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1 [The R.M.C. 803 session was called to order at 1031,
2 28 October 2015.]

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

6 Mr. Connell, you're standing, so I'm assuming you
7 want to be heard on something.

8 LDC [MR. CONNELL]: Yes, sir. I wanted to let you know
9 that Colonel Thomas will be back in just a moment.

10 MJ [COL POHL]: Okay. We'll proceed without him.

11 I'll direct this question -- when I say this to Major
12 Schwartz, I'm not excluding Ms. Bormann per se. Whoever wants
13 to answer can do it. Major Schwartz, is Mr. Bin'Attash
14 prepared to tell me why there is good cause to sever the
15 relationship?

16 ACC [MR. BIN'ATTASH]: [Spoken in English] There's no
17 translation -- translation.

18 MJ [COL POHL]: Hold on a second.

19 LDC [MS. BORMANN]: There's no translation going through
20 the ear phones.

21 ACC [MR. BIN'ATTASH]: [Spoken in English] Now good. Now
22 good.

23 MJ [COL POHL]: Thank you.

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1 Major Schwartz.

2 DDC [Maj SCHWARTZ]: No, Your Honor, Mr. Bin'Attash is not
3 prepared to have that colloquy immediately.

4 First -- and it is a tricky point because, Your
5 Honor, as you mentioned, Ms. Bormann sits here; she's at the
6 table; she hasn't been excused; but she's not participating in
7 my advice to Mr. Bin'Attash right now.

8 I have sought the advice of the Chief Defense
9 Counsel, General Baker, but as we progress through this, it
10 seems to me more and more that I'm acting under conflict as
11 well. I've been a part of this defense team for as long as
12 Ms. Bormann has. Mr. Bin'Attash has been asking for her
13 excusal, and that's something that has been -- it's a new
14 issue. It's something that we've just been trying to develop
15 the reasons behind over the past 48 hours, maybe 72 hours as I
16 mentioned. So to have this conversation with Mr. Bin'Attash
17 at this point without Ms. Bormann or without any learned
18 counsel input is an issue.

19 Number two, for the past 48 hours I've been advising
20 Mr. Bin'Attash that the state of the law is X, and again,
21 we'll brief that issue subsequent to your finding, but now we
22 have to backtrack from that and explain to him why the
23 regulation may not be worded as we've advised -- or the state

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1 of the law may not be as we advised him.

2 But it seems we're putting the cart before the horse
3 in that the Chief Defense Counsel certainly does -- even under
4 UCMJ practice, we contemplate the detailing authority having
5 some kind of role in this process. And it may be that Chief
6 Defense Counsel investigates this and decides there's no good
7 cause, and so we don't even have to get to the colloquy.

8 The Chief Defense Counsel has spent, over two
9 occasions in the last three days, three to four hours speaking
10 to Mr. Bin'Attash, and as you see in his declaration to you,
11 he requires more time to do his own investigation. But as I
12 go to him during our recess today, and I advise him of my
13 concerns and I seek his guidance, General Baker tells me we
14 need time to work this issue out.

15 MJ [COL POHL]: What issue?

16 DDC [Maj SCHWARTZ]: Set aside the issue of the
17 regulation. No problem. In order for me to advise
18 Mr. Bin'Attash, there are questions implicated with respect to
19 Ms. Bormann's role. Can I advise him on this issue, given my
20 experience, given the fact that I am not learned counsel,
21 without her participation, and does he have access to counsel
22 without her participating? Even with ----

23 MJ [COL POHL]: Let's just back up. Is that whether he

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1 is -- doesn't he determine what her involvement is? Isn't
2 that a decision by the accused?

3 DDC [Maj SCHWARTZ]: Well, if he makes a knowing and
4 voluntary and informed decision about waiver ----

5 MJ [COL POHL]: Well, the problem we're getting here,
6 Major Schwartz, is it appears to be a never-ending do-loop, is
7 that he can't make a decision until he's been fully informed,
8 but I can't fully inform him, therefore he can't make a
9 decision, therefore let's do what, nothing?

10 I mean, and I'm going to let the government here on
11 this, but it seems to me is if Mr. Bin'Attash wants to change
12 what we've been doing in terms of counsel representation for
13 the last three years, okay, he has that option, as I explained
14 to him. I also explained to him the way ahead. Okay.

15 Now, whether you believe General Baker is the
16 authority to establish good cause or the court is, we've had
17 that discussion. But at the end of the day is he knew, you
18 knew that he had to show good cause. Now, who he showed it
19 to, there's been a dispute about that. I've got that. You
20 know the way it is here, okay?

21 But if you're telling me that Mr. Bin'Attash is not
22 in a position to articulate on the record why he needs to be
23 severed, then we just go to the current state of affairs and

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1 it's not severed. And what Ms. Bormann does going forward or
2 you do going forward is in the context of what your client
3 tells you to do. I mean, otherwise we would never get there.

4 DDC [Maj SCHWARTZ]: The reason, Your Honor, I think that
5 he's not -- the reason he isn't prepared isn't that he isn't
6 factually prepared. It's that I haven't provided him the
7 advice, and I can't provide him the advice without taking a
8 step back, investigating -- not the legal issue but the
9 factual issue, the underpinning of the good cause question.
10 And that ----

11 MJ [COL POHL]: But you've had -- you know, when does this
12 end? I mean, good cause is right in the regulation. Again,
13 disagreement of who you have to show it to, I've got that.
14 It's good cause right in the regulation, right in the case
15 law, you know, what it is. And it's not just simply I don't
16 like so and so, or a disagreement about minor issues on the
17 case. It's good cause. And then I have to do a balance to
18 see whether it is even then.

19 And, again, we're not on the eve of trial, I've got
20 that, but we're four years down the road. So, you know, this
21 idea that -- you know, you've got to investigate what?

