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1 [The R.M.C. 803 session was called to order at 0959, 20 July
2 2016.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when commission
5 recessed. For planning purposes, we intend to take the lunch
6 break at approximately 1245.

7 Mr. Ryan.

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

9 MJ [COL POHL]: Good morning.

10 TC [MR. RYAN]: Sir, I'm here to present argument on
11 behalf of the United States in regard to AE 380, which, of
12 course, contains many, many pleadings. The issue before Your
13 Honor right now this morning is whether the accused,
14 Mr. Bin'Attash, can in essence fire one specific attorney on
15 the team. That attorney at this point is not defined in the
16 statute, in the rules, or anywhere else. He is added to the
17 defense team, and the defense team, by virtue of statute and
18 rules in this case, must include and does include detailed
19 military counsel, which is Major Seeger, and learned counsel,
20 who is Cheryl Bormann.

21 Everyone else on the team, as I said, enjoys no
22 definition, but is added to the team, and I certainly don't
23 quarrel with it, by the Chief Defense Counsel. And from the

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1 pleadings they have entered, their position is that between
2 the Chief Defense Counsel and learned counsel, they make the
3 decision as to who and how many, and I guess in what capacity
4 and in what role, any other attorneys will be added. It could
5 be two, three, four, five. We don't know, nor have they
6 offered that. There's certainly no formula, and I don't
7 quarrel with that.

8 And inherent in that and as you've heard already from
9 General Baker, is apparently neither the accused,
10 Mr. Bin'Attash, nor you get any vote in this discussion. It's
11 totally up to them.

12 Now, in many cases, I would say the vast majority of
13 cases, this is something that probably never reaches you for
14 any input or concern simply because most of the time, I hazard
15 to guess, an accused is, for the most part, happy with his
16 representation, sometimes not. And even in situations where
17 discussions occur, disagreements occur, it's not that often
18 that it's raised to the level of the court or the commission
19 hearing about it. That's not us.

20 Several sessions ago, I believe it was back in
21 October, something happened in the Bin'Attash camp, and the
22 accused, really out of the blue, I think surprising even his
23 own counsel, first asked Your Honor about self-representation.

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1 We spent a good week or so on that at the time. And then that
2 turned into more of a desire to fire, first, learned counsel,
3 and then over the course of more sessions, a desire to fire
4 learned counsel and Mr. Schwartz. And of course, as Your
5 Honor knows, during this exact time period, Mr. Schwartz had
6 gone from being detailed military counsel required by statute
7 and rule, to becoming a detailed counsel as designed by the
8 Chief Defense Counsel.

9 The discussion over Mr. Bin'Attash's aims, desires
10 and wants in regard to this has continued on ever since that
11 time, and it's maybe been a bit of a hill and valley sort of
12 approach. And maybe we were all hoping things were getting
13 better, but this morning seems to indicate otherwise.

14 Your Honor, I think -- and we've talked about this
15 before -- I think did a very good job and deft job at trying
16 to work this issue without overstepping and without getting
17 too far into the inner workings of a defense camp. On at
18 least two separate occasions Your Honor received
19 communications directly from the accused, I believe both
20 orally and in writing.

21 At one point, as Your Honor recalls, we even reached
22 where learned counsel, based on the events, based on her
23 inability to communicate with the accused, actually stood at

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1 this podium and asked Your Honor to withdraw from the case. I
2 should also note that at the exact same time, the same issue
3 was in existence as to Mr. Schwartz; however, for reasons that
4 were not made known to us at the time, he was not moving to
5 withdraw. It was only Ms. Bormann.

6 I, of course -- the prosecution, of course,
7 recognizing the statutory obligations, argued strenuously that
8 she not be allowed to withdraw.

9 MJ [COL POHL]: Do you see a distinction in between
10 statutorily required counsel and what I'm calling
11 nonstatutorily required counsel?

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

13 MJ [COL POHL]: And when you look at the rule 505 ----

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

15 MJ [COL POHL]: ---- it does not make that distinction.

16 TC [MR. RYAN]: It does not spell it out, sir. I don't
17 attach any meaning to it, in the sense of I believe General
18 Baker talked about being the congressional intent.
19 Congressional intent established two positions and said this
20 is what he needs. This is what we determine is the necessary
21 part.

22 Now, after that -- I'm sorry, sir.

23 MJ [COL POHL]: No. Go ahead.

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1 TC [MR. RYAN]: Now, after that, the determination of what
2 else is happening or what else is needed is a process that is
3 in place, and it's in place in this case. The Chief Defense
4 Counsel has made some decisions. It's been, as Your Honor
5 well knows, an evolving team. It's very different now than it
6 was back when we first came here for arraignment.

7 MJ [COL POHL]: So the choices that, at least General
8 Baker and I believe the pleadings from the counsel indicate,
9 is that the accused can choose to be represented by counsel or
10 go pro se?

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

12 MJ [COL POHL]: And those are his only choices. And that
13 once he chooses to be represented by counsel, decisions about
14 how that team is constituted and tactical level decisions are
15 counsel decisions, not accused decisions?

16 TC [MR. RYAN]: The accused gets no vote.

17 MJ [COL POHL]: That's their position.

18 TC [MR. RYAN]: That's their position.

19 MJ [COL POHL]: Now, let me return to a part of this
20 issue, too, because it's -- the government's position is
21 that -- and, again, reading the regulation, that statutorily
22 required counsel, you need good cause.

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

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1 MJ [COL POHL]: Although you could read 505 to say that --
2 but it's in the "may" category. They could be excused based
3 on just the -- just read 505 in isolation, simply at the
4 request of the accused.

5 TC [MR. RYAN]: Yes, sir. I recognize the language of
6 505.

7 MJ [COL POHL]: One could read it that way. One could
8 read it the other way because it's "may" and then you do a
9 weighing, what does "may" mean?

10 But the only way Mr. Bin'Attash can excuse
11 Ms. Bormann is through good cause, which if he established
12 good cause, would that necessarily mean that he was entitled
13 to -- and, again, I'm talking about entitled to as a matter of
14 right -- to a replacement?

15 TC [MR. RYAN]: No, Judge. I agree -- I'm sorry, first
16 point is, yes, we firmly have espoused and we continue to
17 state that to dismiss learned counsel at this point in the
18 proceedings, and we're a good chunk down the road, requires
19 good cause for reasons as set forth in numerous, numerous
20 cases, many of which we have discussed here today.

21 And part of that reason being, although it's not
22 stated in the statute, but this is inherent, is the
23 commission, and the parties, have a right to be involved so as

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1 to preclude an accused -- and I'm not saying in this
2 situation, but an accused from manipulating the system to
3 constantly just keep demanding new counsel so that a case
4 never gets to trial. That's inherent in our position, sir.

5 So where we stood, sir, is my description of the
6 events that had happened. The last few things I just want to
7 note in that regard is we are aware that in the time that has
8 been going on since this issue was first raised, I think way
9 back in October, the Chief Defense Counsel has stepped in and
10 taken on something of a role of a bridge or a peacemaker,
11 including as late as this morning; however -- and, you know,
12 we can't ignore this, Judge, because it's pretty obvious --
13 things aren't getting any better. It looks like there's
14 little, if any, communication, and, in fact, the
15 Accused Bin'Attash reaffirmed it today in very striking terms.

16 And I want to cover one thing, Judge, because General
17 Baker kept making -- using the word "elected," and this goes
18 back to Your Honor's question about when somebody has a choice
19 of, if I want counsel, I take what they give me or I'm all on
20 my own. I do want to remind Your Honor that this is a little
21 bit -- we have to be a little bit careful about this concept
22 of elected because he didn't affirmatively elect anything at
23 any point.

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1 Your Honor went through, quite properly, all of the
2 options and possibilities and so on back at the time of
3 arraignment, and at that time Accused Bin'Attash did not
4 answer -- I don't believe any of them did -- and Your Honor
5 entered counsel by default.

6 Now, since that time, and again as late as this
7 morning, the election we do have on the record and the only
8 election as to counsel is that he says now he does not want
9 learned counsel. At some point in the pleading it seemed to
10 indicate that learned counsel was acceptable, but this morning
11 he said no, and Mr. Schwartz was not acceptable, and the
12 others, he didn't accept. He said he didn't know. So that's
13 the record that we're left with right now in regard to what
14 General Baker, I think, tried very hard to establish the
15 commission ----

16 MJ [COL POHL]: At the end of the day, where we sit right
17 now is it's the government's position that Ms. Bormann cannot
18 be -- I'm talking about Ms. Bormann here, not Mr. Schwartz --
19 cannot be excused without good cause.

