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1 [The R.M.C. 803 session was called to order at 0902,
2 15 May 2017.]

3 MJ [COL POHL]: The commission is called to order.
4 General Martins, who is here for the United States today?

5 CP [BG MARTINS]: Good morning, Your Honor. Present for
6 the government, Brigadier General Mark Martins, Mr. Robert
7 Swann, Mr. Edward Ryan, Mr. Clayton Trivett, Ms. Nicole Tate,
8 Major Christopher Dykstra, Mr. Dale Cox, Mr. Rudolph Gibbs,
9 Sergeant Jesus Banks. And present in the back of the
10 courtroom with the Federal Bureau of Investigation are Patrick
11 O'Malley, Kim Waltz and Mary Needham.

12 Your Honor, I would like to put on the record that
13 these proceedings are being transmitted by closed-circuit
14 television to locations in the Continental United States
15 pursuant to your order.

16 MJ [COL POHL]: Thank you.

17 Mr. Nevin.

18 LDC [MR. NEVIN]: David Nevin, Ms. Lebeouf and Major
19 Poteet. Mr. Sowards is absent pursuant to your order.

20 MJ [COL POHL]: Upon your request, yes.

21 LDC [MR. NEVIN]: Permitting that in response to my
22 request. And Mr. Mohammad is present.

23 MJ [COL POHL]: Ms. Bormann.

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1 LDC [MS. BORMANN]: Judge, present are myself, Mr. Edwin
2 Perry, Captain Brian Brady and Major Matthew Seeger.

3 MJ [COL POHL]: Mr. Harrington.

4 LDC [MR. HARRINGTON]: Judge, in addition to me is Alaina
5 Wichner and Major Jarrod Stuard, who will give his credentials
6 in a few minutes. And excused at our request is Major
7 Christopher Lanks. Right.

8 MJ [COL POHL]: Mr. Connell.

9 LDC [MR. CONNELL]: Good morning, Your Honor.

10 MJ [COL POHL]: Good morning.

11 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi are
12 myself, James Connell; Lieutenant Colonel Sterling Thomas of
13 the United States Air Force; Ms. Alka Pradhan. Excused at our
14 request is Major Jason Wareham.

15 MJ [COL POHL]: Mr. Ruiz.

16 LDC [MR. RUIZ]: Judge, I am present along with
17 Ms. Suzanne Lachelier, Lieutenant Colonel Jennifer Williams,
18 Major Joseph Wilkinson, and Mr. Sean Gleason.

19 MJ [COL POHL]: Thank you. The commission will note all
20 the accused are also present. Major Stuard, please put your
21 detailing qualifications on the record.

22 ADC [Maj STUARD]: Good morning, Your Honor.

23 MJ [COL POHL]: Good morning.

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1 ADC [Maj STUARD]: My name is Major Jarrod Stuard, United
2 States Air Force. I have been detailed by Brigadier General
3 John Baker, the Chief Defense Counsel, shown by my detailing
4 memo, Appellate Exhibit 004X. I am qualified and certified
5 under ----

6 MJ [COL POHL]: Major Stuard.

7 ADC [Maj STUARD]: Yes, sir.

8 MJ [COL POHL]: I tell this to everybody. You need to
9 slow down because the interpreters need to have time to
10 interpret, okay? Go ahead.

11 ADC [Maj STUARD]: I am qualified and certified under
12 Article 27(b) and sworn under Article 42(a) of the Uniform
13 Code of Military Justice. I am also qualified and certified
14 under Rules 502 and 503 of the Rules for Military Commissions.
15 I have not acted in any manner that might tend to disqualify
16 me in these proceedings.

17 MJ [COL POHL]: Thank you.

18 ADC [Maj STUARD]: Thank you, sir.

19 MJ [COL POHL]: Pursuant to the normal practice on the
20 first day of the hearings, I am going to advise all the
21 accused of their rights to be present and their ability to
22 waive said right.

23 And this is directed to all of the accused. You have

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1 the right to be present during all sessions of the commission.
2 If you request, if you request to absent yourself from any
3 session, such absence must be voluntary and of your own free
4 will. Your voluntary absence from any session of the
5 commission is an unequivocal waiver of the right to be present
6 during that session. Your absence from any session may
7 negatively affect the presentation of the defense in your
8 case. Your failure to meet with and cooperate with your
9 defense counsel may also negatively affect the presentation of
10 your case.

