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1 [The R.M.C. 803 session was called to order at 0932, 28  
2 October 2015.]

3 MJ [COL POHL]: Commission is called to order. All  
4 parties are again present that were present when the  
5 commission recessed.

6 Before the commission was going to listen to  
7 Mr. Bin'Attash, commission was going to see if the government  
8 wished to add anything to this. And lo and behold Mr. Ryan is  
9 standing at the podium, so I suspect Mr. Ryan wants to say  
10 something.

11 TC [MR. RYAN]: Just very briefly, yes, Your Honor.  
12 Because this matter that's ongoing right now, I think, for the  
13 most part, concerns the commission, counsel and the accused  
14 and because, quite frankly, there are some things we simply  
15 don't know about because of ex parte pleading.

16 All I wanted to say, Judge, is, because I heard  
17 something about a request for withdrawal, if at some point the  
18 commission is going to take up that matter, obviously the  
19 United States wishes to be heard on it.

20 MJ [COL POHL]: Yes, just kind of the way ahead, and we  
21 will proceed in an orderly manner as best as possible, is --  
22 my plan is, is to discuss with Mr. Bin'Attash exactly what his  
23 issue is. If the issue is pro se representation, that's one

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1 inquiry. If the issue is new counsel or replacement of  
2 counsel, that's another inquiry. Okay?

3 TC [MR. RYAN]: Yes.

4 MJ [COL POHL]: I'll explain to him what I view the law to  
5 be on either of those two, explain to him that -- after I get  
6 done with that, I will take a break, and then without getting  
7 input from him at that point to make sure that if either  
8 side -- well, I'm not going to put -- I'm going to give his  
9 defense counsel an opportunity to respond, if they want to,  
10 but I don't want them put in a position to argue against their  
11 client.

12 But I want to give the government an opportunity,  
13 also, to say that's a correct statement of the law. Because,  
14 for example, just -- that the way I read the state of the law  
15 is that there needs to be good cause to sever the  
16 relationship, and good cause to warrant a substitution of  
17 counsel. Examples are a conflict of interest under  
18 irreconcilable conflict or complete breakdown of the  
19 communications between the attorney and the defendant, and I'm  
20 reading from Smith v. Lockhart, and it cites a number of other  
21 cases.

22 Also relying on Smith v. Lockhart it talks about when  
23 a defendant raises seemingly substantial complaint about

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1 counsel, the judge has an obligation to inquire thoroughly  
2 into the factual basis of the defendant's dissatisfaction,  
3 which would include an inquiry on the record.

4           So procedurally I think that was the way -- that's  
5 the way I will go forward. But the government, of course,  
6 obviously will have an opportunity to be heard on the law  
7 portion of it. If you disagree with anything I've just said,  
8 then -- after I talk to him, and then if we do have a  
9 colloquy, whether or not that amounts to good cause shown.

10       TC [MR. RYAN]: Understood, Judge. And based upon the  
11 commission's initial questions to the accused that you just  
12 informed me about, depending on the answers, we may need to be  
13 heard at that point, too.

14       MJ [COL POHL]: I understand. I understand. No decision  
15 will be made until you have an opportunity to be heard.

16       TC [MR. RYAN]: Thank you, sir.

17       MJ [COL POHL]: Ms. Bormann.

18       LDC [MS. BORMANN]: I spoke with Mr. Bin'Attash over the  
19 break, and I can inform the court that he does not have a  
20 request to go pro se. It is, in fact, a request to have me  
21 withdraw or to change his counsel, however he wants to phrase  
22 it.

23       MJ [COL POHL]: Okay. I think, as everybody knows, at the

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1 end of the day this is a right of the accused and, therefore,  
2 must be discussed specifically with the accused. Okay.

3 Mr. Bin'Attash, now I'm going to go over your rights  
4 to counsel, but I want to make sure that I have what the issue  
5 is before you. You are not asking to represent yourself; is  
6 that correct?

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

8 MJ [COL POHL]: Okay. But you are asking about perhaps  
9 replacing Ms. Bormann?

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

11 MJ [COL POHL]: Okay. And when I say "replacing  
12 Ms. Bormann," that would be two parts. One would be for her  
13 to leave and somebody to replace her. Is that what you want  
14 me to tell you, what your rights are?