20 TC [MR. RYAN]: No, sir. It's our position ----

21 MJ [COL POHL]: Go ahead.

22 TC [MR. RYAN]: ---- that learned counsel can be waived
23 with a colloquy from the ----

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1 MJ [COL POHL]: No, no, what I'm saying is just because --
2 because I think I understand the defense position. And,
3 again, I know there's a third option here ----

4 TC [MR. RYAN]: All right, sir.

5 MJ [COL POHL]: ---- the government believes that's what
6 we're fighting over, and the third option being excusing some
7 members of the defense team but having to keep others. Let's
8 put that one to the side.

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

10 MJ [COL POHL]: But option number one is accepting the
11 defense team as-is. Option number two is the only way that
12 Ms. Bormann can be excused is if he chooses -- a good cause,
13 which he has not established, if he chooses to help himself.
14 And option number three is the one we're arguing over. Do you
15 agree?

16 TC [MR. RYAN]: I believe I do, Judge.

17 MJ [COL POHL]: That's what I was saying, is that the only
18 way Ms. Bormann can be -- and, again, we're talking about
19 stand-by counsel -- not getting into that right now, but is --
20 it appears that both sides are of the position, and I'm going
21 to give the defense an opportunity to respond if I'm
22 mischaracterizing their position. But the only way that
23 Ms. Bormann is be excused is good cause or

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1 self-representation.

2 ACC [MR. BIN'ATTASH]: Can you repeat the choices once
3 again?

4 TC [MR. RYAN]: Before you do that, sir, maybe let me
5 answer just to -- because it might help to refine it, if
6 that's acceptable.

7 The government's position is option one, they are
8 represented by counsel and none of this is sort of brought to
9 your attention. Number two, total self-representation under
10 Farretta.

11 MJ [COL POHL]: Uh-huh.

12 TC [MR. RYAN]: And number three, it is the government's
13 position that any counsel within, including those established
14 by statute, required by rule, such as learned counsel, can be
15 waived.

16 So to put a fine point on it here, it is our position
17 that he can choose to be represented by Major Seeger as
18 detailed military counsel. After a colloquy, he can waive,
19 knowingly and voluntarily, other counsel, specifically learned
20 counsel. And then Chief Defense Counsel is of course free and
21 able to ----

22 MJ [COL POHL]: Okay, let me ----

23 TC [MR. RYAN]: ---- make changes as he sees fit.

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1 MJ [COL POHL]: I saw that in your pleading. Let me make
2 sure I understand this. When you say after a colloquy he can
3 waive learned counsel, this is in the pro se box?

4 TC [MR. RYAN]: It is not in the complete pro se box, no,
5 sir. It is in the box of he can choose to be represented
6 by -- I'm sorry. Let me back it up.

7 If he chooses to represent himself, pure Farretta
8 situation ----

9 MJ [COL POHL]: Right.

10 TC [MR. RYAN]: ---- then detailed military counsel
11 becomes standby counsel under the statute, under the rule.
12 That's, I think, pretty clear.

13 Second is he has the right to waive specific persons,
14 and that includes one established and required under rule and
15 statute, specifically in this case, learned counsel.

16 MJ [COL POHL]: In a ----

17 TC [MR. RYAN]: And good cause is not part of that
18 analysis.

19 MJ [COL POHL]: And the pro se -- you've got me a little
20 confused here. Let me go back to my boxes.

21 TC [MR. RYAN]: All right, sir.

22 MJ [COL POHL]: Box number one is the defense team as
23 detailed by General Baker, decisions of the makeup belongs to

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1 the attorneys themselves, if he chooses to be represented.

2 Box two is the pro se part we just talked about, and
3 that's where -- is that where you're talking about where the
4 stand-by counsel, he can waive the learned counsel as a
5 stand-by counsel, or are you saying that ----

6 TC [MR. RYAN]: I'm saying it's box three, sir. Box two
7 being full pro se, self-representation.

8 MJ [COL POHL]: Okay. But now we're ----

9 TC [MR. RYAN]: At which time -- I'm sorry to interrupt,
10 sir -- at which time Seeger becomes stand-by.

11 MJ [COL POHL]: And box three, which I thought we were in
12 earlier with learned counsel.

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

14 MJ [COL POHL]: You believe he can waive learned counsel?

15 TC [MR. RYAN]: Yes, sir, I do.

16 MJ [COL POHL]: I thought we said he needs good cause.

17 TC [MR. RYAN]: Good cause if he's seeking additional -- a
18 replacement learned counsel.

19 MJ [COL POHL]: Okay.

20 TC [MR. RYAN]: But he's certainly free to waive that
21 specific position.

22 MJ [COL POHL]: Okay. But the position being is that at
23 this point, he has not -- it wasn't a substitute issue. It

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1 was simply, I want to fire Ms. Bormann, and therefore, he
2 needs good cause for no replacement.

3 TC [MR. RYAN]: If he wants a replacement.

4 MJ [COL POHL]: If he wants a replacement.

5 TC [MR. RYAN]: If he wants a replacement, he must have
6 good cause. We have been down this road and we have had
7 extensive arguments about it.

8 MJ [COL POHL]: Okay.

9 TC [MR. RYAN]: What he has not been informed of, warned
10 of, he has the right to waive one of those two specific
11 statutory positions, that being learned counsel and detailed
12 military counsel. He can waive learned counsel. He can make
13 that same decision.

14 MJ [COL POHL]: Okay.

15 TC [MR. RYAN]: Continuing on, Judge, in the area of
16 where -- what has turned -- what has become of the defense in
17 this case or the relationship, I also remind you, sir, that in
18 addition to what he has put on the record this morning, he's
19 also announced previously that he will not attend sessions due
20 to his wish not to be represented by counsel. As I said
21 before, we thought that we were just talking about
22 Mr. Schwartz but that's apparently not the case. And, in
23 fact, it seems that he has made good on that promise. Since

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1 making it, I don't recall him being at any session where he
2 was not required.

3 So, sir, in short, it's just not getting better, and
4 I want to be very clear that I stand by arguments previously
5 made as to good cause, that being it doesn't -- his happiness
6 is not a prerequisite to this case going forward absent a
7 finding of good cause. I stand by that completely.

8 MJ [COL POHL]: Okay. Let me ask you this, Mr. Ryan.

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

10 MJ [COL POHL]: What is the way ahead today? What I'm
11 saying is this is a relatively complicated issue. And now I'm
12 on the Schwartz issue.

13 TC [MR. RYAN]: Right.

14 MJ [COL POHL]: A complicated issue.

15 TC [MR. RYAN]: I came in thinking, sir, that it was an
16 argument being made as to one undefined counsel, and it
17 changed into something else. I do have -- if Your Honor will
18 bear with me for a few minutes, because I really want to get
19 to this, some of the other arguments raised, but I do have a
20 proposed way forward, sir.

21 MJ [COL POHL]: Go ahead.

22 TC [MR. RYAN]: Okay. The question now, as it's been
23 framed both to the Chief Defense Counsel and to myself, is:

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1 Can he waive one counsel not required by statute? At least
2 that's where we started, and I'll stick with that one just for
3 the moment.

4 The answer -- our answer is this: If he can walk
5 into a court, into a commission hearing and under Farretta,
6 Supreme Court case which is honored and followed everywhere
7 and waive them all, even if Your Honor was to warn him that
8 this is a bad idea, then it must certainly be true that he can
9 walk into a courtroom and waive one who is not required by
10 statute, even again if Your Honor warns him it's a bad idea.
11 Even if Your Honor warns him. Even if the Chief Defense
12 Counsel warns him. Even if other counsel warn him as to such.

13 Quoting General Baker, he thinks it's a bad idea --
14 it's always a bad idea, I think he said, for somebody to go
15 without. Taking that to its -- and applying it to certain
16 factual situations, maybe this one, maybe not, but if you're
17 putting an accused in the position of having to accept one to
18 get them all, you could be opening yourself -- the commission
19 could be opening itself to having coerced or extorted him to
20 represent himself, even if he says I want everybody else, it's
21 just one or so.