22 DDC [Maj SCHWARTZ]: That's why the analysis is tricky.
23 What we have to do here is to take a step back and provide

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1 advice to Mr. Bin'Attash on what is good cause, because he's
2 not an attorney.

3 MJ [COL POHL]: I know he's not an attorney, as we
4 discussed yesterday, or the other day when I made a remark
5 about there's difficulties with nonattorneys trying to
6 understand legal concepts.

7 Just help me here, okay? Good cause and what
8 constitutes good cause is a legal concept, I've got that,
9 okay? But what we're really talking about from an accused's
10 perspective, a defendant's perspective, is why factually would
11 you want to sever the relationship? He gives you the facts,
12 and then you try to see whether -- you give your legal advice
13 on those facts. It is or is not good cause, in my opinion.
14 But understand my opinion in this case, the attorney's opinion
15 doesn't control. The judge's opinion controls.

16 So I don't understand why he has to know all the case
17 law and everything on good cause when it's simply a factual
18 issue that he's got to convey to you. And as any lawyer, you
19 take facts from your client and you filter them through your
20 training and experience into a legal argument.

21 DDC [Maj SCHWARTZ]: That's exactly where I am, Your
22 Honor. I completely agree with everything you just said.
23 It's that I don't understand the facts as I know them today.

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1 And this is where we start to get into this ex parte, this
2 privileged information.

3 As we've learned over the past three days, there are
4 facts that are unknown to defense counsel. That's -- what you
5 saw in the ex parte filing 380 ----

6 MJ [COL POHL]: Papa and Romeo.

7 DDC [Maj SCHWARTZ]: The first of the two ex parte filings
8 includes some information that would inform my advice. Until
9 I have all of that information, and Mr. Bin'Attash doesn't
10 have all of that information. There are members of the
11 defense team who have ----

12 MJ [COL POHL]: Okay. Okay. You lost me there.

13 Mr. Bin'Attash wants to sever the relationship based
14 on information he does not have. Is that what you just told
15 me?

16 DDC [Maj SCHWARTZ]: No. He wants to sever the
17 relationship based on ----

18 MJ [COL POHL]: What he has.

19 DDC [Maj SCHWARTZ]: He has information. He doesn't have
20 all the information.

21 MJ [COL POHL]: Then how does it impact on his decision?
22 How does an unknown fact impact on his decision?

23 DDC [Maj SCHWARTZ]: Well, it just proves that his

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1 decision isn't fully informed.

2 MJ [COL POHL]: You're losing me here, Major Schwartz.
3 I'm trying to understand your position. Mr. Bin'Attash, if he
4 wants to sever the relationship, has to give a factual
5 predicate to establish good cause. Okay. Now, would that not
6 be facts that he knows, not facts he doesn't know?

7 DDC [Maj SCHWARTZ]: The conclusion he's reached today is
8 based on the facts that he knows. As we investigate this
9 issue -- and whether it's I'm investigating it to provide him
10 legal advice, Your Honor is investigating it in terms of a
11 colloquy to provide him his rights, the Chief Defense Counsel
12 is investigating it to determine if excusal is appropriate,
13 there will be more information provided to him -- and Your
14 Honor couldn't provide that to him -- but I can provide him
15 more information by conducting an investigation. The Chief
16 Defense Counsel can provide him ----

17 MJ [COL POHL]: Explain to me what you're investigating.

18 DDC [Maj SCHWARTZ]: That's what needs to be done in a
19 closed session.

20 MJ [COL POHL]: Okay. So let's go to that. Let's go to
21 that issue. Okay. If he wants to establish good cause, and
22 there's a substantial likelihood, I suspect -- or there's a
23 possibility, let me just put "possibility," that may entail

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1 attorney work product/privileged information, you believe that
2 should be done in a closed ex parte session? Or in open
3 court?

4 DDC [Maj SCHWARTZ]: The concern is that privileged
5 information isn't divulged. Matters related to representation
6 does not -- do not ----

7 MJ [COL POHL]: How would the government be able to argue
8 whether it's good cause or not if they don't know what it is?

9 DDC [Maj SCHWARTZ]: The government has taken the position
10 they object to the severance of the relationship.

11 MJ [COL POHL]: No. The government has taken the position
12 they want to hear the facts. Let me make sure -- okay, stay
13 there.

14 Mr. Ryan, just so I understand, the government's
15 position is that there are a certain set of facts that may
16 warrant severance of any attorney-client relationship and
17 we'll wait and see what these facts are. Would that be a fair
18 statement?

19 TC [MR. RYAN]: That's a fair statement, Judge. And there
20 is an analysis that has to take place and the government, as
21 well as the commission, would have to hear those circumstances
22 and facts that can be presented before we can have a position
23 as to all of this. Also, Judge, I would note we are in a

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1 further compromised position because there have been at least
2 two ex parte pleadings where we don't know anything.

3 MJ [COL POHL]: I understand that, and I understand that
4 we will -- I understand that and we will, as I told
5 Ms. Bormann, they're currently under seal. That doesn't mean
6 they may stay under seal.

7 TC [MR. RYAN]: I understand.

8 MJ [COL POHL]: I just want to clarify the point that the
9 government's position is there are always a set of
10 circumstances that may warrant severance and there's a set of
11 circumstances that may not warrant severance, but until you
12 hear the circumstances, you can't take a position on this
13 case.

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

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

16 DDC [Maj SCHWARTZ]: Your Honor, this is 292, this is
17 Mr. Harrington needing to know the information ----

18 MJ [COL POHL]: Now, wait a minute. Wait a minute here.
19 Let's just be very clear. 292 involved an external
20 investigation into the defense team, okay? This issue has
21 nothing to do with anybody except members of the defense team,
22 correct?

