excusing your learned counsel for four years there's going to  
8 be no delay in the case, whether you get a replacement or not  
9 is up to General Baker, and you're going to accept how this  
10 impacts on your proceedings. If he makes a knowing and  
11 informed waiver on that, you're saying that he can't do that?

12 CDC [BG BAKER]: No, sir. Again, the accused is faced at  
13 a decision point.

14 MJ [COL POHL]: So he can make a waiver of no counsel  
15 informed waiver, but he can't make a waiver of partially  
16 represented by counsel?

17 CDC [BG BAKER]: That is exactly right. Yes, sir.

18 MJ [COL POHL]: Okay. Just wanted to understand your  
19 position. Go ahead.

20 CDC [BG BAKER]: And, you know, Your Honor, you know, in  
21 their reply brief, again, the government talked about if  
22 Mr. Bin'Attash or any accused -- let's not make this about  
23 Mr. Bin'Attash. This is a legal question, it's not about

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Mr. Bin'Attash specifically. But if any counsel -- excuse me,  
2 any accused wants to excuse counsel, and that counsel is going  
3 to be replaced, we are in substitute -- we are in the  
4 substitute arena where you need good cause.

5 MJ [COL POHL]: But that's your call. What I'm saying is  
6 I'm not hearing -- if an accused wants to waive a counsel, and  
7 he's told that this is not a substitute issue, this is simply,  
8 you're not going to get -- if you choose to add, that's up to  
9 you. But what I'm simply saying is if the accused says, I  
10 want to, for example, replace my lead counsel with this other  
11 counsel, that's a completely different analysis.

12 CDC [BG BAKER]: Yes, sir.

13 MJ [COL POHL]: Okay. If he's got good -- and of course,  
14 there's -- the distinction here, at least arguably, is the  
15 distinction between statutorily required counsel and  
16 nonstatutorily required counsel.

17 CDC [BG BAKER]: Can I address that point, sir?

18 MJ [COL POHL]: Not right now. We're going to come back  
19 to it. What I'm saying is the substitution is one issue. But  
20 that's not what we've got here. He's not asking for a  
21 substitute. At least I haven't heard him ask for a  
22 substitute. And if Mr. Schwartz is excused, there will be --  
23 you may get one, you may not. That's not my call. That will

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 not be part of the analysis.

2 CDC [BG BAKER]: Your Honor, that has to be part of the  
3 analysis. That has to be part of the analysis because when  
4 the accused elects -- again, the -- when the accused elects to  
5 go pro se, the accused is giving up effective representation  
6 of counsel. He's giving up that right.

7 When the -- when an accused elects to be represented  
8 by counsel, the accused is electing to be represented by  
9 effective counsel. That has to be the way it works, Your  
10 Honor.

11 MJ [COL POHL]: And that decision is made by the lead  
12 counsel?

13 CDC [BG BAKER]: That -- the way, under our system, the  
14 excusal process, there's an excusal authority -- and I don't  
15 want to get into a debate about whether I have excusal  
16 authority.

17 MJ [COL POHL]: That's not -- I agree, we don't need to  
18 talk about that.

19 CDC [BG BAKER]: But where we are right now, the final  
20 excusal authority is you. There's a permission-asking  
21 process.

22 MJ [COL POHL]: I got it. We don't need to go down that  
23 road. But what I'm saying is your position is when the

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 accused chooses to be represented by counsel -- talking about  
2 indigent accused here. Remember, that's what we're talking  
3 about, we're talking about provided-for counsel as opposed to  
4 this -- is that once he chooses that, all other substantive  
5 decisions of the defense team are in the sole domain of the  
6 lead defense counsel; is that your position?

7 CDC [BG BAKER]: Yes, sir. Yes. 100 percent. That's --  
8 you know, I looked through the transcript when this came up in  
9 2013, when there was an issue with Major Hennessey, and the  
10 government seems to argue that because that was done once,  
11 that suddenly makes it that we have to do it now, to the  
12 extent that two wrongs -- I mean, two wrongs never make a  
13 right.

14 But in that discussion, as soon as that was done, you  
15 had a discussion with Mr. Nevin about Mr. Sowards. Mr. Nevin  
16 pointed you to the Farretta case, which the government cites  
17 in their brief for the proposition that a lead counsel in a  
18 capital case makes the -- makes the team decisions. I give  
19 them their tools. They run their teams.