22 Now, again, after this morning, I guess that's not
23 our situation, but it -- I believe logically Your Honor can

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1 see that that's not the right result, especially in a case
2 like this, and I'll get to it in a minute in terms of the
3 numbers and the resources and the time yet.

4 Now, under my scenario where he can do these things,
5 he does not -- and I emphasize and point it out, he does not
6 have the ability to frustrate the process by saying I want
7 another one continuously until such time that he finds who
8 he's happy with because the obvious implication ----

9 MJ [COL POHL]: But if he is told, any accused -- and I
10 don't want to personalize this, but we obviously have one
11 case. But if he is told that he chooses to excuse
12 Mr. Schwartz, and he is told by doing that you're going to
13 lose an attorney that's been on the case for over four years,
14 he's going to lose his ability to have institutional memory,
15 lose his ability of what he knows and has worked with the
16 team, and there will be no ordered substitute and there will
17 be no delay caused by Mr. Schwartz's excusal at your own
18 choice ----

19 TC [MR. RYAN]: Right.

20 MJ [COL POHL]: ---- if he does all of that in an informed
21 way, isn't that -- I mean, it's kind of a mini Farretta
22 situation, isn't it?

23 TC [MR. RYAN]: Absolutely, Judge. And that's our

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1 position. I mean, he can be warned about it, and as I said,
2 he can be warned by several people, but most importantly Your
3 Honor, that it may not be a good thing for you, if you lose
4 one attorney, maybe General Baker helps you with another one,
5 maybe he doesn't. But as far as the commission is concerned,
6 the case goes forward. You don't get to make more demands as
7 to something else. You have to understand you are waiving
8 this. You are losing it. There may not be anyone else
9 sitting in that position. You could probably put it, Judge,
10 in a way of saying as far as the commission is concerned,
11 there won't be anybody else, so he has the full understanding
12 of the import.

13 MJ [COL POHL]: Well, that wouldn't be in -- that wouldn't
14 be -- he's not requested a substitute.

15 TC [MR. RYAN]: That's right.

16 MJ [COL POHL]: He's requesting an excusal.

17 TC [MR. RYAN]: Absolutely.

18 MJ [COL POHL]: But what others do, that's not before me.

19 TC [MR. RYAN]: Not your concern, sir. As we've seen ----

20 MJ [COL POHL]: Understand, I have a concern for it, but
21 that's not the issue before me.

22 TC [MR. RYAN]: I understand. I phrased it wrong, but
23 yes, sir, that's correct.

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1 Now, the defense and the Chief Defense Counsel wave
2 the great talisman and warn Your Honor that allowing this to
3 happen will threaten the effectiveness of counsel. I want to
4 be really clear about this. The prosecution does not dispute
5 for one second that Mr. Schwartz is a fine attorney and
6 important to that team, but at this point under the
7 circumstances, they can't have it both ways, and to raise that
8 claim, we suggest, is inappropriate.

9 This motion, 380, as Your Honor knows, has sort of
10 been in sort of a combination with 355. In 355, the accused,
11 through the defense team, filed a sworn affidavit from
12 Mr. Schwartz in which he lists all his lack of experience, and
13 he does that for the purpose -- they do that for the purpose
14 of demonstrating how much this team had to have other things
15 that they wanted at the time, that they couldn't simply rely
16 on someone who was so young to the process. And one of the
17 things they were asking for was additional civilian lawyers.
18 That affidavit, that declaration was filed back in
19 August 2012.

20 Now it's four years later. As far as I know,
21 counsel, Mr. Schwartz, has not worked on any other case, and
22 yet in that short period of time, he's become one of those
23 civilian positions that he was being used as a justification

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1 to obtain, and they tell you that he's so important that at
2 this stage of the case, the team would go from being effective
3 on the day he was there to being ineffective one day later due
4 only to his absence.

5 This is despite learned counsel, who informs us often
6 that she's got 30-plus years of experience. This is despite
7 brand new civilian defense counsel, Mr. Perry, who was sworn
8 in for the first time today. This is despite another civilian
9 position that Mr. Schwartz currently occupies. This is
10 despite detailed military counsel.

11 And I point out, Judge, that in addition to those
12 resources I just listed, the Chief Defense Counsel in one of
13 his -- I believe it was his declaration or his pleading in
14 this regard, said that through the period of time this case
15 has been pending, the team has consisted of as many as 30
16 individuals, lawyers, paralegals, analysts, et cetera. This
17 is also despite other lawyers that may be behind the scenes
18 that are unknown to the parties or to the commission.

19 MJ [COL POHL]: Would I make a -- judge ineffectiveness at
20 this point in time?

21 TC [MR. RYAN]: You really don't, Judge.

22 My last point was to say we're at a point where we
23 don't have a trial date. The teams change on an almost

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1 session-by-session basis in terms of people coming in and
2 people going out. A cursory reading of the signature block of
3 pleadings and just looking out at the tables, you can see
4 that. So I would suggest absolutely, Judge, for you to kind
5 of get into a discussion about how effective this team -- if
6 they're going to be ineffective, which is a big term in the
7 legal world, at this point is silly.

8 The point being, sir, as to this whole argument is
9 this: We don't care. The prosecution does not care who his
10 lawyers are, but we believe it's incorrect and improper to say
11 he has no vote in the whole matter, at least as to the limited
12 circumstances that we started talking about.

13 Now, sir, the question of the way forward that you
14 raised. In light of the fact -- in light of all of the
15 facts -- I won't repeat them, you know where we've been. But
16 in light of the fact that just a few moments ago, he did say
17 he wants -- he does not want two counsel who have been on the
18 case all this time and he's not sure about others, I'd ask
19 Your Honor to go back to the point of giving this accused the
20 options that exist under the law; that would include, one, he
21 has an absolute right to represent himself, and he should be
22 told that Major Seeger, pursuant to statute and rule, would
23 then serve as his stand-by counsel, as he is the detailed

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1 military counsel. That, of course, requires a colloquy which
2 we hammered out several months ago.

3 Another option he can be informed of is that he can
4 waive specific positions on the team, including those
5 established -- including learned defense counsel and be
6 represented by military defense counsel, detailed military
7 defense counsel, Major Seeger, with the understanding that the
8 Chief Defense Counsel can do what he can and as he sees fit to
9 staff that team. And that of course -- but that, of course,
10 we point out would require a colloquy as well.

11 MJ [COL POHL]: You keep saying that, and I'm -- and I
12 just want to -- do you believe he can waive learned counsel
13 without good cause, then?

14 TC [MR. RYAN]: Yes, sir. Yes, sir. Our position is --
15 and really it's not terribly different than our position as to
16 any other counsel in the case.

17 MJ [COL POHL]: Has that been the position all along?

18 TC [MR. RYAN]: Yes, sir. It hasn't come up before, but
19 yes, sir, it is absolutely, sir.

20 MJ [COL POHL]: So when we discussed this earlier with him
21 wanting to excuse Ms. Bormann, we went ----

22 TC [MR. RYAN]: No, sir. I don't know that we discussed
23 it -- my memory, sir, is that I put this on the record

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1 specifically at one time, but I can't tell you when it was.
2 Things were changing very quickly.

3 MJ [COL POHL]: Okay. Give me your analysis of this,
4 because when this first issue came up and we discussed
5 Ms. Bormann's excusal and the issue was whether it can be
6 done, does it require good cause, I thought the government
7 position was it requires good cause.

8 TC [MR. RYAN]: It absolutely does if he is requesting or
9 if there is -- if he is requesting or allowing for ----

10 MJ [COL POHL]: I got it. Good cause if he wants a
11 substitute.

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

13 MJ [COL POHL]: No good cause if he just wants to let her
14 go.

15 TC [MR. RYAN]: If he just wants to let her go, if he
16 waives it, in the same scenario that we've been talking about,
17 where he understands the downside, he goes through a full
18 colloquy, he has the right to waive specific counsel,
19 specifically in this case, learned counsel.

20 MJ [COL POHL]: Can he waive detailed counsel, too, then?

21 TC [MR. RYAN]: Detailed counsel cannot be waived because
22 as established, if in the event he seeks to represent himself,
23 he would -- that detailed military counsel would remain as

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1 stand-by counsel because it's stated so.

2 MJ [COL POHL]: Okay. Okay.

3 TC [MR. RYAN]: Sir, that's all I have.

4 MJ [COL POHL]: Okay. Thank you. I'm going to give
5 General Baker a chance to respond and then, Ms. Bormann, you
6 may also, if you wish to.