23 I know what you're saying, but I just want to make

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1 sure it's clear. This has nothing to do with anything outside
2 the defense team; is that correct?

3 DDC [Maj SCHWARTZ]: I'm not suggesting any kind of
4 infiltration here. We have infiltration issues.
5 Procedurally, this is like 292.

6 MJ [COL POHL]: Okay, I'm with you. I'll buy that part,
7 but I just want to make it clear, this is a completely
8 different -- and the reason why I say that is -- why it's
9 completely different, is that all the known knowns are within
10 the defense team.

11 Now, there may be either prior or current members of
12 the defense team, whether they're being shared with the entire
13 defense team may be a different issue altogether, I've got
14 that. This is all internal to -- it's all -- let me put it
15 this way, it's all covered by the attorney work product in
16 some way, shape or form.

17 DDC [Maj SCHWARTZ]: I would agree with that
18 characterization. If we subsequently find out this is
19 something else, I don't want to waive that issue.

20 MJ [COL POHL]: Well, you can't waive an issue you don't
21 know about, so I've got it. Go ahead.

22 DDC [Maj SCHWARTZ]: This is the problem, is this requires
23 more information to be provided to me. I can go find that

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1 information. I think learned counsel needs to be a part of
2 that investigation of learning those facts, and I think we're
3 all on the same page that Ms. Bormann's position doesn't allow
4 her to do that at this point.

5 I also personally feel that I'm operating under
6 conflict. It almost seems to me ----

7 MJ [COL POHL]: Are you making a motion to withdraw?

8 DDC [Maj SCHWARTZ]: I'm not, Your Honor, but it seems to
9 me the Chief Defense Counsel's role here really could resolve
10 this issue. Again, if we take a step back and allow him to do
11 his analysis and he determines there is no good cause, we
12 don't even have to address any of these issues.

13 MJ [COL POHL]: Oh, really? So let me -- and, again, I
14 don't want to minimize the role of the Chief Defense Counsel,
15 and I don't want to minimize what the regulation says that I
16 disagree with. I'm not minimizing that.

17 But if the Chief Defense Counsel says there's no good
18 cause, then we're now done? Mr. Bin'Attash comes into court
19 and says I want -- you know, isn't it his decision to decide
20 whether to raise it to the court, and once raised to the
21 court, the court, commission's decision to decide? So at best
22 General Baker's opinion is an advisory opinion to be given
23 such weight as it deserves ----

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1 DDC [Maj SCHWARTZ]: I take that ----

2 MJ [COL POHL]: ---- as I view the law, which you may
3 disagree with, but as we talk about it.

4 So he investigates and finds good cause or doesn't
5 find good cause, so what? And, again, I'm not minimizing his
6 position, but so what? I'm back in the same position.

7 DDC [Maj SCHWARTZ]: Right. If he investigates and he
8 finds that there's no good cause, that information ----

9 MJ [COL POHL]: Then what?

10 DDC [Maj SCHWARTZ]: ---- that he would like to provide in
11 some amicus filing or we would provide to the commission,
12 again, might limit -- here's the problem as we're trying to
13 figure out where we go from here, if you open up the good
14 cause inquiry with Mr. Bin'Attash today.

15 Number one, I don't think he's acting with full legal
16 advice; number two, I know he's not acting with all the
17 information; and number three, we have this issue of how we do
18 this, the vehicle, is it a closed session, is it a closed
19 filing?

20 Regardless -- well, that sounds messy. A Chief
21 Defense Counsel, somewhat independent investigation, might
22 answer a series of questions that would make for a much
23 cleaner process.

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1 MJ [COL POHL]: I don't want to get into issues about a
2 Chief Defense Counsel getting involved in the work product of
3 a particular team, okay? Again, let's just put that aside,
4 okay?

5 What I'm asking is this, is what I have before me --
6 okay. What I have before me is an apparent request to sever
7 an attorney-client relationship, okay? I have that before me.
8 And that's Mr. Bin'Attash's request to me to talk about that.
9 And so -- and you say we're not ready to do it, and so we have
10 two options, then: We stop until you give me this -- we're
11 ready to go, or we just keep going forward because the issue
12 isn't before me, or we address the issue.

13 I mean, what I'm kind of hearing you say, and I've
14 read the most recent pleading, is stop full ahead until we get
15 this other information. And quite frankly, the other
16 information as you've given to me -- and I'm trying to be
17 cryptic here -- I'm not sure you're ever going to get; but
18 that's neither here nor there. I just don't know the
19 relevance of it, okay?

20 DDC [Maj SCHWARTZ]: The piece of information that we were
21 proposing to obtain in our filing this morning is one aspect.
22 May I have a moment, Your Honor?

23 [Pause.]

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1 MJ [COL POHL]: Ms. Bormann?

2 LDC [MS. BORMANN]: He wants to take a break.

3 Judge, a couple of things. First, Mr. Bin'Attash is
4 now informing us that he would like to discuss the matter
5 further with us, so I'm asking for a few moments.

6 MJ [COL POHL]: Okay. I say "okay" being I heard you, not
7 necessarily that I'm agreeing to this.

8 LDC [MS. BORMANN]: Ten minutes, 15 minutes? I don't know
9 what the new information is.

10 Secondly, and this is not a conflicted issue here,
11 but the bigger issue, I think, going forward is how to protect
12 from divulging protected material that may be elicited during
13 a colloquy in open court and not cause damage to a capital
14 defense. That's a big issue.

15 MJ [COL POHL]: But -- it is, Ms. Bormann, but ----

16 LDC [MS. BORMANN]: There are ways -- I would suggest to
17 you there are ways to minimize the damage done.

18 MJ [COL POHL]: Do you have any authority that this --
19 that the inquiry on the reason for severance would be done in
20 a closed session, let me -- where the government's excluded?