11 Under certain circumstances, your attendance at a
12 session can be compelled, regardless of your personal desire
13 not to be present. Regardless of your voluntary waiver to
14 attend a particular session of the commission, you have the
15 right to attend any subsequent session. If you decide not to
16 attend the morning session but wish to attend the afternoon
17 session, you must notify the guard force of your desires.
18 Assuming there is enough time to arrange transportation, you
19 will then be allowed to attend the afternoon session.

20 You will be informed of the time and date of each
21 commission session prior to the session to afford you the
22 opportunity to decide whether you wish to attend the session.

23 Mr. Mohammad, do you understand what I just explained

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1 to you?

2 ACC [MR. MOHAMMAD]: Yes.

3 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I
4 just explained to you?

5 ACC [MR. BIN'ATTASH]: Yes, but I have one point I would
6 like to tell the judge as soon as he is done addressing the
7 rest of the brothers.

8 MJ [COL POHL]: Okay. You will be given that opportunity,
9 Mr. Bin'Attash.

10 Mr. Binalshibh, do you understand what I just said?

11 ACC [MR. BINALSHIBH]: Yes.

12 MJ [COL POHL]: Mr. Ali, do you understand what I just
13 said?

14 ACC [MR. AZIZ ALI]: Yes.

15 MJ [COL POHL]: And Mr. Hawsawi, do you understand what I
16 just said?

17 ACC [MR. AL HAWSAWI]: Yes.

18 MJ [COL POHL]: Before I speak to Mr. Bin'Attash, there is
19 one other thing I want to alert counsel to which I am going to
20 discuss. The government response to 488 and 502C, footnote
21 two, reflects some confusion upon the process for partially
22 nonjoining, for want of a better term. I'm just alerting you
23 to that. I want to discuss that relatively early this week to

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1 make sure that we understand where we are at and to clear up
2 what confusion there is, if there is confusion.

3 That being said, Mr. Bin'Attash, what did you want to
4 say?

5 ACC [MR. BIN'ATTASH]: At the beginning I would like to
6 note about the team that I have. There is no improvement or
7 any advancement between the relationship between me and the
8 attorneys. Last month they prevented the paralegal from
9 visits, even though they allowed them this month. All of this
10 because they do not trust each other. They do not trust each
11 other and I don't trust them and they do not trust me. This
12 is all under the leadership of Cheryl Bormann.

13 And the second point that is connected to the same
14 topic, among the things that we agreed to so the situation
15 would improve had to do with attorney James Hatcher. He was
16 with me on this case since February 2008 until a couple of
17 months ago. I trust him and I know him and I trust his work.

18 Among the things that I agreed with with the team
19 last session, that he would return to the team so he would be
20 the connection between me and the attorneys to, you know, to
21 get the trust and the relationship between us, and they
22 approved that. However, things did not work well, especially
23 with General Baker and Hatcher, and he was dismissed lately

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1 from the Office of the Defense.

2 The last point, it has to do with motion 380. It is
3 a motion under seal. I have sent a letter to the judge on
4 that 13 January 2015 and I want it to be taken from under
5 seal.

6 Also, motion 380FF, I don't want it to be under seal.
7 Even if there is an attorney-client relationship involved, I
8 have no problem with that.

9 This is all I have.

10 MJ [COL POHL]: Thank you, Mr. Bin'Attash.

11 That brings us to the current schedule. Just to
12 clear up a little housekeeping, Mr. Ruiz, we discussed 335 and
13 310. Those orders are in the process of being done, but they
14 are not completed. If you wish to be heard on them, I will
15 certainly let you be heard on it again if you would like.

16 LDC [MR. RUIZ]: I guess it depends on what the order is
17 going to be. If you let me know, I'll let you know if I want
18 to be heard.

19 MJ [COL POHL]: Okay. Well, when you get a judge who will
20 buy off on that, let me know, because I'm not.

21 LDC [MR. RUIZ]: I just had to try, Judge.

22 MJ [COL POHL]: Okay. That brings us to 506A, which is a
23 request for continuance from Ms. Bormann.

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1 LDC [MS. BORMANN]: Good morning.

2 MJ [COL POHL]: Good morning.

3 LDC [MS. BORMANN]: As a point of clarification,
4 essentially it is not a motion to continue, it is a motion to
5 abate pending the resolution of a conflict.

