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1 [The Military Commission was called to order at 0915,
2 15 April 2014.]

3 MJ [COL POHL]: As I think is clear to all parties, I
4 like to start on time. I was delayed today because I wanted
5 to read the defense submission and the government's
6 submission, so that's why we're starting a little bit late
7 today.

8 That being said, the commission is called to
9 order. Any changes, Trial Counsel, on members of the
10 prosecution present.

11 CP [BG MARTINS]: Your Honor, the same members of the
12 prosecution who were present yesterday morning are present.

13 MJ [COL POHL]: And, Defense, is there any changes in
14 any of your teams? Going once. Going twice. Okay.

15 All parties are again present that were present
16 when commission recessed -- when the court recessed yesterday.

17 Trial Counsel, are you going to account for the --
18 I will note that Mr. al Hawsawi and Mr. Ali and Mr. Bin'Attash
19 are not here today. Is that correct?

20 CP [BG MARTINS]: Yes, Your Honor.

21 MJ [COL POHL]: Mr. Swann?

22 CP [BG MARTINS]: If the captain would proceed to the
23 stand. Captain, please proceed to the witness box and raise

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1 your right hand for the oath. Please stand for the oath,
2 please.

3 CAPTAIN G, U.S. Army, was called as a witness for the
4 prosecution, was reminded of her oath, and testified as
5 follows:

6 **DIRECT EXAMINATION**

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

8 Q. Captain, are you the liaison between the Staff
9 Judge Advocate and the camp in which the detainees are held?

10 A. Yes, sir.

11 Q. Did you have occasion to advise the accused of
12 their right to be present this morning?

13 A. Yes, sir.

14 Q. All right. Let's take Mr. Bin'Attash first.

15 Did you advise Mr. Bin'Attash of his right to be
16 present this morning?

17 A. Yes, sir.

18 Q. And did you use the form that has been provided on
19 previous occasions, and did you follow to form?

20 A. Yes, sir.

21 Q. All right. Did Mr. Bin'Attash indicate that he
22 wished to attend or not attend?

23 A. He did not wish to attend this morning, sir.

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1 Q. Did he execute that form in English or in Arabic?

2 A. In Arabic, sir.

3 Q. All right. I have in front of me what's been
4 marked as Appellate Exhibit 295. Do you have that document?

5 A. I do have the document in front of me, sir.

6 Q. Consisting of one page?

7 A. Yes, sir.

8 Q. Now, with respect to Ali Abdul Aziz Ali, did you
9 advise him of his right to attend this morning?

10 A. Yes, sir.

11 Q. Did you advise him in English or in Arabic?

12 A. In English, sir.

13 Q. Did you use the form that has been marked as
14 Appellate Exhibit 295?

15 A. Yes, sir.

16 Q. Did he indicate that he wished to attend or not
17 attend?

18 A. He did not wish to attend.

19 Q. Now, with respect to Mr. Hawsawi, did you advise
20 Hawsawi of his right to attend this morning?

21 A. Yes, sir.

22 Q. And did he execute an Arabic form or an English
23 form?

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 A. An Arabic form, sir.

2 Q. Do you have that document in front of you?

3 A. I do, sir.

4 Q. Did all three of these men execute or sign that
5 document in your presence?

6 A. Yes.

7 Q. Did any of these men indicate that they wanted to
8 attend?

9 A. No, sir.

10 TC [MR. SWANN]: Your Honor, I'm finished.

11 MJ [COL POHL]: Defense, any questions of this witness?
12 Apparently not. Okay.

13 LDC [MR. CONNELL]: I have one question.

14 **CROSS-EXAMINATION**

15 **Questions by the Learned Defense Counsel [MR. CONNELL]:**

16 Q. I didn't hear your name, ma'am.

17 A. Captain G.

18 LDC [MR. CONNELL]: Your Honor, there hasn't been a 505
19 proceeding with respect to pseudonym. I object to the use of
20 a pseudonym without a government claim of privilege or
21 adjudication of privilege.

22 MJ [COL POHL]: Counsel response?

23 TC [MR. SWANN]: Your Honor, she is a member of the camp

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1 staff. If you recall, Your Honor, we filed a pleading
2 recently with respect to the last individual that was in a
3 similar position in which she currently occupies. The
4 situations are the same. These individuals come in here, they
5 perform an administrative function. That's all they
6 performed.

7 MJ [COL POHL]: So your previous submission you believe
8 applies to all similarly situated people?

9 TC [MR. SWANN]: It will apply, Your Honor, because --
10 without getting into that submission, it applies.

11 MJ [COL POHL]: Got it. Objection is overruled. Thank
12 you.

13 You're excused.

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

15 MJ [COL POHL]: Mr. Connell, you had filed a pleading on
16 152 objecting to the hearing. Which you may already know
17 this, but your objection was overruled, and I conducted the
18 hearing yesterday about 1300 hours. Okay.

19 LDC [MR. CONNELL]: Yes, sir. Could I ask the military
20 commission to confirm that the entire presentation, including
21 the text, was made a part of the record and made available to
22 the appellant court on appeal?

23 MJ [COL POHL]: Yes. It will be included with the

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1 classified proceeding -- and the classified exhibit, and the
2 answer to that is yes.

3 Another housekeeping thing is, Mr. Harrington,
4 your team filed a 505 notice?

5 LDC [MR. HARRINGTON]: Yes, Your Honor.

6 MJ [COL POHL]: Today or yesterday.

7 LDC [MR. HARRINGTON]: Yes, we attempted to file it on
8 Sunday but it could not be filed until yesterday.

9 MJ [COL POHL]: Forgetting the substance of it,
10 shouldn't it have been filed much earlier than this?

11 LDC [MR. HARRINGTON]: It should have, Judge. The issue
12 came up because of an interview on Sunday that we had. But
13 the answer to your question is yes, it should have.

14 MJ [COL POHL]: Okay. Okay. So if and when we get to
15 that, I will give the government ample time to respond because
16 of the late filing.

17 Now, as -- since we've met yesterday, I've
18 received 295A, which is a government preliminary response to
19 292, and also 292B, which is the defense reply to 292A.

20 The government position 292A is that prior to
21 addressing the issue of what I'm calling the FBI interview
22 issue, the government wants to address the 909 issue. The
23 defense objects to that, and wants to go to 292 initially.

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1 Then there's also the rest of 152, which is a defense motion
2 dealing with the conditions of confinement of Mr. Binalshibh.
3 There is somewhat of a chicken-and-egg component to this. Had
4 the defense raised the issue of competency of their client, it
5 be a different issue. But since competency is presumed, and
6 that the defense is not challenging said competency and the
7 government's 909 hearing, it's basically an evidentiary
8 hearing to support said presumption, the commission feels that
9 we can operate on the presumption for now, understanding the
10 government, if you wish to pursue a 909 hearing at a
11 subsequent date, we will.

12 But again, given the posture of that litigation,
13 it strikes to the commission that 292 may have to be addressed
14 first. Back to 152 itself, that is a defense motion, original
15 152 is a defense motion, and from your -- what you said
16 yesterday, Mr. Harrington, I would glean that you would
17 rather -- you wish to address. You believe 292 must be
18 addressed before 152, or, quite frankly, anything else; is
19 that correct?

20 LDC [MR. HARRINGTON]: That's correct, Judge. And,
21 Judge, I think I indicated the other day to you that we did
22 not come here prepared to address the full substance of 252,
23 primarily because of the government's request to defer their

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 answer until the 909 hearing was completed.

2 MJ [COL POHL]: Okay. I'm sorry, I think you may have
3 confused the number or I misheard you. 152 is the one you are
4 not fully prepared to go?

5 LDC [MR. HARRINGTON]: I'm sorry, yes. 152.

6 MJ [COL POHL]: Okay. So that being said, I want to
7 address the way forward on 292. Defense, it's your motion and
8 your burden. What evidence are you prepared to present now,
9 or wish to present?