21 LDC [MS. BORMANN]: Judge, I'm not actually proposing that
22 necessarily. But what I am proposing is that the commission
23 consider doing this in the least intrusive way, the least

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1 damaging way to a capital defendant, one who's actually facing
2 his very life.

3 MJ [COL POHL]: I understand.

4 LDC [MS. BORMANN]: And who has no legal training, and,
5 frankly, has no idea that what he's divulging is going to be
6 taken by the government that wants to kill him and then later
7 used against him.

8 So this has been a very tumultuous last two weeks,
9 and if you engage in a colloquy right now with Mr. Bin'Attash,
10 there is a very good chance that he will relay information
11 regarding work product to the government in an open setting,
12 and we won't be able to shut the door. That's the concern,
13 so ----

14 MJ [COL POHL]: Is that not -- no, I understand. I'm
15 sensitive to that. But we're now getting into a situation
16 where, is that not the choice he has to make to show good
17 cause, if it deals with that?

18 LDC [MS. BORMANN]: Well, if you rule that way, it is.
19 But I want to make the record very clear that capital case
20 considerations are very different than a typical case. The
21 protections that inure to a capital defendant are much greater
22 and given much more deference by appellate courts.

23 So looking back in a commission where the rules are

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1 unclear, where there appears to be a rule that the commission
2 has decided it's not going to follow because the commission
3 believes it would result in an absurd result, where there
4 are -- you have counsel saying my client's communications need
5 to be protected because they are privileged, and he's not in a
6 space right now to be able to do that. I'm asking you to
7 listen to fashioning a way to protect, to the greatest extent
8 necessary, those communications.

9 MJ [COL POHL]: Ms. Bormann, I will listen to any
10 suggestions you have.

11 LDC [MS. BORMANN]: Thank you.

12 MJ [COL POHL]: If that's all you're asking me, that's
13 fine.

14 LDC [MS. BORMANN]: I am.

15 MJ [COL POHL]: Okay. I got it. I got it.

16 LDC [MS. BORMANN]: I need to meet with him. So if we can
17 take just a short recess, it may implicate all of this. I
18 don't know what the situation is.

19 MJ [COL POHL]: Okay. Hold on a second.

20 Mr. Ruiz, do you need something to say right now?

21 LDC [MR. RUIZ]: Yes. I think I need to say it before you
22 go any further so you have a chance to correct it.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. RUIZ]: Judge, I think the exchange that you had
2 with Mr. Bin'Attash, in particular with respect to the
3 civilian pool and the inside and outside of the military
4 defense office's resources, I think was at best confusing, but
5 I think it could have been misleading as well. And then what
6 I want to do is ----

7 MJ [COL POHL]: What part do you believe is misleading?

8 LDC [MR. RUIZ]: In particular, I think the discussion
9 with respect to inside and outside the defense office was a
10 little bit confusing. And to the extent that these colloquies
11 are going to shape future colloquies in terms of how the
12 commission advises other defendants, if we ever were to cross
13 that road again, that's why I think it's necessary to at least
14 make sure we're very clear as to what that means.

15 And I'll tell you what my understanding is of ----

16 MJ [COL POHL]: Okay. I told him and then I told him
17 again what it is. He's got a lawyer to explain it to him,
18 okay?

19 LDC [MR. RUIZ]: Sure. I want to make sure that the
20 commission itself understands the process, again, as it shapes
21 future litigation. My concern, of course, is that to the
22 extent there are any communications amongst codefendants, I
23 want to make sure that that's clear.

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1 But, Judge, I think the part that I have particular
2 trouble with was a counsel need not be a member of the Chief
3 Defense Counsel's office to be appointed as a learned counsel.
4 It does not have to be within the office. The office does
5 have the ability to reach out, have somebody come into the
6 office, and then apply to that pool and then be considered to
7 be a learned counsel.

8 So I think that's the portion that wasn't clear, is
9 that that type of counsel can, in fact, be funded by the
10 U.S. Government, even if they're not currently and presently a
11 part of the military Chief Defense Counsel's office. I don't
12 think that was clear, and I think that that's something, going
13 forward, that I would want the commission to be aware of.
14 Does that make sense?

15 MJ [COL POHL]: Yeah. I'm just reading out of the
16 regulation, and I understand that the pool of counsel are not
17 necessarily assigned to the Chief Defense Counsel's office.
18 But as I said -- and correct me if I'm wrong on this, I'm
19 assuming they've made their names available to the Chief
20 Defense Counsel, and I believe that's what I explained to
21 Mr. Bin'Attash.

22 LDC [MR. RUIZ]: That's correct. But counsel need not be
23 on that pool to still be considered as learned counsel. So

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1 you could identify somebody outside of that list.

2 MJ [COL POHL]: Right.

3 LDC [MR. RUIZ]: The Chief Defense Counsel could consider
4 the qualifications, admit them, and then appoint them. So
5 it's not a situation where they have to be presently as part
6 of that pool to be considered. They can be considered
7 otherwise. I think that's important to understand ----

8 MJ [COL POHL]: Gotcha.

9 LDC [MR. RUIZ]: ---- in that sense.

10 The second piece that I wanted to just put my two
11 cents in with respect to the privileged communications,
12 because that is of great concern, and I think I heard you say
13 that the choice a defendant has to make before engaging in a
14 colloquy where they're going to assert counsel rights, is
15 either waive the privilege for themselves or engage in a
16 colloquy. And that is extremely troubling if that is the
17 court's position. We certainly object with respect to that.