6 On May 5 of this year, in the District Court for the
7 Northern District of Illinois, a lawsuit was filed by a former
8 mitigation specialist who worked for the defense team for
9 Mr. Bin'Attash. That -- I'm sorry, it was actually filed
10 sometime in April, but it was served on the Department of
11 Defense General Counsel, who accepted service.

12 On May 8th we filed a notice with you containing an
13 ex parte version of the complaint. And on Tuesday, May 9th,
14 Judge Gettleman, the presiding judge over the civil suit,
15 sealed the complaint.

16 I am a named defendant, as is Major Matthew Seeger
17 and Mr. Edwin Perry. General Baker is a named defendant.
18 Three of the four defense counsel now serving Mr. Bin'Attash
19 are named defendants in the lawsuit. I can't go into the
20 nature of the lawsuit because it's a sealed complaint.

21 I am asking Your Honor to take an ex parte
22 presentation because it is a sealed complaint and because it
23 involves matters that are sensitive and involve

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1 attorney-client privilege and opinion privilege. I would like
2 to make an ex parte presentation regarding the nature of the
3 conflict and why it is that defense counsel, including Captain
4 Brian Brady, are put in a position where if the matter does
5 not abate, we will be asking for: one, an independent counsel
6 to advise Mr. Bin'Attash, because he is named as a witness in
7 the complaint; and two, we will be moving to withdraw.

8 So at this point I am asking for an ex parte
9 presentation.

10 MJ [COL POHL]: Do you have any authority for why a
11 criminal trial will stop because of a civil suit?

12 LDC [MS. BORMANN]: My Professional Rules of
13 Responsibility 1.7, which pertains to all of us as we sit here
14 in the back row, requires us to identify conflict. And when
15 we have identified that conflict, do what we can to resolve
16 it.

17 An abatement, short of withdrawal, would possibly
18 resolve the conflict. Because if there is no factual
19 determination necessary in the lawsuit, it doesn't put us in a
20 position where we are adverse to Mr. Bin'Attash. But if it
21 gets past that situation, there is a different issue, and I
22 can't go into that in an open setting.

23 MJ [COL POHL]: No, I understand that. But I read your

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1 ex parte pleading and I'm assuming that that's the conflict
2 you are talking about.

3 LDC [MS. BORMANN]: It is.

4 MJ [COL POHL]: Okay. So why do I need to have another
5 ex parte discussion about it?

6 LDC [MS. BORMANN]: Because there is additional
7 information which has come to be known to defense counsel for
8 Mr. Bin'Attash that you need to be apprised of.

9 MJ [COL POHL]: Has any pleading been served on the
10 government on this issue?

11 LDC [MS. BORMANN]: Yes. The open pleading identifying
12 that there is a conflict, at this point a potential conflict,
13 but that being named in a lawsuit that's asking for a
14 significant amount of money for allegations made by
15 Mr. Semmerling has, at the very least, put a bit of a chill on
16 defense counsel sitting in the back row.

17 MJ [COL POHL]: Ms. Bormann, I'll give you your ex parte
18 presentation, but let me kind of say where I am seeing this
19 now. What you are saying, what you are telling me is that if
20 a former member of the defense team sues current members of
21 the defense team somewhat related to the representation, that
22 the criminal trial stops until the civil proceeding is
23 completed; is that what you are really asking me?

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1 LDC [MS. BORMANN]: No, Judge, that is not, in fact, what
2 I am asking you.

3 MJ [COL POHL]: What are you asking me?

4 LDC [MS. BORMANN]: I am asking you to do one of two
5 things today -- ultimately, actually three things. One would
6 be to abate, pending resolution of ----

7 MJ [COL POHL]: When is the resolution going to be?

8 LDC [MS. BORMANN]: Well, if the matter is dismissed under
9 Rule 12(b), then there is no factual averment necessary and a
10 conflict can be avoided.

11 MJ [COL POHL]: And what if it's not?

12 LDC [MS. BORMANN]: Then we have to address the issue.
13 Then it becomes an actual conflict, and I can't go into the
14 basis for that right now.

