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1 [The R.M.C. 803 session was called to order at 0914,
2 16 February 2016.]

3 MJ [COL POHL]: The commission is called to order. Just
4 so everybody understands the order of march, at least
5 initially here, it's not anything unusual, but I just want
6 everybody to know. We are going to first account for the
7 parties, including any new counsel. I will also then advise
8 the accused of their right not to be present. I will also put
9 on the record a 505(f)(2)(B) hearing I had with the
10 prosecutors yesterday. Then the first order of substantive
11 business will be a discussion with Mr. Bin'Attash about his
12 issues with his counsel, and then we will begin with the
13 normal AEs beginning with 406.

14 That being said, General Martins, please account for
15 the parties.

16 I'm sorry. Mr. Connell?

17 LDC [MR. CONNELL]: I have some matters from the 802
18 hearing to put on the record. Can we do that around the same
19 time as the 505(f) advisement?

20 MJ [COL POHL]: Sure. General Martins?

21 CP [BG MARTINS]: Good morning, Your Honor. Present for
22 the prosecution, myself, Brigadier General Martins; Mr. Swann,
23 Mr. Ryan; Mr. Trivett; Mr. Groharing; Ms. Tate; Ms. Tarin;

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1 Captain Dykstra. Also at counsel table are our paralegals,
2 Mr. Cox and Legalman Second Class Petrill.

3 MJ [COL POHL]: Mr. Nevin?

4 LDC [MR. NEVIN]: I am here, Your Honor; as is Major
5 Poteet; Mr. Sowards; Ms. Medina-Celestin at the table,
6 paralegal; Ms. Leboeuf is in the room; as is our DISO,
7 Mr. Smith.

8 I want to state or remind the court that in AE 406,
9 we put you on notice of at least the possibility of a conflict
10 and I feel that we are laboring under a potential conflict at
11 present and that this affects the quality of Mr. Mohammad's
12 representation going forward from this moment.

13 I understand you are going to take it up later, but I
14 wanted to put that on the record at the present time.

15 MJ [COL POHL]: Got it. Ms. Bormann?

16 LDC [MS. BORMANN]: Judge, counsel from the last hearing
17 are present along with the addition of Major Matthew Seeger
18 who needs to be let in -- or sworn in.

19 MJ [COL POHL]: I got it. Major Seeger, please put your
20 detailing qualifications on the record.

21 DC [MAJ SEEGER]: Your Honor, I am Major Matthew H.
22 Seeger, Judge Advocate General's Corps, U.S. Army. I have
23 been detailed to this military commission by the Chief Defense

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1 Counsel. The detailing memorandum has been marked as
2 Appellate Exhibit 006B. I am qualified and certified under
3 Rule 502(D)(2) and sworn under Rule 807. I have not acted in
4 any manner that might tend to disqualify me in this
5 proceeding.

6 MJ [COL POHL]: Thank you. Mr. Harrington?

7 LDC [MR. HARRINGTON]: Judge, I am here with Major Elena
8 Wichner, and we have other support personnel in the court.

9 MJ [COL POHL]: Okay. It's primarily the counsel I am
10 concerned with. Thank you.

11 Mr. Connell?

12 LDC [MR. CONNELL]: Present on behalf of Mr. al Baluchi
13 are Lieutenant Colonel Sterling Thomas, United States Air
14 Force, and myself, James Connell.

15 MJ [COL POHL]: And Mr. Ruiz?

16 LDC [MR. RUIZ]: Judge, Walter Ruiz, Susan Lachelier,
17 Lieutenant Colonel Sean Williams and Lieutenant Colonel
18 Gleason.

19 MJ [COL POHL]: I will note the former Major Schwartz is
20 here as Mr. Schwartz on the Bin'Attash team.

21 Now, as is the practice, I am going to talk to each
22 of the accused about their right to be absent -- actually,
23 their right to be present and to waive that right if they so

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1 choose.

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

12 Under certain circumstances, your attendance at a
13 session can be compelled regardless of your personal desire
14 not to be present. Regardless of your voluntary waiver to
15 attend a particular session of the commission, you have the
16 right at any time to decide to attend any subsequent session.

17 If you decide not to attend the morning session but
18 wish to attend the afternoon session, you must notify the
19 guard force of your desires. Assuming there is enough time to
20 arrange transportation, you will then be allowed to attend the
21 afternoon session.

22 You will be informed of the time and date of each
23 commission session prior to the session to afford you the

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1 opportunity to decide whether you wish to attend that session.

2 Mr. Mohammad, do you understand what I just explained
3 to you?

4 ACC [MR. MOHAMMAD]: Yes.

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

7 ACC [MR. BIN'ATTASH]: Yes.

8 MJ [COL POHL]: Mr. Binalshibh, do you understand what I
9 just explained to you?

10 ACC [MR. BINALSHIBH]: Yes.

11 MJ [COL POHL]: Mr. al Baluchi, do you understand what I
12 just explained to you?

13 ACC [MR. AZIZ ALI]: Yes.

14 MJ [COL POHL]: Mr. Hawsawi, do you understand what I just
15 explained to you?

16 ACC [MR. HAWSAWI]: Yes.

17 ACC [MR. BIN'ATTASH]: I have just a simple question about
18 what you just read to us right now.

19 MJ [COL POHL]: Okay. Just a second. Who is the question
20 coming from? Mr. Bin'Attash?

21 ACC [MR. BIN'ATTASH]: Yes.

22 MJ [COL POHL]: Go ahead.

23 ACC [MR. BIN'ATTASH]: When do I have the opportunity to

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1 go back to the camp as soon as possible?

2 MJ [COL POHL]: Okay.

3 ACC [MR. BIN'ATTASH]: Is it the 10:30 break or the lunch
4 break?

5 MJ [COL POHL]: Mr. Bin'Attash, there is something I need
6 to talk to you specifically. If you wish to waive your
7 presence here, it's a matter of the transportation. If you
8 don't want to stay, obviously it's your option. Initially
9 what would happen is they would take you and put you back in
10 the holding cell outside and then when arrangements can be
11 made to transport you back to the camp, that's when that would
12 occur. Do you understand?

13 ACC [MR. BIN'ATTASH]: Yes. You mean I can leave at any
14 time?

15 MJ [COL POHL]: Once you say you want to voluntarily
16 leave, you can physically leave any time. What I am simply
17 saying to you is I cannot guarantee that if you leave the
18 courtroom, that you will necessarily immediately go back to
19 the camps. You may have to wait outside until the
20 transportation can be arranged to take you back to the camp.
21 Do you understand that?

22 ACC [MR. BIN'ATTASH]: The judge cannot order the guards
23 to take me to the camp right away?

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1 MJ [COL POHL]: I will accommodate your wishes if I can,
2 but the answer is there is a lot of moving pieces that I know
3 nothing about. I can authorize your absence from this
4 courtroom. Once you leave this courtroom, you then fall under
5 the jurisdiction of the fine facility of wherever you go from
6 there. So if your question to me is can I tell the guard
7 force how to do their job outside the courtroom, the answer as
8 a general rule: No.

9 ACC [MR. BIN'ATTASH]: All I wanted is for the judge to
10 tell the guard force that it is okay for me to leave and go to
11 the camp. That's all I'm asking for.

12 MJ [COL POHL]: Okay. And my answer to you,
13 Mr. Bin'Attash, is if you want to leave, if you want my
14 permission to leave to return to the camp, the answer is all
15 you have to do is ask and that will be done. I am just simply
16 saying is, I don't know how long it will take to get
17 physically from outside here to the camp because that's -- the
18 camp owns the transportation vehicles, not me.

