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1 [The R.M.C. 803 session was called to order at 0906,
2 29 October 2015.]

3 MJ [COL POHL]: Commission is called to order.

4 Trial Counsel, any changes in the prosecution team
5 since the commission last recessed?

6 CP [BG MARTINS]: No, Your Honor.

7 MJ [COL POHL]: Mr. Nevin?

8 LDC [MR. NEVIN]: Same, Your Honor.

9 MJ [COL POHL]: Ms. Bormann?

10 LDC [MS. BORMANN]: We're the same, Judge.

11 MJ [COL POHL]: Mr. Harrington?

12 LDC [MR. HARRINGTON]: Same, Judge.

13 MJ [COL POHL]: Mr. Connell?

14 LDC [MR. CONNELL]: No changes.

15 MJ [COL POHL]: Mr. Ruiz?

16 LDC [MR. RUIZ]: No changes.

17 MJ [COL POHL]: I would note all detainees are here except
18 for Mr. al Hawsawi, unless he's hiding back -- no, okay.

19 Mr. Swann.

20 LDC [MR. RUIZ]: He is not, Judge.

21 MJ [COL POHL]: Thank you.

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

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1 DIRECT EXAMINATION

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

3 Q. Good morning. Are you the same Assistant Staff Judge
4 Advocate who testified earlier during these proceedings this
5 week?

6 A. I am.

7 Q. Again, I remind you you are still under oath.

8 Did you have occasion to advise Mr. al Hawsawi of his
9 rights to attendance this morning?

10 A. Yes, I did.

11 Q. Okay. At what time did you do that?

12 A. Began at 0533.

13 Q. When did you finish with those rights advisements?

14 A. Approximately 0538.

15 Q. All right. I have -- or you have in your possession
16 what's marked as Appellate Exhibit 384, consisting of three
17 pages. Is that the form you used to advise him of his rights?

18 A. Yes, it is.

19 Q. All right. In English and in Arabic?

20 A. Yes.

21 Q. After advising him of his rights, did he indicate
22 that he wanted to come here today?

23 A. He stated he did not wish to attend this commission

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1 proceeding today, but instead wished to attend his scheduled
2 legal meetings.

3 Q. At Echo II?

4 A. Yes, sir.

5 Q. All right. Do you believe that he understood his
6 rights to attend today?

7 A. Yes, I do.

8 Q. All right. He executed the form?

9 A. Yes, he did.

10 TC [MR. SWANN]: I have no further questions.

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

12 LDC [MR. RUIZ]: No questions.

13 MJ [COL POHL]: Thank you, Captain.

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

15 MJ [COL POHL]: The commission finds that Mr. al Hawsawi
16 has knowingly and voluntarily waived his right to be present
17 today.

18 As discussed yesterday in the last open session, the
19 commission at 1400 conducted an ex parte closed session with
20 Mr. Bin'Attash's team to discuss his counsel rights and his
21 election thereto. There will be an order forthcoming on the
22 closure, the normal 806 closure order, and it will be coming
23 for -- it will be coming out, and I made those conclusions for

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1 the necessity of a closed hearing prior to conducting the
2 closed hearing.

3 That being said, after the conclusion of the said
4 hearing, there was a transcript prepared of the hearing. The
5 transcript was provided to the defense team to get their
6 position of what part of the transcript should be redacted.
7 And, again, this is just their approach to it.

8 Subsequently, I received a pleading, which was -- has
9 been marked as 380 -- [discussion with court reporter]. I
10 believe it was filed yesterday evening.

11 Okay, and that will be 380W. The pleading was served
12 on the trial judiciary and the court reporters. I had a
13 member of my staff contact the defense to make sure who they
14 believe should see the pleading. It was not filed under seal,
15 but we note it had not been served on the other side.

16 Subsequently, I believe we received an e-mail from
17 the defense that -- to the effect of that they want it under
18 seal. So the initial inquiry to me is -- to the defense is:
19 Why can't the government see 380W with the attached redacted
20 transcript?

21 LDC [MS. BORMANN]: Do you want me to address that in a
22 pleading or on the record?

23 MJ [COL POHL]: Right now.

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1 LDC [MS. BORMANN]: The proposed sealing order, which I
2 think is now going to the trial judiciary, along with the
3 pleading and the proposed redactions, indicates the first
4 position that the defense has, is that the entire colloquy is
5 not germane, is not material and relevant to the prosecution.

