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1 [The R.M.C. 803 session was called to order at 0902, 25 July
2 2016.]

3 MJ [COL POHL]: Commission is called to order. Trial
4 Counsel, any changes from the last time the commission
5 recessed from an open session?

6 CP [BG MARTINS]: No changes, Your Honor. And these
7 proceedings are being transmitted by closed-circuit television
8 to the United States per your order.

9 MJ [COL POHL]: I note that all detainees are here except
10 Mr. Bin'Attash. Mr. Nevin, any change to the defense team
11 since we last recessed?

12 LDC [MR. NEVIN]: No, sir.

13 MJ [COL POHL]: Ms. Bormann?

14 LDC [MS. BORMANN]: We have no changes, Judge.

15 MJ [COL POHL]: Mr. Harrington?

16 LDC [MR. HARRINGTON]: No change.

17 MJ [COL POHL]: Mr. Connell?

18 LDC [MR. CONNELL]: No change.

19 MJ [COL POHL]: Mr. Ruiz?

20 LDC [MR. RUIZ]: No change.

21 MJ [COL POHL]: Trial Counsel, do you want to account for
22 the absence of Mr. Bin'Attash?

23 MAJOR, U.S. ARMY, was called as a witness for the

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1 prosecution, was reminded of his previous oath, and testified
2 as follows:

3 **DIRECT EXAMINATION**

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

5 Q. Major, let me remind you that you are still under
6 oath.

7 A. I understand.

8 Q. Did you have occasion to advise the accused Khallad
9 Bin'Attash of his right to attend this morning?

10 A. I did.

11 Q. All right. Tell the court what happened when you
12 went in to provide him with the rights advisement?

13 A. I read the English version like I normally do and he
14 followed along with the Arabic. I then had the translator
15 read the Arabic version to Mr. Bin'Attash, and I advised him
16 again that anything other than a signature, based on the
17 comments last week from the court, would not be considered a
18 voluntary waiver. He said he understood, then took several
19 minutes.

20 I asked him if he was simply going to sign the form.
21 He was filling out a letter. He gave me the Arabic form back
22 signed and dated, and then he gave me a letter in Arabic
23 addressed to the court, the prosecution team, and all of the

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1 defense teams.

2 Q. All right. Based on what occurred last week,
3 Mr. Bin'Attash knew that if he did anything other than simply
4 signing the form, it might be considered an involuntary waiver
5 if, in fact, that happened. Now, you say he signed the
6 form ----

7 LDC [MS. BORMANN]: Judge, I object to Mr. Swann's
8 characterization because I don't think that's what
9 Mr. Bin'Attash understood.

10 MJ [COL POHL]: I understand it's Mr. Swann's
11 characterization. I got the source. Objection overruled. Go
12 ahead.

13 **Questions by the Trial Counsel [MR. SWANN]:**

14 Q. So you first gave him the form. He signed the form
15 indicating a waiver; is that correct?

16 A. That's correct.

17 Q. All right. What else did he tell you at that point
18 in time?

19 A. He gave me the letter. I asked him what was in the
20 letter, and he said, make sure the judge and the prosecution
21 and the defense teams receive the letter. He had
22 previously -- I saw him last Friday at Echo II, and I advised
23 him again that anything other than a signature on the form

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1 would not be considered a voluntary waiver. And when he gave
2 me the form, he said, "This is a voluntary waiver because I
3 did nothing but sign the form and date the form."

4 So the translator read to me the Arabic letter, and
5 everything that was in the statement last Thursday was in this
6 letter, plus additional language.

7 Q. So it was the same thing that he put into the letter
8 this morning that he placed on the form last week?

9 A. That's correct.

10 Q. And did that indicate to you that that was an
11 involuntary waiver of attendance this morning?

12 A. It did.

13 Q. All right. What did you do then?

14 A. I advised him that this -- the form along with the
15 letter together were not a voluntary waiver, and that I would
16 advise the camp that this is not a voluntary waiver and that
17 he needed to come to the commissions this morning.

18 Q. All right. And, in fact, he is here this morning; is
19 that correct?

20 A. He is.

21 Q. Now, he's in the back cell there. Did you have a
22 further conversation with Mr. Bin'Attash about coming into the
23 courtroom?

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1 understanding of Judge Pohl's order that he need not write --
2 shouldn't write anything on the waiver form?