10 LDC [MR. NEVIN]: Your Honor, it wouldn't -- I
11 understand the court's ----

12 LDC [MR. HARRINGTON]: Go ahead.

13 LDC [MR. NEVIN]: ---- question, and I apologize to
14 counsel, but I just wonder if the court would give us maybe a
15 brief recess in place to discuss this, to make sure we're all
16 on the same page. Are you open to that?

17 LDC [MR. HARRINGTON]: Yes.

18 LDC [MR. NEVIN]: Just a few minutes.

19 MJ [COL POHL]: Okay. Okay. Obviously, this is going
20 to go to both sides, so just the way forward. How much time
21 do you think you would like?

22 LDC [MR. HARRINGTON]: Five minutes, Judge.

23 MJ [COL POHL]: No such things as a five-minute recess.

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1 LDC [MR. NEVIN]: Five equals 15.

2 MJ [COL POHL]: It's now, on that clock, 9:22. We'll
3 reconvene at 9:40. Commission is in recess.

4 [The Military Commission recessed at 0922, 15 April 2014.]

5 [The Military Commission was called to order at 0942,
6 15 April 2014.]

7 MJ [COL POHL]: Please be seated. Commission is called
8 to order. All parties are again present that were present
9 when commission recessed.

10 I remind everybody in the well of the court that
11 cell phones are not permitted, whether on or off. So if
12 anybody has a cell phone in the well of the court, take it out
13 now, out as in out of the room.

14 I see no movement, so that tells me nobody has a
15 cell phone.

16 Mr. Nevin?

17 LDC [MR. NEVIN]: Your Honor, thank you. I think
18 other -- and I just say other counsel may want to speak to the
19 question that the commission raised, but I think I'm at the
20 first chair, so I prevailed on being able to speak to you
21 first.

22 I understand the commission to have asked what
23 evidence are we ready to present to you today on 292, and I

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 want to answer that in perhaps three ways: First, just to
2 make it clear that our -- that the point of this motion is to
3 seek the commission's action in conducting an inquiry. That's
4 what the cases require, is that when the specter of a conflict
5 is presented, and it appears that it's possible that a
6 conflict exists, it falls to the commission to conduct the
7 ultimate inquiry to determine whether or not that's
8 actually -- a conflict is actually present, and what must be
9 done about it.

10 So our purpose in filing 292 is to bring that --
11 is to bring the request for the commission to make an inquiry
12 to the commission's attention, so that it can take appropriate
13 action. The motion -- and that's number one.

14 Number two, I want the commission to know that
15 over the last 24 hours -- over the last 12 hours, a new issue
16 has arisen, that I ask the commission to consider, and that is
17 the following:

18 Your Protective Order No. 1 has a procedure in it
19 by which we are to determine whether or not certain materials
20 are classified or not, what their status is.

21 We followed that procedure when we dealt with the
22 writings that are at issue in the government's motion 018Y;
23 that is a letter to Mr. Mohammad's wife, correspondence with

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Rory Green, and the document entitled Invitation to
2 Happiness. We followed that procedure.

3 The government filed 018Y in which it alleged that
4 we had broken rules in that process, and made other statements
5 and allegations. I don't mean to argue them right now.
6 Ultimately, we filed a response. It's called 018FF, and in it
7 we recited that we had followed the procedure that you
8 directed us to follow in Protective Order No. 1.

9 In the last 12 hours, we've been told that -- or
10 the original classification authorities have determined that
11 our statement that we did that is classified, and that
12 therefore 018FF may be considered a secret NOFORN document,
13 and our having transmitted it over NIPR systems can be
14 considered a spill, and I bring to the commission's attention
15 what the commission already knows, which is that the
16 classification rules are specifically not to be invoked for
17 the purpose of avoiding embarrassment, and that is what is
18 happening here, and that is an additional fact that puts me in
19 a state of uncertainty about exactly what's going on here.
20 That's an additional fact that wasn't in 292, because
21 obviously it hadn't happened at the time that we filed 292,
22 but I bring that to the commission's attention. That's two.

23 Third, is simply to recite where we stand. We

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 provided three exhibits when we filed 292, and those would be
2 the two nondisclosure agreements that the FBI agents who
3 approached Mr. Harrington's DS0 required him to sign which had
4 the effect of, in essence, putting him in league with those
5 FBI agents.

6 We have the declaration of Mr. Harrington himself
7 describing what he has done, and what his understandings are
8 from his limited conversation with the DS0. And we have
9 certain ex parte evidence that Mr. Connell can speak to, and I
10 think there's a limit on the nature of the detail that can be
11 provided in this setting. And we have a DS0 who is the -- who
12 is the supervisor of all of the DS0s who is present on island
13 and can testify as well to provide information that he holds,
14 although I think it's highly likely, based on what I've
15 described, that it won't add much in terms of significant
16 additional information beyond what's already contained in the
17 materials that have been submitted to you.

18 Now, 292 and 292B, our reply to the government's
19 response, establish, I think clearly, that what the case law
20 says is that when there is the possibility of a conflict of
21 interest, it imposes an obligation on two people, or on two
22 sets of people.

23 One would be the tribunal itself; namely, the

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 military commission, to make an inquiry and to get to the
2 bottom of what the status of things is, and the other is on
3 counsel who have statutory and ethical responsibilities to
4 avoid conflicts of interest, and who are subject to discipline
5 and other sanctions in the event that they go forward in the
6 face of a -- of what appears to be a conflict of interest.

7 We have to deal with our obligations, but the
8 commission has to deal with its as well. And I submit to you
9 that the materials we've provided to you clearly establish the
10 existence of at least a possible conflict, and that's all we
11 have to show you, and that that requires that this matter get
12 cleared up before we go forward. So that's my ----

13 MJ [COL POHL]: Yeah. Mr. Nevin, I understand that, and
14 I've read your briefs ----

15 LDC [MR. NEVIN]: Yes.

16 MJ [COL POHL]: ---- and obviously in some ways by
17 addressing this right now, I ----

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

19 MJ [COL POHL]: ---- I understand the defense position
20 that this needs to be resolved. Okay.

21 But my question goes back to is what evidence --
22 other additional evidence you wish to submit on this issue.

23 LDC [MR. NEVIN]: Well, okay, and I ----

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You say you have a responsibility to
2 inquire. I've got that. But other than looking for witnesses
3 or things like that, what I'm simply saying, for example, is I
4 don't know what the DSO told the FBI, if anything. I don't
5 know what the FBI has said. There's names in here. There's
6 issues of privilege floating around here, and I certainly
7 don't want to sua sponte go into privileged communications
8 without the defense saying they want me to, or it's -- so
9 that's why I come back to, who -- and, again, they may not be
10 here today. I've got that.

11 LDC [MR. NEVIN]: Right.

12 MJ [COL POHL]: But what I'm just saying is who or what
13 do you want me to consider other than what I already have?

14 LDC [MR. NEVIN]: Right. And I understand your
15 question, and I -- it seems to me, and I -- having had a
16 couple of days to do this and a hundred other things, I
17 wouldn't claim that I have thought it all the way through to
18 the bottom yet, but it does seem to me that at a minimum, we
19 should be hearing the testimony of the two FBI agents and of
20 Mr. Harrington's DSO. I would, at a minimum, like to present
21 you with that testimony.

22 And then finally, there's a member of the trial
23 team, Ms. Baltes, who is also -- who also serves as the Chief

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of Staff to the Deputy Director of the FBI. And I appreciate
2 counsel's unequivocal statement that the prosecution was not
3 aware of this investigation, did not know -- did not know that
4 an investigation was taking place and did not direct FBI
5 agents to go and try to penetrate Mr. Harrington's team, but
6 somebody did, and somebody at the FBI did.

7 And I don't think it's too much of a leap to
8 imagine that when a member of the trial team has a dual role
9 as the Chief of Staff to the Deputy Director of the FBI, that
10 there could be an interface there, and I think it would be
11 appropriate to examine Ms. Baltes as well.

12 But obviously, Your Honor, when I say the
13 commission -- that this would be an inquiry that the
14 commission would undertake, I can call Ms. Baltes, I can call
15 the FBI -- well, I don't know whether I can do those things or
16 not. I don't know whether I could even find contact
17 information for them. But assuming I could, my guess is that
18 they will say, you know, thanks, have a nice day, but I'm not
19 talking to you.

