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1 [The R.M.C. 803 session was called to order at 1143,
2 28 October 2015.]

3 MJ [COL POHL]: Commission is called to order. It appears
4 all parties are again present. If I'm wrong, let me know.
5 Nobody says anything, so I'm assuming everybody is here.

6 Consider the way ahead on this issue:

7 The defense request for in essence a two-month
8 continuance is denied.

9 The government proposed action or procedure to
10 discuss this with Mr. Bin'Attash raises issues of both
11 practicality and legality. By that I mean is that on a
12 practical basis filtering through Major Schwartz may or may
13 not be efficient or effective, but legally speaking is, I need
14 to hear it from the accused's own mouth, not through his
15 counsel.

16 So the court has considered the various alternatives
17 in this example -- or to address this issue, and the court,
18 commission will state here's the way ahead:

19 The court finds under Rule For Military Commission
20 806 that there are unusual circumstances that would warrant a
21 closed proceeding, and as such will conduct one. The way it's
22 going to work is at 1400 hours today everyone except for the
23 Mr. Bin'Attash team will be out of the courtroom. Everyone --

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1 not counting, you know, court reporters, obviously, but all
2 parties, and we will conduct a closed session under Rule For
3 Military Commission 806, written order to that effect to
4 follow.

5 At that time I will discuss with Mr. Bin'Attash
6 directly what he believes good cause is shown. Upon the
7 conclusion of that hearing, the commission will then issue
8 appropriate follow-on orders as it deems fit.

9 But that's the way we're going to proceed today. As
10 far as how long -- where the detainees go, that's not my
11 concern. All my concern is, is that at 1400, the only people
12 in this courtroom are the Bin'Attash team, my people and the
13 court reporters.

14 Now, Major Schwartz, you indicated some way that
15 General Baker has some type of privileged relationship here.
16 He is not a member of the Bin'Attash team, and just so I don't
17 address the issue, do you want him here for the colloquy? And
18 if you do that, are you not waiving the privilege by having an
19 unprivileged person knowingly listening to it?

20 LDC [MS. BORMANN]: Can I address that?

21 MJ [COL POHL]: Sure.

22 LDC [MS. BORMANN]: In this very unusual system, from my
23 perspective, by its very nature there are zones of privilege

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1 with respect to everything that we do. So I've never been in
2 a system where, for instance, in order to do investigative
3 work and have to travel somewhere, I have to submit a request
4 explaining what the need is to the same entity that approved
5 capital charges against my client. That's what we do, and we
6 do that because we are required to, under this system, operate
7 disclosing privileged material just to be able to get stuff
8 done. In the office -- or the Military Commissions Defense
9 Organization, that happens to be the case.

10 So those things, those privileged materials, and I
11 just gave you one example, go directly to the Chief Defense
12 Counsel and the Deputy Chief Defense Counsel. They act under
13 an understanding that that material is privileged. And so
14 there have been privileged communications with defense counsel
15 and the Chief Defense Counsel, and it's necessary in order for
16 us to be able to represent Mr. Bin'Attash at all.

17 MJ [COL POHL]: Okay. But my point is this: Is if he
18 wants to sit in, do you have any objections?

19 LDC [MS. BORMANN]: No, and ----

20 MJ [COL POHL]: And let me ask you this: But you do not
21 believe him sitting in waives any privileges or disclosure of
22 attorney work product? Just say yes or no.

23 LDC [MS. BORMANN]: I don't believe so. I haven't

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1 researched the issue.

2 MJ [COL POHL]: Just hold on right there.

3 LDC [MS. BORMANN]: Okay.

4 MJ [COL POHL]: Trial Counsel, on this issue and this
5 narrow issue alone, would you concur that the presence of
6 General Baker does not waive privileged material to third
7 parties?