3 A. That is correct.

4 Q. And you did that, I think, yesterday in Echo II,
5 right?

6 A. It was on Friday.

7 Q. On Friday in Echo II. And that's because on Friday
8 in Echo II he was meeting with some members of the defense
9 team?

10 A. That's correct.

11 Q. And you had that conversation in front of those
12 members?

13 A. That's correct.

14 LDC [MS. BORMANN]: I have nothing else.

15 MJ [COL POHL]: Has the letter he sent been translated
16 into English?

17 TC [MR. SWANN]: It's almost done, Your Honor. It's a
18 page-and-a-half. We gave it immediately to our translator who
19 is translating it now. I believe I gave a copy to Ms. Bormann
20 who has their translator at the table and I know has probably
21 indicated to them exactly what it says.

22 LDC [MS. BORMANN]: Judge, that's correct. We received it
23 right before court started, and we had an oral translation

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1 done sitting at the table with our translator. I mean, I
2 don't think it affects the voluntariness of this waiver at
3 all, given the commission's past rulings. So our position is
4 exactly the same as Mr. Bin'Attash's with respect to the
5 waiver, which is, he doesn't want to be here and he shouldn't
6 be forced to be here.

7 MJ [COL POHL]: Okay. That's fine, but I want to hear
8 before I make a final decision here, what is in the letter.
9 We can wait for a translation or somebody could read it and
10 translate it. That's fine, too.

11 General Martins?

12 CP [BG MARTINS]: Your Honor, to clarify our position on
13 the absence and presence issue. Right now, you have an
14 expulsion of him from the courtroom on Thursday due to
15 disruptive behavior, and he has not then availed himself of
16 the clear path you provided to indicate a knowing, voluntary
17 and intelligent waiver in writing outside of the court's
18 presence. There is a preference for in-court waivers and a
19 presumption against waiver generally in this very important
20 area.

21 The way we see it is we don't have a voluntary waiver
22 here. We have continued disruptive conduct, an area of great
23 discretion for you. To what extent you're going to

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1 tolerate ----

2 MJ [COL POHL]: What's the continual disruptive conduct?

3 CP [BG MARTINS]: Well, he has indicated he doesn't want
4 to come in without, if necessary, force. We don't have -- we
5 regard the current posture of what he's put in writing as not
6 meeting the very clear advice you gave him last week and not
7 meeting the very clear path to waive. That's how we -- that's
8 how we regard the current record.

9 MJ [COL POHL]: I got it. But I need to -- you keep
10 referring to a document I've not seen.

11 CP [BG MARTINS]: Understood.

12 MJ [COL POHL]: So until I see the document, I'm not going
13 to decide. My question is how long will that take?

14 CP [BG MARTINS]: We have a translator working it right
15 now. We could have -- perhaps we could have someone read it
16 to you.

17 MJ [COL POHL]: That's fine, if somebody -- we need to
18 mark it as an exhibit.

19 LDC [MS. BORMANN]: Judge, until we're provided with a
20 written copy -- we have a very rough oral translation that I
21 asked my translator to do whispering in my ear over here in
22 about 90 seconds, but I don't know if this contains
23 information that should not be provided to others or ----

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1 MJ [COL POHL]: Okay. Okay. Ms. Bormann, there's a
2 simple way of handling this for your client. Just have him
3 come, okay? This is now the third time we have been delayed
4 for his personal beliefs for whatever it is. I'm giving you
5 an opportunity -- giving an opportunity for me to consider
6 what the letter is.

7 If you want to take time to read the whole thing,
8 fine, we'll just consider it a nonwaiver and we'll bring him
9 in.

10 LDC [MS. BORMANN]: Judge, what I'm ----

11 MJ [COL POHL]: I don't think you want that.

12 LDC [MS. BORMANN]: What I'm suggesting is that the
13 government has had this letter for a significant period of
14 time, longer than we did, which is why I didn't put my
15 translator on it immediately, because I was told they were
16 going to do it.

17 The letter is literally a page-and-a-half long. What
18 I would suggest to the court is that it cannot possibly take
19 more than another few moments to do a translation. Our
20 translator had a translation in the court's hands within
21 15 minutes the other day, so ----

22 MJ [COL POHL]: But you just told me that you wanted it to
23 be translated and then you wanted a chance to look at it to

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1 see whether or not there's an issue in there. Hasn't your --
2 doesn't that -- so why should I do that?