6 If you determine there is good cause, then that is
7 ultimately your decision to make. If you determine there is
8 no good cause, based upon what you heard yesterday, then that
9 is your determination to make.

10 The government cannot either propound or disparage
11 counsel. That's not their role. And so, therefore, they
12 really don't have a dog in this fight. This is a ----

13 MJ [COL POHL]: Don't they -- let me ask you this,
14 Ms. Bormann: Does the government not have a right to be heard
15 on whether or not there is good cause?

16 LDC [MS. BORMANN]: I don't believe they do, no. And I
17 believe that the memorandum cites to some cases that talk
18 about that very issue. They -- this is not their issue. This
19 is the defendant's right, and this is the judge's
20 determination.

21 You went forward yesterday into a colloquy with
22 Mr. Bin'Attash, and you have the ultimate decision-making
23 power here under your interpretation of the rules. So the

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1 government -- the government's interference in and request for
2 knowledge about what may or may not have transpired during
3 that colloquy is not appropriate.

4 MJ [COL POHL]: Let me ask you this: If the basis for the
5 termination was not a privileged matter or a work product
6 matter -- for example, the accused was suing his lawyer and
7 there's a public record to that effect, okay, would the
8 government, under that scenario, have the opportunity to say
9 that is not good cause or is good cause?

10 LDC [MS. BORMANN]: Well, those are different ----

11 MJ [COL POHL]: Is there different rules because the
12 nature of the basis for the requested termination?

13 LDC [MS. BORMANN]: There are two different issues here.
14 So what you're talking about is a motion to disqualify. If
15 the government comes into knowledge that somebody is being
16 sued and there is a conflict, and that conflict is disclosed
17 to the government or they learn of it separately, they can
18 actually move to disqualify. And when they do that, they
19 obviously have a position ----

20 MJ [COL POHL]: No, but let's assume the government's
21 position is the public knowledge is not grounds for
22 disqualification or good cause to terminate the proceeding.
23 Would they have a right to present that argument to the judge

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1 before he decided whether it did amount to good cause?

2 LDC [MS. BORMANN]: Well, it would depend, of course, on
3 the nature of the factual determination. If, for instance,
4 the example that you gave, there is a pending lawsuit against
5 counsel based upon representation, then that is a matter of
6 public record, and there is no need to consider and weigh and
7 balance whether or not the information is material and
8 relevant to the prosecution, because it's already out there.

9 So I don't think the same set of circumstances apply.
10 I think they frankly don't have a right to either promote what
11 they believe might be counsel's effectiveness or disparage
12 counsel ----

13 MJ [COL POHL]: Okay.

14 LDC [MS. BORMANN]: ---- if they take a position to the
15 contrary. Because the case law is clear that -- that under
16 those circumstances, they're interfering improperly in the
17 attorney-client relationship.

18 So you asked me the position -- Mr. Bin'Attash has a
19 right, regardless of what this court's decision is, to keep
20 matters related to his defense as sacrosanct as possible,
21 given the circumstances we find ourselves under. Much of what
22 occurred yesterday in the closed session is the very thought
23 process that Mr. Bin'Attash goes through. Revealing that to

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1 the United States Government, in a prosecution where they're
2 seeking to kill him, is giving the government information that
3 they can utilize, and is doing so without any showing of
4 materiality or relevance to their argument.

5 And you're in a position, frankly, to make that call,
6 right? I mean, you engaged in the colloquy. If the court
7 determines that, you know, I guess that it's material and
8 relevant in some fashion, I mean, we object to that. We
9 believe the entire thing is sacrosanct. But I can't imagine
10 under any analysis that you could even reach that conclusion.

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

12 Trial Counsel, do you want to be heard on this issue?
13 And, Mr. Ryan, I understand that you do not have the benefit
14 of the pleading that I have, but what I'm simply -- the issue
15 is because the basis for the termination of the relationship,
16 the good cause factual predicate, is -- assume for the sake of
17 this discussion is protected by at least attorney work
18 product, if not privilege, okay? How much does the government
19 have a right to know before I decide?

20 TC [MR. RYAN]: Your Honor, the concept before the
21 commission is whether there exists good cause for the accused,
22 Mr. Bin'Attash, to seek the termination of a relationship with
23 counsel that he has had for going on four years now, if not

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1 four years. It impacts on, first of all, the very central
2 matter of right to counsel within a proceeding, which I submit
3 is a matter of imperative importance to all parties, including
4 the commission; and the commission, as to such a central
5 issue, not only benefits from, but really needs the input of
6 all parties in the course of the discussion.