15 ACC [MR. BIN'ATTASH]: **[Spoken in English]** Yes.

16 MJ [COL POHL]: Okay. Now, I know it's been a while, but  
17 I'm going to go over your full rights to counsel as I  
18 explained to you at the arraignment in May of 2012, and I'm  
19 going to talk about both Ms. Bormann and Major Schwartz so you  
20 understand your rights. If you have any questions as we go  
21 through this, please ask them.

22 Now, Mr. Bin'Attash, pursuant to the Manual for  
23 Military Commissions, you have the right to be represented by

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1 your detailed military defense counsel, Major Schwartz. Do  
2 you understand this?

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

4 MJ [COL POHL]: Now, Major Schwartz is provided to you  
5 free of charge. Do you understand this?

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

7 MJ [COL POHL]: You also have a right -- excuse me, the  
8 option to request an individual military counsel, and you may  
9 ask the Chief Defense Counsel to provide a specific military  
10 attorney assigned to the Office of Chief Defense Counsel,  
11 Military Commissions, that you wish to represent you if that  
12 military attorney is reasonably available.

13 Now, if your request for this individual military  
14 counsel were approved, your detailed defense counsel, Major  
15 Schwartz, would normally no longer be available to represent  
16 you. However, you may request the Chief Defense Counsel, in  
17 this case Brigadier General Baker, to let your detailed  
18 defense counsel, Major Schwartz, stay on the case, but your  
19 request would not have to be granted. Do you understand this?

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

21 MJ [COL POHL]: Now, in addition to your detailed defense  
22 counsel, you have the right to at least one additional  
23 detailed counsel who is learned in the applicable law relating

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1 to capital cases and who, if necessary, may be a civilian.  
2 This detailed learned counsel is provided to you free of  
3 charge and is paid for by the United States in accordance with  
4 regulations prescribed by the Secretary of Defense.

5 In your case, your current detailed learned counsel  
6 is Ms. Bormann, a civilian lawyer who is paid for by the  
7 United States. She is specially trained and experienced in  
8 cases in which a death sentence may be adjudged. Do you  
9 understand this?

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

11 MJ [COL POHL]: Now, I just explained to you your rights  
12 to detailed defense counsel and detailed learned counsel  
13 provided free to you and are paid for by the United States.

14 Now, you may also have a civilian lawyer of your own  
15 choice to represent you at no expense to the government;  
16 however, this civilian lawyer must be qualified to represent  
17 you. To be qualified, he or she must be a U.S. citizen  
18 admitted to the practice of law in a state, district,  
19 territory or possession of the United States or a federal  
20 court; two, must not have been subject of disqualifying action  
21 by a bar or other competent authority; three, must be eligible  
22 for a secret security clearance or higher as required -- in  
23 this case this individual would have to be eligible for a top

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1 secret security clearance -- and must agree in writing to  
2 comply with the orders, rules and regulations of these  
3 military commissions.

4 Now, if a civilian lawyer represents you, your  
5 detailed defense counsel and your detailed learned counsel  
6 will continue to represent you unless you specifically waive  
7 the right to be represented by detailed defense counsel and/or  
8 your detailed learned counsel. Do you understand what I have  
9 just told you?

10 ACC [MR. BIN'ATTASH]: Yes. Yes. But just give me a  
11 minute.

12 MJ [COL POHL]: Sure. Take your time.

13 [Pause.]

14 ACC [MR. BIN'ATTASH]: Okay. Go ahead.

15 MJ [COL POHL]: Okay. Now, if you wish to excuse or  
16 what's called sever the relationship with one of your two  
17 counsel, there are some other things you need to know. Now,  
18 let me make sure what we're talking about here because it  
19 makes a difference.

20 Do you want to know -- and I'm not asking for a  
21 decision, but just so you understand your rights -- about  
22 releasing Ms. Bormann or Major Schwartz or both of them?

23 ACC [MR. BIN'ATTASH]: Only one of them, not both of

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1 them.

