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1 [The R.M.C. 803 session was called to order at 1044,
2 15 May 2017.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties again are present that were present when the
5 commission recessed that -- when the commission last recessed
6 in its open session. Just to make the record clear, in the
7 open session.

8 We conducted an ex parte hearing with just the
9 Bin'Attash team and Mr. Bin'Attash himself and I did it under
10 the authority of 806. And although 806 doesn't specifically
11 talk about this as a basis for holding a closed ex parte
12 hearing, I do rely on the authority contained in the
13 discussion of United States v. Kaspers and found that these
14 were unusual circumstances warranting such an ex parte
15 hearing.

16 That being said, Mr. Ryan -- and to make it clear
17 from the record, what I am about to say, which is information
18 that came up in the ex parte hearing, was discussed in the
19 ex parte hearing with the Bin'Attash team. Hypothetically,
20 and I'll give you the question at the end, if Mr. Bin'Attash
21 was aware of the lawsuit, if Mr. Bin'Attash had no details, if
22 Mr. Bin'Attash has questions about how the lawsuit is to
23 proceed and if Mr. Bin'Attash expressed interest in learning

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1 more about the lawsuit to decide whether or not to assist the
2 plaintiff in said lawsuit ----

3 TC [MR. RYAN]: I'm sorry. That last part again, Judge?

4 MJ [COL POHL]: Again, these are all hypotheticals. If
5 Mr. Bin'Attash expressed interest in learning more about the
6 lawsuit in order to decide whether or not to assist the
7 plaintiff in the lawsuit, and lastly, that no decision is made
8 of what he wants to do at this time. Assuming those facts are
9 true for this hypothetical, does that change any of the
10 analysis of whether there is a current conflict of interest in
11 this case?

12 TC [MR. RYAN]: No, sir. Not at all.

13 MJ [COL POHL]: Does Mr. Bin'Attash have a right to have
14 an independent counsel to discuss the lawsuit with him?

15 TC [MR. RYAN]: No, sir. If he wants to know about
16 lawsuits or any other matters, he can speak with his attorney
17 about it. To the extent he wants further information or
18 information that counsel doesn't want to give him, I imagine
19 he can make arrangements through counsel to receive written
20 items, documents, through the normal course of order 018. The
21 court ----

22 MJ [COL POHL]: Does analysis change if -- the fact that
23 the current attorneys are the subject of this lawsuit?

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1 TC [MR. RYAN]: No, sir, for all of the reasons that I
2 stated before. There is some disagreement. There is a
3 lawsuit, in effect. I understand that. What we are talking
4 about is a conflict, a conflict that invades the relationship
5 between that accused and these attorneys.

6 These attorneys will do what they will do in the
7 civil suit, but it is understood and presumed under the law
8 and under rules of ethics that counsel will at all times
9 zealously represent their client.

10 As I said before, this lawsuit, much of which I know
11 very little about, does not ever at any point impact on
12 counsel's ability and obligation to zealously defend this
13 particular client. He has, again, no dog in this fight; he is
14 not affected by this lawsuit in any way. What happens in
15 regard to this Mr. Semmerling is a matter that's at least two
16 years past and does not affect counsel's ability to represent
17 the client in a criminal proceeding.

18 Again, Judge, we are talking about the 9/11 crime of
19 15 or 16 years ago now and Mr. Bin'Attash's participation in
20 that horrible event. What happens with a member of a defense
21 team many years thereafter and now a few years behind us does
22 not affect counsel's obligations in this case.

23 MJ [COL POHL]: Okay. Anything further?

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

2 MJ [COL POHL]: Ms. Bormann, last word.

3 LDC [MS. BORMANN]: With all due respect to Mr. Ryan, he
4 is wrong. I, Major Seeger, Mr. Perry, and even Captain Brady
5 cannot advise Mr. Bin'Attash regarding this lawsuit because
6 if, in fact, Mr. Bin'Attash becomes a witness, then any advice
7 we gave would be seen and construed against us. I'm
8 conflicted. I can't even begin to give fair advice to
9 Mr. Bin'Attash regarding this one issue, and so it seems with
10 the remainder of his defense counsel.

11 You heard the ex parte presentation. You understand
12 the situation. Mr. Bin'Attash is entitled to full and fair
13 advice that I can't give him, Mr. Perry can't give him, Major
14 Seeger can't give him, and Captain Brady can't give him.

15 So we are asking for an independent counsel to advise
16 Mr. Bin'Attash and we are asking you to abate Mr. Bin'Attash's
17 case until the conflict can be either resolved or it becomes
18 an actual conflict which would require other action.

19 MJ [COL POHL]: How does the independent counsel resolve
20 any potential conflict? Simply, what I am hearing you say,
21 Ms. Bormann, is that appoint independent counsel. And so we
22 can have another lawyer explain to Mr. Bin'Attash about a
23 civil lawsuit.

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1 LDC [MS. BORMANN]: Judge, I can't go into the details of
2 what we discussed in the closed hearing, but I can say to you
3 that if given advice by independent counsel and accepted by
4 Mr. Bin'Attash, it might resolve the conflict. That's all I
5 can say.

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

7 LDC [MS. BORMANN]: And as Your Honor knows, we are
8 burdened by a conflict that exists at this very moment. We
9 have made that clear on the record, and so we are asking for
10 independent counsel to be assigned and for abatement of
11 Mr. Bin'Attash's case pending that.

12 MJ [COL POHL]: Thank you. The commission will be in
13 recess until 1330 hours.

14 [The R.M.C. 803 session recessed at 1052, 15 May 2017.]

15 [END OF PAGE]

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