7 I recognize that there is a danger involved in the
8 sense that the commission had to peek behind the curtain, so
9 to speak, at least a little bit, as to the inner workings of
10 the defense team. Yesterday we talked quite a bit about that
11 and the necessity, or the lack of it, in terms of what other
12 parties should have to know.

13 I think, Your Honor -- first of all, we presented a
14 possible alternative to protect the information and
15 communications of the inner workings of the defense team, and
16 Your Honor took it even a step further and found good reason
17 to, in fact, close a hearing and discuss these matters with
18 the accused without the benefit of the United States or, for
19 that matter, the other parties in the case. And I don't take
20 issue with that. I think Your Honor crafted what you saw as
21 the best possibility for getting the information you needed to
22 have while protecting their inner communications, but, of
23 course, understanding that you had to take the somewhat

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1 drastic step of excluding everyone else from the case.

2 The government, the United States, absolutely has a
3 dog in this fight, Judge. We're in a case now that a
4 client -- an attorney-client relationship is four years in.
5 The proceedings have been going on for three and a half years.
6 What the accused suddenly decided to drop in this commission a
7 week or so ago was a complete derailment of matters in which
8 it will affect the speed of the case going forward; it would
9 probably affect many issues and appellate issues looking
10 backward; and, would, in fact, affect the enormous amount of
11 resources that have been dedicated to this project over the
12 past few years; and undoubtedly will affect it going forward
13 at a time in the case that I really believe is critical in
14 light of just the rulings from the commission over the past
15 week or so and a half, and also the positions of other parties
16 in the case.

17 So in short, Judge, this is a matter that doesn't
18 just affect the one team or one accused. It affects
19 everything in this courtroom. And it certainly affects the
20 United States of America, and the United States has a right to
21 be heard on this and to weigh in on it. Quite frankly, I
22 think Your Honor would agree that you benefit from the back
23 and forth, the discussion between the parties and to the

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1 extent there are dangers and there are parts of it that are
2 simply none of our business. I think Your Honor has done
3 everything to craft that. But now we're down to a basic legal
4 discussion and a concept of good cause. And for that, Judge,
5 I submit you need to hear from the United States as well.

6 Thank you, sir.

7 MJ [COL POHL]: Okay. Let me ask you this, Mr. Ryan.

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

9 MJ [COL POHL]: Are you prepared to give me what your
10 version of what good cause is without knowing what
11 Mr. Bin'Attash said yesterday?

12 TC [MR. RYAN]: Judge, all I could do -- and I'd ask you
13 not to do this because I, quite, frankly, think it ----

14 MJ [COL POHL]: I'm not saying I'm going to do it. I'm
15 just -- there's two issues here, Mr. Ryan ----

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

17 MJ [COL POHL]: ---- is the issue of what is good cause,
18 and that's strictly a legal issue, okay? Under the law -- and
19 we discussed a little bit of it on the record yesterday, and I
20 don't know whether you disagreed or agreed with the court's --
21 the commission's interpretation of what good cause is.

22 Really, it's what -- most cases say what it is not, okay? And
23 if you want to be heard on that, obviously I will let you be

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1 heard on that.

2 But the other issue is the balancing, because I take
3 issue with Ms. Bormann's view, quite frankly, that the
4 government has no role in this, as I do think the government
5 has a dog in this fight.

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

7 MJ [COL POHL]: Okay. So I recognize that. But there's a
8 balance that needs to be struck here between the government's
9 interest in the accused's protection of the attorney work
10 product and privileged material which will have to be struck.

11 TC [MR. RYAN]: Yes.

12 MJ [COL POHL]: So my question really is, the first part:
13 Do you wish to be heard on what good cause is strictly from a
14 legal perspective? And then I will get -- without deciding
15 whether or not I'm going to permit you to know what he said
16 yesterday.

17 TC [MR. RYAN]: Your Honor, all I could do, in the vacuum
18 I'd be operating under, is recite to the commission the
19 relevant factors of determination that I found in the course
20 of legal research yesterday as to the cases that exist out
21 there, or at least the cases that came closest to the facts
22 before the commission, as best I understood them. I don't
23 believe that's going to aid you an awful lot because I'm sure

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1 you're in the same position of understanding what the legal
2 authorities say. And Your Honor yesterday cited the Lockhart
3 case, and certainly that's one of them, and there are others
4 as well.