2 MJ [COL POHL]: Which one?

3 ACC [MR. BIN'ATTASH]: Cheryl Bormann, the learned  
4 counsel.

5 MJ [COL POHL]: Okay. Okay. And you want to keep Major  
6 Schwartz; that's correct?

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

8 MJ [COL POHL]: Okay. So as we go through this, since you  
9 want to keep Major Schwartz and you may have an issue with  
10 Ms. Bormann, you will have the ability to consult with Major  
11 Schwartz about some legal issues, okay? And understand, we're  
12 going to go through this slowly, and I'm not forcing you to  
13 make any decision immediately.

14 Now, if you wish to sever your current relationship  
15 with Ms. Bormann, you have to show me good cause to sever that  
16 relationship. And Major Schwartz can explain to you what  
17 "good cause" means. But basically you're going to have to  
18 tell me in open court why you want to sever the relationship  
19 with Ms. Bormann, okay? That's the first point.

20 The second point: If I find you have demonstrated  
21 good cause and excuse Ms. Bormann from further participation  
22 in the case, you may request to the Chief Defense Counsel,  
23 General Baker, for a new detailed learned counsel paid for by

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1 the United States to be appointed to represent you, okay?

2 To do this, you would have to submit the request, and  
3 since Major Schwartz is still on the case, he will assist you,  
4 to General Baker, who decides if your request is granted and  
5 decides who the new learned counsel would be. Do you  
6 understand that?

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

8 MJ [COL POHL]: Okay. Now, as discussed earlier, you can  
9 request for a civilian lawyer who is not part of General  
10 Baker's office to represent you, okay? However, this person  
11 would, A, have to comply with all those requirements I talked  
12 about earlier, be a United States citizen, not subject to any  
13 disqualifying professional action, eligible for a top secret  
14 clearance and willing to put in for a top secret clearance.  
15 Understand that, is that this person must say, "I will fill  
16 out all the paperwork to get my clearance," and agree in  
17 writing to comply with the orders and the regulations.

18 Even if this person -- you want this person, and this  
19 person is willing to do that, this person will not be paid by  
20 the United States Government. In other words, he or she would  
21 pay her own way or his own way or some other funding stream  
22 not connected with the United States Government. Do you  
23 understand that?

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1 ACC [MR. BIN'ATTASH]: Just to make sure that I understood  
2 you well, you mean that this person has to be from outside the  
3 defense office?

4 MJ [COL POHL]: No, what I'm saying is this -- okay, is  
5 there is an option to get somebody from inside the defense  
6 office, and if General Baker picks that person, like his  
7 predecessors picked Ms. Bormann, then that person would be  
8 paid by the United States Government.

9 But if you wanted somebody to represent you who is  
10 not within that office, you have no right -- or excuse me,  
11 this person would not be paid for by the United States  
12 Government, so he or she would pay her own way or get -- or  
13 some other funding source. But at the end of the day, this  
14 person would have to be willing to come in here and represent  
15 you, understanding that he or she would get nothing from the  
16 United States Government to pay for her -- his or her  
17 services. Do you understand it?

18 ACC [MR. BIN'ATTASH]: I understood you.

19 MJ [COL POHL]: Okay. And lastly, I just want to make it  
20 very clear that if you decide that you wish to sever the  
21 relationship with Ms. Bormann, you're going to have to tell me  
22 on the record the facts of why you think that is necessary.  
23 Do you understand that?

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

2 MJ [COL POHL]: Okay. Trial Counsel, do you have any  
3 issues about what I just told him?

4 TC [MR. RYAN]: Good morning again, sir.

5 MJ [COL POHL]: Good morning.

6 TC [MR. RYAN]: Your Honor, as a point of clarification,  
7 it might have been just that I missed it, as I heard the last  
8 part of your discussion with the accused, the way I heard it  
9 said was that if Ms. Bormann was excused -- which we would  
10 oppose, but I'll get to that at some other point -- but if  
11 that was to happen, that the accused could certainly -- could  
12 have someone free of charge from within the office of the  
13 Chief Defense Counsel, but that anyone from outside that  
14 office would have to come free of charge to the United States  
15 Government.