20 I need the power of the subpoena to bring them to
21 court to -- or to bring them in to what presumably would be to
22 be an ex parte deposition to question them within the
23 parameters of 292 in order to get to the bottom of what's

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 going on here.

2 Now ----

3 MJ [COL POHL]: Why would the interview of the FBI
4 agents have to be ex parte?

5 LDC [MR. NEVIN]: Well, it would need to be ex parte
6 because this is -- this is an inquiry -- this is an inquiry
7 which is -- which touches defense strategy and tactics, and
8 confidential matters within defense work product.

9 So in other words, the situation is likely going
10 to arise that one of these FBI agents is going to say, we
11 think you're doing ABC or XYZ, or I may need to ask, is your
12 inquiry pointed at fact that I thought this, or I did that, or
13 I said the following. And those may -- in all likelihood,
14 those will be proprietary or privileged confidential matters.

15 MJ [COL POHL]: But then again, I'm just trying to
16 figure out the way forward here, okay?

17 Is your question to the FBI agent is what do you
18 know, how did you interview, what did you learn from
19 Mr. Harrington's DSO ----

20 LDC [MR. NEVIN]: Yeah.

21 MJ [COL POHL]: ---- that may touch privileged material.

22 LDC [MR. NEVIN]: Right.

23 MJ [COL POHL]: But it's already been disclosed to him

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 or her. True?

2 LDC [MR. NEVIN]: Who?

3 MJ [COL POHL]: The FBI agent.

4 LDC [MR. NEVIN]: Yes.

5 MJ [COL POHL]: Okay. So if there's a violation of
6 privilege, hasn't it already been ----

7 LDC [MR. NEVIN]: Well ----

8 MJ [COL POHL]: From the FBI's perspective, I'm just
9 simply saying. If you ask the FBI, what do you know, where
10 did you learn this.

11 LDC [MR. NEVIN]: When did you know it, yeah.

12 MJ [COL POHL]: Right.

13 LDC [MR. NEVIN]: Well, there are -- I mean, there are
14 several components to this, and one is that -- this is
15 something that I actually talked to my co-counsel about, that
16 292 focuses pointedly on this attempt by the FBI to penetrate
17 Mr. Harrington's team.

18 But the issue exists apart from that as well. So
19 in other words, the government's pleading in 018Y contains
20 allegations, and it contains fairly serious allegations, and
21 they back off from those in a later pleading. But
22 nonetheless, those things as well raise the specter that the
23 government thinks we have behaved improperly. And you know,

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1 particularly, as I said earlier, when you back that with the
2 idea that your explanation suddenly becomes classified and
3 can't be seen publicly, it really increases the alarm as well.

4 So it's not just the FBI's actions. If we are
5 under investigation in some way, both we and Mr. Mohammad are
6 entitled to know that in order to inform how we go forward.
7 And then the question becomes what's the investigation? What
8 are you looking at? What's the theory? If the prosecution is
9 genuinely not privy to that information, then we are entitled
10 to keep that information private from the prosecution.

11 As the military commission knows from reviewing
12 our pleadings in other contexts, the question becomes -- one
13 of the crucial questions in determining whether or not there's
14 been a waiver of privilege or a work product is whether or not
15 there was a reasonable intention to prevent the opposition or
16 the opponent, or whatever the exact language is, from
17 acquiring the information. If there is an acknowledgement or
18 a recognition that the opponent is going to acquire the
19 information, you can come to the conclusion that it wasn't
20 intended to be kept confidential. But the work product
21 privilege might survive if you intend for it to be kept
22 confidential from the opposition.

23 To agree to a non-ex parte inquiry in this would

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 be to agree -- would be to waive the work product privilege
2 with respect to everything that the FBI agents say.

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

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

5 MJ [COL POHL]: I'd like to hear from Mr. Harrington
6 next because this is really -- more impacts his team directly.
7 It's kind of the same question, because it's your
8 DSO.

9 LDC [MR. HARRINGTON]: Yes.

10 Judge, I think it's -- to extend on what Mr. Nevin
11 was saying, and you said there's already been a disclosure by
12 a DSO, assuming that's happened ----

13 MJ [COL POHL]: I just want to be -- I don't want to get
14 too far off track here. The ex parte issue is a down-the-road
15 issue. The real issue is who we want to hear from, what
16 evidence we are going to consider, and then we talk about the
17 format later. And I don't want to get too distracted on that
18 component of it, or to make any type of representation or
19 implication that there's been a disclosure already, therefore
20 there's been some waiver of the privilege. I didn't mean to
21 imply that.

22 Go ahead, Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, another thing you should

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 be aware of, when I spoke to my DSO on Saturday, which was a
2 very brief conversation, I advised him that he really should
3 seek his own counsel, which is my understanding that he has
4 done, which means now that we will have to work through his
5 counsel in order to accomplish anything.

6 But just as an example of the collateral
7 consequences that keep coming up here, in preparation for the
8 909 hearing, which presumably was going to go ahead this week,
9 Lieutenant Commander Bogucki and I were encountering different
10 issues, and even that came up over the weekend, after
11 interviewing various people, potential witnesses and that, and
12 we did not have a DSO to rely on, and that's kind of a
13 spillover and it's not the situation where our DSO got sick or
14 something, wasn't here. It's a situation that was caused by
15 the actions of the government here.

16 That's really a -- it's a side issue. But, as
17 Mr. Nevin said, there's more and more side issues that keep
18 coming up as a result of what this conduct is.

19 But I agree with the suggestion of Mr. Nevin of
20 who the witnesses are that we need, at least at this point,
21 and it may well be that that's going to be the end of whom it
22 is that we need.

23 MJ [COL POHL]: That would be the two FBI agents?

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. HARRINGTON]: And ----

2 MJ [COL POHL]: And perhaps Ms. Baltes?

3 LDC [MR. HARRINGTON]: And my DSO and potentially
4 Ms. Baltes. Yes.

5 MJ [COL POHL]: Okay.

6 LDC [MR. HARRINGTON]: And then, Judge, you say you
7 don't want to go too far into terms of the procedure, but we
8 get into the procedure with my DSO.

9 MJ [COL POHL]: Yeah.

10 LDC [MR. HARRINGTON]: And the issue arises whether each
11 of the other counsel can be present when my DSO is being
12 deposed by other people.

13 MJ [COL POHL]: No, again -- and, again, Mr. Harrington,
14 I know the procedure is going to be important, okay. Just
15 kind of want to get the left and right lanes, and then because
16 obviously, although it's a joint defense, there may be issues
17 that are unique to you ----

18 LDC [MR. HARRINGTON]: Correct.

19 MJ [COL POHL]: ---- that you don't want to disclose to
20 others ----

21 LDC [MR. HARRINGTON]: Correct.

22 MJ [COL POHL]: ---- whether it's a deposition format or
23 a hearing format. So that's why when Mr. Nevin talked about

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the responsibility that he believes that I have to conduct an
2 inquiry, which the case law seems -- supports that, I wanted
3 to make it clear that I see that as an in the normal process
4 where the parties present what evidence they want to me as
5 opposed to me going out looking for evidence itself or
6 appointing somebody to do that for me. So that's kind of the
7 format.

8 But that's one of the reasons why, for example,
9 whether or not your DSO wants to testify, for want of a better
10 term, and in what form, through an ex parte declaration,
11 however, to protect your privilege and your work product ----

12 LDC [MR. HARRINGTON]: Right.

13 MJ [COL POHL]: ---- to minimize any further disclosure,
14 assuming there has been disclosure.

15 LDC [MR. HARRINGTON]: And to protect our client's
16 interests, thought has to be given of whether we in fact can
17 do the depositions ourselves, if we're the subject matter of a
18 deposition, and whether independent counsel may have to do
19 that. It's just another complicating issue.

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

21 Ms. Bormann.

22 LDC [MS. BORMANN]: Assuming you don't want to skip me
23 again.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I think I don't need to quote from the relevant
2 case law, but just a note, which is that the Supreme Court has
3 held that a reversal -- per se reversal happens when a trial
4 court fails to make an inquiry, even though he knows or
5 reasonably should know that potential for conflict exists.
6 That's what we have here.