15 MJ [COL POHL]: I am talking procedurally right now.

16 LDC [MS. BORMANN]: And if that occurs, if that occurs,
17 then I will be moving to withdraw, along with the other three
18 members of the defense team sitting in the back row, and the
19 hearings that you will have held in the meantime on
20 Mr. Bin'Attash's case will have been affected by what I am
21 advising you of today, which is the potential for conflict,
22 which is what I am required to do under Rule 1.7 of the
23 Illinois Rules for Professional Conduct. So I have identified

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1 a conflict ----

2 MJ [COL POHL]: But what I am saying is that, in
3 essence, that we stop everything because a former member has
4 filed a civil suit, and then basically we wait until that
5 civil suit is resolved before we come back. Is that what you
6 are asking me?

7 LDC [MS. BORMANN]: I'm asking you to take -- to make a
8 ruling one way or the other. I'm asking you to recognize that
9 there is a potential conflict that we are burdened by.

10 MJ [COL POHL]: Okay --

11 LDC [MS. BORMANN]: We have identified it under our
12 ethical rules to you.

13 MJ [COL POHL]: I have got your pleading, but now you are
14 telling me there is something more.

15 LDC [MS. BORMANN]: There is, and that the situation
16 merits an abatement until the potential conflict is resolved
17 one way or the other. If it does not become an actual
18 conflict, then there is a possibility that there will be no
19 effect. If it becomes an actual conflict, then we are
20 required, under ethical rules, to move to withdraw because
21 there is a problem.

22 So, you know, you recognized this very issue in
23 AE 292. In that case Mr. Harrington was burdened by a

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1 potential conflict. It didn't become an actual conflict as
2 you ruled eventually because Mr. Harrington's conduct turned
3 out not to warrant further investigation and charges.
4 However, while that potential conflict was pending, you abated
5 proceedings because you understood that Mr. Harrington was in
6 a situation that could not -- where he could not proceed and
7 advise his client properly on the nature of the conflict
8 because he himself was -- had a personal interest in it.

9 And what I am saying to you is four of us -- Major
10 Matthew Seeger, myself, Mr. Edwin Perry, and a witness to it,
11 Captain Brian Brady -- all have a personal interest in the
12 outcome of this litigation. That is the definition of a
13 conflict. So I'm asking, one, to be able to give you more
14 information if you are disinclined to abate Mr. Bin'Attash's
15 case without it.

16 MJ [COL POHL]: Okay. All I am saying is you filed a
17 pleading and you say you have additional information you want
18 me to consider?

19 LDC [MS. BORMANN]: Yes.

20 MJ [COL POHL]: Why don't you just supplement your
21 pleading?

22 LDC [MS. BORMANN]: Because we just discovered this
23 subsequent information yesterday, last night, at 5:00 -- 4:15,

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1 sorry, after client meetings.

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

3 LDC [MS. BORMANN]: Thank you.

4 MJ [COL POHL]: Trial Counsel wish to be heard on this? I
5 am assuming this is solely a Ms. Bormann issue, so ----

6 TC [MR. RYAN]: Good morning, Your Honor.

7 MJ [COL POHL]: No, what I am saying is it's only your
8 team as opposed to the other teams.

9 Good morning, Mr. Ryan.

10 TC [MR. RYAN]: Your Honor, I have significant argument to
11 make on the whole issue. If Your Honor is only considering
12 now whether to take ex parte presentation from defense
13 counsel, maybe it is best for me to wait. I do note that I do
14 object to the ex parte presentation.

15 MJ [COL POHL]: Since you are not going to see the
16 ex parte presentation, if there is any, or ex parte pleading,
17 which is probably what it's going to be, we can do it now or
18 we can do it later, because here is what I am going to do? I
19 am not going to have an ex parte hearing. If the defense
20 wishes to supplement their pleadings with additional facts, we
21 will do it as a normal ex parte supplement and then we are
22 going to address the issue at that time.

23 TC [MR. RYAN]: In that case, sir, I would like to make my

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1 argument now.

2 MJ [COL POHL]: Go ahead.

3 TC [MR. RYAN]: The short answer, Judge, is counsel is
4 wrong. There is no legally cognizable conflict of interest
5 under the law at this time burdening counsel that would
6 justify the stopping of these proceedings through an
7 abatement. Before I get into the law, I wish to make a few
8 points. First off, a civil complaint has been in existence
9 now, according to counsel's own pleadings, since 21 April.

