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1 [The R.M.C. 803 session was called to order at 1403, 20 July
2 2016.]

3 MJ [COL POHL]: Commission is called to order. Trial
4 Counsel, any changes?

5 CP [BG MARTINS]: No, Your Honor.

6 MJ [COL POHL]: Defense, any changes? Apparently not.

7 Mr. Bin'Attash, let me make sure I phrase this
8 exactly how I want you to answer, okay? Are you requesting
9 that Mr. Schwartz be removed without replacement, or are you
10 requesting whether Mr. Schwartz be removed with replacement?

11 ACC [MR. BIN'ATTASH]: I request the removal of the
12 attorney Michael Schwartz. I would like a replacement, but if
13 the replacement took time, I'm not in a hurry for that.

14 MJ [COL POHL]: Okay.

15 ACC [MR. BIN'ATTASH]: The important thing is that the
16 courts and the procedures continue and there would be no
17 delays.

18 MJ [COL POHL]: My same question, just to clarify, because
19 I reviewed the record of previous proceedings with regard to
20 Ms. Bormann, but I want to make sure I understand your current
21 position: Do you want Ms. Bormann to be removed with
22 replacement or be removed without replacement? Which is your
23 request?

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1 ACC [MR. BIN'ATTASH]: I request that would be removed
2 from the team. There would be a replacement, but I give the
3 same answer that I gave before. The proceedings would
4 continue as-is. Any motions that I lose or does not get
5 discussed, I take responsibility and I assume responsibility
6 for that.

7 MJ [COL POHL]: Okay. Thank you. Some of the things said
8 here may impact, arguably, potentially, on some of the other
9 defense teams. Do any of them want to be heard? Mr. Nevin?
10 You don't have to be. I just -- some of the remarks, I
11 think -- I want to make sure that your clients all understand
12 kind of where we're at.

13 LDC [MR. NEVIN]: [Microphone button not pushed; no
14 audio.]

15 MJ [COL POHL]: Sure. Sure.

16 Mr. Harrington, do you want to be heard on this?

17 LDC [MR. HARRINGTON]: In just a minute, Judge. Thanks.

18 MJ [COL POHL]: Mr. Connell? Same? Okay. Okay. Take
19 your time.

20 [Pause.]

21 LDC [MR. NEVIN]: Thanks for the opportunity, Your Honor,
22 but I don't have additional comments or any comments to make.

23 MJ [COL POHL]: Thank you.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Harrington.

2 LDC [MR. HARRINGTON]: Judge, I've read 505(d) many, many
3 times now, and I don't think it's the best crafted section
4 that we have. But General Baker mentioned this morning that
5 subsection (A) about defense counsel talks about before
6 there's an attorney-client relationship, counsel being removed
7 without cause, and then this subsection (B) talks in
8 subsection (ii) about good cause for the record, and obviously
9 the difficulty we struggle with today, I think, is in the
10 middle of subsection (B) and subsection (i).

11 But I think -- and when I listened to the argument
12 this morning, I think there wasn't enough emphasis placed on
13 the word "may" in your discretion, and had it been that
14 there's no cause required, that the word wouldn't say "may";
15 it would say shall excuse somebody if either the accused asked
16 for it, or if counsel asked to be relieved.

17 MJ [COL POHL]: But arguably, the "may" language applies
18 to good cause also.

19 LDC [MR. HARRINGTON]: Well, I don't know that it has to
20 be -- I mean, good cause is a ----

21 MJ [COL POHL]: I would -- let me explain.

22 LDC [MR. HARRINGTON]: Right.

23 MJ [COL POHL]: I don't want to go too far down that road

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 because I think, frankly, if the court found there was good
2 cause the "may" becomes awfully close to a "shall," if you
3 find good cause ----

4 LDC [MR. HARRINGTON]: I agree with that.

5 MJ [COL POHL]: ---- the way it's drafted. I tend to
6 agree with you it's not the best worded. I'm not sure which
7 is the best worded of these rules, but it's certainly ----

8 LDC [MR. HARRINGTON]: But focusing just on subsection (i)
9 when it has "may" in there, it seems to me that that means
10 that there has to be some reason, whether we call it cause or
11 not good cause, whatever we call it, that there has to be
12 reason and different factors may impact on that, how close you
13 are to trial, how long the person has been involved in the
14 case, what role they play on the defense and all of the rest
15 of those things would obviously enter into the court's
16 discretion, and the court could conceivably say no when either
17 counsel asks for the -- or the accused asks for it, so that
18 there's no mandatory part of that.

19 So I think that it's not quite the open way that
20 Mr. Ryan argued today that somebody -- a defendant walks in
21 and says I don't want this guy and that guy's gone. I don't
22 think that's it at all. I think that there has to be some
23 merit or some reason to it. And you have very, very broad

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 discretion, according to the way this is written, in how you
2 do it. That was the only point that I wanted to raise.