19 So if you say, "I want to leave. I understand my
20 rights to be here, I want to leave," then if you tell me you
21 are voluntarily leaving, then you have my permission to leave,
22 to walk out that door with the guards and as they can, they
23 will take you back to the camp when the transportation is

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1 available. Do you understand?

2 ACC [MR. BIN'ATTASH]: Yes.

3 MJ [COL POHL]: Okay. And just to put on the record --
4 although I don't think there is a requirement of notice, I'm
5 going to do this anyway -- that yesterday the government had
6 asked for an ex parte presentation under Military Commission
7 Rule of Evidence 505(f)(2)(A). I granted that request and had
8 approximately a 45-minute session with them, and that session,
9 as according to the rule, has been transcribed. It will be a
10 sealed exhibit attached to the record of trial.

11 That being said, Mr. Connell, you said something
12 about the 802 you wanted to address.

13 LDC [MR. CONNELL]: Good morning, sir.

14 MJ [COL POHL]: Good morning.

15 LDC [MR. CONNELL]: Pursuant to practice with respect to
16 802 conferences, there are a couple of items that came up that
17 I just wanted to place on the formal record.

18 MJ [COL POHL]: Okay. Just so we are all clear, because I
19 think we are, although the 802 is transcribed, decisions are
20 not made at the 802.

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: It is strictly a scheduling device. If
23 anything comes up at the 802, as you are doing now, and you

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1 wish to put on the record, understand counsel are free to do
2 that. Go ahead.

3 LDC [MR. CONNELL]: Thank you, sir. The first item from
4 the 802 that I wish to place on the record is with respect to
5 the order of hearing AE 397 and AE 402C. We have filed a 505
6 notice AE 397C and a motion for a 505(h) hearing 402C. At the
7 802 the conference I asked that the 505 hearing be held before
8 the argument on 397. The military commission refused that
9 request and I understand that we will be going forward on 397
10 today in the ordinary course.

11 The second item is that I asked that the military
12 commission address the scheduling of AE 400, the press issue.
13 The military commission advised that its intention is to hear
14 AE 400 on Monday, 22 February, first thing at 0900 hours. I
15 will tell you that as the POC on that I conveyed that
16 information to counsel for the media and it is my
17 understanding that he intends to appear first thing Monday
18 morning for the hearing on AE 400.

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

20 LDC [MR. CONNELL]: The third item is that in the course
21 of the 802 hearing, you advised counsel for Mr. Bin'Attash,
22 who requested guidance on the delivery of a letter, you
23 advised them to deliver it to chambers. There was no

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1 government objection to that procedure and I would ask that an
2 Appellate Exhibit number be assigned to the letter if it
3 hasn't been done already.

4 MJ [COL POHL]: Got it.

5 LDC [MR. CONNELL]: The fourth item is that I requested
6 the military commission's early attention to AE 407, which is
7 an ex parte matter involving Convening Authority resourcing.
8 After the close of business on Friday, the Convening Authority
9 acted on the subject of AE 407 and denied the resource that we
10 were seeking in AE 407. I think it's proper for the military
11 commission to have a copy of the Convening Authority's
12 memorandum on that topic. I would ask that it be marked
13 as 407A and that I could approach and give a copy to the
14 military commission.

15 MJ [COL POHL]: Go ahead.

16 LDC [MR. CONNELL]: Your Honor, the fifth item is that I
17 asked to add to the docket in 402B and addressed at the 802
18 conference the matter of AE 052. You said that the commission
19 had acted on that; and on 14 February of 2016 we received
20 AE 052II and on 15 February 2016 we received AE 051D/AE 052HH.
21 I believe government action on those orders would cause
22 irreparable harm to the defense and we just wanted to give
23 everybody notice that that's our plan as soon as we can.

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1 MJ [COL POHL]: What do you mean by extraordinary review
2 just so I know which person you are asking? You are going to
3 come back to me for reconsideration or somebody else?

4 LDC [MR. CONNELL]: Sir ----

5 MJ [COL POHL]: And I don't take offense if it is somebody
6 else.

7 LDC [MR. CONNELL]: No offense. I think the appropriate
8 action is for us to ask the military commission to stay the
9 implementation of AE 052II and AE 050HH which is the same as
10 AE 051D, and then statutorily we have to begin with the court
11 of military commission review for mandamus. I understand that
12 their position is that they can't grant mandamus, so it
13 eventually would wind up in the D.C. Circuit.

14 MJ [COL POHL]: You realize that currently there is no
15 court of military commission review?

16 LDC [MR. CONNELL]: The issues are legion, Your Honor,
17 procedurally.

18 MJ [COL POHL]: Okay. Go ahead and do what you think you
19 need to do.

20 LDC [MR. CONNELL]: I just wanted you to know what our
21 intention on that was.

22 The last issue with respect to the 505 hearing that
23 the military commission held on 15 February, I want to note

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1 our objection to the exclusion of the attorney and defendant
2 from that hearing, from a critical phase of the proceeding
3 without notice, in what we have continuously contended is a
4 violation of the Fifth and Sixth Amendments as well as 10
5 United States Code 949b(2)(B). And I would particularly note
6 that the ex parte provisions in 10 U.S.C. 949p-2 and 949p-4
7 both contain limitations on the ability to hold ex parte oral
8 hearings; that is, that they must be to the extent necessary
9 to protect classified information.

10 I would suggest that some sort of advance notice is
11 necessary to allow the adverse party to object and that prior
12 to this time, and it has been the military commission's
13 practice, to grant notice of upcoming ex parte hearing so that
14 the other parties on either side could state their position.

15 Thank you.

16 MJ [COL POHL]: Thank you. You join that?

17 LDC [MR. NEVIN]: I join it, but only to add -- or I speak
18 only to add that in a capital case, such as the one before
19 Your Honor, the considerations that Mr. Connell just recited
20 with respect to the secret hearing yesterday also implicate
21 the Eighth Amendment, and the failure to follow the process to
22 the letter has a cruel and unusual punishment application as
23 well. So I wanted to add that. Thank you.

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1 MJ [COL POHL]: Mr. Harrington?

2 LDC [MR. HARRINGTON]: Judge, at the 802 conference the
3 other day, I did not bring this to the court's attention
4 because it was an evolving situation, but pending on the
5 documents ----

6 MJ [COL POHL]: Hold for a second. Do you join in
7 Mr. Connell's objections?

8 LDC [MR. HARRINGTON]: We do, Your Honor.

9 MJ [COL POHL]: Mr. Ruiz, you join?

10 LDC [MR. RUIZ]: Yes, Judge.

11 MJ [COL POHL]: And Ms. Bormann, I assume you join also?

12 LDC [MS. BORMANN]: Yes, Judge.

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

14 Mr. Harrington?

15 LDC [MR. HARRINGTON]: Your Honor, pending on the docket
16 is 152LL with respect to the show cause order for contempt
17 regarding 152. And in the very recent past, we have developed
18 two witnesses who are present here in the facility and we will
19 work with the government and I just want to alert the court
20 that we may well be requesting permission to have them testify
21 next week.

22 MJ [COL POHL]: Okay. Just while you are on that topic,
23 Mr. Harrington, this is the one you want the commission to

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1 hold the facility or the guards in contempt for not following
2 the order?