7 Going beyond that, I want to talk a little bit
8 about what I see problems for Mr. Bin'Attash to be. I don't
9 know that members of Mr. Bin'Attash's defense team have not
10 been approached by those FBI agents or other FBI agents, or
11 other law enforcement agents working with the DIA, the CIA or
12 some other group that may be coordinating with the FBI in some
13 form of investigation.

14 So though we managed to learn of this conflict as
15 a result of, frankly, the DSO for Mr. Binalshibh coming
16 forward in what might be construed by some as a violation of
17 the nondisclosure agreement he signed with the FBI, which
18 purports to make that DSO a confidential informant of the FBI,
19 I don't know that that same relationship doesn't exist between
20 members of my defense team, Mr. Bin'Attash's defense team, and
21 other law enforcement agents.

22 So I think it is reasonable to expect that given
23 the constraints -- let's just go down the road. If, in fact,

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1 those FBI agents or other law enforcement agents have been
2 approaching other members of defense teams, it is likely that
3 there are other members of the defense who have thus been
4 compromised, and exist without the knowledge of defense
5 counsel here.

6 That is a question that needs to be part of the
7 inquiry the commission must undertake. Because in advising
8 Mr. Bin'Attash of the potential conflict that he can choose to
9 waive or not waive, you must at least advise him of relevant
10 facts, and that's a relevant fact. And only the FBI is going
11 to be able to tell us that.

12 And possibly since Ms. Baltes is the Chief of
13 Staff to the Deputy Director of the entire Federal Bureau of
14 Investigation, she may very well have that information since
15 she is a sitting member and an active member of trial counsel.

16 I also expect, as evidence, we do -- and I think
17 Mr. Nevin touched on this briefly -- have the head defense
18 security officer present, and that is the defense security
19 officer that works for Mr. al Baluchi's team, and he could
20 also apprise Your Honor of some relevant facts which may give
21 some more light.

22 One of those facts being that the -- before I knew
23 about this problem, my defense security officer knew about it,

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1 and so did every security officer who works for SRA. SRA is a
2 contractor -- contracting company which provides security
3 officers for the defense, for this court. There's one sitting
4 in this room right now, sitting next to the -- to Your Honor,
5 and also for the prosecution.

6 And I think if you were to hear evidence from
7 Mr. Connell's DSO, you would find out that the prosecutor's
8 own security officers were a part of the conversation
9 involving this FBI investigation, and so, in fact, members of
10 the prosecution were advised of the existence of this FBI
11 questioning, certainly prior to my knowledge of it, which
12 brings me to my -- brings me to my next comment which is ----

13 MJ [COL POHL]: Were the defense DSOs included in this
14 briefing?

15 LDC [MS. BORMANN]: Yes. Defense DSOs were, I'm
16 told ----

17 MJ [COL POHL]: But you say the government security
18 officer at this briefing, therefore the government knew about
19 it, but then you said they knew about it before I do, but
20 their knowledge would be the same as yours, wouldn't it?

21 LDC [MS. BORMANN]: Well, they knew about it. I found
22 out about it on Saturday, because I was in Guantanamo Bay ----

23 MJ [COL POHL]: Okay.

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1 LDC [MS. BORMANN]: ---- so I wasn't in D.C. I found
2 out about it as soon as my DSO landed. Everybody landed on
3 Saturday. We had an immediate 802 conference, went back from
4 the 802 conference. I was informed by my DSO about the phone
5 conversation that had occurred on Friday.

6 Because of my distance from my DSO, which is the
7 same problem Mr. Ruiz had. He was also in Guantanamo Bay
8 prior to the plane landing on Saturday. Mr. Ruiz and I were
9 behind the eight ball on this, which is why Mr. Nevin,
10 Mr. Harrington, and Mr. Connell had been informed on Friday.
11 They knew before I did. And I'm presuming that if the
12 prosecution knows -- has contact with their own security
13 officers, they were also informed, although, I mean, you know,
14 that's just surmising on my part.

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: But I wanted to correct the record
17 on that.

18 At any rate, the way forward is for the court to
19 do an inquiry. How the court does the inquiry is, of course,
20 for the commission to fashion.

21 I want to make sure, though, that when we do this,
22 we protect any confidences that may be part of the Bin'Attash
23 defense or part of the joint defense. Because even though an

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1 FBI agent may have -- or two FBI agents may have questioned
2 members of my defense team or members, we know they questioned
3 members of Mr. Binalshibh's defense team. Because that
4 information was disclosed in violation of the attorney-client
5 privilege doesn't mean that you don't have a duty to protect
6 it from further dissemination.

7 So although the harm has been done ----

8 MJ [COL POHL]: How would you propose to take the FBI
9 agent's testimony, then?

10 LDC [MS. BORMANN]: I think that it can be done in an
11 ex parte fashion with respect to parts of it. If we're going
12 to go into matters that pertain to activities of defense teams
13 that would expose work product, then the government should be
14 barred from that much the same way as we were barred
15 yesterday. Right?

16 We didn't participate at all in the hearing you
17 had with the government yesterday. So in that same way, we
18 could go forward to protect defense secrets, which were or may
19 have been compromised as a result of government intrusion into
20 the privilege.

21 MJ [COL POHL]: So just so I understand this, the
22 proposal would be to bifurcate the FBI agents' testimony,
23 drawing a line between anything that discusses work product or

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1 privileged information on one side of the line in an ex parte
2 session. On the other side of the line, anything that
3 relates, who told you to do this, who did you report to, how
4 the investigation was conducted, how did it come about --
5 would be that the line?

6 LDC [MS. BORMANN]: That's a possibility, although it
7 may not be necessary. Let me give you yet another
8 possibility.

9 Maybe -- it's possible that these FBI agents have
10 talked to, let's say, a dozen individuals. In that case,
11 bifurcation is going to be necessary, because if there are a
12 dozen various team members, and 11 of them haven't reported to
13 defense counsel that they've been approached and allied with
14 the FBI, we have a much bigger problem than we know of right
15 now. Then that would require bifurcation.

16 But if, for instance -- and nobody sitting here on
17 this side of the aisle right now, and I -- and Mr. Harrington
18 didn't address this directly, but I know this from
19 conversations, and I know it from his affidavit, he didn't ask
20 about the content of what was disclosed to the FBI.

21 So we don't know as we sit here today what that
22 particular DSO said to the FBI. We only know a summary of the
23 types of questions that were asked of that particular defense

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1 security officer.

2 If the defense security officer takes the stand
3 and says, you know, I told him to -- that I didn't know
4 anything and I just started with this job and I never saw
5 anything, there's no need for bifurcation, right?

6 But if the DSO said, yeah, I told him -- I sat
7 down with him for two hours and filled him in on everything
8 that my team was doing because I was afraid when two FBI
9 agents come knocking on my door on a Sunday unannounced and
10 tell me that they need me to act as a confidential informant,
11 then we have a completely different issue, which is really why
12 we need the inquiry.

13 MJ [COL POHL]: Okay.

14 LDC [MS. BORMANN]: And if you don't have any other
15 questions ----

16 MJ [COL POHL]: I don't. Thank you.

17 Mr. Connell.

18 LDC [MR. CONNELL]: Your Honor, I'd like to first
19 address the question that you addressed about what evidence
20 needs to be taken.

21 The administrative supervisor of defense security
22 officers, by random chance, is assigned to my team. He is on
23 island, he is in the witness trailer and he is available to

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1 testify. I don't believe he would add a great deal beyond
2 what Mr. Harrington has stated in his declaration, but if we
3 feel that it's necessary to go forward on that today, we are
4 prepared to do that.

5 MJ [COL POHL]: And in essence, would he repeat what's
6 in the declaration that the -- Mr. Harrington's DSO reported
7 to him about this visit from the FBI?