16 And I just wanted to make sure I'm understanding the  
17 commission that the accused could seek another learned counsel  
18 who comes to the Office of Chief Defense Counsel in the same  
19 way that Ms. Bormann did, that is from outside and is hired  
20 essentially, as in her words, as an outside contractor.

21 MJ [COL POHL]: Yes, I understand your point. It is  
22 theoretically -- as I understand the regulation, there is a  
23 pool of learned counsel who have agreed to participate, okay,

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1 and they've signed some documents to that effect, the way I  
2 read the regulations. So I'm assuming the regulation is being  
3 followed, and, therefore, I am including them when I say under  
4 the -- I guess under the detailing authority of General Baker.

5 TC [MR. RYAN]: Understood.

6 MJ [COL POHL]: That's what I meant. What I am saying is  
7 if he wanted to pick somebody outside of that pool, that comes  
8 on his or her own dime.

9 TC [MR. RYAN]: Judge, only because of the issue the  
10 accused may think people in uniform are with that office.  
11 Maybe you could clarify that?

12 MJ [COL POHL]: I'll go over that. Let me ask you another  
13 question.

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

15 MJ [COL POHL]: If he establishes good cause to sever the  
16 relationship with Ms. Bormann, okay -- and I know we're not at  
17 that point.

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

19 MJ [COL POHL]: But I just want to make sure, I'm just  
20 talking about from the legal perspective. Does he have the  
21 right to another detailed learned counsel? Or do you want to  
22 think about that?

23 TC [MR. RYAN]: He can certainly ----

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1 MJ [COL POHL]: He can always ask, I've got that.

2 TC [MR. RYAN]: I'm not answering your question directly.

3 Certainly he could waive detailed, learned counsel just like

4 he can waive counsel in general. As far as the issue of an

5 additional learned counsel, that's going to be suggested, Your

6 Honor, dependent on a lot of factors, and part of what I would

7 be arguing to the court -- to the commission regarding

8 Ms. Bormann. So if the commission would allow me, I would

9 rather hold that one for the moment.

10 MJ [COL POHL]: We're going to get to that sooner or

11 later.

12 TC [MR. RYAN]: I understand, Judge.

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

14 Mr. Bin'Attash, I just want to clarify something. I

15 hope you understood it, but I didn't make it perfectly clear.

16 If you get -- if Ms. Bormann is removed from your case and you

17 request a new learned counsel from the defense counsel office,

18 that learned counsel is from a pool that have volunteered, in

19 essence, to perform this function, which I'm assuming

20 Ms. Bormann and all the other learned counsel did -- well,

21 actually people have done it at different times.

22 But the point I'm trying to make is that General

23 Baker has authority to appoint learned counsel, assuming he is

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1 within or she is within that pool who have made themselves  
2 available to operate as learned counsel. So I don't mean to  
3 say that if you ask for a civilian lawyer, that you could only  
4 get a military lawyer from the Chief Defense Counsel. Do you  
5 understand?

6 ACC [MR. BIN'ATTASH]: Yes, I do understand that.

7 MJ [COL POHL]: Okay. Major Schwartz, let me make sure I  
8 clarify your role in this. It appears that Mr. Bin'Attash  
9 wishes to retain you, and the only issue deals with  
10 Ms. Bormann; is that correct?

11 DDC [Maj SCHWARTZ]: That's my understanding, Your Honor.

12 MJ [COL POHL]: Again, I don't want to put you or her or  
13 anybody in a position where you may be arguing against part of  
14 your team if you -- or Mr. Bin'Attash -- well, actually  
15 Mr. Bin'Attash's interests. So if I ask you any questions you  
16 just don't want to answer, you feel uncomfortable answering,  
17 don't answer them, okay?

18 DDC [Maj SCHWARTZ]: I understand, Your Honor. My concern  
19 now is we've sort of removed learned counsel from this phase.

20 MJ [COL POHL]: No, I haven't. No, I haven't. Nobody's  
21 been removed.

22 DDC [Maj SCHWARTZ]: I don't mean removed in the sense  
23 she's withdrawn or you've excused her.

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1 MJ [COL POHL]: I'm just saying what I have before me is  
2 the issue that deals with Ms. Bormann, not with you.  
3 Mr. Bin'Attash, of course, can discuss anything he wants with  
4 Ms. Bormann and with you. I just wanted to clarify that it  
5 doesn't deal with you because, arguably, Ms. Bormann may  
6 have -- may be put in a position of arguing against what her  
7 client has asked for dealing with her, that's all.