7 Wait a minute. Wait a minute. General Baker, before
8 you come up, Mr. Ryan, come back here.

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

10 MJ [COL POHL]: The question I asked earlier and you were
11 going to come back to, and I don't think we came back to: If
12 I adopt the government's position, what's the way ahead today?

13 TC [MR. RYAN]: Well, Judge, it depends on -- strike that.

14 The way ahead that I proposed is that first Your
15 Honor address the accused directly -- and as far as him
16 speaking about what he wants, he's said definitively in some
17 terms, not definitively in others, I would suggest that you
18 further explore that with him. And if it's equivocal as to
19 some, all or -- some or all, I would suggest that we move on
20 from here.

21 MJ [COL POHL]: No, what I'm saying is if -- focusing
22 strictly on Mr. Schwartz, if I adopt the government's
23 position, do I need to -- do I need to resolve that issue now

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1 before we do anything else, or can we -- I mean, right now,
2 the default is counsel are here. None have been excused.
3 Okay. We have a 426 coming up, which is one of Mr. Schwartz's
4 motions, okay?

5 Can we -- it's the government's position that we can
6 take this under advisement like issues are, issue comes out in
7 due course, until then the status quo remains or ----

8 TC [MR. RYAN]: Or it has to happen right this minute.

9 MJ [COL POHL]: ---- or a decision has to be made before?

10 TC [MR. RYAN]: I understand, Judge. Can I have one
11 moment, please?

12 MJ [COL POHL]: Sure. You can come back to that. Let me
13 get to General Baker because I'm going to ask him the same
14 thing.

15 TC [MR. RYAN]: I'm not trying to avoid. I'm sure our
16 position is right, but I want to check with colleagues.

17 MJ [COL POHL]: Okay. Do you think it's only going to
18 take a second?

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

20 MJ [COL POHL]: Go ahead.

21 We'll get there, General Baker.

22 [Pause.]

23 TC [MR. RYAN]: Thank you, sir. Judge, I can't -- we can

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1 think of no provision of law that says this decision has to be
2 made now, especially considering the amount of time it's been
3 pending. We can't think of a prejudice that comes at this
4 moment from Your Honor considering it as you have been.

5 So the government's position, sir, is the way forward
6 is of course the motion is pending. The issue is before Your
7 Honor. We believe it will be handled. I don't take the
8 position that Mr. Schwartz, before Your Honor makes his final
9 decision, has to leave the court or leave the team.

10 I do only want to stress this, Judge, and this isn't
11 just as to Counsel Schwartz. This is as to whatever is going
12 on over there. As I said before, it's not getting better.
13 The events of the last few days and this morning indicate that
14 it's coming to a head, and we would submit that all of the
15 argument before Your Honor has to -- we've reached the point
16 of something must occur. And I've given Your Honor our
17 proposed way forward, and we submit that that's the proper
18 way.

19 MJ [COL POHL]: Thank you, Mr. Ryan.

20 General Baker.

21 CDC [BG BAKER]: Your Honor, I want to touch on a couple
22 of points. Mr. Ryan classified Mr. Schwartz or any civilian
23 attorney that serves with MCDO is an undefined position. I

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1 just want to point out that the Regulations for Trial by
2 Military Commission specifically do define this role. It's
3 definition of an assistant defense counsel, and
4 R.T.M.C...1.a.5 and R.T.M.C. 1.b.1 specifically identify a DoD
5 civilian performing duties with the MCD0 as an assistant
6 defense counsel. This isn't an undefined position.

7 Your Honor, what the government seems to be arguing
8 is that the accused can force his counsel to be ineffective.
9 Now, the accused does have a right to ineffective
10 representation. That's going pro se. But what -- the
11 government's position is that the accused can waive everybody
12 but Major Seeger. That's not the law, Your Honor. The
13 accused can waive his right to counsel. That's a waiver of
14 effective representation.

15 The accused can't elect counsel -- to be represented
16 by counsel and then force his team to be ineffective. That's
17 why the ABA -- that's why the ABA provides -- the
18 ABA Guidelines that Mr. Connell provided you and the case law
19 requires a showing of good cause.

20 The analysis for -- the analysis that you followed to
21 make a determination that he couldn't just waive
22 Ms. Bormann -- because if that were true, then you would
23 have -- you would have waived her in February. You required

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1 there to be a showing of good cause.

2 MJ [COL POHL]: But the context of that, with some other
3 pleadings, was not a -- wasn't there also a component of he
4 wanted a substitute? Is the analysis the same? The
5 government seems to say there's two -- there's an analysis of
6 whether it's good cause. If you have good cause, you get a
7 substitute. If you don't have good cause, you don't get a
8 substitute. And the context we had at that point was he had
9 indicated -- and I don't know -- and I don't want to go into
10 too much depth because some of it was ex parte, but bottom
11 line is it was a substitute issue.

12 CDC [BG BAKER]: Let's -- I'm going to come back to that.

13 MJ [COL POHL]: So let's ----

14 CDC [BG BAKER]: There's a key event that occurs, and 505
15 points this out. Once we form an attorney-client
16 relationship, you need good cause. Because when you haven't
17 formed a good -- when you have not formed an attorney-client
18 relationship, if you look at 505, 505...(A) says they can be
19 excused without cause.

20 Once you formed the attorney-client relationship,
21 there's this permission-asking process, and ----

22 MJ [COL POHL]: That doesn't require ----

23 CDC [BG BAKER]: Your Honor, the accused can't ----

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1 MJ [COL POHL]: General Baker, with all due respect, you
2 keep saying that but you keep ignoring the other provision
3 that says "upon the request of the accused." But the good
4 cause is another paragraph. So there's three options in the
5 rule and it's upon -- it's may, I got you, it's may, "may be
6 excused upon the request of the accused, application for
7 withdrawal by counsel, or for good cause shown," there's three
8 options in the rule.

9 CDC [BG BAKER]: Yes, sir, if that reading of the rule
10 were correct, the case law that you cited ----

11 MJ [COL POHL]: If that reading of the rule is correct
12 that I just read to you.

13 CDC [BG BAKER]: That you don't need good cause that the
14 accused can say you're gone without cause whatsoever.

15 MJ [COL POHL]: What I'm saying is this: If you are going
16 to rely on the rules authority, you have to look at the entire
17 rule.

18 CDC [BG BAKER]: Yes, sir. Which is why -- let's look at
19 the entire. You have to read 505. You have to read
20 505...(A), Your Honor, 505...(A) says without cause. So in
21 5...(A), no attorney relationship, no cause. You then pop
22 down to 5...(B), now we formed an attorney-client
23 relationship. You need cause. There's a permission-asking

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1 process, but you can't just -- you can't just fire them for no
2 reason whatsoever.

3 MJ [COL POHL]: Okay. Go ahead.

4 CDC [BG BAKER]: Your Honor, it's -- the other thing that
5 I can't quite figure out from the government's argument is
6 which cake do they want? Because Mr. Ryan keeps talking about
7 it's not getting better, which seems to suggest now we're
8 going in -- maybe there's a reason to change, but we're not
9 there.

10 MJ [COL POHL]: Well, that ----

11 CDC [BG BAKER]: And, sir, you have an incredibly
12 important role in this process, so when the -- when any
13 defense team asks for any item in order to be effective, first
14 they ask me. If I get it, I provide it to them. If I can't
15 get it, then they go to the convening authority. And if the
16 convening authority doesn't provide it or says no or whatever,
17 they come to you. And they come to you and you make a
18 decision, the defense needs this tool to provide effective
19 representation. So you are the final arbiter of effective
20 representation.

21 You've made a -- the government wants you to go
22 down -- wants to create a third category where the accused can
23 just decide I want ineffective representation and force the

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1 attorneys, whoever it is that are sitting at the table,
2 whichever ones he decides or she decides that they want, to
3 provide ineffective representation in violation -- I mean, in
4 violation of their oath as counsel, in violation of their bar
5 regulation.

6 MJ [COL POHL]: If counsel aren't qualified to try the
7 case, then they have an opportunity to withdraw as counsel,
8 right?

9 CDC [BG BAKER]: I ----

10 MJ [COL POHL]: I mean, you can't take a case that you
11 can't do, but if they're sitting at the table, they're ----

12 CDC [BG BAKER]: Your Honor, under the government's
13 theory, they -- absolutely they would have to, because the
14 accused could say I don't want Mr. Jones. And so are we going
15 to be in this perpetual do loop where the accused says I don't
16 want to be represented by Mr. Smith?