3 LDC [MR. HARRINGTON]: Yes, Judge. Yes.

4 MJ [COL POHL]: I am going to throw an issue out to you
5 and when we get to this, you can give me the answer. As
6 contempt is defined in the regulations or in the manual, does
7 it cover this situation?

8 I don't need an answer now and I am not asking for an
9 answer now; in fact, I don't want an answer now. I am just
10 saying from reading your thing that's my question, can I give
11 you the relief you have asked. I don't need an answer now,
12 but that's what I am just looking at.

13 LDC [MR. HARRINGTON]: We understand that, Judge.

14 MJ [COL POHL]: Okay. Go ahead.

15 LDC [MR. HARRINGTON]: Assuming you can, I am just
16 advising we have witnesses to corroborate our position.

17 MJ [COL POHL]: Okay. Thank you. Mr. Ruiz?

18 LDC [MR. RUIZ]: Judge, just one real quick question.
19 Going back to the issue of returning to the camp, this is an
20 issue that also potentially impacts Mr. al Hawsawi throughout
21 the day. And while I understand your position that you do not
22 direct the guard force's ability to do that, I would ask that
23 if the court can inquire -- I know that the officer in charge

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1 of the guard force is here and can at least give us some
2 clarity regarding what their capabilities are to return any of
3 these men, particularly Mr. al Hawsawi, if he should require
4 that during the day.

5 MJ [COL POHL]: Yeah. I think -- I don't mind doing
6 that ----

7 LDC [MR. RUIZ]: Sure.

8 MJ [COL POHL]: ---- once I get a request that I want to
9 leave, and if I get such a request, then I can turn to the
10 guard force and say how long will it take you to get them back
11 to the camp, and then the individual before they leave will
12 know what it is, but it seems to me it is going to be
13 time-specific as to resources and availability.

14 LDC [MR. RUIZ]: I guess my question is if it is a uniform
15 issue that will always be the same or if it is something that
16 changes. It will simply be helpful to us to know that for
17 planning purposes in terms of ----

18 MJ [COL POHL]: All I know, Mr. Ruiz, is that moving
19 detainees is apparently a large muscle movement.

20 LDC [MR. RUIZ]: Right. Which is why I am asking you to
21 inquire of the officer in charge, who is here, and have them
22 give you the direct answers as to what exactly their ability
23 and their procedures to do that. So they are the best to give

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1 you that answer. I understand that.

2 MJ [COL POHL]: You're right.

3 LDC [MR. RUIZ]: You have the authority I think to do that
4 and most likely get the best answer out of any one of us in
5 this courtroom.

6 MJ [COL POHL]: When and if a client asks to leave, I'll
7 ask then, because that's when I will want to know.

8 LDC [MR. RUIZ]: Thank you.

9 MJ [COL POHL]: You're welcome.

10 Okay. Mr. Bin'Attash, I was delivered a letter from
11 you, through your counsel, and it will be marked 380 whatever
12 next is in the -- EE.

13 As we discussed, I believe, in depth in the October
14 hearing, when you expressed displeasure with one of your
15 counsel and you and I had an ex parte discussion and you
16 explained your views on it, after that, after listening to
17 what you said, I issued an order, which I just gave to you.

18 Now, at this point, most of this information has just
19 been between the commission, meaning me, and you and your
20 counsel. The other lawyers on the other defense have not seen
21 it and the government has not seen it. Now, you have filed
22 this new letter. Okay? And you are requesting certain
23 relief. So it's almost like a motion, and you are not a

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1 lawyer. So my first question to you is, you are unhappy with
2 Ms. Bormann; do you want Mr. Schwartz to stay on your case?

3 ACC [MR. BIN'ATTASH]: Are you asking me right now?

4 MJ [COL POHL]: Yes. Yes, I am.

5 ACC [MR. BIN'ATTASH]: Even with Schwartz, I do have a
6 military counsel right now. Even Schwartz, I do want him to
7 leave right now.

8 MJ [COL POHL]: Okay.

9 ACC [MR. BIN'ATTASH]: Because I cannot work with someone
10 who cheats me.

11 MJ [COL POHL]: Now, what about Major Seeger? Do you want
12 him to stay on your case?

13 ACC [MR. BIN'ATTASH]: For the first time I saw him was
14 yesterday. The first time I saw him was yesterday and I do
15 not have a problem with him. But the lawyer has to be
16 subjected to the same rules applied by JTF. Very similar to
17 JTF regulations. He cannot meet with me, although he does
18 have a permit. He has to have another person to accompany
19 him.

20 MJ [COL POHL]: Mr. Bin'Attash -- Mr. Bin'Attash, as I
21 discussed earlier, you have got to stay on topic. Okay? And
22 I'm asking you very simple questions. I just want you to
23 address the questions. I am not talking about what happens at

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1 the camp, I am not talking about anything else now, except:

2 Do you want Major Seeger as your attorney?

3 ACC [MR. BIN'ATTASH]: Yes.

4 MJ [COL POHL]: Now, in your letter to me, you asked me to
5 do certain things. I'm not going to put what those things are
6 right now, because it is only between myself and you and your
7 team. Okay? So it almost is like a legal motion requesting
8 some relief from the commission. But you're not a lawyer, and
9 there is no legal analysis, and it's not my job to do your
10 legal analysis for you. That's your lawyer's job. Do you
11 understand that?

12 ACC [MR. BIN'ATTASH]: I do, but I put it as a testimony
13 from me as a personal written statement from me in order to
14 correct the misleading information contained in the motions
15 that were presented by the lawyers to the judge.

16 MJ [COL POHL]: Would it be fair to say that the purpose
17 of that submission is for me to release Ms. Bormann and
18 Mr. Schwartz from your defense team?

19 ACC [MR. BIN'ATTASH]: I do have another letter for the
20 judge. The problem is that I cannot give it to the lawyers
21 because I do not trust it will make it to the judge. And I
22 asked the translator just now how long it would take him to
23 translate it into English, and he said a day. And I had a

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1 major question today: How could we get in touch with the
2 judge directly as long as I do not trust the lawyer?

3 MJ [COL POHL]: Well, you just said you trust Major
4 Seeger. Or don't you trust Major Seeger, too? I mean, you
5 either have lawyers or you don't, Mr. Bin'Attash, and you have
6 got to use the ones -- I understand if you don't like
7 some ----

8 ACC [MR. BIN'ATTASH]: [In English] Slow down. Slow
9 down, Judge.

10 MJ [COL POHL]: I'm saying you have sat here for almost
11 four years, okay, as everybody has, and you understand how the
12 process works. As long as an accused is represented by an
13 attorney, as a general matter, the attorney argues on behalf
14 of the accused and the attorney provides legal documents to
15 the judge for decisions. Okay? That's how it normally works.
16 You have at least one lawyer. And so what I am saying is if
17 you say I don't trust any of my lawyers, then we are in a
18 different situation. If you say I don't trust two of my three
19 lawyers, but I have one I do, then you have got to work
20 through him to me. Do you understand that?

21 ACC [MR. BIN'ATTASH]: I do, but you must understand my
22 situation. For the first time I met him was yesterday I met
23 him. He was not allowed to meet with me by himself. These

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1 are Schwartz' and Cheryl's laws. He is under their control, I
2 cannot deal with him. The situation in which I am right now,
3 I am not -- I am not saying I do not trust Seeger. All I'm
4 saying is that he is under the -- under their control right
5 now and he cannot do anything. Therefore, we should have the
6 right to communicate with the judge directly.