8 LDC [MR. CONNELL]: Yes. The sequence of events is that
9 the DSO involved reported to his administrative supervisor,
10 his administrative supervisor reported to me. I suggested --
11 and this actually goes to the question of wouldn't the DSOs be
12 expected to talk to their lawyers first. I suggested, you
13 know, I don't want to be involved in this, you need to take
14 this up with Mr. Harrington. And I also reported to my
15 administrative supervisor.

16 That is -- beyond that, you know, sort of
17 procedural who said what to whom at what time period, the DSO
18 would state the same thing as Mr. Harrington.

19 MJ [COL POHL]: So you -- okay. Got it.

20 LDC [MR. CONNELL]: Is that clear, sir?

21 MJ [COL POHL]: Yes, it is.

22 LDC [MR. CONNELL]: There are four exhibits that I think
23 that the court should consider from Mr. al Baluchi. These

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1 four exhibits are information that is protected under
2 paragraph 4(d)(2) of AE 013DDD. That's the classification
3 review procedure.

4 I know that counsel for Mr. Mohammad believes that
5 their conduct may have triggered this inquiry. I believe that
6 information that we have submitted for classification review
7 may have triggered this inquiry. And the -- those exhibits
8 can be available to the military commission in short order.
9 Three of them are contained on the top-secret system, which I
10 understand the network is down at the moment, but, you know,
11 it goes up and down all the time, so it could be back up this
12 afternoon. The other is contained on the secret-level system,
13 and I could provide that, you know, with within a matter of
14 minutes.

15 I agree with other counsel as to the four
16 witnesses who we know of who have relevant information to the
17 inquiry. And if I may provide my two cents on the question of
18 procedure, it seems that, if necessary, the military
19 commission could detail the military judge as a deposition
20 officer under Rule 702 in order to specifically deal with
21 assertions of privilege. Because I know better than to
22 attribute questions as opinion to the military commission, but
23 it does seem to me that there are elements of the inquiry that

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1 could be adversarial. There are elements of the inquiry that
2 one or more parties -- there are elements that Mr. al Baluchi
3 has a privilege that he can assert, there are elements that
4 Mr. Binalshibh has a privilege that he can assert, and so
5 there would have to be some kind of bifurcation of a
6 proceeding.

7 It might be easiest to do that as a deposition,
8 but I don't have a lot of experience with military
9 depositions, so that's not really my area of expertise.

10 MJ [COL POHL]: Generally, a deposing officer doesn't
11 make rulings in a military deposition.

12 LDC [MR. CONNELL]: All right.

13 MJ [COL POHL]: All he does is note the objection. So
14 I'm not sure that solves any problem, since I have a feeling
15 that as soon as that is over with, we'll be right back to
16 where we are.

17 LDC [MR. CONNELL]: Sure. I just throw it out there as
18 an option. I don't really have a strong opinion on the
19 procedure.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: The only other thing that I will
22 note is that it does strike me that even in a -- in a
23 partially ex parte procedure individuals may have their --

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1 their personal counsel involved. You know, the DSO who is
2 involved may have retained counsel. The FBI may have FBI
3 lawyers, you know, who are unaffiliated -- who are walled off
4 from the prosecution who may be involved. I don't know. But
5 people are entitled to representation when there's an
6 allegation that they've done something wrong.

7 So I think that anyone who desires and has
8 representation should be allowed to have it.

9 MJ [COL POHL]: Okay.

10 LDC [MR. CONNELL]: Thank you.

11 MJ [COL POHL]: Thank you.

12 Mr. Ruiz.

13 LDC [MR. RUIZ]: Judge.

14 MJ [COL POHL]: Good morning.

15 LDC [MR. RUIZ]: Judge, one of the questions you asked
16 was if the DSOs were part of a phone conversation and the
17 phone conversation we've related to you a number of times. I
18 would just want to make clear that our DSO was not part of
19 that conversation simply because he was also here in
20 Guantanamo Bay, and was not available to participate in that
21 phone conference when it took place.

22 MJ [COL POHL]: Okay.

23 LDC [MR. RUIZ]: In terms of evidence that I think we

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1 would need for this hearing, I'm not going to rehash things
2 that have already been mentioned, but I will make an oral
3 motion here, given the circumstances, and that you've asked
4 this question of us. And I think and I suspect that we will
5 follow it up with a more comprehensive request after we confer
6 with the other teams as well.

7 But certainly, we would ask the judge to issue a
8 ruling to compel discovery with respect to documentary
9 evidence that relates to any investigation that is ongoing of
10 the defense team, including, but not limited to, any FBI 302s
11 that have been generated as a part of these investigations or
12 these inquiries, any documents or correspondence that relates
13 to the questioning of Mr. Harrington's defense security
14 officer as well as any 302s, correspondence or other
15 information that relates to such an investigation.

16 Certainly, Judge, we think, as you sit from the
17 bench, you can make a ruling that that information is directly
18 material to the inquiry that we're asking you to conduct, and
19 which the case law certainly supports that you conduct.

20 I would also indicate that that covers and should
21 cover any directives that instruct this inquiry or instruct
22 the requirement that defense personnel be enlisted as
23 informants or as spies to assist the government in this

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1 investigation.

2 So we believe that's very relevant to the
3 investigation and to the inquiry. And as I said, we will
4 follow this up with a written request to the commission, but I
5 wanted to at least highlight that for you ----

6 MJ [COL POHL]: Okay.

7 LDC [MR. RUIZ]: ---- at this point in time.

8 Mr. Nevin referenced that he had received as early
9 as today, I believe, I was not aware of this earlier -- that
10 he had received additional guidance or directive, so to speak,
11 that the information that he had put in his motion responding
12 to the government's motion relating to the proper procedures
13 that they followed, and having this document reviewed for
14 classification review and cleared by the special security
15 officers within the convening authority's office -- actually,
16 I think now that's the world headquarters services -- that now
17 there's some indication that that response ought to be
18 classified. I would like to make an oral motion at this time
19 to request the specific guidance that they're relying on, and
20 where this information is delineated that the procedures that
21 you've highlighted in your order are in fact now classified
22 and constitute a spill. So I'm asking for that documentary
23 evidence, as I am aware of no directive that indicates that

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1 that procedure which you delineated in your order is in fact
2 classified.

3 In terms of how the procedure takes place, Judge,
4 I think that's going to be something that we need to have some
5 flexibility on, and I don't have any additional arguments on
6 that. I adopt the arguments on behalf of Mr. Hawsawi.

7 MJ [COL POHL]: Thank you. Trial Counsel.

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

9 MJ [COL POHL]: Good morning, Mr. Ryan.

10 TC [MR. RYAN]: Your Honor, first note of importance,
11 that the prosecution team is in a position where we are
12 precluded from being in a position of knowledge as to the
13 circumstances surrounding the events described in 292.

14 The only thing I will say further about matters
15 the defense has raised in regard to this company called SRA,
16 is the earliest anybody heard anything from the prosecution
17 team would have been this past Friday in regard to a phone
18 call that may or may not have been taking place.

19 As far as we know, no member of the prosecution
20 team, and as far as I know, no member of OCP was on that call.
21 Again, to the best of our knowledge. Certainly no information
22 concerning it was presented to us.

23 That's the earliest.

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1 MJ [COL POHL]: You are talking about information
2 presented as to the reported contact as opposed to what was
3 said during said contact?

4 TC [MR. RYAN]: That's correct.

5 MJ [COL POHL]: I mean, as I understand it from the
6 defense perspective, it was late last week, Thursday or
7 Friday, the head of the contractor who owns all of the
8 security officers had some telephone conference with all of
9 the security officers saying this occurred, and -- but without
10 going into any substance of what may or may not have been said
11 by Mr. Harrington's DSO to the FBI. And that occurred
12 sometime Thursday or Friday, as I understand it, and different
13 people heard about it at different points in time. And now
14 we're the following Tuesday.

15 TC [MR. RYAN]: That is correct. So to be clear, we're
16 sort of two steps removed in the sense that we don't know the
17 phone -- if anyone was on the phone call, we certainly don't
18 know what happened on any phone call, and beyond that, you
19 know, as I said, we were not -- we are not in a position of
20 any sort of knowledge, by design, regarding any sort of
21 interviews that took place.