8 But right now there's been nothing to change the  
9 defense team's relationship or anything like that, but I  
10 just -- because there is no issue with your representation, I  
11 did not want to put her in the position where she might feel  
12 that she has to argue against her own client's interests for  
13 her own interests, and I don't want to do that or even appear  
14 to do that.

15 DDC [Maj SCHWARTZ]: I understand, Your Honor.

16 MJ [COL POHL]: Now, that being said, the issue that comes  
17 up now, the threshold inquiry is your client has indicated he  
18 wishes to relieve a counsel who has been on this case for over  
19 four years. And he's got to show me good cause, and good  
20 cause is not just "I don't like her," okay?

21 Is your client prepared to do that now, or do you  
22 want ----

23 DDC [Maj SCHWARTZ]: I think we would need a recess. But

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1 have you determined that the state of the law is you have this  
2 authority and that the regulation is incorrect, that the Chief  
3 Defense Counsel does not have sole discretion to remove  
4 counsel ----

5 MJ [COL POHL]: Is it your position that the Chief Defense  
6 Counsel can remove the counsel?

7 DDC [Maj SCHWARTZ]: It's the position of the regulation.  
8 I understand I heard ----

9 MJ [COL POHL]: I know what the regulation says. Okay,  
10 I'm going to tell you this, this is my position, is that once  
11 counsel appears, the judge is the ultimate thing. There is no  
12 court -- people can write regulations all they like, okay, but  
13 you still have to take them in context of the law.

14 I'm familiar with no system whatsoever that would  
15 permit a supervisory attorney to remove somebody from  
16 representational capacity who's appeared before a judge  
17 without the judge's okay. If you've got authority to the  
18 contrary other than the regulation -- and, again, I didn't  
19 write the regulation. I see no cites or case authority that  
20 permits that. I would certainly be willing to listen to it.

21 But I'm going to tell you this: I don't believe  
22 that's the state of the law, and I suspect the government  
23 doesn't believe that's the state of the law, because that

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1 would place us in a position of a third party terminating a  
2 relationship. I mean, when you read it, that he determined  
3 what good cause has shown. All the cases say the judge  
4 determines good cause.

5           So what I am saying to you is -- and, quite frankly,  
6 if the government wants to be heard, they can, but I'm not  
7 sure they need to be.

8           TC [MR. RYAN]: Only to say we agree, Judge.

9           MJ [COL POHL]: Because, quite frankly, I didn't really  
10 care if they disagreed, because I just don't think that's the  
11 law. So yes, if you're asking me how do I view it, if the  
12 regulation is read that the Chief Defense Counsel sole  
13 discretion to excuse counsel without the approval of the judge  
14 for a counsel who's appeared, that's not the law in this case  
15 today. He has to convince me, not General Baker.

16          DDC [Maj SCHWARTZ]: Your Honor, we would want to brief  
17 that issue. If -- that sounds like a finding.

18          MJ [COL POHL]: I'm -- if you want to brief it, knock  
19 yourself out. That's what we're doing here today. We're not  
20 going to sit here and wait for a whole briefing cycle for an  
21 issue that I think is a clear statement of the law, and I  
22 would suspect -- again, if you want to brief it, go ahead.

23               If it turns out that I find no good cause and that

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1 General Baker finds good cause and we want to have a  
2 discussion about who controls, we'll have that discussion.  
3 Because, to me, that's the only reason it would come up, okay?

4 But the issue -- so the issue before me is your  
5 client has to show me good cause to sever the relationship  
6 with Ms. Bormann, and he's got to tell me that on the record  
7 and convince me that it is good cause, and then we'll go from  
8 there. But that's a colloquy he's got to tell me.