7 MJ [COL POHL]: Mr. Bin'Attash, I'm not -- I'm not saying
8 that if you wish to provide me something -- I mean, quite
9 frankly, I'll tell you this, I have people look at it before I
10 look at it to make sure it is not something inappropriate for
11 me to see. Okay? But if it meets that test, you know, if you
12 want to do this, as you have done it before, I have permitted
13 it.

14 The problem you are running into, and I sense a
15 little frustration, but I got it, is that you can't file
16 things with me asking me to do stuff that doesn't meet any
17 type of legal analysis. In your first letter to me, you had
18 two parts; one part about, in your view, correcting the record
19 and the other part ends asking for me to do certain things.
20 Okay? And when you ask a judge to do certain things, that's
21 really a motion. And the issue of whether or not I will
22 permit you to fire Ms. Bormann and Mr. Schwartz is a legal
23 issue. We discussed it in October. I gave you my ruling. In

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1 there, I put all sorts of legal authority. Okay?

2 But there comes a point where if you've got lawyers,
3 you have got to use lawyers. If you want to go pro se and
4 represent yourself, that's a different issue. Do you
5 understand what I am saying? So what I am saying to you is
6 this, that if you wish to file papers with the commission
7 asking the commission to do certain things, okay, whether it's
8 correct the record or certain types of action you want me to
9 take, that must be filed through your lawyers so they can put
10 it in a proper legal format with some type of legal authority
11 for it and then I can make a decision based on the law. Do
12 you understand what I am saying?

13 ACC [MR. BIN'ATTASH]: I do. But let me ask you one
14 question. Do you believe -- when the lawyer becomes my
15 opponent, do you believe that that lawyer can achieve,
16 materialize, anything on my behalf?

17 The translation was not complete. Do you think that
18 attorney will ask the judge on my behalf that is relating to
19 that attorney himself?

20 MJ [COL POHL]: What I ----

21 ACC [MR. BIN'ATTASH]: The problem is that the attorneys
22 became the enemy. They -- he presented information to the
23 judge that was misleading, and I wanted to correct that

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1 information. And I had seven attachments with that letter.
2 My lawyer became my opponent, and I don't think he can
3 represent me before the judge. The judge is the only person
4 who can solve this issue between us.

5 If we assume -- if you will give me one second,
6 please ----

7 MJ [COL POHL]: Sure.

8 ACC [MR. BIN'ATTASH]: ---- if Counsel Seeger wasn't
9 available today, and I'm still working with Cheryl and
10 Schwartz only, how could I ask them something to send to the
11 judge to solve a problem relating to them? They are the
12 opponent. The only resort is the judge between us.

13 Therefore, we must have an opportunity to communicate
14 with the judge and it is up to the judge's discretion to make
15 our letter into a motion. It's up to the judge, or a
16 testimony or an attachment.

17 MJ [COL POHL]: Mr. Bin'Attash, that's where there is
18 confusion of roles here. Okay? It's not my job to do your
19 attorney's job. Okay? The last time, because of the unique
20 circumstances, I did a lot of what an attorney's job would
21 normally do because I wanted to protect your rights. But you
22 cannot have it both ways. You cannot have attorneys
23 representing you and then send stuff directly to me and have

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1 me do your legal analysis for you. I'm not going to do it.

2 If you have attorneys and you wish to communicate a
3 legal issue to the court, which is what your first letter was,
4 then your attorneys have to do that for you. If you don't
5 trust all of your attorneys and you want to fire them all,
6 then we are back to whether you just represent yourself, and
7 that's a different issue altogether. But if you think it is
8 the court's job, my job, to put your stuff in proper legal
9 format and then decide it on its own, that's not how the
10 system works.

11 So what I am saying to you is this: If you wish to
12 present things to me directly about stuff, you know, again, as
13 a general rule I won't prevent you from doing that. But I
14 will tell you this: I'm not going to necessarily do anything
15 with it until I have some legal authority for it.

16 The other day, in October, when this issue first came
17 up, I explained to you and I provided a legal ruling of what
18 the basis is to fire your attorney. Okay? We talked about
19 the good cause standard. There's cases on what that means and
20 where it goes. Okay? I don't expect you to know that, but
21 that's what your attorneys are for. So you have got to choose
22 to go through your attorneys -- or in this case, Major
23 Seeger -- if you wish to. Okay?

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1 But it is not the commission's job or my job to
2 frame -- to take your paperwork and put it in a legal format
3 and then rule whether or not my legal analysis is correct. Do
4 you understand that?

5 ACC [MR. BIN'ATTASH]: Yes. So we are clear on this,
6 let's leave my case here to decide. If any facts get to the
7 judge about any of the motions, from whichever attorney, and
8 if any one of us five here find any of these facts to be
9 mis- -- incorrect, or may include lies to the judge, or
10 misleading, do I have the right to tell or inform the judge of
11 these facts? Or what is the right way to get this information
12 to the judge so he knows what the facts are? The judge will
13 not know that there are misleading facts until he is told. So
14 how do we do this, in case we fall into this situation?

15 MJ [COL POHL]: I don't generally deal with hypotheticals.
16 I will simply say this, that your attorney is to work in your
17 best interests. Okay? If there is a disagreement on a fact
18 that's put in a motion or something like that and it is
19 presented to the court, then the initial way to do it is you
20 discuss it with your attorney.

21 Now, if the attorney-client relationship is such that
22 you can't do that, then that's a separate issue altogether,
23 because that's not -- what you are asking me is what's the

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1 procedure to correct the record, for want of a better term,
2 and what I am telling you is that is not the real issue, the
3 real issue is ----

4 Excuse me. Excuse me, ma'am?

5 The real issue is whether or not your attorney and
6 you are presenting your defense in a coherent manner, so it is
7 simply a representational issue. Are you with me on this? By
8 that I mean if you have this kind of breakdown, the question
9 is does it constitute good cause to sever the attorney-client
10 relationship. It's really not -- because it should never come
11 to this, that there is a disagreement on facts between a
12 client and his attorney in any case.

13 So what you are telling -- so I understand what you
14 are saying, but you provide me information, there is no
15 evidence of it, there is just your view of what occurred, and
16 there is no motion, there is no anything.

17 Well, I don't -- I don't deal with that. There is
18 nothing for me to deal with. You have your version of the
19 facts, there is the other version of the facts. Okay, fine.
20 What do you want me to do? And that's why we use legal
21 motions to say, "Hey, Court, Judge, we want you to do this
22 because of this fact," but that's got to be put in a coherent
23 way with some legal basis. It can't simply be, "Your Honor,

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1 my attorney said the light was red, it really was green."

2 Okay, thanks. Nothing I can do with that. And that's why you
3 have got to work together with your attorneys, whether it's
4 Major Seeger or whomever. Do you understand what I am saying?

5 ACC [MR. BIN'ATTASH]: Yes. Let's say there is no letter
6 addressed to the judge. Can I write testimony to be attached
7 to motions? And I can give it to the attorney so it can make
8 it to the judge? Not a letter addressed to the judge.

9 MJ [COL POHL]: Your attorney can attach things to his
10 motions that he believes are in the best interests of his
11 client. If that is a statement from the client, that's a
12 decision between you and your attorney whether you wish to
13 include it, and I will give to it the weight it deserves, just
14 like any other attachment.

15 So the answer to your question is if you want -- and,
16 again, this is coming back to your letter to me this week is
17 you take that letter, you give it to your attorney, he takes
18 those facts, he puts it in a motion and says this is the
19 reason why Ms. Bormann should be released and here are all the
20 facts, see the attachment from my client; and here is the law
21 that means these facts warrant such action. That's what your
22 attorney's job is.