10 Nineteen days later the motion that's before the
11 commission in 506 was filed. That was the first time that the
12 prosecution learned of its existence. We know from the
13 pleading ---- or we are told from the pleading that Your Honor
14 has been provided a copy of the civil complaint filed in
15 Illinois. By the time that we had heard about it, its
16 existence, the complaint in Illinois had, in effect, been
17 sealed by the U.S. district judge.

18 The complaint is the basis of their entire motion
19 seeking significant relief from this commission. We request
20 that the commission order defense to provide us with at least
21 a redacted version so that we can be better apprised of the
22 facts or, in the alternative, Your Honor, that the judiciary,
23 through Your Honor, provide us with a properly, as you see it,

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1 redacted complaint so that we may be better apprised of the
2 facts.

3 The second point, sir, as part of their argument, the
4 defense states that an actual conflict could arise not just as
5 to counsel for Bin'Attash, but as to all of the counsel in
6 this case because of what they call "a limited joint defense
7 agreement."

8 Now, when this was raised before by the prosecution,
9 the commission and the prosecution were told that it was none
10 of your, or our, business, and that was even if it exists.
11 You heard that phrase many times. Now, not only are they
12 willing to say it exists, but they are telling you that it is
13 so binding on all other counsel who represent other
14 defendants, that it must -- it is so binding on all of them
15 that it will create a conflict for every lawyer in this
16 courtroom.

17 In light of this rather sobering revelation, we
18 request that you be provided with this limited joint defense
19 agreement so that you may rule on whether it is acceptable
20 under the law, under rules of ethics, and under your oversight
21 responsibility for this case in this courtroom.

22 But now as to the conflict itself, Your Honor, you
23 should rule as a matter of law, without further evidence or

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1 testimony or information, that none exists.

2 Now, here is what we know, sir. There was a
3 gentleman known as Semmerling. I believe he is referred to at
4 times as Dr. Semmerling, who was an employee of the Bin'Attash
5 team. This I think goes back about two years ago now since he
6 left that team, Judge. He apparently feels now that he has
7 suffered tortious conduct and even civil rights violations as
8 a result of actions by the Bin'Attash defense team. It's my
9 understanding that Dr. -- or Mr. Semmerling was the mitigation
10 expert on the team. I know from information and belief that
11 he has had experience in that area and that he was the
12 mitigation expert in the Dr. Hasan Fort Hood shooting case.

13 So Mr. Semmerling filed a civil suit, and here is the
14 important point: Based on the papers, even the ones we
15 haven't seen, it seems quite clear that all of these matters
16 occurred within the Khallad Bin'Attash defense team or within
17 the military defense team's organization. There is no
18 allegation of prosecutorial involvement or any investigative
19 agency acting on behalf of the prosecution team or even
20 independently.

21 The law states that a conflict of interest of the
22 type being raised here requires the defense counsel be under
23 the scrutiny at least of the United States government in the

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1 form of either a criminal prosecution or at least a criminal
2 investigation. The theory and understanding that goes back
3 many decades in this is that, at that point, the counsel is
4 operating under a conflict because he or she will, the famous
5 phrase is, pull his punches, pull his or her punches in the
6 advocacy of his client to try and curry favor with the
7 government; and/or because they are under investigation, lose
8 such objectivity out of their intense anger towards the
9 government that they won't be acting on behalf of their client
10 in a reasoned fashion, but rather will be acting out of
11 personal animosity.

12 Here we don't have that. We have a civil party, a
13 private citizen, who apparently feels very wronged and is
14 suing this defense team. In that, all by itself, there is no
15 such incentive to either pull punches or to try and curry
16 favor.

17 Also, the result of the civil suit, whatever it might
18 be, and whether it comes in a short period of time or a long
19 period of time has no bearing on Mr. Bin'Attash. He has got
20 no dog in that fight. Fighting Mr. Semmerling tooth and nail
21 will have no impact on him. If Semmerling loses, if he is
22 beaten senseless in a court of law, Bin'Attash loses nothing.
23 If Semmerling prevails, if he wins a king's fortune,

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1 Bin'Attash gains nothing.

2 Now, the defense tries to fit a square peg in a round
3 hole by saying that Bin'Attash could, and often the word could
4 is used, take a factual stance contrary to his defense team
5 that could, again, give rise to their liability in a civil
6 sense or even ethics issues as well. Now, once again, it's
7 quite speculative in a sense. And it's said, and we have not
8 heard this before, that Bin'Attash is a possible witness in
9 this case. Leaving aside all of the issues of how they are
10 going to make a witness out of a detainee at Guantanamo, that
11 still doesn't get them there.