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

4 Mr. Connell?

5 LDC [MR. CONNELL]: Sir, our position aligns with
6 virtually all of the parties in some extent and disagrees with
7 them in all extent.

8 The problem with the government's waiver idea is that
9 it doesn't apply in the Sixth Amendment context for this
10 particular reason: The Sixth Amendment, unlike virtually
11 every other right that a defendant has, is a right -- is the
12 right to counsel also contains the right not to have counsel.
13 There was -- and it's different from most rights where you can
14 simply have a waiver of it and then it goes away.

15 In one of the military commission's questions which I
16 thought was insightful, the commission asked the government,
17 are you saying this is like a sort of mini Farretta situation,
18 and the fact that Farretta provides a right not to be
19 represented by counsel as well as Gideon providing a right to
20 be represented by counsel, means that the third category that
21 the government is -- seems to be angling for of you could just
22 simply waive some counsel and that would be fine doesn't
23 exist.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 There are really only two boxes here, and the
2 significance of that is the -- if there is a right not to be
3 represented by some particular counsel, then that is
4 Mr. Bin'Attash's right under this sort of mini Farretta
5 analysis. If on the other hand there is no right, then it's a
6 rule-based analysis, and the military commission constructs
7 the Rule 505, Rule for Military Commission 505, as best it
8 can.

9 But the idea that the government can come up here and
10 analyze the situation as it's gotten very bad, there's almost
11 no hope, it's coming to a head, we're at a crisis point, but
12 at the same time it could take the position that, well -- and
13 all of that can be solved by a simple waiver is not consistent
14 with the unusual binary nature of the Sixth Amendment, which
15 has both a right to counsel and a right not to have counsel.

16 MJ [COL POHL]: Did you -- I know this wasn't your motion,
17 but did you read the government's pleading?

18 LDC [MR. CONNELL]: I did.

19 MJ [COL POHL]: Okay. And if I am misstating this, I'm
20 sure Mr. Ryan will correct me, but there appears to be at
21 least some argument about waiver of -- when you talk about
22 waiver of learned counsel, in that the cases that they rely on
23 for that proposition really are all pro se cases.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: In fact, most of these waiver cases, the
3 choice is pro se or not pro se.

4 LDC [MR. CONNELL]: Right.

5 MJ [COL POHL]: And perhaps I misunderstood him, but I
6 thought he said that the accused could waive learned counsel,
7 as long as it's a knowing waiver, without good cause.

8 LDC [MR. CONNELL]: Right. And I don't think that's -- I
9 don't think that's accurate.

10 MJ [COL POHL]: Perhaps I misunderstood him, but I thought
11 that that's what he said.

12 LDC [MR. CONNELL]: And I understand why the government is
13 doing it. I'm not blaming them for it. They're trying to
14 create a very careful category where Mr. Bin'Attash could
15 basically eviscerate his lawyers -- his legal team but still
16 have it be minimally legally sufficient. I understand. It
17 strategically makes sense as a position.

18 But legally it doesn't make sense as a position,
19 because either -- and, you know, I think the reason why most
20 of these cases are pro se cases is because it is difficult for
21 judges to walk the line between respecting both the right to
22 counsel and respecting the right not to have an attorney.
23 I've always -- I've always felt that the bench has a

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 difficult, you know, line that it has to walk there. But it
2 is binary. There's not some third category of you could
3 simply waive some aspects and maintain other aspects.

4 MJ [COL POHL]: Yeah.

5 LDC [MR. CONNELL]: Thank you.

6 MJ [COL POHL]: Thank you.

7 Mr. Ruiz, do you wish to be heard on this?

8 LDC [MR. RUIZ]: I do not.

9 MJ [COL POHL]: Mr. Perry, do you have anything to add?

10 That was a no?

11 DC [MR. PERRY]: No, Your Honor.

12 MJ [COL POHL]: General Baker, anything further? And then
13 to end this, Mr. Ryan, you will have the last word. You will
14 have the second to the last word.

15 CDC [BG BAKER]: Very briefly, Your Honor, as I looked
16 again at Rule 505, and I know we're almost at the point where
17 we're beating a dead horse, but it's important. When you look
18 at 505...(B)(i), the accused -- at the request of the accused
19 or at the application for withdrawal by such counsel, there's
20 no specific good cause tied in there except for as I've argued
21 before. But certainly, you have required good cause. There's
22 a requirement for good cause when an attorney requests to be
23 withdrawn. Similarly, there's a good cause -- again, to go

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 back to my argument, there's a good cause requirement when the
2 accused requests to change counsel.

3 So you know, in that good cause -- in that good cause
4 requirement is captured because in, A, there's a requirement
5 that you can excuse an attorney without showing good cause,
6 but then when you get down to B, we're in the showing good
7 cause stage, and certainly upon the application for withdrawal
8 by such counsel, you have required good cause.