23 ACC [MR. BIN'ATTASH]: The attorney will not present a

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1 motion to fire themselves, to release themselves.

2 MJ [COL POHL]: I got that.

3 ACC [MR. BIN'ATTASH]: They will reject that.

4 MJ [COL POHL]: I got it, and that's why last time we had
5 that discussion with just you and me and the attorneys were
6 here and you gave me everything that you wanted and then I
7 took that and I took the law of what it takes to release an
8 attorney of a case that's -- particularly one we have been so
9 far down the road -- and I said you have not established good
10 cause to fire Ms. Bormann. At that time, it was only
11 Ms. Bormann, had nothing to do with Major Schwartz, now
12 Mr. Schwartz. That's not the way it works.

13 So if you have an attorney who you want to represent
14 yourself, in this case Major Seeger, you give him your
15 guidance and he puts it in a proper motion, he makes a
16 professional judgment that it's not a frivolous motion, and as
17 long as it is not a frivolous motion he will put it in the
18 best format he can to get what you want. And if that is
19 contrary to Major -- to Mr. Schwartz and Ms. Bormann, so be
20 it. The ultimate loyalty of the attorney is to the client,
21 not to other attorneys. Do you understand what I'm saying?
22 So, you know, Major Seeger, you talk to him, you say, "I want
23 you to write this up so I can get rid of Ms. Bormann and

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1 Major Schwartz," his allegiance is to you, not to them. Do
2 you understand that?

3 ACC [MR. BIN'ATTASH]: I asked him in the morning and he
4 couldn't talk to me. He is afraid of them. He left me and
5 went to talk to them. Because there was no third person.
6 There must be a third person present.

7 MJ [COL POHL]: Mr. Bin'Attash, I understand ----

8 ACC [MR. BIN'ATTASH]: [In English] The translation never
9 finished.

10 MJ [COL POHL]: Okay. You've got to stop talking so the
11 translation can finish.

12 ACC [MR. BIN'ATTASH]: Right now I am dealing with
13 interrogators with the laws that they put down. So I used to
14 deal with interrogators from the FBI and CIA, not just
15 lawyers.

16 MJ [COL POHL]: Stop, Mr. Bin'Attash. I am not talking
17 about any side issue. You're saying that you believe -- that
18 Major Seeger has not been able to talk to you individually.

19 Okay. Okay. And what I am saying to them, to Major Seeger,
20 who is sitting in the back of the courtroom, that it seems --

21 Now, let me ask you this. I am looking at Major
22 Seeger. I know you are way back there. Why don't you come up
23 here.

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1 DC [MAJ SEEGER]: Yes, sir.

2 MJ [COL POHL]: You have heard Mr. Bin'Attash's concerns
3 about your inability to talk to him separately; that somehow
4 that you are controlled by Ms. Bormann and Mr. Schwartz?

5 DC [MAJ SEEGER]: Yes, Your Honor.

6 MJ [COL POHL]: Do you have a response?

7 DC [MAJ SEEGER]: Your Honor, our team has instituted a
8 rule that no team member will meet with our client alone, and
9 the purpose of that rule is to prevent no possible
10 miscommunications or misunderstandings.

11 MJ [COL POHL]: That's just a team rule, for want of a
12 better term?

13 DC [MAJ SEEGER]: Yes.

14 MJ [COL POHL]: Given that rule today, do you think that
15 rule makes sense if you talk to Mr. Bin'Attash about
16 potentially fashioning a motion to remove Ms. Bormann and/or
17 Mr. Schwartz?

18 DC [MAJ SEEGER]: Yes, Your Honor, I do. I think it is a
19 good and sensible rule.

20 MJ [COL POHL]: So you and Mr. Bin'Attash meet. Who would
21 be the third person there?

22 DC [MAJ SEEGER]: Perhaps one of our paralegals, perhaps
23 one of our analysts, someone else who is cleared to speak with

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1 him.

2 MJ [COL POHL]: Okay. But not Ms. Bormann or
3 Mr. Schwartz?

4 DC [MAJ SEEGER]: No, not necessarily, Your Honor.

5 MJ [COL POHL]: Okay. Now, I know you are new to this, I
6 don't know if you're new to the case, but at least you are new
7 to Mr. Bin'Attash.

8 DC [MAJ SEEGER]: Yes, Your Honor.

9 MJ [COL POHL]: You heard my discussion about his letter
10 and how it needs to be put in a proper format to establish
11 some legal basis to terminate the relationship between
12 Ms. Bormann and himself and/or Mr. Schwartz? Did you hear me
13 say that?

14 DC [MAJ SEEGER]: Yes, Your Honor.

15 MJ [COL POHL]: What would you -- what do you believe your
16 role would be in assisting him in that function, if any?

17 DC [MAJ SEEGER]: I believe, Your Honor, I could be
18 involved in accepting the letter and having it reviewed by a
19 translator and having it reviewed by the other lawyers,
20 Ms. Bormann and Mr. Schwartz and Mr. Perry, who is not cleared
21 yet, and deciding on whether presentation of that letter to
22 the commission would be in his best interests.

23 MJ [COL POHL]: Who decides that?

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1 DC [MAJ SEEGER]: Well, Your Honor, as you just said, it's
2 the duty of the lawyer to decide whether to attach a
3 communication from the client to a motion to the court or the
4 commission based on a decision whether it's in the client's
5 best interests to do so.

6 MJ [COL POHL]: But Mr. Bin'Attash has concerns that
7 Ms. Bormann and Mr. Schwartz would not zealously advocate
8 their own demise, for want of a better term. And so have you
9 seen his letter, the one he has already filed?

10 DC [MAJ SEEGER]: Yes, Your Honor, I have.

11 MJ [COL POHL]: And you understand ----

12 DC [MAJ SEEGER]: I have seen the English version.

13 MJ [COL POHL]: Yes, well, that's the version I saw too.

14 ACC [MR. BIN'ATTASH]: He is talking about the first
15 letter, not the second letter.

16 MJ [COL POHL]: That's right, I am talking about the first
17 letter.

18 Okay. And in there -- and I am assuming you read the
19 pleadings and the decision from the October hearing.

20 DC [MAJ SEEGER]: Yes, Your Honor.

21 MJ [COL POHL]: So you understand at that point, given the
22 state of that record, what law I applied to say he has not
23 shown good cause?

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1 DC [MAJ SEEGER]: Yes, Your Honor.

2 MJ [COL POHL]: And now we have this letter and this
3 letter talks about correcting the record information, and then
4 also asks me to do certain things at the end.

5 DC [MAJ SEEGER]: Yes, Your Honor.

6 MJ [COL POHL]: Okay? I don't want to go into too much
7 detail on it right now because right now it is a sealed
8 exhibit. But there is no legal authority for any of this
9 stuff, so should not -- if he has an attorney, should not that
10 attorney put in some type of motion that would make it
11 appropriate for relief?

12 DC [MAJ SEEGER]: Not if the relief he seeks, Your Honor,
13 would not be in his best interests, in that attorney's
14 judgment.

15 MJ [COL POHL]: Okay. So if Mr. Bin'Attash wants to fire
16 Ms. Bormann and you believe that's not in his best
17 interests -- and, again, even though he wants to do it, he
18 wants to do it, but you believe it is not in his best
19 interests, therefore, you would not file such a motion?