9 DDC [Maj SCHWARTZ]: We have spent the last 48 hours  
10 having this discussion with the understanding that the  
11 regulation is the law. It's going to take a minute to step  
12 back from that, discuss this issue and do some analysis  
13 on ----

14 MJ [COL POHL]: But even the regulation requires good  
15 cause, doesn't it?

16 DDC [Maj SCHWARTZ]: Certainly. And if this colloquy has  
17 to happen on the record, I think the next question is -- which  
18 I don't dispute it would have to happen on the record. The  
19 next question is: Does it happen in open court?

20 MJ [COL POHL]: Okay. I don't want to prohibit either  
21 side from discussing whether it needs to be on the record or  
22 not. I've read the case that I believe has control on it, but  
23 I'm certainly willing to listen to other people if they want

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1 to do it some other way. It's got to be on a record, the  
2 question is what record it is.

3 But the government has a dog in this fight,  
4 obviously, and so if you want to discuss whether it's going to  
5 be some other forum other than open court, you let me know,  
6 but right now that's what we're going to do. If you've got  
7 authority to the contrary, if the government believes it can  
8 be done in some ex parte way, I'm willing to listen to it. I  
9 don't think it's consistent with the current case law as I  
10 read it, but I sometimes misread it and you guys help me out  
11 and get me on the right track. So I'm certainly willing to  
12 listen.

13 Are you done?

14 DDC [Maj SCHWARTZ]: May I have a moment?

15 MJ [COL POHL]: Sure. Mr. Nevin, do you want to be heard  
16 on this?

17 LDC [MR. NEVIN]: Your Honor, I wanted to ask the military  
18 commission for a brief recess as a lawyer who had a detailed  
19 military counsel to Mr. Mohammad removed against our wishes by  
20 a third party to these proceedings. I want to think about --  
21 I'd like to have a few minutes to talk about the military  
22 commission's ----

23 MJ [COL POHL]: Okay.

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1 LDC [MR. NEVIN]: ---- last remarks.

2 MJ [COL POHL]: I understood what you said, and, quite  
3 frankly, I don't think it's a particularly novel idea. If  
4 counsel were removed, okay -- and you've got to understand  
5 what we've done here.

6 We've replaced and added counsel as a concept based  
7 on representations by the lead counsel. Mr. Sowards, for  
8 example. You said he wants him, so I said fine.

9 If there was an objection for removal of counsel -- I  
10 mean, we had this discussion the other day with one from the  
11 Bin'Attash team, I said, well, how about letting me know? But  
12 if you have objection of removal of counsel, bring it to me.  
13 I've got no problem discussing it. But I never saw it.

14 LDC [MR. NEVIN]: We did.

15 MJ [COL POHL]: Who are we talking about? Are we talking  
16 about Major Wright?

17 LDC [MR. NEVIN]: Yes, sir. But rather than ----

18 MJ [COL POHL]: I don't want to get into -- what I am  
19 saying ----

20 LDC [MR. NEVIN]: If we could have a minute to ----

21 MJ [COL POHL]: You're going to get a minute because  
22 they're going to get time. You're going to get a minute to  
23 think about it. But understand this, Mr. Nevin, I'm not

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1 addressing that right now.

2 LDC [MR. NEVIN]: I understand.

3 MJ [COL POHL]: If you want to revisit the Major Wright  
4 issue at some time, but we're not doing that right now.

5 LDC [MR. NEVIN]: It wasn't clear to me that I should at  
6 least not raise that as an issue at this point, and that's why  
7 I asked for a minute to think about it.

8 MJ [COL POHL]: But as I understand it, Major Wright has  
9 been released from active duty.

10 LDC [MR. NEVIN]: At this point, that's correct.

11 MJ [COL POHL]: But what I was simply talking about was  
12 the way the regulation would appear to let the Chief Defense  
13 Counsel remove defense counsel for good cause without the  
14 court having to agree to it. That's what I'm talking about.

15 But I don't want to get into Major Wright right now  
16 anyway.

17 LDC [MR. NEVIN]: TJAG removed without the court's ----

18 MJ [COL POHL]: We can talk about Major Wright, but I  
19 don't want to talk about Major Wright right now or today, but  
20 we'll get to him.

21 What we're going to do is recess until 1030, and at  
22 that time we'll see where we're at. The commission is in  
23 recess.

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1 [The R.M.C. 803 session recessed at 1003, 28 October 2015.]

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