9 That's all I have, sir.

10 MJ [COL POHL]: Thank you.

11 Mr. Ryan? As I said, the second to the last word.
12 Go ahead.

13 TC [MR. RYAN]: Your Honor, the -- I just want to make one
14 last point with regard to the issue of waiver of learned
15 counsel. In the earlier version of the Military Commissions
16 Act there was no provision for learned counsel. In current
17 military practice, as I understand it, there is no provision
18 for learned counsel to be provided to a servicemember accused
19 in a capital case.

20 Congress, in the Military Commissions Act that we
21 serve under right now, provided for learned counsel, as I
22 said, for the first time; and then in discussing the issue of
23 pro se, certainly allowed for the accused to go pro se if he

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 so wishes, and only then put in the provision that detailed
2 military counsel will remain as ----

3 MJ [COL POHL]: But that was in the context of a pro se
4 representation and detailed counsel will be the stand-by
5 counsel.

6 TC [MR. RYAN]: I agree. That is correct. I do agree
7 that it is not completely on all fours by any stretch. My
8 only point in making this is Congress, in putting this
9 together, has not seen learned counsel -- I shouldn't say --
10 has provided for learned counsel but has also provided that
11 there are circumstances that they believe -- that Congress
12 believes it would become unnecessary. And that would be the
13 pro se context, I agree, but still, keeping detailed military
14 only and letting, for the expulsionary ----

15 MJ [COL POHL]: But you would agree with me that even
16 under a pro se issue, if you had a learned counsel who had
17 been on the case for four or five years, there would be
18 certain discretion to tell them to stay on the case as a
19 stand-by counsel.

20 TC [MR. RYAN]: I do, Judge. I absolutely do. I think
21 that's where we go from statute to the wise discretion of a
22 judge who has to run a courtroom, and I recognize that
23 discretion.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

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

2 The commission agrees with the defense that they
3 deserve an answer today before we go forward, that
4 Mr. Bin'Attash deserves an answer today to go forward, and
5 there will be a specific ruling that was put out.

6 The regulation is not as clear as it could be, but
7 I'm not sure it really makes too much difference because I
8 think you go back to what the -- and I'm not addressing the
9 issue about whether -- what parts of the Constitution apply to
10 this commission or do not apply, but I think on an issue like
11 this, we have to look at what the appellate courts have said,
12 as everybody is aware of, that this commission falls under the
13 direct appellate authority of the D.C. Circuit Court of
14 Appeals.

15 In general I don't do this, but I'm going to read
16 from Bostick, which is a 2015 opinion from that court. And
17 this is a case involving indigent defendants.

18 "When a defendant asks the district court to replace
19 appointed counsel, the court generally has an obligation to
20 engage the defendant in a colloquy on the record for the cause
21 of the defendant's dissatisfaction" ----

22 ACC [MR. BIN'ATTASH]: [Speaking in English] Slow down.
23 Please, slow down. No translation.

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Got it. I'll start again. I know how
2 Mr. Connell feels.

3 "When a defendant asks the district court to replace
4 appointed counsel, the court generally has an obligation to
5 engage the defendant in a colloquy on the record concerning
6 the cause of the defendant's dissatisfaction with his
7 representation. The defendant bears the burden of showing
8 good cause to replace appointed counsel."

9 Now, Bostick is not a replacement case. Bostick is a
10 removal case. The facts of Bostick is he wanted to remove a
11 counsel. He wasn't talking about replacing counsel. The
12 District Court in Bostick, though, took the language from the
13 replacement situation and applied it to the removal situation.
14 In some ways that doesn't really impact on what we're doing
15 here because my understanding is, from what Mr. Bin'Attash has
16 said, is we're talking about replacement anyway. But
17 following the language of Bostick, the direction of Bostick,
18 which I feel I'm compelled to do, is it really doesn't make
19 any difference whether it's removal or replacement, there's a
20 good cause requirement to be shown.

21 Accordingly, it is -- and, again, it's a little
22 unclear. This really, I believe, started out as a government
23 motion, oral motion, so I'm going to treat it as such just for

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this ruling.

2 The government's motion for Mr. Schwartz to be
3 excused at the request of Mr. Bin'Attash under the state of
4 the record is denied. The court -- commission holds that for
5 excusal of counsel under these circumstances, it adheres to
6 its other -- original finding that good cause is required and
7 that accordingly, since no good cause exists, the request to
8 excuse Mr. Schwartz is denied.

9 And just so everybody is clear, is -- and there will
10 be -- again, like I said, there will be a written ruling
11 coming, but I want to make sure Mr. Bin'Attash understands
12 that his options are to take the defense team or to represent
13 himself. Those are the two options.

14 Given the nature of this issue and quite frankly,
15 obviously, the emotionalism that was displayed earlier in the
16 case, I want to give Mr. Bin'Attash an opportunity to think
17 about the way ahead. Accordingly, I'm going to recess early
18 today, and tomorrow we begin at 0900 with AE 355.

19 The commission is in recess.

20 [The R.M.C. 803 session recessed at 1427, 20 July 2016.]

21 [END OF PAGE]

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