17 MJ [COL POHL]: Right.

18 CDC [BG BAKER]: And so we get into ----

19 MJ [COL POHL]: It's an informed -- as I discussed with
20 Mr. Ryan, he makes an informed choice of how this will impact
21 on the team.

22 CDC [BG BAKER]: So the team remains minus Mr. Smith.

23 MJ [COL POHL]: Okay.

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1 CDC [BG BAKER]: And in the view of the lead counsel,
2 they're ineffective. Now you have the lead counsel -- now
3 they're moving to withdraw because they can't provide
4 effective representation. That's not what the law is.

5 The law is that the accused can 100 percent choose
6 ineffective representation. The accused can't choose
7 ineffective representation with a counsel, with the assistance
8 of counsel.

9 MJ [COL POHL]: Let me ask you this, something you
10 mentioned earlier about the good cause thing: Does it cause
11 you pause that currently the counsel in this case don't even
12 sit at the same table with the accused because he doesn't want
13 them there?

14 CDC [BG BAKER]: Yes, sir. Yes, sir. It absolutely does.
15 And that's why we are working -- that's why, Your Honor, this
16 is -- you know, in this capital case or frankly in any capital
17 case, the relationship between the accused and his attorneys,
18 as somebody talked about today, ebbs and flows. But you have
19 made -- again, I'm not going to talk about my decision. I'm
20 talking about your decision.

21 MJ [COL POHL]: Yeah, I ----

22 CDC [BG BAKER]: You've made the decision that they don't
23 have cause.

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1 MJ [COL POHL]: At the time I made that decision.

2 CDC [BG BAKER]: Yes, sir. Again, you may revisit that
3 decision. But it absolutely concerns me that the only lawyer
4 that he's talking to right now is me, and I'm -- as you've
5 pointed out many times, I'm not a party, I don't represent
6 anybody.

7 But as long as we have the determination that there's
8 no cause to release them, then I am going to work to -- just
9 like I've told Mr. Bin'Attash a number of times, I'm going to
10 do all I can to fix this.

11 MJ [COL POHL]: So you're back to the -- in my box
12 analysis, the two-box analysis?

13 CDC [BG BAKER]: Yes, sir, 100 -- I am 100 percent in two
14 boxes: Either pro se or elect to be represented by counsel.

15 MJ [COL POHL]: And as far as Ms. Bormann is concerned,
16 the only way he can excuse Ms. Bormann is not individually.
17 The government seems to say he can waive her, but as part of
18 this box number two, the pro se box. And then we'll discuss
19 stand-by counsel, separate issue. Is that ----

20 CDC [BG BAKER]: The only way he can excuse Ms. Bormann,
21 Your Honor, is to establish good cause. If he doesn't have
22 good cause, then if he doesn't want to -- then if he doesn't
23 want to be represented by Ms. Bormann, then, yes, he -- then

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1 he -- if he doesn't want to take the appointed counsel with
2 which he has been provided, then the accused goes pro se.

3 MJ [COL POHL]: Those are his two options.

4 CDC [BG BAKER]: Yes, sir, just like it is in federal
5 court, just like it is in state court. In all of those
6 jurisdictions, Your Honor, the judge is the final arbiter.

7 MJ [COL POHL]: Oh, I -- I know that.

8 Let me ask you this, same question I asked Mr. Ryan:
9 What's the way ahead today?

10 CDC [BG BAKER]: We're at all-stop, sir. I mean, I don't
11 see how the government can have their cake and eat it too.
12 Either the accused can make a knowing waiver or he can't. And
13 if he can't -- I mean, and if he can, then he cannot be forced
14 to be represented by counsel he doesn't want. I mean, I think
15 we are at 100 percent all-stop until you make a decision.

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

17 CDC [BG BAKER]: No, sir.

18 MJ [COL POHL]: Thank you very much.

19 Ms. Bormann, do you wish to add anything, or
20 Mr. Perry?

21 DC [MR. PERRY]: Your Honor, I'm going to try to keep my
22 remarks brief and to the point raised by the government. When
23 an accused elects counsel, which all the accused in this case

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1 have done thus far in this current iteration of the case, they
2 do not elect counsel of their choice. They don't have the
3 right to pick and choose their counsel as they see fit.

4 That's what the government is creating. They're
5 asking Your Honor to create something that has never been done
6 before in American jurisprudence. There's a bevy of case law
7 that's been cited in the pleadings that they have the right to
8 counsel. They also have a right under Farretta to proceed pro
9 se if that's what they wish to do, but they do not have a
10 right to counsel of their choice. They don't get to pick and
11 choose. Bostick, the D.C. Circuit case, makes this perfectly
12 clear. When the defendant makes that attempt to pick and
13 choose, in that instance there were three attorneys on the
14 case, the defendant wanted to get rid of one but keep the
15 other two in the midst of the trial, the judge went through a
16 good cause analysis, because that's the only analysis to do.
17 And finding no good cause ----

18 MJ [COL POHL]: Is the same -- would the same analysis in
19 Bostick -- they were four months into the trial itself. Would
20 the same analysis apply at this stage?

21 DC [MR. PERRY]: Yes, absolutely, because we are years
22 into this, and Mr. Schwartz, in particular, is years into
23 representing Mr. Bin'Attash.

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1 MJ [COL POHL]: No, I understand that, but with the good
2 cause analysis could be different depending on at what point
3 in time it comes up, correct? Or the good cause analysis
4 makes -- by that I mean is, Bostick, you're in the middle of a
5 four months -- I don't know how long the trial is. You're
6 four months into a trial itself and he says, I want to fire
7 somebody, and the impact on the team in front of the trial,
8 the impact in front of the jurors is one. And then now we're
9 still -- although we are four years into this case, we are not
10 four months into a trial or four months from a trial. So is
11 he -- are you saying the good cause analysis is unrelated
12 where you are at in the proceedings?

13 DC [MR. PERRY]: Good cause analysis is always employed.
14 What are those exact factors at the time changes, obviously.
15 The complexity of the cases are different between Bostick and
16 this case. This case is much more complex than Bostick. But
17 the analysis is always the same. The legal principle is
18 always the same applied in that situation because counsel --
19 or because the accused do not get to pick counsel of their
20 choice.

21 As General Baker said, they have two choices in this
22 system, and in any system: To proceed with appointed counsel,
23 and if so, they get the counsel that is appointed, or to waive

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1 counsel completely and proceed pro se. There is no third
2 option. Your Honor would be creating a third option that has
3 never existed before, and with good reason, and that's why in
4 our pleadings we pointed out that that third option doesn't
5 exist for a variety of reasons, principally because, as the
6 Supreme Court has said time and time again, they have a right
7 to effective assistance of counsel. They do not have a right
8 to ineffective assistance of counsel. They have a right to be
9 ineffective representing themselves.

10 In other words, if they elect to proceed pro se and
11 things don't go well for them, they can't cry to an appellate
12 court down the road, I was ineffective, I didn't have an
13 attorney representing me, I didn't know what I was doing. Of
14 course not, because you elected to waive your right to
15 effective representation when you elected to waive counsel.

16 But there is not a third option, and so, Your Honor,
17 if you were to go down that road of creating a third option
18 and allow the defendants in this case to waive counsel without
19 good cause, meaning no substitution is coming, they're just
20 waived and gone, that renders the rest of the team
21 ineffective. They cannot function. And that is what is
22 presented in our pleadings, and that's what General Baker was
23 talking about.

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1 I could not be an effective representative of
2 Mr. Bin'Attash without Mr. Schwartz, without Ms. Bormann.
3 Major Seeger could not be an effective representative of
4 Mr. Bin'Attash if Mr. Schwartz is waived, if Ms. Bormann is
5 waived, if I am waived. And he will -- I would like Major
6 Seeger to address that point after I am done with my remarks.

7 MJ [COL POHL]: Well, no, it's one counsel per issue. I'm
8 not going to listen to everybody on every issue. So if you --
9 if you understand what Major Seeger's position is, you're
10 representing Mr. Bin'Attash on this issue, and I don't have
11 multiple counsel discuss from the same team, from -- same
12 thing with the government. I know it's the first time you've
13 appeared before me, Mr. Perry; I don't know what your practice
14 is, but my practice is one counsel per issue.