3 LDC [MS. BORMANN]: Well, because we're not sure that the
4 translation would be accurate. That's why we have translation
5 services, and that's why we review them. Because having
6 somebody try to translate something on the fly is, quite
7 frankly, prone with error while we have a written document.
8 While I understand the commission's desire to move forward,
9 our position is the same as Mr. Bin'Attash's, which is that he
10 has executed a voluntary waiver.

11 MJ [COL POHL]: Then he should stop writing me letters in
12 Arabic that I've got to look at.

13 LDC [MS. BORMANN]: I can't prevent that, Judge.

14 MJ [COL POHL]: I understand. But it seems to me there's
15 context here. He signs a waiver, he submits a letter, and
16 then he verbally tells the guard force that he doesn't want to
17 come. Okay. The in-between, I've got to see what it says.
18 If he chooses to do this, this is the scenario we're going to
19 go down to.

20 LDC [MS. BORMANN]: Judge, there has been nothing that the
21 commission has ruled thus far that prohibits Mr. Bin'Attash
22 from sending you a letter at any point during the pendency of
23 this case.

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1 MJ [COL POHL]: You're absolutely right, Ms. Bormann, but
2 as we have said, you -- this is at the request of the defense
3 to waive the presence. The government actually objected to it
4 earlier, okay? Now what it's become is -- this option that
5 you asked for has now delayed the hearing three days in a row.

6 CP [BG MARTINS]: Your Honor, if I might, based on this
7 interchange and on reflection, we believe that the simplest
8 thing to do and given the preference for open-court
9 discussions with the individual, not through counsel, and the
10 case law, very clear, I cite to United States v. Cross, that's
11 the key D.C. Circuit decision that's in our briefs in the
12 Appellate Exhibit 037 series, that you now have him come in
13 and talk to him about this, because that's the simplest way to
14 make sure that you have knowing, voluntary, intelligent
15 waiver. And we would agree the current record -- he has
16 clouded the record on what his intentions are.

17 LDC [MS. BORMANN]: You have in front of you a two-page
18 waiver, one page in Arabic, the other page in English. He
19 signed the Arabic version with no other remarks. It is our
20 position and Mr. Bin'Attash's position that that is a
21 voluntary waiver.

22 MJ [COL POHL]: Then why did he add a letter to it?

23 LDC [MS. BORMANN]: Judge, I can't tell you why

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1 Mr. Bin'Attash believes that writing a letter is the
2 appropriate thing to do. That, I can't possibly answer. But
3 I can tell you that he has evinced to us and to other defense
4 team members this morning that he did not wish to be here and
5 that he signed a voluntary waiver. So that would be our
6 suggestion to move forward. The ----

7 MJ [COL POHL]: I'm not -- I'm going to tell you: If the
8 suggestion is that I move forward without knowing what's in
9 the letter, that suggestion is rejected.

10 LDC [MS. BORMANN]: Well, obviously, because we now have a
11 translated version, so thank you.

12 MJ [COL POHL]: What's the exhibit number of the waiver,
13 Mr. Swann?

14 TC [MR. SWANN]: Going to be a 440 series, I think.

15 MJ [COL POHL]: It will be 440E, and it will include
16 the -- all of the documents included in the letter.

17 [Pause.]

18 LDC [MS. BORMANN]: Judge, we've reviewed the written
19 translation, and it appears to us to be accurate.

20 MJ [COL POHL]: Okay. Ms. Bormann, I'm going to need to
21 hear from Mr. Bin'Attash himself. It strikes to me, though,
22 to avoid a potential issue, his initial problem is sitting at
23 the table with his attorneys. So my suggestion is, we're

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1 going to call him in, but I'm going to ask the four attorneys
2 to sit in the back of the courtroom while I'm talking to him.

3 LDC [MS. BORMANN]: Judge, we will do as you instruct,
4 but ----

5 MJ [COL POHL]: Okay. So go ahead and do that and inform
6 Mr. Bin'Attash -- I think he's listening anyway -- that I'm
7 going to ask him to come in to explain -- just inform him that
8 the judge is telling him that he needs to come into the
9 courtroom. And I would like the four attorneys to move to the
10 back of the courtroom while he's here.

11 And just to make that clear on the record, the only
12 reason I'm doing that is not because I think Mr. Bin'Attash
13 will do anything disruptive, but he indicates in his letter
14 that that causes him issues, sitting at the table with his
15 attorneys. And to avoid any possible conflict, that is the
16 only reason I'm directing the attorneys to go to the back of
17 the room, for the limited purpose of discussing this issue
18 with him.