5 So I think -- although I'd be happy to, if it would
6 help the commission, to recite some of the factors I noticed
7 and found that were consistent within the various cases. I
8 submit, sir, that the -- that having a meaningful input from
9 the government, from the United States, requires us to know
10 what you deem we should know, and agreeing with your point
11 about the balancing act, Judge, I think that's where you've
12 already been.

13 You balanced yesterday the right of the accused
14 versus the right of the other parties, including the
15 United States, to be aware of what's happening as to this
16 significant issue, and Your Honor I think crafted a position
17 that certainly protects the accused's interests.

18 So at this point, Judge -- and it's really entirely
19 in your hands, so I think you're in a position to kind of keep
20 crafting as you go along. You can decide from that transcript
21 which -- what factor is important for us to see or necessary
22 for us to see that does not infringe on the defendant -- on
23 the accused, versus what can be.

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1 So that's my pitch to you, Judge. I submit that you
2 should go through the transcript with the accused's proposed
3 redactions, make a determination, give us the benefit of that,
4 whatever it is, and then I'm in a better position to address
5 the commission.

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

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

8 MJ [COL POHL]: One moment, please.

9 **[Pause.]**

10 MJ [COL POHL]: Ms. Bormann, I know you requested this to
11 be under seal, but it seems -- I'm looking at 380W. Do you
12 have a copy in front of you?

13 LDC [MS. BORMANN]: I don't. It was being sent in to you
14 when we were required to be in court. If you can give me
15 three minutes, I can get one.

16 MJ [COL POHL]: What I'm going to do, I'm going to -- one
17 moment.

18 I'm going to hand you my copy because I want to ask
19 you about one particular provision, and I want you to know
20 what I'm going to ask you about to see if you have any
21 problems with it.

22 Court reporter, please hand her 380W.

23 And what I really want to ask you about -- the only

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1 thing I'm going to ask you about is the first paragraph.

2 LDC [MS. BORMANN]: The first paragraph of?

3 MJ [COL POHL]: The first paragraph on page 1.

4 LDC [MS. BORMANN]: Yes.

5 MJ [COL POHL]: Okay.

6 LDC [MS. BORMANN]: Yes.

7 MJ [COL POHL]: Okay. Okay. Do you have any objection to
8 me discussing that? Because that appears to be strictly legal
9 principle.

10 LDC [MS. BORMANN]: May I have a moment?

11 MJ [COL POHL]: Sure.

12 [Pause.]

13 LDC [MS. BORMANN]: I'm a little confused, but I think
14 that what you're asking me is if ----

15 MJ [COL POHL]: I mean, what I have before me, just so I'm
16 clear, I want to -- I have before me, although it wasn't filed
17 yet, is a request that this entire thing be sealed.

18 LDC [MS. BORMANN]: Correct.

19 MJ [COL POHL]: Okay. And I want to ask you something in
20 open court about one paragraph in this ----

21 LDC [MS. BORMANN]: Okay.

22 MJ [COL POHL]: ---- without, you know -- the rest of the
23 sealing order, I don't want to -- I've not decided on that.

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1 But I think this is a significant issue that I want to discuss
2 with you.

3 LDC [MS. BORMANN]: And ----

4 MJ [COL POHL]: Just the first paragraph.

5 LDC [MS. BORMANN]: Just the first paragraph of ----

6 MJ [COL POHL]: On page 1.

7 LDC [MS. BORMANN]: ---- defense position?

8 MJ [COL POHL]: Exactly. It does not appear to be
9 inconsistent with ----

10 LDC [MS. BORMANN]: No, I think that's right.

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

12 And, Trial Counsel, since you don't have this
13 document, I'm going to read the entire first paragraph so you
14 understand what I'm talking about.

15 This is from 380W: "Pursuant to R.M.C. 806, the
16 commission should seal the attached transcript of
17 Mr. Bin'Attash's 28 October 2015 R.M.C. 806 hearing in its
18 entirety."

19 And the attached transcript is the redacted
20 transcript?

21 LDC [MS. BORMANN]: That's correct.

22 MJ [COL POHL]: "In the alternative, the commission should
23 only consider releasing portions of the transcript in the

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1 event the commission finds good cause to excuse learned
2 counsel. And in the further alternative, the commission
3 should release only those portions of the transcript not
4 redacted in Attachment A."