15 DC [MR. PERRY]: That was in response to the government's
16 point that he can waive everybody but Major Seeger, and I
17 think Major Seeger can best address how that would play out if
18 that scenario was ever gone down that road.

19 Counsel for Mr. al Baluchi laid out, I think it's
20 380AA, way back in 2015 the difference in the allocation of
21 choices between the defense, the defendant and the counsel.
22 So once counsel is elected, all of those strategic tactical
23 choices: How best to constitute the team, how many attorneys

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1 are necessary for the team, what mitigation specialist to
2 employee, what experts to seek. All of those are choices made
3 by the lead counsel and -- in our system, with the assistance
4 of detailing by the Chief Defense Counsel.

5 As General Baker said, Your Honor has an important
6 role to play in that as well in the sense that we seek our
7 resources, we go to the convening authority. If we don't get
8 relief there, we file motions before Your Honor. The
9 convening authority has deemed it necessary and a requirement
10 in order to provide effective representation that civilian
11 counsel be appointed and funded and provided to these teams.

12 They're necessary in order to provide effective
13 representation which is required ----

14 MJ [COL POHL]: You're not really arguing to me that we
15 should go to the convening authority for the source of whether
16 or not you're effective or not? You're not really arguing
17 that to me, I hope.

18 DC [MR. PERRY]: The convening authority is not appointing
19 and funding people ----

20 MJ [COL POHL]: No, the convening authority. You -- the
21 CDC requests resources, convening authority gives them. That
22 does not necessarily -- I understand why they're there, but
23 what I'm saying is you fail to see -- you seem to be saying

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1 that the convening authority made a decision, to be effective
2 you have to do A, B, C and D.

3 DC [MR. PERRY]: Because of the presentation of the
4 parties and ----

5 MJ [COL POHL]: You said you made ----

6 DC [MR. PERRY]: ---- to the convening authority that they
7 were necessary.

8 MJ [COL POHL]: But the bottom line, the effectiveness is
9 determined by the defense counsel, not by an external agency
10 like that.

11 DC [MR. PERRY]: Our legal duty and ethical obligation is
12 to provide effective representation.

13 MJ [COL POHL]: I got it. I got it. When you bring the
14 convening authority in and somehow he's voting on your
15 effectiveness on this, I'm not sure that's -- because you
16 certainly don't want him to get into the position of saying,
17 well, I think you would be effective with two counsel, either.
18 What I'm saying is I don't think he has much of a vote in
19 this.

20 DC [MR. PERRY]: The convening authority.

21 MJ [COL POHL]: The convening authority.

22 DC [MR. PERRY]: No, we, the lead counsel and the defense
23 counsel, make decisions about what does it take to be

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1 effective in this case given this amount of discovery, given
2 the complexities of the case and given the nature of the
3 circumstances of where we are at now, and it is their
4 estimation that this team as it's currently constituted is
5 required.

6 So General Baker also talked about the ebb and flow
7 of the attorney-client relationship. Obviously, I'm not at
8 counsel table right now, I'm at the podium. I'm sitting at
9 the back right now. But that could change. Just in February,
10 Ms. Bormann was up at the counsel table. Mr. Bin'Attash had
11 asked her to read, you know, and present before Your Honor at
12 the February hearing.

13 So the characterization by the government that this
14 is coming to a head or it's somehow beyond hope, I don't -- we
15 don't agree with that, and General Baker doesn't agree with
16 that.

17 MJ [COL POHL]: Okay. So -- well, we can always have
18 hope, but we have got to deal with the reality of the facts on
19 the ground. So where we're at right now, this issue has been
20 festering. I believe it first may have come up in October.
21 It's gone back and forth. There's been recent events both in
22 this courtroom and other things that have caused concern.

23 DC [MR. PERRY]: Right. And I would agree, Your Honor,

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1 that it's time ----

2 MJ [COL POHL]: I mean, are we back to advising
3 Mr. Bin'Attash again of his counsel rights and then he makes
4 another decision? I mean, because as you can tell from his
5 questions earlier -- and I certainly don't want to get into a
6 position between any accused and his defense counsel, and I'm
7 very cautious of doing that, and that's why I try to avoid
8 unnecessary colloquies with the accused, and as I've told them
9 before, is that -- sometimes when they want to talk, is they
10 talk through their lawyers, because I don't want to get in
11 between them, and it's not appropriate for them to do that.

12 But be that as it may -- and he had a question in the
13 middle of Mr. Ryan's presentation, are what are my rights,
14 what are the boxes that I think he was asking about. Are we
15 back to that point, is that he's told fundamentally, your two
16 choices are accept the defense team as presently constituted
17 or represent yourself, understanding the second option is --
18 requires more than just simply that one question. I've got
19 that. But do you believe those are his only two choices?

20 DC [MR. PERRY]: Absolutely. And I think Your Honor is
21 correct, if anything has come to a head, it's that this 380
22 series needs to be resolved and we need to finally have a
23 definitive statement about what are the roles between the

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1 accused and their counsel, what decisions they are allowed to
2 make and they alone are allowed to make.

3 MJ [COL POHL]: Well, the initial decision -- what we have
4 right now on the record is that Mr. Bin'Attash says I don't
5 want Ms. Bormann, I don't want Mr. Schwartz, I'm not sure
6 about Major Seeger, and quite frankly, I don't think he's
7 really sure about you either. And part of that appears to be
8 based on his relationship with Ms. Schwartz -- or excuse me,
9 Ms. Bormann, everything flowing from there. I mean, you're
10 right, this needs to be resolved.

11 But I fail to see how it can be resolved unless he
12 has given -- he is given what he knows his options are, and
13 the government -- your position is, it's awkward because I'm
14 getting in the position of not giving not legal advice, but
15 discussing with the accused issues that are normally discussed
16 between him and his defense counsel. Is that where we're at?

17 DC [MR. PERRY]: Where we're at, Your Honor, and I think
18 it would be entirely appropriate is for you to yet again
19 articulate to the accused what their rights are to counsel and
20 their rights to proceed pro se, those two choices. But that
21 is it. Not this third option that the government is asking
22 you to create. It would be inappropriate for you to advise
23 him that they have that right and ability because that right

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1 and ability does not exist. It would be a fundamental error
2 of law that would be a complete creation by this court.

3 MJ [COL POHL]: Most of the case law in this area,
4 Farretta, all of the prodigy, deal with defense team or pro
5 se. Other than Bostick, do you have any other -- let me go
6 back to it.

7 Was Bostick an indigent defendant?

8 DC [MR. PERRY]: I'd have to take a look. I don't recall.
9 I believe he was.

10 MJ [COL POHL]: Okay. But, see, most of the case law, at
11 least what I reviewed and looked at what you guys supplied,
12 most of these deal with selection of counsel that are retained
13 and he said I want this guy and the judge didn't give him the
14 guy he wanted, but it wasn't ----

15 DC [MR. PERRY]: Right.

16 MJ [COL POHL]: ---- it was retained counsel.

17 DC [MR. PERRY]: We're in the realm of appointed counsel.
18 And when you have appointed counsel, you do not have counsel
19 of your choice, correct.

20 MJ [COL POHL]: But at least, yeah, I couldn't find
21 anything military or ----

22 DC [MR. PERRY]: Just for the same reason why you won't
23 find any case law supporting the government's position of this

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1 third option. Because it doesn't happen. It doesn't exist.

2 If -- when these situations occur, in my experience
3 in federal court, it's not uncommon that a defendant has a
4 team of attorneys and he has a disagreement with one but not
5 the other or the third or the fourth and raises those concerns
6 to the judge, the judge says, well, Mr. Smith, because you
7 elected counsel, you do not have counsel of your choice. You
8 have counsel that has been provided to you.

9 MJ [COL POHL]: But wouldn't there be case law on that
10 scenario, then? I mean, I understand what you're saying, but
11 I mean, if the judge says, I'm not letting you excuse
12 counsel ----

13 DC [MR. PERRY]: Right. Not letting you pick and choose
14 which of the four ----

15 MJ [COL POHL]: The lack of legal authority I'm not sure I
16 ever give that much weight because I don't know what it means.
17 Your theory is the government can't find anything to support
18 its position because we've never had this happen. Your
19 position is when it does happen, the judges always rule that
20 there is no third option.

21 DC [MR. PERRY]: Correct.

22 MJ [COL POHL]: Okay. If the judges always rule there is
23 no third option, nobody's ever appealed that issue and

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1 therefore there's no reported decision on it.