20 DC [MAJ SEEGER]: Correct, Your Honor.

21 MJ [COL POHL]: Is that the law? I don't want to put you
22 in an awkward position here, Major Seeger, because you kind of
23 walked into this and I understand that. But, I mean, let me

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1 just give you another example.

2 In Moussaoui, contrary to his attorney's interests,
3 he pled guilty. I know it's one of his five big decisions.
4 Okay? You are saying under this scenario that if you believed
5 it was in his best interests to keep Ms. Bormann, that you
6 would not file that motion on his behalf?

7 DC [MAJ SEEGER]: I don't believe so, Your Honor. I don't
8 think that would be in his interests. I would certainly
9 research the law and make an assessment of my duty in these
10 circumstances. But my inclination would be to not file that
11 motion, because I don't think it would be in his interests to
12 fire Ms. Bormann or Mr. Schwartz.

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

14 ACC [MR. BIN'ATTASH]: Could I comment about what he said?

15 MJ [COL POHL]: Hold on a second, Mr. Bin'Attash. The
16 answer is yes, but I want to do something else first.

17 Mr. Connell?

18 LDC [MR. CONNELL]: Your Honor, the exact point that you
19 were just asking is one that you asked us to brief in October.

20 MJ [COL POHL]: Yeah.

21 LDC [MR. CONNELL]: I'm not taking any position on
22 Mr. Bin'Attash, but on legal principle, can I be heard
23 briefly?

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1 MJ [COL POHL]: Yeah. I just want to make clear, what I
2 said in October may have been too expansive and may not have
3 been, I don't want to get into that.

4 What I do want to get into is the concept that -- the
5 hypothetical of if a client wants to file a motion that's not
6 frivolous, I got that, not frivolous, and the attorney
7 believes is not in his best interests, who decides?

8 LDC [MR. CONNELL]: Right. Your Honor, I would like to
9 direct the military commission's attention to AE 380AA, which
10 is where we set forward our position on this exact question.
11 The case most on point that we could find was called the
12 Government of the Virgin Islands v. Weatherwax at 77 F.3d
13 1425, Third Circuit 1996 case. That case held that because
14 the filing of motions is not one of the "big five," as the
15 military commission just referred to it, it is a matter that
16 is under the control of the attorney and not under the control
17 of the client. So as a general matter, I believe that the law
18 is, and the case law is not all that rich, but the ABA
19 standards are quite rich on this topic -- and I don't mean
20 just the capital standards, I mean the administration of
21 justice standards -- that filing motions or not filing motions
22 is a tactical decision to be made by an attorney.

23 Now, there is a duty to communicate with the client,

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1 accept the client's input on the question, and as a, you know,
2 good communication matter, it behooves an attorney to listen
3 to their client and in general do what they want within the
4 bounds of law and ethics, but the actual law is that it is the
5 attorney's decision.

6 MJ [COL POHL]: But most of those cases -- correct me if I
7 am wrong -- deal with the situation where motions were filed
8 that the client didn't know about or a lot of them deal with
9 it. Okay?

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

11 MJ [COL POHL]: My question is, that's really -- so, but
12 my question is really more of a reverse, but actually it is if
13 a client says, "Don't file that motion," okay, so he knows
14 about it, he says don't file it, it's your position the
15 attorney should file it anyway if he believes it is in the
16 best interests of his client?

17 LDC [MR. CONNELL]: My position is it is the attorney's
18 decision. I take no position whether they should file it not
19 file it, because I don't know what the hypothetical is, it
20 might be a terrible idea to file it, but it is the attorney's
21 decision.

22 MJ [COL POHL]: What we are talking about today is not the
23 hypothetical motion to suppress.

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1 LDC [MR. CONNELL]: Sure.

2 MJ [COL POHL]: It deals with one of the big five, choice
3 of counsel.

4 LDC [MR. CONNELL]: Right.

5 MJ [COL POHL]: Okay. So under this scenario, if -- and,
6 again, I'm not -- you stood up, but I was going to ask for
7 input anyway so I appreciate it. If you don't want to answer
8 it, I understand that.

9 LDC [MR. CONNELL]: Fair enough.

10 MJ [COL POHL]: Hypothetically -- it is not really a good
11 hypo, but I am going to say it anyway -- if a client wishes to
12 fire one of his attorneys and there is an attorney he does not
13 want to fire, part of the same team, is the attorney then
14 permitted to say, well, this is a bad idea because you are
15 firing our best attorney and not file it? If you don't want
16 to answer I understand it ----

17 LDC [MR. CONNELL]: No, no, no. I do want to answer it.

18 MJ [COL POHL]: But that's the hypothetical -- that's the
19 reality I am facing right now.

20 LDC [MR. CONNELL]: It is a complex situation. Don't get
21 me wrong. Here are the factors going into this decision.

22 Item number one is that legal teams are essentially
23 indivisible in that I think that the -- once it has been

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1 decided through either tradition in military courts or
2 statute, as in this matter, who the lead counsel is, if there
3 is a dispute, that tie is broken by the lead counsel. All
4 right? If the decision is do we file the motion or not file
5 the motion, the lead counsel is ultimately the one who makes
6 that decision.

7 The complexity here, of course, is that this is
8 something that does go to one of the big five, whether a
9 defendant is going to represent themselves and what, within
10 limits, is going to be their representation, and it creates an
11 impossible situation for the hypothetical defendant in that
12 situation of how can they ask one lowest-ranking member of the
13 legal team to take a position adverse to other higher-ranking
14 members of the legal team.

15 So -- and I think one of the things the military
16 commission is trying to do this morning is to fashion a path
17 where basically all of the interests which are in play can be
18 represented, and as -- I have never read any case that deals
19 with these specific facts, but as I understand it, if the
20 attorneys decline to file a motion, even one which goes to the
21 heart of the defendant's rights, in this situation they don't
22 have to file it; which means that in order to represent the
23 defendant's rights, there has to be some other path, whether

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1 that's -- you know, often we see directly addressed to the
2 judge or ex parte hearing or letter or other ideas that the
3 military commission has explored here, but I don't think the
4 answer to that can be that unless there is some sort of
5 independent counsel, that a dependent counsel, the
6 lowest-ranking counsel, can be directed to advocate against
7 the interests of the higher ranking counsel because it is
8 ultimately an attorney tactical decision as to whether to file
9 motions or not.

10 MJ [COL POHL]: If the lower-ranking counsel -- and of
11 course, the scenario here is a little different because we
12 have, as I understand it, the three counsel, one is a contract
13 counsel, one is a government employee -- I believe
14 Mr. Schwartz is ----

15 LDC [MR. CONNELL]: Yes, that's right, sir.

16 MJ [COL POHL]: ---- and one is a military counsel.

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

18 MJ [COL POHL]: So they don't have common financial -- it
19 is not like at the same law firm, for want of a better term.
20 Let me ask you this: If -- under your scenario, if the
21 lower-ranking counsel sees lead counsel being ineffective,
22 okay, does he not owe a duty to the client to ameliorate that?

23 LDC [MR. CONNELL]: In fact, yes, and I've been in that

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1 situation before in a different trial where I felt the
2 higher-ranking counsel was being ineffective and I filed a
3 motion about that and directly addressed the judge and the
4 judge took action that -- you know, corrective action, whether
5 right or wrong. I agreed that the ultimate -- and I fully
6 agree with the military commission's view earlier that the
7 ultimate duty of the attorney of loyalty is to the client and
8 not to other people, whether that's their supervisor or
9 somebody else on the legal team or anything else. So that
10 places those two things in conflict, which is the duty of
11 loyalty to the client, the interests of the client in
12 controlling the big five decisions, versus the tactical
13 decision of the attorneys to -- tactical control of the
14 question of whether to file or not to file.