22 We, in short, sir, cannot dispute many of the
23 claims made by the defense in 292 because we just don't know.

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1 And as I said, that is by design.

2 Your Honor, this comes down to a basic legal issue
3 of conflict. We, in our response, tried to cut through a lot
4 of the vagueness and a lot of the hyperbole and get to the
5 specific issue of conflict. And as we noted, it comes up in a
6 few different instances. That is one where it's concurrent
7 representation of clients, and which we have at one point at
8 least raised it to the commission and the commission handled
9 it; two, where there might be successive representation; and
10 three, this is the only one that really matters for this
11 purpose, that being where something happens that makes
12 counsel, the lawyers' interests, personal interests,
13 inconsistent with those of the defendant in a criminal case.

14 The interests have to be contrary to the point
15 that it raises this issue of conflict. The first point I want
16 to make, Judge, is there is currently no -- there is no
17 legally cognizable conflict of interest for any counsel in
18 this case.

19 Just counting those who are in fact detailed, by
20 my count, there are 15 lawyers on that side of the aisle. Not
21 one has a conflict of interest at this time.

22 The defense can't dispute it. While Mr. Nevin was
23 talking, he used the term "possible" at least twice. They're

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1 talking about speculating of everything bad that could
2 possibly happen down a road that nobody has gone down.

3 MJ [COL POHL]: Mr. Ryan, let me ask you a question,
4 because it's been raised by the defense.

5 TC [MR. RYAN]: Sure.

6 MJ [COL POHL]: Part of their allegation, and I think
7 it's -- if you read the nondisclosure agreement, that's where
8 it's coming from, is that they don't necessarily know what
9 they don't know. Okay.

10 TC [MR. RYAN]: And we never do, Judge.

11 MJ [COL POHL]: Well, I'm going to see if I can solve
12 that, so let's go.

13 Okay. Would you object -- does the government
14 have any objection to me issuing an order to all defense team
15 members that they are to disclose any contact with any outside
16 agency to their lawyers, and then let the lawyers decide what
17 to do with it?

18 The concern that they could have is that if
19 somebody else signed the nondisclosure agreement and read it
20 literally, they didn't tell anybody, so what we have now is --
21 or not know -- so what I'm saying is would such an order trump
22 any FBI nondisclosure agreement -- and, again, I'm not telling
23 them to tell me or you, simply to tell their defense counsel

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1 that, yes, I talked to the IRS about my taxes, and therefore
2 that's no dig deal. Or some three-letter agency has hired me
3 or wants me to tell them what's going on.

4 TC [MR. RYAN]: I can play no part, Judge, in any
5 decision along those lines. This is for the protection of the
6 prosecution team as well as in this case.

7 MJ [COL POHL]: Again, I'm not talking about any
8 substantive issues.

9 TC [MR. RYAN]: I understand what you are saying, Judge,
10 but no ----

11 MJ [COL POHL]: You take no position on whether such an
12 order is valid ----

13 TC [MR. RYAN]: What you are inquiring of me is if the
14 court can issue an order that might ----

15 MJ [COL POHL]: No, what I'm really saying is: Do you
16 have any legal objection to any such order?

17 TC [MR. RYAN]: Agreed, sir. You're asking if I'm
18 objecting to the court issuing an order that ----

19 MJ [COL POHL]: That's actually freeing the defense
20 counsel's team from any nondisclosure agreement intra defense
21 team only.

22 TC [MR. RYAN]: Judge, my objection is simply that I
23 cannot participate. It's as simple as that.

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1 MJ [COL POHL]: Okay.

2 TC [MR. RYAN]: The prosecution team cannot participate
3 in what the court or the commission is suggesting is what I'm
4 concerned about, an intrusion into what might be an ongoing
5 investigation of which I have no knowledge. I cannot
6 participate in that, sir, most respectfully.

7 MJ [COL POHL]: No, I understand. Okay. But then that
8 raises the next issue. And I -- Mr. Ryan, I certainly
9 understand the government's position about you don't want to
10 get involved with an ongoing investigation. Okay.

11 Then where are -- again, this isn't directly to
12 you, necessarily. Then where are we at? If there's an
13 ongoing FBI investigation into this, unless there's some
14 evidence that's going on ----

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

16 MJ [COL POHL]: ---- and the government's position, if
17 you have one, maybe you don't have one, is what's the next
18 step forward? If they say -- I mean -- they say we're not
19 going to talk because there's an ongoing investigation, where
20 do we go?

21 TC [MR. RYAN]: We come back to where we are, Judge,
22 which is what is 292 asking? What is 292 stating?

23 MJ [COL POHL]: Okay.

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1 TC [MR. RYAN]: Which is the issue of conflict. And
2 what I have stated, Your Honor, what is still the case, we are
3 talking about facts. Taking what they say is true, one person
4 from one defense team, a DSO, and I know it's a position that
5 didn't even exist when this case began, according to 292, was
6 approached. That person is the subject of this.

7 That does not translate -- and the case law we
8 have cited is quite clear. It does not translate magically
9 into a conflict of interest whereby the interests of these
10 lawyers is suddenly contrary to that of the five defendants
11 that they represent. It doesn't. So where we are, Judge, is
12 we get back to the docket. We get back to doing what this
13 court -- what this commission came down here to do.

14 This is the second point I wish to make, Judge.
15 There are compelling reasons to move forward at this time.
16 Back in December we raised the issue of the 909 and the 706
17 board. That is an important issue. Understanding that there
18 is in fact a presumption upon which we can rely, nonetheless,
19 we felt after much discussion and much research that issues
20 concerning Mr. Binalshibh had to be brought to the forefront.
21 This is not just based on what Your Honor has witnessed in
22 court and had to act upon, but also goes back to things that
23 occurred several years ago at the first go-round of this

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1 military commission.

2 It was the reasoned judgment of the prosecution
3 that we just had no choice but to raise it. Those issues, and
4 as Your Honor has pointed out, as intertwined with 152 deserve
5 to be brought out and we have taken great steps to get us
6 there.

7 There are three doctors prepared to testify, Your
8 Honor: One of them, a Navy captain who was assigned to the
9 National Defense University, has traveled down with us. A
10 second, who is the current camp doctor, is due to rotate out.
11 He is prepared as well. And a third person, a camp commander,
12 who is prepared to testify, is due to be rotated out next
13 week, so he won't be here from this point forward.

14 This evidence is ready to be presented. This
15 evidence is of a compelling nature relevant to, as Your Honor
16 puts it, a sort of chicken-and-egg situation, in which we have
17 got an individual -- and an individual with some issues that
18 we have to deal with. We relied on the presumption, and we go
19 forward under it, and but we believe in our best reasoned
20 judgment, sir, we have to take that up, and we have to come
21 back to it.

22 This is not something that should involve the --
23 I'm sorry, sir. This is not something that should involve the

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1 defense security officer to any great extent. The defense in
2 fact is not contesting Mr. Binalshibh's competence or any
3 concerns about Mr. Binalshibh's competence.

4 Beyond 909 and 152, Your Honor, there are other
5 motions pending, some of them for months. Sadly, some of them
6 for years. The attorneys in this matter have presumably been
7 ready to argue them for some time. They have been fully
8 briefed. We are concerned asking about or talking about as to
9 those other motions, oral argument only. In fact, something
10 that Your Honor could decide without hearing oral argument.
11 These are things that if we had, say, had another week the
12 last session, they might have been already handled.

13 If we had come down two weeks earlier, before
14 April 6th, these would have been handled. I submit to Your
15 Honor that those motions -- there is no concern this
16 commission should have about handling those things which have
17 been pending for so long.

18 Number three, Your Honor, this is only Tuesday of
19 a week in which we were supposed to spend four days down here.
20 Great effort and expense have been made to bring everyone
21 here. It includes all of the parties, it includes the
22 observers, and it includes the families of the murdered.

23 At this point, Judge, we are asking that Your

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1 Honor deny any abatement and resume back to the docket that is
2 currently pending before the commission.