2 DC [MR. PERRY]: Defendants have probably routinely tried
3 to say I want that attorney but not this one, and I'll keep
4 that -- that specialist, but not that one, and ----

5 MJ [COL POHL]: We're only talking attorneys here. Don't
6 move it beyond the attorney issue.

7 DC [MR. PERRY]: Right. But even if we just keep it to
8 attorneys, every time a defendant has done that in a federal
9 or state court, that judge has said no, you do not have that
10 choice. You have the choice to proceed pro se or you have the
11 choice to proceed with appointed counsel ----

12 MJ [COL POHL]: Other than anecdotal evidence ----

13 DC [MR. PERRY]: ---- and that's the -- that's it.

14 MJ [COL POHL]: Other than anecdotal evidence based on
15 your experience, do you have any reported case that says that?

16 DC [MR. PERRY]: All of the decisions that Your Honor sees
17 in the pleadings are all instances where the individual was
18 complaining that he wanted more counsel and was denied
19 counsel, or it was instances where an individual wanted to go
20 pro se and was not allowed to go pro se. That's Farretta.

21 MJ [COL POHL]: Okay.

22 DC [MR. PERRY]: The Supreme Court stopped that.

23 MJ [COL POHL]: Okay. So you're comfortable going forward

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1 with a client who won't talk to any of his lawyers.

2 DC [MR. PERRY]: Well, I'm not -- I won't agree that he
3 won't talk to all his lawyers ----

4 MJ [COL POHL]: That's what he just told me today.

5 DC [MR. PERRY]: ---- for the rest of these days, no.

6 MJ [COL POHL]: I know, but he told me today that since
7 February he has had no contact with his lawyers and ----

8 DC [MR. PERRY]: We are ----

9 MJ [COL POHL]: You keep telling me we have got to stay
10 together to effectively represent him, and he won't even talk
11 to you.

12 DC [MR. PERRY]: What I will say is our defense team is
13 committed to representing Mr. Bin'Attash, and he has met and
14 spoken with Ms. Bormann just as late as February. This is not
15 a situation where we have no communication whatsoever.

16 Have I met personally with Mr. Bin'Attash yet? No, I
17 have not.

18 MJ [COL POHL]: Okay. I want to -- and, again, I don't
19 want to get into the inner workings of the defense team, okay,
20 and I just got that from what he just told me today and he
21 said he has all of these complaints about the contact. And we
22 went through this. You weren't here. A variation of this
23 came up when we were discussing the good cause and the -- when

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1 this whole thing just started. Okay. But just -- and you say
2 you have hope and General Baker has hopes that things will
3 improve. Okay. That may happen. It may not happen.

4 But it's your position that currently right now, that
5 say assuming Mr. Bin'Attash wants to be represented by
6 counsel, the current defense team can effectively represent
7 him under the current relationship with him?

8 DC [MR. PERRY]: Yes.

9 MJ [COL POHL]: Okay.

10 DC [MR. PERRY]: We are providing effective representation
11 of Mr. Bin'Attash right now.

12 MJ [COL POHL]: Okay. Now, let me ask you the same ----

13 DC [MR. PERRY]: But to eliminate one of us would ----

14 MJ [COL POHL]: I know. I know.

15 DC [MR. PERRY]: What was your question, Your Honor?

16 Sorry.

17 MJ [COL POHL]: Now, General Baker, the current status
18 is -- the current status is obviously that he's represented by
19 four attorneys, and we're talking on this issue only about
20 Mr. Schwartz, okay? Government says that we can take it
21 under -- I can take it under advisement and decide it in due
22 course, and until then the status quo remains. General Baker
23 seems to believe that, no, you've got to decide right now.

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1 DC [MR. PERRY]: This needs to be resolved. This cannot
2 be hanging over the rest of these hearings. This question of
3 this third option possibly being available, that needs to be
4 decided by Your Honor now and rejected. And if that then
5 requires a re-advisement of the accused about what their
6 rights to counsel are and their rights to proceed pro se, so
7 be it. But it cannot hang out in the ether. It needs to be
8 decided.

9 MJ [COL POHL]: Okay. Thank you. Anything further?

10 DC [MR. PERRY]: No, Your Honor. Thank you very much.

11 MJ [COL POHL]: Thank you.

12 Mr. Bin'Attash, in May of 2012 and I believe also
13 again last October or December, I advised you of your rights
14 to counsel. Do you remember me telling you that?

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

16 MJ [COL POHL]: Yes. Okay. And at this hearing I'm going
17 to go over them with you again. But you've listened to the
18 arguments here -- and, again, let me reiterate something I
19 said earlier.

20 These are the positions of the lawyers. They're not
21 necessarily what's going to happen until I decide. Do you
22 understand that?

23 ACC [MR. BIN'ATTASH]: [Speaking in English] Keep going.

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1 MJ [COL POHL]: Okay. Both sides agree that you have a
2 right to your detailed counsel, and that's, this case, all
3 four of them. Do you understand that?

4 ACC [MR. BIN'ATTASH]: [Interpretation resumed.] By both
5 parties, do you mean the government and the defense team?

6 MJ [COL POHL]: Yes.

7 ACC [MR. BIN'ATTASH]: Or is it the attorneys and General
8 Baker?

9 MJ [COL POHL]: I believe General Baker takes it too --
10 agrees that also you have a right -- well, let's forget what
11 they say. I'm going to tell you what your rights are.

12 You have a right to be represented by your detailed
13 team. That's all four of them. You also have a right, as we
14 discussed earlier briefly, but we will go into more detail, to
15 represent yourself. That's with no lawyers. Now, there's --
16 I'm giving you a very short version. There's a longer version
17 of that I'd have to go over with you. Okay. Do you
18 understand that?

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

20 MJ [COL POHL]: Okay. Now, what we are discussing is
21 whether or not you can excuse Mr. Schwartz, but you would
22 be -- you would have to keep at a minimum, as suggested
23 earlier, Ms. Bormann and Major Seeger. Do you understand

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1 that?

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

3 MJ [COL POHL]: Okay. Do you have any questions -- and I
4 know this is a complicated legal issue, but do you have any
5 questions of me? As we discussed earlier, is that you've
6 given stuff directly to me, and I've said that generally goes
7 through the attorneys. But because of this particular issue,
8 that you and I might have to discuss this, do you have any
9 questions of what was discussed today?

10 ACC [MR. BIN'ATTASH]: In order to understand -- or I
11 understood what you said, that lawyers Cheryl and Schwartz are
12 going to remain on the case.

13 [Speaking in English] Seeger not Schwartz.

14 [Interpretation resumed.] Seeger, not Schwartz. Is
15 that correct?

16 MJ [COL POHL]: Yes.

17 ACC [MR. BIN'ATTASH]: That keeps us in the same problem,
18 and we didn't really solve it. We have the right at the stage
19 in front of the wall that we cannot go past. I do understand
20 the court's opinion that I have to present a valid cause.

21 [Speaking in English] A good cause.

22 [Interpretation resumed.] A good cause.

23 I tried to solve the problem many times since last

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1 October, but the attorneys don't seem that they want to solve
2 the problem. There is no way I can sit with the attorney at
3 the same table or have a meeting with her because I have used
4 up all the means.

5 But because I don't want to cause any trouble for the
6 court based on the decisions they have taken already -- I
7 never wanted to cause any issues in the courtroom, but there
8 was no other choices for me. I intended not to meet with her,
9 not to talk with her, so how am I expected to do that now?

10 I ask that the judge reconsider his decision on
11 keeping my learned counsel, who is an experienced lawyer in
12 capital cases, on my case. Had I known of any other solutions
13 to the problem we are currently having, I would have done -- I
14 would have taken that.

15 I can take the responsibility that in a capital case,
16 I can proceed without the learned counsel until another lawyer
17 is appointed, and there would be no delay in proceeding the
18 case.

19 MJ [COL POHL]: But do you understand, Mr. Bin'Attash, is
20 that if you were to -- let's talk about Mr. Schwartz more so
21 than Ms. Bormann.

