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1 [The R.M.C. 803 session was called to order at 0903, 28  
2 October 2015.]

3 MJ [COL POHL]: Commission is called to order. All  
4 detainees are here with the exception of Mr. Hawsawi.

5 Trial Counsel, any changes in the trial counsel team  
6 since the last time we met as a regular prosecution team?

7 CP [BG MARTINS]: Good morning, Your Honor. Ms. Tarin is  
8 back in the courtroom as is Ms. Mary Needham of the Federal  
9 Bureau of Investigation. Everyone else remains the same.

10 MJ [COL POHL]: Mr. Nevin?

11 LDC [MR. NEVIN]: Good morning, Your Honor. No changes.

12 MJ [COL POHL]: Ms. Bormann?

13 LDC [MS. BORMANN]: The same personnel, Judge.

14 MJ [COL POHL]: Mr. Harrington?

15 LDC [MR. HARRINGTON]: No changes.

16 MJ [COL POHL]: Mr. Connell?

17 LDC [MR. CONNELL]: No changes.

18 MJ [COL POHL]: And Mr. Ruiz?

19 LDC [MR. RUIZ]: No changes.

20 MJ [COL POHL]: Thank you. Mr. Swann.

21 CAPTAIN, U.S. ARMY, was called as a witness for the  
22 prosecution, was previously sworn, and testified as follows:

23 **DIRECT EXAMINATION**

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

2 Q. Good morning.

3 A. Good morning.

4 Q. Are you the same Assistant Staff Judge Advocate  
5 that's testified previously in these proceedings?

6 A. I am.

7 Q. All right. I again remind you that you are still  
8 under oath. Did you have occasion to advise Mr. Hawsawi of  
9 his rights to attend this morning?

10 A. Yes, I did.

11 Q. And did you use the form which has been marked, I  
12 believe, Appellate 383 consisting of three pages?

13 A. Yes, I did.

14 Q. Did you advise him of his rights in English or  
15 Arabic?

16 A. I read them in English while an interpreter was  
17 present and read them to him in Arabic.

18 Q. This was done at 5:27 this morning?

19 A. That's correct.

20 Q. And those rights were completed at 5:32 this morning?

21 A. Yes.

22 Q. Did he understand his rights to attend today?

23 A. Yes, he did.

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1 Q. What did he tell you, if anything, about wanting to  
2 attend?

3 A. He stated he wished not to attend this commission  
4 proceeding today but he wanted to go to his scheduled legal  
5 meetings instead.

6 TC [MR. SWANN]: Thank you. I have no further questions.

7 MJ [COL POHL]: Mr. Ruiz, any questions?

8 LDC [MR. RUIZ]: No questions.

9 MJ [COL POHL]: Thank you, Captain. You are excused.

10 **[The witness was excused and withdrew from the courtroom.]**

11 MJ [COL POHL]: On Monday, at the request of  
12 Mr. Bin'Attash's team, the commission recessed for a day and a  
13 half to permit them to explore various issues. Since that  
14 time I received another ex parte under-seal motion from the  
15 defense. One part of it, I cannot remain ex parte because it  
16 was asking for a further continuance, not to hold the hearing  
17 today. That part of the motion is denied.

18 Now, where we left it on Monday was Mr. Bin'Attash  
19 had indicated he wished to discuss rights to counsel and  
20 pro se representation. And, Ms. Bormann, I know your thing  
21 has been filed under seal, so I don't want to, at this point,  
22 go over what's in there, because of the way you filed it.

23 But before I get to Mr. Bin'Attash, do you wish to be

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1 heard on anything?

2 LDC [MS. BORMANN]: Bear with me.

3 A lot has transpired since the beginning of the  
4 session a week and a half ago, and so I -- we are developing  
5 facts that will assist the court in determining what the  
6 pro se rights should be and fully informing Mr. Bin'Attash.

7 I have been advised by Mr. Bin'Attash early this week  
8 that he wishes for me to withdraw. I approached the Chief  
9 Defense Counsel about it. I met with Mr. Bin'Attash  
10 yesterday, and then the Chief Defense Counsel, Brigadier  
11 General Baker, did as well. I'm seeking leave to file an  
12 ex parte under-seal declaration by him, and I have a copy for  
13 the court.

14 MJ [COL POHL]: That will be 380S. One moment.

15 [Pause.]

16 MJ [COL POHL]: Okay.

17 LDC [MS. BORMANN]: Judge, until the matter is resolved,  
18 because this implicates particular privileged information  
19 going forward, we didn't do a sealing order because this was  
20 provided to me this morning.

21 MJ [COL POHL]: I got it.

22 LDC [MS. BORMANN]: So I'm asking that it be sealed,  
23 pending further order of the court.

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1 MJ [COL POHL]: Yeah, all three of these I will issue a  
2 sealing order. Understand -- understand that they may become  
3 unsealed at some future date, depending on how things develop.

4 LDC [MS. BORMANN]: Exactly, and I understand that. So I  
5 am in the position now of being asked by my client to withdraw  
6 and being informed by the Chief Defense Counsel that he takes  
7 a different position than that.