3 With that, Your Honor, unless you have further
4 questions, I can sit down.

5 MJ [COL POHL]: I don't. Thank you.

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

7 MJ [COL POHL]: Mr. Connell.

8 LDC [MR. CONNELL]: Your Honor, I have three small
9 points that I'd like to make. The first is a clarifying point
10 about the SRA call.

11 My understanding of that call was that it was with
12 their general counsel, and so I have treated that as an
13 attorney-client privileged communication and have not inquired
14 in any way as to the content of that call. I did inquire as
15 to who was on the call, but I don't have any idea of the -- I
16 mean, there was a characterization by the commission of what
17 may have been said on the call. I just want to say, I don't
18 know what was said on the call. I thought it was
19 attorney-client privileged.

20 MJ [COL POHL]: Okay.

21 LDC [MR. CONNELL]: The second point I want to make is
22 that the government argued that they had requested the 909 in
23 December. According to my notes, the government actually

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1 filed a 706 in December, and the board was not able to make
2 a -- reach a conclusion as to competence or incompetence, and
3 then in February the government asked for the 909.

4 The third point I'd like to make is about the
5 possible order that the military commission was considering,
6 or at least discussed as a possibility regarding the
7 disclosure of contact with outside agencies to the attorneys
8 by defense team. The only thing -- I think that's a good
9 idea. The only comment that I would add is that being
10 military or combined organizations, the -- you know, people
11 come and go from teams fairly often, and so that I would ask
12 that former members of the team who are -- who were involved
13 in the representation would be included in that -- in that
14 order, if the military commission is inclined to issue such an
15 order.

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

17 Mr. Nevin.

18 LDC [MR. NEVIN]: Your Honor, just one matter that --
19 and I think the commission is probably aware of this, but I
20 just want to say it for the record, because I heard counsel
21 say this is only a possible conflict. We haven't proved that
22 a conflict actually exists.

23 Look, I don't want to be investigated. If we can

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1 dispel the possibility that our team is being investigated,
2 I'll be right up, waving happily a flag over my head in
3 celebration. I don't want to be investigated. And I'm sure
4 nobody on -- nobody anywhere wants to be investigated. It's
5 not pleasant.

6 But we cite *Wood v. Georgia*, a 1981 United States
7 Supreme Court case; *Cuyler v. Sullivan*, a 1980 United States
8 Supreme Court case; *Holloway v. Arkansas*, a 1978 United States
9 Supreme Court case, all for the proposition -- and they all
10 say this -- that when the court is apprised even of the
11 possibility of a conflict of interest, it has an inquiry
12 obligation. Just of the possibility. And it's a matter of
13 preserving the -- because representation by counsel is part of
14 the structure of the way the system goes forward.

15 So this becomes structural error, and it's not
16 analyzed for harmfulness. It's what's called per se error.

17 MJ [COL POHL]: Mr. Nevin, if the facts bear out the
18 implication that particularly your team was investigated by
19 the FBI on this statement that was released, okay, what's your
20 remedy? I mean, the problem is -- I've got a lot of stuff
21 here. I'm trying to -- and then I've been hearing about
22 partial remedies, independent -- you know, get another lawyer
23 to advise the accused about a conflict, things like that, but

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1 if you -- but at least the pleadings indicate that there is an
2 ongoing investigation centered on your team and the release of
3 this information.

4 LDC [MR. NEVIN]: Right.

5 MJ [COL POHL]: Assuming that is true ----

6 LDC [MR. NEVIN]: Yes.

7 MJ [COL POHL]: ---- what is your remedy?

8 LDC [MR. NEVIN]: Well, there -- I believe there are
9 only two remedies assuming that that's true, and -- but, you
10 know, just to back up, it needs to be an investigation that
11 implicates a conflict. So I mean, theoretically, the
12 investigation could be undertaken for other purposes, and I
13 can speculate about that.

14 MJ [COL POHL]: No, so I ----

15 LDC [MR. NEVIN]: You're saying, here's my hypothetical,
16 they're investigating you, what are your remedies?

17 MJ [COL POHL]: Yes.

18 LDC [MR. NEVIN]: And my answer is, there are two. One
19 of them is that I go, and that anybody who is subject to the
20 investigation goes also; and the other is that Mr. Mohammad
21 waives the conflict after being independently advised.

22 Now, I just want to emphasize that those are
23 two -- those are two separate things. I mean, in other words,

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1 I'll have to make my own decision about whether I can stay,
2 and that's -- that's a decision that I'll have to make in the
3 exercise of my professional and personal judgment about how
4 all of this makes me feel.

5 MJ [COL POHL]: And you don't believe you're on that
6 point yet?

7 LDC [MR. NEVIN]: Well, I don't know. That's the reason
8 for the inquiry. As I say, I think there are -- there are
9 other -- I mean, depending on what the FBI tells us about the
10 purpose of the investigation, there is -- it could be because
11 of something that doesn't -- that doesn't suggest that there
12 is an investigation that would present a problem.

13 I don't know what the outcome of the inquiry will
14 be. So no, I don't think I'm there now, but I'm concerned.

15 I mean, the military commission will note that
16 this 292 was not filed until after the FBI contacted
17 Mr. Harrington's DSO and attempted to enlist him -- or did
18 enlist him.

19 However, I thought it was implicit in 018Y that
20 the government was accusing members of my team of having
21 violated SOPs and the court's order in 018, and the Woods
22 order as well, and that caused me some concern. I was in the
23 process of ruminating about it when the FBI agents took the

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1 actions that they took.

2 So I think that this is something that there's
3 really no way to answer categorically in terms of that first
4 part of it, in other words, what is the investigation, what
5 does it mean, where is it going, and so on.

6 I should -- I mean, I should also just say, so
7 that there's not any misimpression about it, that we haven't
8 violated any rules. I mean, we have -- we lay that out to
9 some degree in this response that's now -- I gather some claim
10 is going to be made that it's classified, we lay out in some
11 detail the proposition that we followed all the rules. But,
12 you know, it's a different thing being -- being investigated
13 and being -- not having done anything wrong are two separate
14 things, as we know.

15 And lots of United States Supreme Court justices
16 have made interesting pithy statements about this over the
17 years, and I can quote some of them, but the point is it all
18 boils down to the same: Even if you -- and maybe even
19 particularly if you haven't done anything wrong, it has a
20 chilling effect to have the Federal Bureau of Investigation
21 investigating you.

22 Thank you.

23 MJ [COL POHL]: Thank you.

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1 LDC [MS. BORMANN]: Can we comment?

2 Mr. Ryan said, well, there's no conflict, there's
3 no demonstrable conflict, so we should just ignore all of
4 this, and I want to present to Your Honor just one of the many
5 conflicts that I am now faced with.

6 We filed 018HH (WBA) on the 3rd of April. It is a
7 defense motion to amend 018 so that my client's own writings
8 can go back to him. Currently, when my client writes to me
9 about the torture he sustained during the times he was in
10 undisclosed locations, that material can be brought out by me
11 and couriered back to a SCIF and used to write motions.

12 I have to mark it as TS/SCI under the proper
13 markings, and I do. Then when I want to try to bring it back
14 to my client so we can work on revisions when there's missing
15 information, I cannot do that because the Privilege Review
16 Team that we're required to go under, the PRT says your 018,
17 your protective order, doesn't allow them to review that.

18 Right now my client is not here because he's angry
19 at me because I can't get him his own words. I want to
20 litigate it. I can't. There's a conflict.

21 LDC [MR. NEVIN]: Your Honor, could we request ----

22 LDC [MS. BORMANN]: There's a comfort break necessary,
23 I'm told.

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1 MJ [COL POHL]: Sure. Sure. We'll be in recess until
2 1100 hours. Commission is in recess.

3 [The Military Commission recessed at 1042, 15 April 2014.]

4 [The Military Commission was called to order at 1101,
5 15 April 2014.]