12 In 350I filed March 23, 2015, we quoted the case of
13 United States v. Bruce. A violation of an ethical obligation
14 does not in and of itself give rise to a conflict of interest
15 unless it involves the attorney putting his own interests in
16 conflict with his client's. It is the competition between
17 these interests, rather than some independent failure of the
18 attorney, that gives rise to the conflict. Thus, not every
19 shortcoming of counsel can be classified as a conflict of
20 interest.

21 Now, of course, it goes without saying that we are
22 not making any comment on whether there was a shortcoming at
23 all by counsel or the counsel's team or General Baker. We

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1 have no idea. But I simply say that even if it is taken to
2 its logical extreme, it still doesn't involve this commission,
3 the ongoing criminal case, because it doesn't involve a
4 legally cognizable conflict of interest.

5 Now, certainly, Judge, we do recognize that it would
6 be a difficult situation where there is this sort of palace
7 intrigue of what was going on in a defense team where one
8 person feels so wronged that they are suing the others. And
9 as to what the military commission should do in this
10 situation, we do have some thoughts on them.

11 In the event that counsel's speculation comes to pass
12 and they are in a position of being on opposite sides of a
13 situation, that alone is simply still a personal dispute. And
14 honestly, Judge, in this particular case, in this particular
15 defense team, it's no different from where we have been for
16 the past two years. Maybe the original breakdown in
17 communication involves Semmerling. We don't know. But they
18 have been greatly at odds and you heard it again this morning.

19 Whatever comes of the civil suit, whether it's a
20 little dispute that involves Bin'Attash or a big one, or he is
21 not involved even in the least, this commission, we submit,
22 should simply add this, the facts regarding this, the issues
23 concerned, into the good cause analysis that the commission

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1 has already engaged in in regard to 380. So we should take
2 this out of this box of being a conflict of interest in the
3 law and make it down into the sort of internal dispute of a
4 client against a defense attorney and whether that rises to
5 the point that the relationship should be severed.

6 This is not a new effect, this is not a new event in
7 the history of criminal law jurisprudence. If we were to ask
8 defense counsel in this case how many of them have ever
9 represented a client where there was a bad personal
10 relationship between them, I imagine we would see a lot of
11 hands get raised in this case, and this one makes it no
12 different. We will see if they settle their differences.
13 Maybe they will. Mr. Bin'Attash has indicated in the past
14 that he thought there was some efforts going to that analysis.

15 But as to where we are now, Judge, Your Honor should
16 reject the idea of conflict of interest, it doesn't belong in
17 that box, and move it back into this 380 analysis that we have
18 been through.

19 One last point, Judge, I want to make at times, and
20 it might have been referred to in the pleading, there is this
21 idea that when there is even a slight cause for a potential
22 conflict, that the commission or a judge will at times engage
23 in a colloquy with an accused. We are submitting that it

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1 should not be done in this situation, Judge, based completely
2 for the most part on what I said on the law, that this doesn't
3 amount to a legal conflict of interest.

4 But also, number two, because of the history and
5 because of the accused's statements in the past, engaging in a
6 colloquy with him as to whether he would waive any potential
7 conflict -- even if one did exist, which it doesn't -- only
8 gives him the ability to do what he was unable to do in 380,
9 which is to fire his counsel.

10 We continue to say, Your Honor, that there was never
11 good cause shown, nor is there today, but we do recognize that
12 Your Honor has a continuing duty to monitor that situation.

13 That's all I have, sir.

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

15 Ms. Bormann?

16 LDC [MS. BORMANN]: Just briefly, Judge, on what Mr. Ryan
17 said about all defendants' counsel. That's incorrect. Some
18 of the codefendants' counsel may be witnesses in the matter,
19 and whether or not and to what extent an actual conflict
20 involves them is yet to be determined. I have no idea. I
21 wanted to raise it for the court because it is certainly a
22 possibility. But the potential conflict that the four of us
23 are under is crystallized pretty clearly.