22 If I were to agree with you to release Mr. Schwartz,
23 you would lose his five years of experience on this case,

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1 approximately five years, you lose all of the work he's done
2 in this case, you lose all of the -- all of the benefit of his
3 advice and the working on your case on your behalf. You lose
4 all of that, and if you did choose to do that -- and, again,
5 we're not at that point yet and I'll go over this in some more
6 detail if I decide that you can excuse him -- you would
7 also -- I would not -- you would do it without a replacement.
8 Now, if General Baker wants to give a replacement. That's up
9 to him.

10 But what you're asking me to do is excuse him without
11 replacement, and that would mean that you would lose him and
12 you may not get a replacement, the team would have to proceed
13 without him. Do you understand that?

14 ACC [MR. BIN'ATTASH]: Yes, I do. But for the substitute,
15 we can talk about that issue by itself.

16 MJ [COL POHL]: No, we can't talk about it by itself
17 because what would happen is this: If Mr. Schwartz is -- if
18 you choose to excuse Mr. Schwartz for no good cause -- and
19 you've not shown good cause, you just say I want him gone, and
20 if the government's position prevails that you don't need to
21 show good cause for that particular counsel, the other thing
22 you will be told is that we're not going to stop for six
23 months for somebody else to catch up.

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1 We will continue with the case just with the same
2 plan of action as we would have done with Mr. Schwartz. That
3 means, for example, this issue that he was going to argue
4 about the -- about the environmental problems down here,
5 AE 426, the fact that he's no longer here doesn't mean I'm
6 going to give your team a delay to go get somebody else spun
7 up on it. We're just going to go right forward. Now,
8 realistically, could we adjust this week's schedule for a
9 small accommodation, yes. But that's what we're talking
10 about. We're not talking about any other delay of any other
11 session or anything else.

12 So if you release Mr. Schwartz, you know, there will
13 be no extra consideration to delay anything because you no
14 longer have Mr. Schwartz because that's a choice you're
15 making. Do you understand that?

16 ACC [MR. BIN'ATTASH]: I don't have a problem with that.
17 I will not request any delay in order to substitute
18 Mr. Schwartz, even if I have to lose that discussion about the
19 motions. We will let the court commissions continue, and I
20 don't have a problem with that.

21 MJ [COL POHL]: But you understand ----

22 ACC [MR. BIN'ATTASH]: My question is: Are we saying that
23 for that position of a substitute lawyer, there will be no

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1 appointees ever in the future? I don't mind waiting for six
2 months or a year. I don't have a problem with that.

3 MJ [COL POHL]: Okay. Mr. Bin'Attash, let me clarify your
4 request, because it's going to make a difference.

5 Are you asking that Mr. Schwartz be excused without a
6 substitute, or are you asking for Mr. Schwartz to be excused
7 with a substitute, whenever the substitute can be provided?

8 ACC [MR. BIN'ATTASH]: It's possible to relieve him from
9 the case and a substitute can be appointed down the road, in
10 the future. Even if it means a delay, there is no problem.

11 The harm I'm enduring with the presence of the
12 lawyers is greater than the harm I may endure without.

13 MJ [COL POHL]: Okay. Just so it's clear: You are asking
14 me to excuse Mr. Schwartz with the understanding that there
15 would be a substitute provided sometime in the future, whether
16 it's six months or six days or whatever. Is that what you're
17 asking me?

18 ACC [MR. BIN'ATTASH]: Would you please repeat?

19 MJ [COL POHL]: Okay. Are you asking that Mr. Schwartz be
20 excused with the belief that there will be a substitute
21 provided eventually for Mr. Schwartz?

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

23 MJ [COL POHL]: Okay. So you're not just -- the other

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1 side of that coin, so you're not asking me to excuse
2 Mr. Schwartz with the understanding that there will be no
3 replacement for him?

4 ACC [MR. BIN'ATTASH]: If this would be my last resort,
5 then I will take it. But as long as there is a position for
6 an additional lawyer on each and every one of the defense
7 teams, I would like to benefit from that in the future.

8 MJ [COL POHL]: So in essence what you're asking me is to
9 have Mr. Schwartz replaced by a different attorney?

10 ACC [MR. BIN'ATTASH]: If this is a possibility in the
11 future, then yes. I will not cause any delay of the
12 proceedings, even if that means that I stay without a capital
13 case lawyer and even if I lose all of the motions presented.

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

15 Mr. Ryan, does that change the analysis?

16 TC [MR. RYAN]: As to going forward, sir?

17 MJ [COL POHL]: No.

18 TC [MR. RYAN]: His answer?

19 MJ [COL POHL]: If Mr. Bin'Attash is asking not for
20 excusal; he's asking for replacement, is the way I've
21 interpreted what he said. And we talked earlier about the
22 difference between the two. Does this change the analysis?

23 TC [MR. RYAN]: Well, I want to make sure I'm clear,

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1 Judge. Are we talking about the answers he gave in regards
2 to ----

3 MJ [COL POHL]: Yeah. What I have clarified is did he
4 believe -- well, I think he said it a number of times, that he
5 expects a replacement, so I think we're not talking about
6 excusal without replacement. He's talking about excusal with
7 replacement.

8 Now, when we discussed this earlier with Ms. Bormann,
9 we talked about the requirement for good cause, correct?

10 TC [MR. RYAN]: We talked about good cause but only in the
11 course, or at least the government's position is only in the
12 course of the analysis of if he seeks Ms. Bormann -- if he
13 seeks the excusal of learned counsel with the desire to
14 replace.

15 MJ [COL POHL]: Right. Okay. Now ----

16 TC [MR. RYAN]: And I don't think he was addressed in that
17 regard.

18 MJ [COL POHL]: No, but what I'm saying is what I took
19 from him, and perhaps you took it differently, that although
20 he doesn't want a delay, he indicates he expects if there's a
21 member of a defense team available, that Mr. Schwartz would be
22 excused with replacement. And so we're talking about a
23 substitute analysis.

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1 And my question is: Does that change -- are we back
2 to a good cause analysis where we were at before, or are we
3 somewhere else?

4 TC [MR. RYAN]: No, sir. I think the totality of his
5 answers, and there were a great deal of them ----

6 MJ [COL POHL]: Uh-huh.

7 TC [MR. RYAN]: ---- indicate that he is prepared to waive
8 and understands the ramifications, and his hopes do not
9 override his desire to waive. Now, taking them all in
10 totality of the circumstances, that's what I heard.

11 MJ [COL POHL]: Let's assume for the sake of this
12 discussion that he -- the request is contingent upon
13 Mr. Schwartz being excused and being replaced. If I take his
14 answers to mean that, does that require good cause?

15 TC [MR. RYAN]: If it's contingent on the end, that being
16 end, replacement, then we do not see that as a valid waiver.

17 MJ [COL POHL]: Okay.

18 TC [MR. RYAN]: However ----

19 MJ [COL POHL]: We're back to good cause, then?

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

21 MJ [COL POHL]: Okay. Go ahead.

22 TC [MR. RYAN]: However, to the extent Your Honor is
23 unsure, I think that would be something an appellate court

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1 would expect you would explore until such time as it was clear
2 one way or another.

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

4 ACC [MR. BIN'ATTASH]: We still have the problem of the
5 capital case lawyer. We did not get out of this problem. And
6 I said I will take responsibility.

7 MJ [COL POHL]: Mr. Bin'Attash, we're going to break for
8 lunch and we're going to continue this discussion after lunch,
9 okay? But I want you to think about this because when we come
10 back, I need to have clear answers. This goes for both
11 Ms. Bormann and Mr. Schwartz, okay?

12 Do you want Ms. Bormann replaced with another learned
13 counsel, or do you want her to be excused with no learned
14 counsel replacement?

15 Do you want Mr. Schwartz ----

16 ACC [MR. BIN'ATTASH]: **[Speaking in English]** No, no, slow
17 down. Translation.

18 MJ [COL POHL]: I got it.

19 ACC [MR. BIN'ATTASH]: **[Speaking in English]** Keep going.

20 MJ [COL POHL]: Same question that you will answer for me
21 after lunch. Do you want Mr. Schwartz to be excused with
22 replacement, or do you want Mr. Schwartz to be excused without
23 replacement?

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1 ACC [MR. BIN'ATTASH]: [Interpretation resumed.] The
2 question is clear.

3 MJ [COL POHL]: Okay. I need to do some other stuff
4 anyway on this issue, so we're going to recess for lunch a
5 little earlier. We will reconvene at 1400 hours. Commission
6 is in recess.

7 [The R.M.C. 803 session recessed at 1124, 20 July 2016.]

8 [END OF PAGE]

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