18 MJ [COL POHL]: My position is twofold: A, they've got to
19 establish good cause on the record. I don't know what that
20 means until I hear what the facts are. And B is this is a
21 Bin'Attash issue. You know, if it comes up to your client,
22 let me know. But I'm not going to get advisory advice from
23 counsel who don't have standing on this issue.

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1 LDC [MR. RUIZ]: Very good.

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

3 Major Schwartz -- Mr. Connell.

4 LDC [MR. CONNELL]: I just wanted to note for the record
5 that Lieutenant Colonel Thomas returned to the courtroom just
6 as the military commission was beginning this session.

7 MJ [COL POHL]: Thank you.

8 Okay, Major Schwartz, back to you. Okay. Whether
9 it's to me or to the Chief Defense Counsel, in any event, the
10 Chief Defense Counsel is not -- does not have an
11 attorney-client relationship with your client, correct?

12 DDC [Maj SCHWARTZ]: He does not have an attorney-client
13 relationship. He has privileged communications in performing
14 his supervisory role.

15 MJ [COL POHL]: Okay. Okay. But at the end of the day,
16 it's that your client must establish good cause to sever this
17 relationship, correct?

18 DDC [Maj SCHWARTZ]: Yes, sir. Yes, Your Honor.

19 MJ [COL POHL]: Ms. Bormann's point about how he does that
20 in open court in a capital case, I understand what she's
21 saying. But I also understand that the government has a role
22 with this, too.

23 Now, you say you need more time to investigate, and I

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1 don't want to, again, put you in a position of revealing
2 things you don't want to reveal. But this issue has now been
3 percolating for virtually a week and a half. As I understand
4 the pleadings as kind of where this came up, it's come up a
5 while ago, not a long time ago, and so it's done.

6 So when you say investigate without going into much
7 detail. What are we talking about here?

8 DDC [Maj SCHWARTZ]: I know we're not talking about
9 15 minutes, Your Honor. I know we're not talking about this
10 week. But it was Ms. Bormann's point that makes me most
11 uncomfortable about my role here.

12 She stands up and she can provide you authority, she
13 can provide you argument on why in a capital case we need to
14 stop and provide Mr. Bin'Attash advice on how to proceed,
15 provide the commission with argument and authority. I can't
16 do that.

17 MJ [COL POHL]: But see, here's the problem I'm having
18 here, Major Schwartz, is that you're taking the position --
19 and correct me if I'm wrong -- that Ms. Bormann is not in a
20 position to make these arguments because of the current -- and
21 you need learned counsel to make these arguments, but the only
22 way you're going to get learned counsel to make these
23 arguments that aren't named Ms. Bormann is if the relationship

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1 is severed and new learned counsel is applied, and then now
2 the new learned counsel comes back and explains why the
3 relationship should be severed.

4 Now, sometimes I know my train of thought gets
5 confusing even to me. But that's what I hear you saying.

6 DDC [Maj SCHWARTZ]: That sounds circular, Your Honor,
7 it's do-loop, right?

8 MJ [COL POHL]: It is circular. That's why I said it.

9 DDC [Maj SCHWARTZ]: I can't even see where the circles
10 are connecting at this point because, even if this is an issue
11 that's been percolating since last Monday, the facts have
12 changed every day, and my role in advising him at this point
13 is so unclear to me and so undefined, that I don't even see
14 the end of the circle.

15 So I go to my supervisory counsel and I say, sir, we
16 need to discuss this, we need to figure this out. And he says
17 we need more time. And so ----

18 MJ [COL POHL]: Time to do what? To research the law or
19 research the facts?

20 DDC [Maj SCHWARTZ]: Certainly the facts first.

21 MJ [COL POHL]: But I come back to it. Isn't the current
22 state -- and, understand, I know this is a critical issue, so
23 I'm not -- and I've given you guys what I think is a lot of

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1 time. If it takes more time, it takes more time. I think the
2 government, I'm sure, knows this, that if I think you need
3 time, I'll give you time. There's no clock on these cases, on
4 any case. So I've got that. But it's got to be some type of
5 reasonable request.

6 And what you gave to me -- and I don't want to talk
7 about it. What you gave to me in the pleading today, or last
8 night I guess it was, is I fail to see how that goes anywhere
9 as far as what Mr. Bin'Attash knows and as far as what
10 Mr. Bin'Attash wants to do to say for good cause.

11 Now, what you're telling me is, as we discussed
12 earlier, this is all within the defense team. Any good cause
13 he gives me, I would suspect, will implicate attorney work
14 product at a minimum and perhaps put material -- again, okay.
15 I mean, just what I've got so far.

16 So I just -- when you say "investigate"
17 investigate -- how long is this going to take and what are you
18 looking at? And I'm talking about you. I'm not talking about
19 General Baker. He does what he does. I'm talking about you
20 and your ability to advise your client.

21 DDC [Maj SCHWARTZ]: On this internal matter, I learned a
22 fact last night that affected my ----

23 ACC [MR. BIN'ATTASH]: [Spoken in English] No

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1 translation.

2 MJ [COL POHL]: Okay. Is the translation okay now?

3 Translator?

4 INT: Yes, Your Honor.

5 MJ [COL POHL]: Okay.

6 DDC [Maj SCHWARTZ]: I learned a fact last night that
7 affected my own analysis of good cause. I learned a fact this
8 morning that affected my own analysis of good cause, having
9 nothing to do with what we filed. What we filed was, I almost
10 think may be more of an example of the types of questions that
11 need to be asked.

12 If Your Honor doesn't see the answers to that example
13 as relevant to the conclusion here, okay, but there are many
14 other questions that I need to ask, at least. Whether I get
15 the answer, whether I expect I get an answer at all will
16 affect my ability to advise him on the good cause colloquy. I
17 know I can't do that right now.