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1 Rule 1.7 states that except -- and this is Illinois,
2 and it's adopted in all of the states where all of
3 Mr. Bin'Attash's counsel are licensed in some form or another
4 with different rule numbers. It says, except as provided in
5 paragraph B, a lawyer shall not represent a client if the
6 representation involves a concurrent conflict of interest. A
7 concurrent conflict of interest exists if, and then I am going
8 to go to subsection (2), there is a significant risk that the
9 representation of one or more clients will be materially
10 limited by the lawyer's responsibilities to another client,
11 not applicable here, a former client or a third person, not
12 applicable here. Here is the one that is: Or by a personal
13 interest of the lawyer.

14 I am being sued, as is Major Matthew Seeger, as is
15 Mr. Perry, and Captain Brian Brady is a witness in the
16 proceedings. Those -- that is the nature of the conflict. I
17 can't get around it ----

18 MJ [COL POHL]: How does that ----

19 LDC [MS. BORMANN]: ---- I have -- I am honest when I tell
20 you it bothered me when I woke up this morning. It bothers
21 each and every one of us.

22 MJ [COL POHL]: I understand from a personal perspective
23 why it bothers you, I got it; no one likes to be sued. I got

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1 it. Let me ask you this. How does this lawsuit chill your
2 representation of Mr. Bin'Attash?

3 LDC [MS. BORMANN]: I cannot tell you why that is until we
4 have an ex parte presentation ----

5 MJ [COL POHL]: Okay. Well ----

6 LDC [MS. BORMANN]: ---- because that pertains to some
7 privileged information.

8 MJ [COL POHL]: Okay. What I am going to do right now,
9 Ms. Bormann, is defer a decision on your abatement request. I
10 am going to grant your request to supplement the record. I am
11 not doing an ex parte presentation, but you may file a
12 supplemental pleading, and after I get that I will consider
13 the next way ahead.

14 LDC [MS. BORMANN]: Judge, if you are going to be forcing
15 us to proceed today and not allow us to do an ex parte
16 presentation, you have put me in a position where I have to
17 withdraw.

18 MJ [COL POHL]: Ms. Bormann, I looked at your pleading.
19 You filed a pleading.

20 LDC [MS. BORMANN]: Yes.

21 MJ [COL POHL]: I see no conflict of interest in the
22 pleading you provided and I see a speculative, potential
23 conflict of interest. That's what you have given me to this

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1 point.

2 LDC [MS. BORMANN]: Yes.

3 MJ [COL POHL]: And now you want me to stop everything
4 because you want to give me more because what you have given
5 me so far is inadequate and if you are not you are going to
6 quit.

7 LDC [MS. BORMANN]: I don't believe it's inadequate,
8 Judge. What I am doing is asking you to give us 15 minutes or
9 a half an hour of time so that we can provide you the
10 information in an ex parte setting that would provide ----

11 MJ [COL POHL]: And who is going to be here at this
12 ex parte sitting now?

13 LDC [MS. BORMANN]: Mr. Bin'Attash and his defense
14 counsel.

15 MJ [COL POHL]: And everybody else leaves and you get 15
16 minutes?

17 LDC [MS. BORMANN]: That's what I am asking for.

18 MJ [COL POHL]: And what are you going to give me as
19 ex parte presentation? You are going to give me another fact?

20 LDC [MS. BORMANN]: Yes, we are going to give you a series
21 of facts that we were apprised of late yesterday afternoon.

22 MJ [COL POHL]: And how were you apprised of these?

23 LDC [MS. BORMANN]: With a -- I can't say in an open

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1 setting because it involves privileged information. This is
2 the difficulty that we have. So I can put it in writing, but
3 before we proceed, then I would ask that we take a break so I
4 can put it in writing and give it to Your Honor or we can do
5 it in an ex parte presentation.

6 MJ [COL POHL]: Okay. When will this end, Ms. Bormann?
7 By that I mean, you are saying I got this pleading, it was
8 filed in April, I got it last week. I filed the pleading.
9 Now I get a new fact on Sunday afternoon or Sunday night.
10 Stop everything. Let me talk about this new fact. This is
11 ongoing civil litigation. Am I going to hear this over and
12 over again? Stop again, Your Honor, I got a new fact from
13 discovery; I got a new fact here; somebody is claiming
14 something over here.

15 LDC [MS. BORMANN]: Judge ----

16 MJ [COL POHL]: How does this end? A civil trial is
17 dictating a criminal trial is what you are asking me to
18 do ----

19 LDC [MS. BORMANN]: Of course not.

20 MJ [COL POHL]: ---- it sounds like it.

21 LDC [MS. BORMANN]: What I am asking you to do is to take
22 testimony on a conflict that exists between defense counsel
23 and Mr. Bin'Attash.