6 MJ [COL POHL]: Commission is called to order. All
7 parties are again present.

8 Ms. Baltes.

9 LDC [MS. BORMANN]: I'm Bormann. Ms. Baltes works for
10 the FBI.

11 MJ [COL POHL]: I knew I had the B right. I apologize.
12 Ms. Bormann.

13 LDC [MS. BORMANN]: I thank Mr. Nevin because I lost my
14 thought track there for a moment. I'm glad for the break.

15 At any rate, we can see what the conflict has done
16 thus far. I'm at liberty to tell you that Mr. Bin'Attash is
17 very upset by the concept that his defense team may be
18 influenced by or had been approached by the very people who
19 are involved in the prosecution of him in this case. And now
20 every time I have to tell him to wait for something that he
21 clearly sees as something that he is entitled to -- which I
22 think there's no doubt he's entitled to get his own writings
23 back. He wrote them. He should be able to get them.

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1 But I have to tell him no, I can't give you your
2 own writings back, because if I do, and the guards find them,
3 I could be charged with a crime, even though they're your own
4 writings. That's where we're at.

5 So right now I have a client who won't talk to me,
6 so we need to get to the bottom of it.

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

8 Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, just a couple of points.
10 I want the court to understand the fact that all of us have
11 been presenting this argument in the form of sort of an
12 abstract philosophical and theoretical thing does not mean
13 that there isn't outrage among us about what has happened.
14 And I think what triggered it in me, again, was the way that
15 Mr. Ryan talked about this, that there's no conflict for these
16 lawyers, and it's like our DSO is some abstract person out
17 there floating in the wilderness.

18 This is no different than if the FBI agents came
19 to my door and asked me. It doesn't matter who it is on the
20 team that did it. That's got nothing whatsoever to do with
21 it. The fact that I would have told the FBI agents to leave
22 is not something, either.

23 But we now are in a position, Judge, where we've

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1 had our DSO working for us for months and months and months,
2 and now we have to go back and question every bit of advice
3 that he gave us. And I'm not impugning him in any way. I'm
4 not saying that I have any reason to believe that he did
5 anything but attempt to perform his duties professionally and
6 on behalf of the defense the way that he did.

7 But that's the position that they've put us in,
8 and it's a real conflict, and it's an extremely difficult
9 concept to talk to our clients about, extremely, given what
10 they have been through and the experience in the court, what
11 we talked about yesterday. And it is not a matter to be
12 trivialized, and I'm actually surprised that the prosecution
13 isn't more outraged by it, as we are, rather than saying they
14 don't have any basis for denying what we say.

15 Thank you.

16 MJ [COL POHL]: Just a second, Mr. Ryan -- or
17 Mr. Harrington.

18 It's your understanding that your DSO may be
19 represented by counsel, correct?

20 LDC [MR. HARRINGTON]: Yes.

21 MJ [COL POHL]: So if I issued an order for him to
22 produce -- witness production issues, obviously, we have got.
23 He's a civilian, correct?

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1 LDC [MR. HARRINGTON]: Yes.

2 MJ [COL POHL]: Let's just short-form this just for the
3 discussion. If I issue an order for him to be produced to
4 provide evidence on this, that would presumptively go to his
5 defense counsel to object, or to his lawyer, if he wishes to.

6 LDC [MR. HARRINGTON]: Correct.

7 MJ [COL POHL]: And I notice in the pleading, perhaps I
8 just overlooked it -- I don't have a name -- you keep
9 referring to him as a defense DSO.

10 LDC [MR. HARRINGTON]: Yes.

11 MJ [COL POHL]: Do you have any difficulty telling me
12 the name in open court or will you provide that to me? I have
13 to issue an order to person, not to an entity.

14 LDC [MR. HARRINGTON]: The only reason we're not using
15 his name is to not to have him suffer any more in terms of
16 publicity than what it is.

17 MJ [COL POHL]: Okay.

18 LDC [MR. HARRINGTON]: I would prefer -- I can give it
19 to the court.

20 MJ [COL POHL]: Send it to me ex parte, but I'm saying
21 that the order is going to go by name.

22 LDC [MR. HARRINGTON]: Right. Correct. Yes.

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

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1 LDC [MR. HARRINGTON]: Okay.

2 MJ [COL POHL]: Anything further from any of the
3 defense?

4 Mr. Ryan, last chance. Do you want to be heard on
5 anything?

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

7 MJ [COL POHL]: Mr. Ryan, I'm going to ask you a
8 question, and I understand your position on your involvement
9 in this. And so if the answer is, I don't want to tell you
10 the answer, that's fine.

11 You work for DoJ, correct?

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

13 MJ [COL POHL]: If I issue an order for the FBI agents
14 to be produced -- and again, if you don't want to answer this,
15 you don't have to -- would it be your experience that it's
16 unlikely they will want to cooperate because it's an ongoing
17 investigation?

18 TC [MR. RYAN]: Your Honor is suggesting that you want
19 to investigate an ongoing investigation. There are numerous
20 government privileges that would be at stake ----

21 MJ [COL POHL]: Okay.

22 TC [MR. RYAN]: ---- numerous internal procedures,
23 rules, et cetera. I can't presume to suggest to you at this

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1 point, Judge, what someone else would do, of whom I'm not
2 permitted to be connected to ----

3 MJ [COL POHL]: I understand that.

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

5 MJ [COL POHL]: I'm just asking for your background on
6 this type of thing.

7 TC [MR. RYAN]: I don't feel comfortable giving an
8 answer on that one, Judge.

9 MJ [COL POHL]: Okay.

10 TC [MR. RYAN]: I think it's outside my lane, other than
11 to say that I think the commission would be greatly mistaken
12 to go down a road of trying to look inside an ongoing
13 investigation being conducted by the Federal Bureau of
14 Investigation, if, in fact, one is in -- exists.

15 MJ [COL POHL]: Okay. Understand.

16 TC [MR. RYAN]: Thanks.

17 MJ [COL POHL]: Thank you.

18 LDC [MR. HARRINGTON]: Judge, could I ----

19 MJ [COL POHL]: Mr. Harrington.

20 LDC [MR. HARRINGTON]: I know you were pondering, Judge.
21 I thought I would give you ----

22 MJ [COL POHL]: Help me ponder, Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, I don't know if it applies

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1 in this system, but in the federal system, which I have a lot
2 of experience with, there are usually ways that can be done
3 that permit for ex parte review of certain things. It may be
4 that that's something that has to be considered in this
5 particular case where information could not be supplied to us,
6 or to other counsel in a deposition or an investigation or
7 something like that, but that information could be supplied to
8 the court for its review to determine the underlying facts.
9 That's in relation to your question with Mr. Ryan.

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

11 LDC [MR. CONNELL]: Your Honor.

12 MJ [COL POHL]: Here's what I'm going to do.

13 I will issue an order later today directing that
14 any current or past member of any defense team who has been
15 contacted or interviewed by any federal governmental agency,
16 including the FBI, concerning any defense-related matter, must
17 disclose such information to the lead defense counsel, not to
18 anybody else. Then if there's an issue that the defense
19 counsel believes should be raised to the commission, then
20 that's on your professional judgment on that.

21 If there's an issue as to whether or not this
22 violates any type of rule that they're concerned about, there
23 also will be a caveat that they can raise that concern direct

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1 to the commission, and I will address it accordingly.

2 Defense, you're requesting various things and
3 you're proposing different ways for various evidence to come
4 before the commission. Mr. Harrington, you proposed a
5 procedure for an ex parte submission of the FBI investigation.
6 They may very well not want to cooperate, and we'll see where
7 we're at at this point, but at this point, I need to know
8 their position, and, therefore, by close of business tomorrow,
9 I want the defense to submit any proposed orders of production
10 that you believe are appropriate in this case. Again, I
11 understand who has to conduct the inquiry, but who should be
12 contacted, I believe, is for the defense.

13 Those proposed orders should also be served on the
14 government unless the defense has a reason why they should be
15 served ex parte. Since they are going to third parties, i.e.,
16 I suspect the FBI, among others, I would -- I am not quite
17 sure why they would need to be ex parte, but I will leave that
18 to your judgment.

19 I want those by COB tomorrow. And when I say COB,
20 I mean 1700 hours tomorrow. We won't meet tomorrow, but we
21 may meet on Thursday, depending where we are at. Okay?

22 That being said, the commission is in recess.

23 [The Military Commission recessed at 1113, 15 April 2014.]

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