5 So just so I've got the bidding down here, we have an
6 unredacted transcript, a redacted transcript ----

7 LDC [MS. BORMANN]: Or no transcript.

8 MJ [COL POHL]: ---- and no transcript, okay. I guess
9 that's the other option.

10 So as I understand your position, is that -- and
11 again, I'm not making any decision. I just want to make sure
12 I understand it because is, is that if I believe that there is
13 a possible good cause shown, then the government should have
14 an opportunity to review some other material potentially. And
15 there's a lot of caveats in that.

16 LDC [MS. BORMANN]: Our position is that Mr. Bin'Attash's
17 communications should not be disclosed to the government,
18 position number one.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: If the commission determines that --
21 that the commission will not order that, then alternative
22 number two is only those portions that are relevant to the
23 determination of the issue before the commission, and that is

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1 whether there is good cause shown, should be released. And we
2 believe that is what our proposed redacted transcript does.

3 MJ [COL POHL]: Position number three, if the first two
4 are rejected, is ----

5 LDC [MS. BORMANN]: Position number three -- and you'll
6 have to state it again.

7 MJ [COL POHL]: Okay. What I'm saying is the government
8 gets more than just a redacted version.

9 LDC [MS. BORMANN]: Well, whatever portion position number
10 three is ----

11 MJ [COL POHL]: Whatever portions are relevant.

12 LDC [MS. BORMANN]: Exactly.

13 MJ [COL POHL]: But if the commission finds there is no
14 good cause anyway, then there's no need to give the government
15 anything.

16 LDC [MS. BORMANN]: Right, because the harm to
17 Mr. Bin'Attash under those circumstances is substantial and,
18 on balance, the government really doesn't have a dog in the
19 fight.

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

21 And last chance, Mr. Ryan, do you want -- anything to
22 add on that last discussion?

23 TC [MR. RYAN]: No, sir.

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1 MJ [COL POHL]: The commission understands the government
2 has an interest in this issue. The commission also
3 understands the need to protect the attorney-client privilege
4 and the work product privilege. If the commission felt that
5 in balancing those needs that there needs to be additional
6 disclosure to the government in order for them to be heard on
7 the factual predicate, the commission would craft such a
8 remedy.

9 After listening to Mr. Bin'Attash yesterday, the
10 commission believes it can rule on this issue without further
11 input from the government. And understanding that in the
12 normal procedure, the government would have the right to
13 additional information, but under the specific circumstance of
14 this issue, the commission does not feel -- between balancing
15 what Mr. Bin'Attash said and the government's need to know
16 what he said, the balance tilts in favor of not disclosing
17 that to Mr. Bin'Attash -- or to the government. Excuse me.

18 Mr. Bin'Attash, I'm going to issue a long order in
19 this -- well, I don't know how long it will be. There will be
20 an order issued in this case which will explain exactly why
21 I'm making the ruling I'm about to make. I will direct the
22 order will be translated into Arabic so you will have an
23 opportunity to read it to understand why I'm about -- why I

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 reached the conclusion I did reach, okay? So you will have
2 that.

3 Under the law, before you may terminate the
4 relationship with a counsel who's got an ongoing relationship
5 with you, you must show good cause. Based on what you told me
6 yesterday and everything I've received in this case, you have
7 failed to meet that burden. You have not shown good cause,
8 and, therefore, at this time I will not terminate
9 Ms. Bormann's representation of you.

10 Again, you will get a copy, in Arabic, of exactly the
11 reasoning. It will go to you and your defense team, under
12 seal, so that the government won't see it.

13 Now, the fact that Ms. Bormann is still a member of
14 your defense team does not mean that you do not have the right
15 to tell her and any other member of your defense team of what
16 you want them to do.

17 Do you understand what I've just told you?

18 ACC [MR. BIN'ATTASH]: Give me a minute, Judge.

19 LDC [MS. BORMANN]: Judge, a break might be appropriate
20 right now so we can discuss the issues with Mr. Bin'Attash
21 before he addresses the court.

22 MJ [COL POHL]: Okay. And you may want to explain some
23 other things going forward, so ----

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1 LDC [MS. BORMANN]: Exactly.

2 MJ [COL POHL]: I was going to give him a break, anyway.

3 We can do it that way because we'll get back to the same point
4 anyway.

5 The commission will be in recess for 15 minutes.

6 [The R.M.C. 803 session recessed at 0935, 29 October 2015.]

7 [END OF PAGE]

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