15 I believe that the attorneys could exercise their
16 tactical decision to file such a motion -- and I'll leave to
17 the side whether that would be a good idea or not, because I
18 don't get a vote in that question. Certainly they can, and I
19 also believe that it's within the authority of the military
20 commission to order one of those attorneys to file such a
21 motion. But on the actual question that brought me to the
22 podium here today, which is whose decision is it to file
23 motions or not, as a general rule, it's the attorney's

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1 decision whether to file motions or not.

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

3 LDC [MR. CONNELL]: Thank you.

4 MJ [COL POHL]: Mr. Bin'Attash, you wanted to add
5 something?

6 ACC [MR. BIN'ATTASH]: Yes. We have two different points
7 right now here. The first point was mentioned by the lawyer,
8 Mr. Seeger, and that is if he sees that there is an interest
9 in not submitting what I am asking for, he would not submit
10 it. The second point was mentioned by the lawyer, Jay, and
11 that is dealing with the point that submitting a motion or the
12 decision to submit a motion is a decision made by the lawyer
13 and not by his client. What I mentioned first or what the
14 lawyer Seeger mentioned is going to have negative
15 repercussions on me. This would be like a coat hanger, that
16 anything that they do not want to submit, they would say that
17 this is not in my best interests, and the judge in this
18 situation would consider or base his decision on the words of
19 the lawyer, and the client is going to be the victim.

20 The other point, the lawyer must know something that
21 is very important. We came from a different region, from a
22 different culture, with a different religion different from
23 the religion of the lawyers. The lawyers have been accustomed

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1 to dealing with criminals in the prisons of America. However,
2 we have a different case and we have a different religion.
3 Our Islamic religion is what governs us and not the military
4 laws.

5 However, we are here present before the commission
6 because we are forced to be present, and it is not by our
7 choice that we have to be subjected to the laws of the
8 military commissions. However, this doesn't mean that I
9 should be forced to accept everything that the lawyer wants to
10 do or following everything that the lawyer wants to follow and
11 agree to everything that the lawyer wants me to agree to.

12 The lawyers must understand our customs, our culture,
13 our religion.

14 MJ [COL POHL]: Mr. Bin'Attash, most defendants -- I
15 daresay nearly all defendants -- in any judicial system don't
16 voluntarily go there. It is that whatever system is trying
17 you is the system we are going to apply. I understand you
18 come from a different culture, but the system of law that we
19 apply is the system of law set up by the President and the
20 Congress and that of the United States and that's how we are
21 going to apply it.

22 That doesn't -- I'm not saying that your cultural
23 differences aren't significant. I am simply saying is we are

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1 simply going to apply American law in this.

2 So, that being said, Trial Counsel. Yes.

3 LDC [MR. NEVIN]: I just want to say -- and I say this
4 because I know having prepared our motion to reconsider on the
5 254 discovery -- that one of the things that the military
6 commission did previously was attribute some intention to
7 counsel standing silent when some remarks were made in court,
8 and I just want to say that I don't agree with everything that
9 Mr. Connell said. I also don't want to speak to it myself,
10 but I just want the record to reflect that I am not ----

11 MJ [COL POHL]: I'm understanding any input from the other
12 defense counsel on this issue is simply advisory because it
13 doesn't deal with your client. Do you understand what I am
14 saying?

15 LDC [MR. NEVIN]: Yes. Just ----

16 MJ [COL POHL]: I understand what you are saying.

17 LDC [MR. NEVIN]: Okay. Great. Thank you.

18 MJ [COL POHL]: I'm not asking -- yeah.

19 Mr. Ryan.

20 TC [MR. RYAN]: Good morning, Your Honor. Your Honor,
21 this matter is before the commission now, and this happened I
22 believe two sessions ago, when complaints were brought to your
23 attention, and in fact at that time Your Honor was sort of

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1 invited into the attorney-client relationship to the point of
2 asking questions of the accused with his counsel present that
3 went to the nature of their relationship. And over the
4 government's objection, the other parties were excluded from
5 it. So Your Honor has a good deal of information about this
6 whole matter that others do not have, and I don't quarrel with
7 that.

8 Now it's back, and you have been informed that the
9 accused Bin'Attash has more information to present to you.
10 There was a letter presented two days ago and now apparently
11 there is another letter that's being proffered up.

12 I understand and agree with the commission's not
13 wanting to get on a slippery slope where there is
14 correspondence in every day's mail, and I think it's
15 appropriate, absolutely appropriate, that the commission has
16 to draw a line in this case and in any case. But as I said,
17 we are already into this to some extent and Your Honor
18 correctly identifies the standard that at some point you have
19 to deal with, which is good cause. And you have heard today
20 very clearly -- and maybe it was in that letter, we don't
21 know, but you've certainly heard today a clear request from
22 the accused that he wants to be relieved of counsel. So it
23 has to be -- it has to be dealt with one way or another.

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1 I understand the commission's questions to Major
2 Seeger about filing motions and so on, and I don't think we
3 need to spend a lot of attention on the issue of whose right
4 is it on this particular instance, and I think Your Honor hit
5 it I think right on the head, and we are not talking about a
6 motion for some collateral matter or some small matter, some
7 issue referring to confinement, we are talking about right to
8 counsel.

9 So what the government suggests, Your Honor, that
10 information, whatever it is that the accused Bin'Attash wants
11 presented to the commission, it should get to you somehow.
12 You can accept the letter directly from him, if you wish, you
13 could -- you questioned Major Seeger about filing it as a
14 motion. It seems to me you could direct Major Seeger to
15 simply file it as an attachment to a pleading saying here
16 is ----

17 MJ [COL POHL]: That's simply the vehicle to get it here.

18 TC [MR. RYAN]: That's really all I am talking about,
19 Judge. It's all logistics how it gets to you. I think at
20 this moment we are really not in a position -- I think that
21 information just has to get to the commission and then you
22 will have to ----

23 MJ [COL POHL]: And the way ahead would be to see what he

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1 says and then determine the next action?

2 TC [MR. RYAN]: I believe so, Judge. As much as I hate to
3 say this, but other comments made in open court today, things
4 like "my lawyer is now my opponent" or other words struck me
5 as being very meaningful in a sense that they raise issues of
6 things like conflict of interest and other matters of
7 irreconcilable conflict of interest or conflict between
8 parties, complete breakdown of the relationship, and these are
9 the items that have been identified in the case law as to what
10 could amount to good cause, depending upon the facts, of
11 course.

12 So it's been put in front of Your Honor right now,
13 and I see no way that we can sort of walk past it without you
14 at least finding out what additional information he wants to
15 convey to you. You may have questions for him. You may
16 decide it's best to go back into the previous method of
17 discussing it with him.

18 MJ [COL POHL]: But the government has a dog in this
19 fight.

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

21 MJ [COL POHL]: And when we did this the first time,
22 because actually it started up as a -- framed as a pro se
23 issue and then it evolved into a termination of relationship

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1 issue and to ensure that there wasn't any spillage, for want
2 of a better term, of attorney/work product privilege
3 information we handled it on an ex parte manner, and then I
4 issued a ruling and I gave you a short form of the ruling but
5 you didn't get all of the detail.