19 TC [MR. SWANN]: Your Honor, can I ask that the major be
20 excused, allow him to go back to the back of the courtroom?

21 MJ [COL POHL]: Let's have him sit there just in case
22 there's a factual dispute of what was said. I don't think we
23 will need him, but let's just keep it where we're at.

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1 [Pause.]

2 [The accused entered the courtroom.]

3 MJ [COL POHL]: Mr. Bin'Attash has joined us.

4 Mr. Bin'Attash, I just wanted to go over something
5 with you, and understand that if you don't want to stay, I'm
6 not going to make you stay, okay? Can you hear me now? Okay.

7 As I said, I just want to go over some matters with
8 you, but if you choose you don't want to stay, you don't have
9 to stay. Do you understand that?

10 ACC [MR. BIN'ATTASH]: Yes, sir. I would like to clarify
11 some points, too.

12 MJ [COL POHL]: Let me go first and then I'll let you
13 talk.

14 ACC [MR. BIN'ATTASH]: After you finish.

15 MJ [COL POHL]: Okay. As I've told you and your fellow
16 accused, you have the right to be present at every stage, but
17 if you want to waive your right, you can. And we've done this
18 a number of times, so you understand that, don't you?

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

20 MJ [COL POHL]: But if you are going to waive your
21 presence here, it's got to be what's known as an unequivocal
22 waiver; that means a waiver that is I definitely don't want to
23 be there. It cannot be a conditional waiver. Unless it's

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1 very clear that you're saying you don't want to be here,
2 you're going to have to be here. Do you understand that?

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

4 MJ [COL POHL]: Now, you may disagree with some of the
5 court's rulings. That obviously is your right. You don't
6 have to agree with everything I decide, and if you feel that
7 you don't want to come because you disagree with my rulings,
8 that will be your option. But I want you to understand that
9 means you're choosing voluntarily not to be present. Do you
10 understand that?

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

12 MJ [COL POHL]: And for example, today you signed the
13 waiver form but then sent me a letter, and the first line of
14 your letter is, "My absence in court and not sitting at the
15 table beside the attorneys is not a waiver of my presence but
16 is due to the problem between us and so no harm occurs to any
17 of us."

18 Okay. That, to me, is not a clear waiver of your
19 right to be present. I understand you have problems with your
20 attorneys. That's not what I'm talking about. I'm simply
21 saying that if you don't want to come, you have to say, "I
22 don't want to come voluntarily and knowingly," not "I don't
23 want to come, but my waiver is not voluntary."

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1 Do you understand what I'm saying?

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

3 MJ [COL POHL]: Okay. After what I've told you -- and I'm
4 going to give you a chance if you want to talk about something
5 else as long as it's on topic -- do you wish to be present
6 today or not?

7 ACC [MR. BIN'ATTASH]: Before -- before I answer this
8 question, I would like to clarify a few points.

9 Once again, you are ignoring completely the problem
10 that is existing between me and my lawyers.

11 MJ [COL POHL]: Mr. Bin'Attash, I've not ignored your
12 problem. I have spent -- virtually every session we've done
13 nothing but address your problem. We addressed your problem
14 in October, December, February, June, and now in July. We
15 spent all day on Monday and Wednesday addressing your problem.
16 Okay.

17 You don't like the ruling. That's fine. But I'm not
18 going to continue to relitigate it with you or anybody. A
19 decision has been made. We are now done. Your problem has
20 not been ignored. In fact, it has been addressed again and
21 again and again, and I'm not going to address it anymore. Do
22 you understand that?

23 ACC [MR. BIN'ATTASH]: Yes, but the problem will remain

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1 with us until the last day of the hearings. And every time I
2 come to this courtroom, as long as these lawyers are with us
3 in the courtroom, the problem will remain.

4 As I have explained to the judge before, I do not
5 want to cause any problems, but I do not have any other
6 solution.

7 MJ [COL POHL]: Mr. Bin'Attash, let me explain for the
8 last time, because we're done with this issue, is I've
9 addressed your concerns. You don't like what I've ruled.
10 Fine. I understand that. But that's the way it is. That's
11 the reality we're going to have here. You've got my ruling.
12 We are now done. I'm not going to do it over and over again.

13 My only question is -- you don't like the ruling.
14 That's fine. My only question to you is: Do you wish to come
15 to court today, or do you wish to go back to the cell and then
16 to the camp?