20 MJ [COL POHL]: Just to be fair, but there was no issue  
21 about -- about an accused not wanting these people on, so ----

22 CDC [BG BAKER]: Yes, sir, but, again, but there's the  
23 process -- and again, if you look at the rule, Rule 505, it

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 doesn't say if it the accused wants to get rid of detailed  
2 counsel, who in our parlance is normally lead counsel. The  
3 rule very specifically says detailed counsel, assistant  
4 counsel and associate counsel. There's this permission-asking  
5 process.

6 MJ [COL POHL]: Okay. Let's talk about something you  
7 wanted to talk about earlier, and I stopped you.

8 You see a distinction between statutorily required  
9 counsel and nonstatutorily required counsel.

10 CDC [BG BAKER]: No, sir. Let me expand on that a little  
11 bit. So the statute, the Military Commissions Act, provides  
12 for the right to counsel, and the statute also directs the  
13 Secretary of Defense to set out the regulations for which  
14 counsel are to be detailed. And the Secretary of Defense,  
15 through both the Rules for Military Commission and the  
16 regulation and the Assistant Secretary of Defense for the  
17 Regulation for Trial by Military Commission lays out the  
18 detailing rules. And those rules provide that the detailing  
19 authority has the sole discretion to detailed defense counsel  
20 and assistant defense counsel.

21 This red herring that the government has come up  
22 with, this new category of nonstatutory counsel, if that were  
23 the rule, 505 would not be written the way that it is, Your

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 Honor.

2 MJ [COL POHL]: But the statute would trump the rule,  
3 correct?

4 CDC [BG BAKER]: But the statute doesn't -- yes, but the  
5 statute doesn't say you only get. The statute doesn't say  
6 that, Your Honor.

7 MJ [COL POHL]: But doesn't the statute establish a floor?

8 CDC [BG BAKER]: Yes, sir. And then the implementation of  
9 the statute then -- the regulations that are proscribed to  
10 implement that statute say the detailing authority makes the  
11 detailing decisions, and determines the size of the defense  
12 teams.

13 And, Your Honor, you know, you look at the size of  
14 this prosecution team. They've made the decisions of how big  
15 they're going to be. I make the decisions on how big these  
16 teams are going to be, and when we remove a counsel on this  
17 case, particularly a counsel -- you know, the pleadings, as it  
18 relates to Mr. Schwartz go through -- and you very well know  
19 how long Mr. Schwartz has been on the case, what impact it's  
20 going to have on this case. But we have to replace him. This  
21 is not -- this can't be that the accused can elect to be  
22 represented by counsel, and then waive all but two.

23 MJ [COL POHL]: Okay. So what your -- your basic

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 position, then, is that Mr. Bin'Attash has a choice. He can't  
2 get rid of Mr. Schwartz unless he gets rid of his entire --  
3 everybody, and appears pro se?

4 CDC [BG BAKER]: No, sir. My -- he can't get rid of  
5 Mr. Schwartz or any counsel on his case unless he establishes  
6 good cause.

7 MJ [COL POHL]: The issue before me is Mr. Schwartz, okay,  
8 and as I've said, there hasn't been good cause shown for  
9 Mr. Schwartz.

10 CDC [BG BAKER]: Yes, sir.

11 MJ [COL POHL]: Now let me go to whether the floor  
12 established by Congress creates two separate categories of  
13 defense counsel. You say there isn't. One can make an  
14 argument that that Congress by writing it this way indicated  
15 some type of minimum representation. Be that as it may,  
16 that's not my question before you.

17 My question before you is this, is that if  
18 Mr. Bin'Attash wants to get rid of Mr. Schwartz without  
19 showing good cause, his only option is to go pro se?

20 CDC [BG BAKER]: Yes, sir.

21 MJ [COL POHL]: That's your position?

22 CDC [BG BAKER]: Because ----

23 MJ [COL POHL]: That puts him in a position with no

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 lawyers instead of some lawyers, and that's a better scenario  
2 for his case ----

3 CDC [BG BAKER]: Provided, Your Honor ----

4 MJ [COL POHL]: ---- than some lawyers?

5 CDC [BG BAKER]: ---- provided, Your Honor, that he makes  
6 a knowing and intelligent waiver.

7 MJ [COL POHL]: Absolutely. There has to be a colloquy on  
8 it. I'm just saying ----

9 CDC [BG BAKER]: And, again, the floor as you say is  
10 established by the statute, is actually established by the  
11 Sixth Amendment. It's the right to -- it's the effective  
12 right to counsel. It's the right to effective counsel. I  
13 have a say in that. You have a say. The accused has -- the  
14 accused has a say to a point.