18 MJ [COL POHL]: Can there be good cause that is unknown to
19 your client?

20 DDC [Maj SCHWARTZ]: Yes.

21 MJ [COL POHL]: Okay. But then is it a severance issue on
22 your client or -- I mean, this is coming from him. So if
23 you've got good cause for a severance issue that doesn't

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1 connect with him, do we have to wait on him to know about it?

2 DDC [Maj SCHWARTZ]: Well ----

3 MJ [COL POHL]: I mean, when I ask that question, I can
4 think of something he doesn't know about, okay, but that's not
5 where we're at. That's why I'm having difficulty here, saying
6 let's go find more facts and then tell more facts to my
7 client, and then -- so he now has more facts for good cause
8 when he's asking me potentially to sever the relationship
9 today.

10 DDC [Maj SCHWARTZ]: Right. And that information that
11 would be provided to him would potentially affect his ultimate
12 position on the issue. It certainly would affect the way that
13 he answers your questions in the good cause colloquy.

14 And so if we proceed now, just hypothetically, if we
15 somehow close the session and there's some kind of colloquy
16 where you're asking him questions and he's providing you that
17 information to try to answer your questions, his information
18 isn't fully informed because I haven't had a chance to do my
19 job. That's how I see this.

20 MJ [COL POHL]: When does it end?

21 DDC [Maj SCHWARTZ]: Without going into the nature of the
22 structure of our team and the number of people involved in
23 this issue, I would think that we could resolve this over the

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1 course of the next several weeks and have the ability for him
2 to answer your questions at the scheduled December hearing.

3 MJ [COL POHL]: What if we come in December -- and
4 understand that I'm not making any decision -- and you stand
5 up and say, well, all these other people won't talk to us, we
6 need to have more time.

7 I mean, isn't there an indication that some of these
8 people you want to talk to have refused to talk to you?

9 DDC [Maj SCHWARTZ]: On what you've seen, Your Honor, I
10 believe an e-mail was sent inquiring about facts on ----

11 MJ [COL POHL]: No, we don't need to go into detail. What
12 I am simply saying is the pleading I have is that somebody
13 that you want to talk to has refused to talk to you, true?

14 DDC [Maj SCHWARTZ]: After having a very short opportunity
15 to receive the request, that's true. And he's one of a number
16 of people who need to be questioned on the issue.

17 MJ [COL POHL]: Okay. "Okay" in the sense I heard you,
18 not okay, that I'm making a ruling right now.

19 Okay. Go ahead. Anything else?

20 DDC [Maj SCHWARTZ]: No, Your Honor, this request I
21 believe for a 15-minute ----

22 MJ [COL POHL]: Let's get this clear. You're not asking
23 for a 15-minute request. You're asking for a two-month

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1 request. So let's -- you know, if you tell me I will give you
2 15 minutes, which I've given you again and again and again,
3 and it's going to be resolved and go forward, great. But if
4 you're asking me for a two-month request and you're asking me
5 for 15 minutes to ask for the two months, that's not useful.

6 DDC [Maj SCHWARTZ]: I understand. And I'll represent to
7 you Mr. Bin'Attash doesn't want a delay here.

8 MJ [COL POHL]: And, again, remember, this is his right.
9 But I've got you. I hear what you're saying.

10 Trial Counsel, before we -- before I do anything, do
11 you want to be heard on any of this?

12 TC [MR. RYAN]: One moment?

13 MJ [COL POHL]: Sure.

14 [Pause.]

15 MJ [COL POHL]: Mr. Ryan.

16 TC [MR. RYAN]: Your Honor, just to announce that we think
17 the court's analysis of the events is correct, understanding
18 this began a week ago Monday with Mr. Bin'Attash making a
19 request at that time to speak with you about the issue of
20 self-representation. Today that morphed into another issue,
21 but once again, as Your Honor has pointed out, having to do
22 with his rights and his choices that he wishes to make.

23 We think the commission has identified the proper

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1 road for handling it and the analysis that would go into it.
2 We, of course, wait to hear the underlying facts so that we
3 can weigh in to the commission as well.

4 MJ [COL POHL]: Okay. Although we don't have a proposal,
5 do you have a comment on Ms. Bormann's comment that there has
6 to be some way to protect privileged material in this context,
7 work product?

8 TC [MR. RYAN]: Judge, we've looked at the case law as you
9 did and that you cited, noting that it -- any discussion has
10 to be on the record. We are willing to discuss possible ways
11 that the commission can work with the defense so that
12 privileged information -- any privileged information is
13 protected to the greatest practical extent. At this moment,
14 though, I don't know that we're in a position to talk about
15 that.

16 If I made myself clear, Judge, I understand ----

17 MJ [COL POHL]: No, I understand what you're saying. I
18 just want to get your input on. If you take -- as I discussed
19 with Major Schwartz, is that these issues appear to be within
20 the defense team ----

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

22 MJ [COL POHL]: Okay. And, therefore, assuming that
23 that's true, without deciding -- assuming that that's true,

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1 therefore, the good cause would necessarily implicate attorney
2 work product and probably attorney privileged material.

3 TC [MR. RYAN]: I would agree the chances are probably
4 pretty good, yes.

5 MJ [COL POHL]: Okay. But the question is: Does the
6 government have the right to know what the good cause is and
7 to be heard on whether it is or is not good cause?

8 TC [MR. RYAN]: Yes, sir, I submit absolutely. Because
9 what we're talking about here, at least one of the requests,
10 if not several of the requests, is of major import in the
11 progress of this case that, as Your Honor has noted, now
12 involves an attorney-client relationship four years in the
13 making.