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1 MJ [COL POHL]: You ask me to take a proffer, I assume.

2 LDC [MS. BORMANN]: Yes.

3 MJ [COL POHL]: You used the word evidence and ----

4 LDC [MS. BORMANN]: Right. I mean we could, I guess, call
5 a witness, but I think the proffer would probably do the
6 trick. Judge, I mean, as you might imagine, this is not a
7 position that any of us wanted to be in.

8 MJ [COL POHL]: No, I understand that. I just ----

9 LDC [MS. BORMANN]: And what I am attempting to do ----

10 MJ [COL POHL]: My problem, Ms. Bormann, I will be right
11 up front with you. I read your pleading and, quite frankly, I
12 see it having no merit, what you have already given me, that
13 no merit that a civil lawsuit somehow that's just been filed
14 would stop a criminal trial from proceeding at all, unless
15 there is an actual conflict in there, and there isn't.

16 LDC [MS. BORMANN]: It wouldn't stop the entire trial,
17 Judge. It only pertains to Mr. Bin'Attash. There -- the
18 other four cases could go forward.

19 MJ [COL POHL]: Okay, let's put that aside for now. As I
20 said, you want me to abate Mr. Bin'Attash's trial until
21 sometime in the future when there is some type of resolution,
22 currently undefined, in this civil proceeding?

23 LDC [MS. BORMANN]: Here is the situation we are under.

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1 We are burdened by a conflict of interest that has not
2 actualized quite yet, although the burden is this ----

3 TC [MR. RYAN]: Counsel, Judge, I was told that
4 Mr. Bin'Attash is apparently telling the guards that he can't
5 hear. He is apparently having problems with sound.

6 ACC [MR. BIN'ATTASH]: I have no problem.

7 TC [MR. RYAN]: My apologies.

8 MJ [COL POHL]: Okay.

9 LDC [MS. BORMANN]: And I forgot where I was.

10 MJ [COL POHL]: I remember where I was. My question was,
11 is that you want the civil proceeding ----

12 LDC [MS. BORMANN]: No.

13 MJ [COL POHL]: ---- to dictate the schedule of the
14 criminal trial for your client?

15 LDC [MS. BORMANN]: No. No. I want to represent my
16 client the best way I know how. And right now I'm not at my
17 best because I have a personal interest in the outcome of a
18 lawsuit that may put me at odds with Mr. Bin'Attash, and that
19 causes problems.

20 MJ [COL POHL]: Okay. And in your current pleading, I
21 fail to see how it puts you at odds with Mr. Bin'Attash.

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

23 MJ [COL POHL]: You filed it. You asked me to consider

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1 it.

2 LDC [MS. BORMANN]: I did, but I can't talk about how that
3 is in the argument, which it is contained in the ex parte
4 version.

5 MJ [COL POHL]: That's what I am talking about.

6 LDC [MS. BORMANN]: Right. I can't do that in open court.
7 But I can tell you, I can crystallize it for you in an
8 ex parte setting.

9 ACC [MR. BIN'ATTASH]: If I may add one sentence to this
10 issue.

11 MJ [COL POHL]: Mr. Bin'Attash, you are represented by
12 counsel. I let you talk when we were talking about that issue
13 and that issue only. But you are not a lawyer in this case
14 and you are not going to sit -- you are not or any of the
15 accused are going to be permitted to present additional
16 argument on what counsel is arguing. So your request to add
17 one point is denied.

18 ACC [MR. BIN'ATTASH]: But I am worried about the issue of
19 conflict of interest.

20 LDC [MS. BORMANN]: Exactly.

21 MJ [COL POHL]: Your request to add anything is denied.

22 Ms. Bormann, I will take you at your word that it is
23 only 15 minutes and that's what you will get.

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1 LDC [MS. BORMANN]: Thank you.

2 MJ [COL POHL]: The commission is in recess. Everybody is
3 to be excluded except for the Bin'Attash team and
4 Mr. Bin'Attash. The outside feed is to be turned off and we
5 will have an ex parte session with Ms. Bormann. Let me know
6 when that's accomplished. The commission is in recess.

7 [The R.M.C. 803 session recessed at 0942, 15 May 2017.]

8 [END OF PAGE]

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