8 TC [MR. RYAN]: I have no idea what General Baker's
9 relationship is, so I cannot opine on such an issue.

10 MJ [COL POHL]: Okay.

11 LDC [MS. BORMANN]: That's fair.

12 MJ [COL POHL]: Thank you, Mr. Ryan. Okay.

13 LDC [MS. BORMANN]: If you can give me just a moment, I'm
14 not sure it's necessary. So bear with me.

15 MJ [COL POHL]: I'm about to give you two hours and
16 15 minutes.

17 LDC [MS. BORMANN]: Okay.

18 MJ [COL POHL]: Okay. So I'll tell you, we'll kick this
19 can down the road. Mr. Ryan?

20 TC [MR. RYAN]: Judge, I want to be -- I understand the
21 way ahead. I do want to be heard -- **[Counsel stepped away**
22 **from microphone; no audio]** -- before the commission breaks.

23 MJ [COL POHL]: Okay. Let me think about it. Let me

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1 think about whether you want us to be here and we'll go from
2 there.

3 Okay. Mr. Ryan.

4 TC [MR. RYAN]: Yes, sir. Judge, actually two matters,
5 one much more housekeeping; that being, the guards should be
6 present, I assume, during the 1400 ----

7 MJ [COL POHL]: Yes.

8 TC [MR. RYAN]: ---- especially since the accused is ----

9 MJ [COL POHL]: The number of guards necessary for one
10 accused will also be present. Anything they hear is not to be
11 disclosed outside the courtroom.

12 TC [MR. RYAN]: Very well, sir. The second part, which is
13 more substantive, is this: I understand the commission's
14 ruling, and I understand the process that you've identified.
15 What I ask, however, is that following the commission's
16 discussion colloquy with the accused, that at the point at
17 which you bring the parties back in, that the government, the
18 prosecution be apprised of the operative facts that justify or
19 that constitute or do not constitute good cause so that we may
20 at least be in a position of some knowledge to be able to help
21 the commission in our argument.

22 MJ [COL POHL]: That's a reasonable request. Like I say,
23 until I hear what I hear, I can't tell you necessarily what

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1 will be the next step. But obviously if it implicates the
2 government's interests, you will have an opportunity to be
3 heard before a decision is made.

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

5 MJ [COL POHL]: Mr. Connell, you stood first.

6 LDC [MR. CONNELL]: Your Honor, I just want to understand,
7 do you anticipate counsel other than Mr. Bin'Attash and
8 defendants other than Mr. Bin'Attash to be standing by?

9 MJ [COL POHL]: No. We would conduct this hearing at
10 1400, we will discuss it and reconvene tomorrow at 0900.

11 LDC [MR. CONNELL]: Thank you, sir.

12 LDC [MR. NEVIN]: Your Honor, Mr. Mohammad asks that he be
13 allowed, and his team be allowed, to be present for the
14 colloquy with Mr. Bin'Attash.

15 MJ [COL POHL]: Ms. Bormann, this is your request, but I'm
16 not sure why we would open it up to anybody other than your
17 team.

18 LDC [MS. BORMANN]: Judge, I don't know, and I believe it
19 is privileged.

20 MJ [COL POHL]: No. The unusual circumstances justifying
21 a closed hearing I believe doesn't implicate any other
22 accused, and, therefore, Mr. Mohammad's request through
23 Mr. Nevin is denied.

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1 LDC [MR. NEVIN]: And, Your Honor, could -- that being the
2 case, would the commission be directing that Mr. Mohammad be
3 returned to the camp after 1400?

4 MJ [COL POHL]: All I'm directing -- all I'm directing is
5 everybody out of the courtroom at 1400. Where he physically
6 is after that is an issue with trial counsel, the guard force,
7 and your desires if they all can meet. Whether that means
8 they wait in the trailer until we're done with the hearing or
9 whether they send them right back, you guys work out what you
10 want to do.

11 LDC [MR. NEVIN]: Does the commission anticipate further
12 proceedings after the ----

13 MJ [COL POHL]: Not today. As I told Mr. Connell, not
14 today.

15 LDC [MR. NEVIN]: No further proceedings today.

16 MJ [COL POHL]: We will reconvene with everybody tomorrow
17 at 0900 and see where we're at.

18 Mr. Harrington.

19 LDC [MR. HARRINGTON]: Could we request our clients be
20 kept here as long as possible?

21 MJ [COL POHL]: All I'm saying is they be out of this
22 courtroom at 1400. Where they are between now and 1400, if
23 they want to stay and talk to you, that's fine. But

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