14 Now, having said that and having an understanding
15 that the government, the prosecution absolutely has the right
16 to weigh in to the commission as to any decision, especially
17 as to something as important as to whether good cause has been
18 shown, we are of the -- we are happy to discuss with the
19 commission and the defense here at the podium a method, if
20 Your Honor so desires, whereby the amount of -- the
21 information coming from the accused as to good cause can be
22 protected, at least in terms of the internal work product
23 that's being divulged, so that the government and the outside

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1 world, really, doesn't hear it, a full spill, if that is what
2 they're concerned about.

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

4 Here's what we're going to do. We're going to recess
5 for lunch in probably about a half hour anyway because prayer
6 is 1145, according to my calendar. It changed.

7 LDC [MR. CONNELL]: Your Honor ----

8 MJ [COL POHL]: I just read what they give me.

9 LDC [MR. CONNELL]: With all due respect, it changed in
10 the U.K. because they're on British summertime, but we haven't
11 had our time change in the United States, so prayer time has
12 not actually changed in the United States.

13 MJ [COL POHL]: Well, I will defer to you guys. I just
14 have been operating from a calendar that has been provided by
15 the Guantanamo Bay Naval Air Station Cuban prayer times. And
16 it says prayer time is 1145. You're saying that is incorrect,
17 that it's actually 1245?

18 LDC [MR. CONNELL]: Yes, sir.

19 LDC [MR. NEVIN]: Until Saturday night at 3:00 a.m.

20 MJ [COL POHL]: Okay. With that being said, we won't
21 recess right now. Okay.

22 Ms. Bormann -- okay. I don't see what's accomplished
23 by another 15-minute break. It seems to me is the issue is

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1 what the issue is. What facts he has is what he wants. I
2 understand -- I understand the difficulty of this issue, but
3 at the end of the day, isn't it the client's decision what he
4 wants to do? And if he's making a bad decision, doesn't he
5 have the right to make a bad decision?

6 LDC [MS. BORMANN]: Well, he has a right to make a bad
7 decision if he's fully informed of the facts, but he's not.

8 So going forward -- and I appreciate the government's
9 suggestion here, because I think they understand what this
10 will do to the record. The divulging of privileged
11 information in a capital case in an open forum where the
12 government has unfettered access to a defendant who is not
13 properly trained in the law, in what is privileged and what
14 isn't, is a very difficult situation.

15 You know, the government said maybe there's a way to
16 protect Mr. Bin'Attash's rights and still allow him to proceed
17 to a colloquy. And so I think there probably is, and I'm --
18 you know, this is not a conflicted position for me because I
19 thoroughly believe that Mr. Bin'Attash has a right to proceed
20 in whatever way he deems acceptable and -- but here his
21 privileged communications should be protected to the greatest
22 extent.

23 There is a way to do that, and that is to have the

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1 colloquy not in a public setting and have you determine what
2 privileged material ought to be redacted to provide to the
3 government so they can formulate their position. You could
4 determine what would be appropriate for that. You do that
5 regularly. You do it in substitutions and a variety of other
6 settings to protect the government's interests.

7 So I think in protecting a capital defendant's
8 interests, that same kind of careful analysis would be useful.
9 And it does no harm to the government at all. They've said to
10 you that they are willing to work with the commission in that
11 regard, and, you know, you can determine what is relevant and
12 what is not and provide that then to the government.

13 MJ [COL POHL]: But let me just -- you know, again, I'm
14 just trying to figure out this process. If we do that, you
15 know, with basically an ex parte colloquy with just you and
16 Mr. Bin'Attash, put it on the record and excluding everybody
17 else, and then a lot of it is privileged/work product, okay,
18 is it's simply a relevancy inquiry, what goes to the
19 government, or a work product/privileged inquiry?

20 LDC [MS. BORMANN]: No. I think you can determine what
21 material would be relevant and necessary -- I think that's the
22 term we use for discovery.

23 MJ [COL POHL]: Uh-huh.

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1 LDC [MS. BORMANN]: For the government where it has to be
2 disclosed, despite work product privileges. But it's a
3 balancing test, and one I believe that the court should
4 absolutely engage in.

5 MJ [COL POHL]: Just understand because I'm just thinking
6 what the universe of information will be, is substantial
7 chance, most of it, if not all of it, is going to be
8 work-product related, given what I know so far.

9 LDC [MS. BORMANN]: Some of it will be, and some of it
10 won't be.

11 MJ [COL POHL]: May not be.

12 LDC [MS. BORMANN]: Intermingled. And I think the court
13 certainly can take a look at it and make that determination,
14 and if the commission determines that all of it is work
15 product and all of it needs to be turned over, then ----

16 MJ [COL POHL]: If we go down this road -- and, again, I'm
17 not saying I'm going to, because I'm going to hear from the
18 government first. If we go -- as I understand what you want
19 to do, is an ex parte closed hearing with just your client and
20 your defense team here, okay, engage in the colloquy. When
21 the colloquy is done, the commission determines what is
22 relevant to go to the defense -- to the government.

23 LDC [MS. BORMANN]: To the prosecution.

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1 MJ [COL POHL]: Okay. But before I do that, I would come
2 back to you and say understand to show good cause shown, this
3 work product or privileged material is going to go to the
4 government, to give you and your client an opportunity to say
5 yes or no. If the answer is no, then maybe we're done. But
6 you understand what I am saying?

7 LDC [MS. BORMANN]: In an abundance of caution, I think
8 that might be ----

9 MJ [COL POHL]: Then we go on, okay.

10 LDC [MS. BORMANN]: ---- some sort of thing just to make a
11 record. But ultimately you make those determinations
12 regularly, right?

13 MJ [COL POHL]: I know. I know. Right.

14 LDC [MS. BORMANN]: And so you make those determinations
15 whenever some party invokes some form of privilege.

16 MJ [COL POHL]: Yeah.

17 LDC [MS. BORMANN]: And we have a privilege issue that I
18 think the commission is very aware. As you said, a lot of it
19 is intermingled. But you may be able to provide the
20 government the information they need without touching on
21 matters of privilege. And if it can happen, then it ought to
22 happen.