6 TC [MR. RYAN]: Yes.

7 MJ [COL POHL]: Does this come a point where the
8 government, in your view, should get the detail and decide if
9 they want to be heard on whether or not it's good cause or do
10 we do this in a similar ex parte manner where I kind of ----

11 TC [MR. RYAN]: As a general matter, Judge, it's always I
12 believe in the best interests of the commission to hear from
13 both parties on any particular issue. This, of course, is
14 where we walk into difficult terrain because often, as
15 Your Honor has stated, accused can be saying things that they
16 don't understand might not be in their interests to be heard
17 in a public setting or by the opposing party. So Your Honor
18 exercised his decision and it's a delicate matter and on the
19 last occasion took his statement in an ex parte fashion. We
20 don't know what we don't know, so we are not in a great
21 position to be able to say when is the time for Your Honor to
22 include us completely. As I said, as a general matter we
23 believe it's always, but we do recognize the court has

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1 discretion in this type of matter.

2 MJ [COL POHL]: In other words, you are taking no position
3 on that?

4 TC [MR. RYAN]: Well ----

5 MJ [COL POHL]: I understand your position.

6 TC [MR. RYAN]: You understand what I am saying, sir.

7 MJ [COL POHL]: I understand what you are saying.

8 TC [MR. RYAN]: Without knowing more, I don't think it's
9 wise for us to take more than that, to take a greater
10 position. I'll leave it at that, sir.

11 MJ [COL POHL]: Okay. Let me ask you this: Is the
12 current status of counsel for Mr. Bin'Attash is that he has
13 not shown good cause to sever the relationship? He indicates
14 he wants to give me another letter, and let's assume we go
15 down this road. Then I will take the new information, treat
16 it as a supplement, for want of a better term, to the
17 previously filed information and my previous ruling, and then
18 decide whether or not he now has established good cause? Do
19 you believe we can go forward with anything until that's
20 resolved?

21 TC [MR. RYAN]: May I have the court's indulgence for one
22 moment?

23 MJ [COL POHL]: Sure.

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1 [Pause.]

2 TC [MR. RYAN]: Thanks, Judge. Your Honor, our
3 recommendation to the commission is taking it a step at a
4 time. First, that the commission accept the letter from
5 Mr. Bin'Attash. I don't object if it is directly; if
6 Your Honor wants it in a different manner, that's fine with
7 us, because as I understand it's in Arabic. Logistically, I
8 think the best thing to do is the courtroom interpreters could
9 give you a translation orally as to what it says, if
10 Your Honor requires, and to be followed up with a full
11 verbatim written translation as well. And then once
12 Your Honor has that information, we can readdress the whole
13 matter. I think that's the first step, sir.

14 MJ [COL POHL]: Okay. But my question is, does this need
15 to be addressed before we do anything else?

16 TC [MR. RYAN]: I'm sorry, sir?

17 MJ [COL POHL]: My question was, does this need to be
18 addressed before we do anything else?

19 TC [MR. RYAN]: Yes, sir. That's our position.

20 MJ [COL POHL]: Okay. But I -- okay. Okay. But I am
21 going to want a hard copy of the letter. It will be marked
22 as 380FF. As soon as that's done, deliver it to me in my
23 office, and then I will -- once I get that I will look at it

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1 and then we will go the way ahead. It seems to me, since
2 counsel rights are so significant, we have got to go through
3 there.

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

5 MJ [COL POHL]: And then both sides will -- not so much
6 the defense, but the government has got to think of the way
7 ahead on this, because as you know, there are various options
8 of whether or not ----

9 TC [MR. RYAN]: Correct, sir.

10 MJ [COL POHL]: ---- of how we go forward with counsel.

11 TC [MR. RYAN]: And maybe the letter will point you to one
12 versus the other, but that's something that would have to be
13 discussed.

14 MJ [COL POHL]: You are saying if we have to get
15 replacement counsel if he wants, that's a separate issue, a
16 logistical issue.

17 TC [MR. RYAN]: I think at this point let's take one step
18 before the next.

19 MJ [COL POHL]: Mr. Bin'Attash, what we are going to do is
20 I am going to have your letter translated and then I am going
21 to read it and then we will see what the next step is. Okay?
22 But I have to tell you this. You had asked earlier about not
23 showing up. Okay. The next time we schedule a session, which

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1 will probably be tomorrow, assuming how long it takes to
2 translate the thing, you've got to be here, because I am going
3 to have some questions for you. If you choose to voluntarily
4 absent yourself, then we're going to go on as if you never
5 raised this issue at this time until you come back in and talk
6 to me. Do you understand that?

7 ACC [MR. BIN'ATTASH]: Yes.

8 MJ [COL POHL]: Okay. The commission is in recess. I'm
9 sorry, the commission is not in recess.

10 Mr. Nevin.

11 LDC [MR. NEVIN]: Thank you, Your Honor. I heard what the
12 commission said about asking Mr. Ryan about whether we have to
13 stop everything until this is resolved, and I understand what
14 the commission said. But I would like to have the opportunity
15 to present 406 to you, because it has in it a conflict
16 question as well, and it's possible, depending upon what the
17 military commission were inclined to do, that if we are going
18 to be in recess for a day or for hours or for whatever it is,
19 that this is something that could be addressed while we are in
20 recess. And I recognize it is something, rather than nothing,
21 that we would be doing until Mr. Bin'Attash's matter got
22 resolved; but we are in an at least analytically similar
23 position because our situation presents the possibility of a

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1 conflict and that -- and that's something that we need the
2 commission to resolve. So we are in somewhat of a similar
3 position.

4 MJ [COL POHL]: Well, I don't see you in a similar
5 position at all. We are talking about your potential
6 conflict, but we are talking about an individual who wants to
7 fire all of his attorneys.

8 LDC [MR. NEVIN]: I agree.

9 MJ [COL POHL]: So I understand it, but, Mr. Nevin, this
10 is a joint trial, and I know this is a specific issue to you
11 and your team.

12 LDC [MR. NEVIN]: Yes, sir.

13 MJ [COL POHL]: But it may implicate other people and I
14 don't want to start saying okay because it is only yours. I
15 understand your concern. It's next on the docket.

16 LDC [MR. NEVIN]: Thank you, sir.

17 MJ [COL POHL]: Major Seeger, you are walking up and that
18 tells me you want to say something.

19 DC [MAJ SEEGER]: Yes, sir. I heard Mr. Ryan suggest the
20 commission use a courtroom translator to translate
21 Mr. Bin'Attash's letter to you.

22 MJ [COL POHL]: I did hear that, but it will not be the
23 courtroom translator, but the team translator.

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1 DC [MAJ SEEGER]: The team translator, within the
2 privilege. Thank you, Your Honor.

3 TC [MR. RYAN]: Sorry, sir, just to clarify something, did
4 the commission inform Mr. Bin'Attash that if he chooses not to
5 be here tomorrow, that we would move on to other matters?

6 MJ [COL POHL]: Yes.

7 TC [MR. RYAN]: The government's position is there is too
8 much on the record right now. Mr. Bin'Attash has to be here
9 tomorrow and we have to finish that first.

10 ACC [MR. BIN'ATTASH]: [In English] I will be here
11 tomorrow.

12 TC [MR. RYAN]: Problem solved.

13 MJ [COL POHL]: The commission will be in recess.

14 Understand this: When I said tomorrow, it's unlikely to be
15 later today, and hopefully we can resolve this tomorrow. The
16 commission will be in recess.

17 [The R.M.C. 803 session recessed at 1032, 16 February 2016.]

18 [END OF PAGE]

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