17 ACC [MR. BIN'ATTASH]: Before I answer, if I have signed
18 the waiver form this morning, if I have clarified in a
19 separate letter the reason behind my waiver without discussing
20 anything else, is there a problem with that?

21 MJ [COL POHL]: There is a problem with that because in
22 your letter you say your waiver -- you say, "it's not a waiver
23 of my presence." So yeah, there is a problem with that.

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1 ACC [MR. BIN'ATTASH]: If I leave this sentence out, would
2 there be a problem with the rest of the letter? I need to put
3 in the record every hearing the reason for my desire not to
4 show up.

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

6 TC [MR. RYAN]: Judge, request permission to be heard.

7 MJ [COL POHL]: Sure.

8 TC [MR. RYAN]: Good morning, sir.

9 MJ [COL POHL]: Good morning.

10 TC [MR. RYAN]: Your Honor, we're reaching a point where I
11 think the commission can't put any real faith in a waiver,
12 even if he offers it at this point because he hasn't -- he's
13 constantly telling you there's conditions attached to it.

14 I think Your Honor offered a good alternative today
15 in the sense that he's sitting here alone, which apparently he
16 has preferred in the past. Because we can't -- it's the
17 prosecution's position because the waiver as it would be
18 currently coming can't hold any validity that Your Honor offer
19 the accused this, of counsel remaining where they are and he's
20 sitting here alone. And at least that way his presence is
21 guaranteed so there can't be the later claim that he was
22 forced into the waiver. And I understand this is a hard
23 choice to make, Judge.

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1 I'll just say one more thing, sir: The events of the
2 end of last week or all of last week and this morning, it
3 seems to have upped the ante quite a bit in terms of what's on
4 the record now in regard to the analysis Your Honor has gone
5 through before. We're looking at the record very hard and the
6 case law, and we may have at some point some suggestions for
7 the commission.

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

9 LDC [MS. BORMANN]: Judge, I have no objection to sitting
10 at the back of the room. The problem that I have is there's
11 no microphone back there. So it makes it impossible for me to
12 object when the prosecution makes comments that are not
13 advised, as Mr. Ryan just did.

14 Mr. Bin'Attash, I think thus far, has evinced to you
15 that he wishes not to be here. Under every form of
16 interpretation, voluntary is, you know, I understand I have a
17 right to be here. I don't want to be here. That's the
18 position of Mr. Bin'Attash.

19 MJ [COL POHL]: Got it. Thank you.

20 Okay, Mr. Bin'Attash.

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

22 MJ [COL POHL]: As you've done in the past, you've sent me
23 letters complaining about your lawyers, and I permitted you to

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1 do that. It's somewhat unusual, but I understand where you're
2 coming from. But your lawyer issue is not the same issue as
3 being here. So if you wish to continually complain about your
4 lawyers or not complain, whatever you want to do, that's one
5 issue. I've decided where we're at right now. Okay.

6 But the only issue I have before me is whether or not
7 you wish to stay here today. I'm not going to come back --
8 understand, the lawyer issue is now decided, at least for
9 today. So if you say, Judge, I don't like your ruling, but I
10 understand it, and I'm voluntarily waiving my presence, that's
11 fine. But you can't say I'm voluntarily waiving my presence
12 but my waiver is not voluntary because I don't like your
13 ruling.

14 Do you understand what I've just said?

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

16 MJ [COL POHL]: Okay. So I'll ask you for the last time:
17 Are you voluntarily choosing not to be here today, yes or no?

18 ACC [MR. BIN'ATTASH]: I would like to stay, but I do not
19 want the attorneys present on the table.

20 MJ [COL POHL]: Okay. Then you will stay. Thank you.

21 WIT: Thanks, Judge.

22 [The witness was excused.]

23 MJ [COL POHL]: Ms. Bormann, I can't solve the microphone

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1 problem right now, but I will simply tell you this. If you
2 stand up in the back of the courtroom, I will recognize you
3 and give you an opportunity to object.

4 LDC [MS. BORMANN]: Terrific. Thank you. The other
5 problem that we have is that we have no files back there.
6 They're all up here and ----

7 MJ [COL POHL]: What we'll do is we'll take a ten-minute
8 recess and give you time to adjust fire. Commission is in
9 recess for ten minutes.

10 [The R.M.C. 803 session recessed at 0941, 25 July 2016.]

11 [END OF PAGE]

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