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

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1 Mr. Ryan.

2 TC [MR. RYAN]: Yes, sir. Your Honor, the proposal from
3 the accused we think goes too far. What we would suggest as
4 an alternative is this: First, the colloquy has to take
5 place, and I think we're all in agreement Your Honor has to be
6 talking to the accused directly. It's important for the
7 commission to be able to observe the accused as he's speaking,
8 to hear answers or at least be satisfied that what you're
9 getting is from him, since we are talking about his choices,
10 his rights, et cetera.

11 What I would suggest as an alternative right now is
12 this: Your Honor can ask for the accused to explain the good
13 cause for which he seeks this extraordinary remedy. The
14 accused can speak with Major Schwartz. Major Schwartz, as a
15 trained lawyer, as an attorney, detailed military counsel on
16 the case for four years now, can take care to filter out any
17 extreme examples of privileged information, work product,
18 et cetera, but explain to Your Honor the good cause at least
19 that's being put forth by the accused with the government in
20 the room so that we may be in the position of being able to
21 observe him as well, listen to the answers as they're coming
22 out through Major Schwartz, et cetera.

23 MJ [COL POHL]: But it seems to me -- and I'm always

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1 willing to listen to both sides' suggestions for a way ahead.
2 And understand I'm just -- I understand Ms. Bormann's
3 position, so when I ask a question, doesn't mean I'm going
4 this way. I just want to clarify my own mind.

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

6 MJ [COL POHL]: Is that if I ask Mr. Bin'Attash what's a
7 good cause, and he turns to Major Schwartz and says, "I want
8 to tell him what happened this day in the defense team," but
9 Major Schwartz says that's work product, now where are we?

10 TC [MR. RYAN]: And that's part of what Major Schwartz's
11 role would have to be. And from there, Judge, we'll just have
12 to take another step at a time. But I suggest starting ----

13 MJ [COL POHL]: But I'm saying if I -- I don't know how
14 far we're going to get, is my issue. And I know things you
15 don't know. I've got that. I got that.

16 But I'm just saying, hypothetically speaking, a lot
17 of this -- and Ms. Bormann took issue when I said most of it,
18 she said it was less than most -- we'll see. A substantial
19 portion of this is intertwined in the defense team and covered
20 by work product at least.

21 TC [MR. RYAN]: I understand.

22 MJ [COL POHL]: And so if -- let me ask you this: Assume
23 there is no practical way to split it up in open court like

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1 you're proposing, given the nature of what the allegations
2 are. Would you object to Ms. Bormann's idea?

3 TC [MR. RYAN]: Court's indulgence, Your Honor?

4 MJ [COL POHL]: Sure.

5 [Pause.]

6 TC [MR. RYAN]: Judge, just before I move on to the
7 commission's specific question, there was one last point I
8 wanted to make about my proposal, which was that Your Honor
9 asks questions of the accused, who speaks to Major Schwartz,
10 who speaks to Your Honor. Just to be sure that at the end of
11 it -- or as we're going along actually much better, that Your
12 Honor could then say, as you're getting answers from Major
13 Schwartz, you could directly address the accused and say, "Is
14 that accurate, what Major Schwartz just presented?"

15 That making the proposal ----

16 MJ [COL POHL]: Just so I understand, because I'm a little
17 confused. I ask a question of Mr. Bin'Attash, Mr. Bin'Attash
18 would relate it to Major Schwartz, and Major Schwartz would
19 then filter out, for want of a better term, attorney work
20 product information and give me a filtered answer, and then
21 I'd go back and confirm that. Is that in essence what you
22 just said?

23 TC [MR. RYAN]: That's our proposal, Your Honor. And then

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1 going through that process, let me suggest that that may be
2 all that's necessary.

3 On the other hand, if Your Honor feels that more is
4 necessary, then we can discuss alternatives. But I think we
5 should at least start out with the least restrictive way
6 possible. And I'll remind the commission that the government
7 needs to be in the best position itself to assess what's
8 happening in terms of the direct colloquy so that we can
9 advise the commission accordingly. This weighs heavily on the
10 government's rights as well, Judge, so ----

11 MJ [COL POHL]: All right. Got it.

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

13 MJ [COL POHL]: Ms. Bormann, if we started out with a
14 variation of Mr. Ryan's proposal, and I would start out
15 basically making it, asking Mr. Bin'Attash, through Major
16 Schwartz, tell me any good cause facts that are not privileged
17 or part of the attorney work product, because you said there
18 are some ----

19 LDC [MS. BORMANN]: Yes.

20 MJ [COL POHL]: I'm not sure there are, but I thought you
21 told me there are some.

22 LDC [MS. BORMANN]: There are some that I suspect are
23 informed by communications that were privileged.

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1 MJ [COL POHL]: Let me ask you this, is you heard
2 Mr. Ryan's proposal. Can we divide this sausage up this way?

3 LDC [MS. BORMANN]: That is an impossible situation, in my
4 opinion, for a variety of reasons, and I believe that it would
5 put Major Schwartz in a particularly difficult position,
6 because what happens if the information conveyed to Major
7 Schwartz was inconsistent with Major Schwartz's own knowledge
8 of the information, which he then is required to provide to
9 the commission?

10 So there is beyond the -- there are lots of problems
11 in an open setting here with having this colloquy, and it's
12 possible to do it in a way that protects the defense function,
13 to the best way possible.

14 MJ [COL POHL]: Got it. Commission is in recess.

15 [The R.M.C. 803 session recessed at 1126, 28 October 2015.]

16 [END OF PAGE]

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