8 I've examined the rules on my own. I've explained my  
9 ethical duties to my client, and that is that I cannot simply  
10 drop his case because we're in the midst of three and a half  
11 years of litigation. And so I am in a position that's  
12 conflicted.

13 So I am seeking to withdraw because my client wishes  
14 me to, but I cannot tell you the way forward.

15 MJ [COL POHL]: Let me ask you just a couple of quick  
16 questions. I don't want you to be put in a position where you  
17 are arguing against your client's wishes.

18 LDC [MS. BORMANN]: And I'm not going to.

19 MJ [COL POHL]: Okay. When were you first, as much as you  
20 can remember, detailed to represent Mr. Bin'Attash?

21 LDC [MS. BORMANN]: In 2011. Would have been July 2011.  
22 The exact date, I'm unaware of.

23 MJ [COL POHL]: Okay. One moment, please.

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1 [Pause.]

2 MJ [COL POHL]: And just so I review the bidding, because  
3 I think I know where this is going, this is really not a  
4 pro se request; it is a replacement of counsel request.

5 LDC [MS. BORMANN]: Well ----

6 MJ [COL POHL]: I'll ask Mr. Bin'Attash, but I'm just  
7 saying ----

8 LDC [MS. BORMANN]: Right. Okay. Yes. Yes.

9 MJ [COL POHL]: ---- they're completely separate.

10 LDC [MS. BORMANN]: It appears to now be that, yes.

11 MJ [COL POHL]: Okay. Anything else before I talk to  
12 Mr. Bin'Attash?

13 LDC [MS. BORMANN]: No. At this point, though, Judge, I  
14 mean, just so you're aware, Mr. Bin'Attash has not been fully  
15 advised and informed of everything going forward because the  
16 Chief Defense Counsel has yet to make any sort of  
17 determination and ----

18 MJ [COL POHL]: Yeah, I don't want to get into a  
19 discussion with excusal of counsel, because the regulation  
20 reads one way that would appear to give the Chief Defense  
21 Counsel unfettered discretion to relieve counsel after  
22 counsel appeared before the commission.

23 LDC [MS. BORMANN]: It does, indeed.

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1 MJ [COL POHL]: It reads that way. I can read it saying  
2 that. I don't think that's true. There's no court I've ever  
3 heard of, and I've never practiced it, that once counsel  
4 appears before the bar in front of the judge, the judge has  
5 the ultimate authority whether counsel is excused or not. And  
6 in looking at General Baker's affidavit -- or memo, one of the  
7 things he does talk about is ratification by the judge, so we  
8 may end up at the same place.

9 But on something like this, I do not believe he has  
10 the authority -- let's just say this -- to excuse you, for  
11 example, without the agreement of the judge.

12 LDC [MS. BORMANN]: Judge, I'm not going to take any  
13 position on that at all.

14 MJ [COL POHL]: I don't want you to. I want to make clear  
15 that I know what that regulation says, and to me it runs  
16 contrary to any practice that I am familiar with that would  
17 permit a third party to unilaterally sever an attorney-client  
18 relationship when that attorney has appeared in court on  
19 behalf of that client without getting the judge's approval  
20 beforehand.

21 But that's not an issue before me, but I just want to  
22 make sure that's clear on the record. Okay. Thank you.

23 LDC [MS. BORMANN]: I'd ask for just a few moments that I

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1 can confer with Mr. Bin'Attash ----

2 MJ [COL POHL]: Sure.

3 LDC [MS. BORMANN]: ---- because I am, if I'm  
4 understanding you correctly, you intend to begin some sort of  
5 advice to Mr. Bin'Attash?

6 MJ [COL POHL]: Well, there's two issues I think have been  
7 conflated here, and I want to make sure he understands what  
8 we're talking about, okay? There's the issue about  
9 replacement -- excusal of counsel and replacement of counsel.  
10 There are certain rights he has on that, okay? There's also a  
11 good cause requirement, okay? That is one thing.

12 Pro se representation is something completely  
13 different, and if an accused were to choose to go to pro se,  
14 that does not trigger any additional right-to-counsel  
15 rights -- I'm not talking about standby counsel. I'm saying  
16 additional counsel rights that, if you say I'm going pro se  
17 and, therefore, that gives me a right to have a new attorney,  
18 that's conflating two separate issues.

19 So when I say I want to clarify with Mr. Bin'Attash,  
20 if he wants to at this time, at least to make sure that he  
21 understands what his rights are under either one. And if he  
22 has been misinformed as to those rights, that he is to  
23 understand that, regardless what other people may have told

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1 him, it's what I tell him is what's going to control.

2 LDC [MS. BORMANN]: Can I have a moment to ----

3 MJ [COL POHL]: Sure. Do you need a moment or ----

4 LDC [MS. BORMANN]: A little more than a moment.

5 MJ [COL POHL]: Because of the nature of the issue, I'll  
6 give you 15 minutes.

7 LDC [MS. BORMANN]: Thank you.

8 MJ [COL POHL]: Commission is in recess until 0930.

9 [The R.M.C. 803 session recessed at 0916, 28 October 2015.]

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