15 MJ [COL POHL]: Yeah. I mean, yeah.

16 CDC [BG BAKER]: They can ask, but they have to establish  
17 good cause.

18 MJ [COL POHL]: Well, why do you keep saying that when the  
19 rule doesn't say that? You keep coming back to say, well, the  
20 rule says X, and in your pleading you reference one part of  
21 the rule but not the other part. It says at the request of  
22 the accused, it's a "may," I agree, it doesn't mean that he  
23 gets it, but 505(e) ----

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 CDC [BG BAKER]: Why do I say that, Your Honor?

2 Because ----

3 MJ [COL POHL]: ---- (e)(2)(B)(1) says upon the request of  
4 the accused, period, it's in the disjunctive, if something  
5 else doesn't apply.

6 CDC [BG BAKER]: But Your Honor, you've looked at that.  
7 You have gone through this decision-making process.

8 MJ [COL POHL]: I understand that I've gone through it,  
9 but the issue of the statutory where the nonstatutory wasn't  
10 addressed before, so I've got that. Just help me here by  
11 saying -- I'm going to ask the government the same thing.

12 CDC [BG BAKER]: Yes, sir.

13 MJ [COL POHL]: Because it appears there's no distinction  
14 between the statutorily required and the nonstatutorily  
15 required. I'm just saying if you want me to refer to the  
16 regulation, but this provision just says, may be excused. I  
17 agree it's discretionary upon the request of the accused. It  
18 doesn't say the good cause in a separate paragraph.

19 CDC [BG BAKER]: Your Honor, the case law that you looked  
20 at to make the decision as it relates to Ms. Schwartz and --  
21 excuse me, Ms. Bormann and Mr. Schwartz in February, it's the  
22 same analysis. There's no distinction in 505 about  
23 nonstatutory counsel. There's just not.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1           If you look at the regulations, an assistant defense  
2 counsel can be military, can be -- or civilian attorney  
3 assigned to the ----

4           MJ [COL POHL]: Well, couldn't the analysis -- when it  
5 says may, couldn't the analysis then include a consideration  
6 of the congressional intent of what he ought to get, and  
7 therefore create these two different categories?

8           CDC [BG BAKER]: Sir, you should consider everything.

9           MJ [COL POHL]: I understand that, but ----

10          CDC [BG BAKER]: But when you look at congressional  
11 intent, I mean, Congress can -- the congressional intent was  
12 that the accused in this system are provided effective  
13 assistance of counsel. They are -- that is the intent. And  
14 then the regulations go -- explain how that effective  
15 assistance of counsel is provided.

16          And when the accused elects to be represented by  
17 counsel, the makeup of that defense team is -- the detailing  
18 authority provides them counsel, what each individual lawyer  
19 does is up to the lead counsel. If there's a need to change  
20 counsel, again, it's a permission-asking process.

21          MJ [COL POHL]: So it's your position, just so I'm clear,  
22 that when we get done with this entire discussion, if I adopt  
23 the defense position on this, then I should have a colloquy

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 with Mr. Bin'Attash because he's the one raising the issue  
2 personally, saying here are your choices. Do you accept the  
3 defense team as presently constituted, or you represent  
4 yourself?

5 CDC [BG BAKER]: Yes, sir.

6 MJ [COL POHL]: Understand with the long colloquy on the  
7 representing yourself, I've got that part.

8 CDC [BG BAKER]: And, again, there's a mechanism to  
9 change -- there's a mechanism to change your defense counsel,  
10 but you need good cause. Absolutely. That's 100 percent my  
11 position.

12 MJ [COL POHL]: And you think he's better off having no  
13 defense counsel than getting rid of one he doesn't like and  
14 having some defense counsel?

15 CDC [BG BAKER]: Your Honor, I think no accused is ever  
16 better off getting rid of all of his defense counsel, but he  
17 has the right to represent himself. It's called  
18 self-representation. What he -- what any accused doesn't have  
19 the right to is, in an appointed counsel situation,  
20 determining which counsel is appointed.

21 Your Honor, the accused is never better off -- one  
22 man's opinion, the accused is never better off representing  
23 himself, but the Supreme Court has said the accused has that

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

1 right.

2 MJ [COL POHL]: Okay. Anything further?

3 CDC [BG BAKER]: No, sir.

4 MJ [COL POHL]: Thank you.

5 Trial Counsel.

6 TC [MR. RYAN]: Your Honor, I'm prepared to make our  
7 response. Can I ask for one moment with the Chief Prosecutor  
8 and co-trial counsel?

9 MJ [COL POHL]: Okay. Let's take a ten-minute recess.  
10 Commission is in recess.

11 [The R.M.C. 803 session recessed at 0947, 20 July 2016.]

12 [END OF PAGE]

13

14

15

16

17

18

19

20

21

22

23

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**