

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 0902,
2 11 February 2015.]

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

4 General Martins, the same prosecutors present when
5 the commission recessed?

6 CP [BG MARTINS]: Yes, Your Honor. I also would like to
7 state that Brianna Hearn and Mary Needham of the Federal
8 Bureau of Investigation are also here who were not here
9 before.

10 MJ [COL POHL]: All accused are again present. It appears
11 all defense counsel are present when the commission recessed.
12 Have there been any changes?

13 LDC [MS. BORMANN]: No.

14 MJ [COL POHL]: Silence means no.

15 Let's begin where we ended up, dealing with the
16 interpreter issue. Since that time there has been a
17 classified filing that the commission understands has been
18 provided to the defense; is that correct? Mr. Nevin will
19 speak?

20 LDC [MR. NEVIN]: Yes, Your Honor.

21 MJ [COL POHL]: And the government has also filed a
22 pleading 350B dealing with a request for documents and there
23 is also a 505(g) notice filed by the defense under 350A.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Okay. Trial Counsel, since you -- what is the way
2 ahead in the government's perspective on this issue?

3 CP [BG MARTINS]: Good morning, Your Honor. I also want
4 to mention that there was one more filing, a draft ruling that
5 is associated with 350B.

6 MJ [COL POHL]: Okay. When did you file that, this
7 morning?

8 CP [BG MARTINS]: This morning.

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

10 CP [BG MARTINS]: Your Honor, as you are aware and as the
11 parties are aware, on Monday the prosecution confirmed that an
12 interpreter utilized by the Ramzi Binalshibh defense team was
13 a former CIA interpreter. At no point during his service with
14 the defense was he working for or with the Central
15 Intelligence Agency.

16 I want to reiterate that the presence of a former CIA
17 linguist on one of the defense teams in no way resulted from
18 any action by any executive branch agency to gather any
19 information regarding defense activities from any of the
20 defense teams. And that bears repeating. The presence of a
21 former CIA linguist on one of the defense teams in no way
22 resulted from any action by any agency of the executive branch
23 to gather any information regarding defense activities from

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 any of the defense teams.

2 I want to respectfully remind counsel and the
3 commission that that fact is an unclassified fact that can be
4 referred to here. To the extent any counsel wishes to discuss
5 identifying information, that remains classified. And so
6 name, physical attributes, appearance, when and if the
7 individual was in Guantanamo, when and if the individual was
8 in the courtroom, those things would need to be the subject of
9 a 505(g) notice, and then we would need to have a
10 use/relevance/admissibility hearing under 505(h).

11 Your Honor, you have our motion in 350B. The
12 government, prosecution, believes that the first step -- to
13 the extent the commission believes it needs to deal with this
14 any further, that the first step would be to obtain the
15 administrative record of how the Ramzi Binalshibh defense team
16 requested translator services up to this session, justified
17 that request and, pursuant to Chapter 9 of the Regulation for
18 Trial, vetted that individual, obtained appropriate agreement
19 and affidavit that's required by the reg. And that's the
20 first and obvious place to go should the commission deem it
21 necessary to deal with this further before moving on to the
22 crowded docket that we have.

23 And subject to any questions that you may have,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that's our -- what we urge the commission to do.

2 MJ [COL POHL]: Thank you. Defense? I guess, pick what
3 order you want.

4 LDC [MR. CONNELL]: Your Honor, the prosecution just
5 informed the military commission that, except for the few
6 facts that it would like to be in the public, it has
7 classified virtually every fact regarding the former CIA
8 linguist utilized by Mr. Binalshibh's team, including if and
9 when he has ever been to Guantanamo Bay. We received notice
10 of that information, that the prosecution considered that
11 classified at 8:05 -- at 2005 last night. We prepared a
12 505(g) notice, which is in the record at 350A.

13 Previously in the record is Mr. al Baluchi's motion
14 for a 505(h) hearing prior to any argument on any element for
15 which a 505(g) notice has been given. That is in the record
16 at AE 338. I have not yet seen the last pleading that the
17 prosecution referred to, a proposed ruling. I have read
18 AE 350B, and we have quite a lot to say on this topic.
19 Essentially AE 350B accuses the defense of violating its
20 ethical duties to protect the confidentiality of the
21 defendant's information from intrusion from the FBI, the CIA
22 or whoever else was interested.

23 Mr. al Baluchi has been saying the same thing to me

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 since the first -- since April, at least, when the FBI
2 intrusion was discovered. And it may very well be that, upon
3 mature reflection, I may have to agree with the government. I
4 think that the failure to protect confidential information is
5 in fact the government's fault because it robs us of all the
6 tools that we would need to do that, from classification
7 guidance to the CVs of interpreters to the ability to even
8 speak to interpreters prior to providing them information.

9 But I mention that all to say that there is a lot to
10 be said in response to AE 350B, and I would urge the
11 commission not to grant the government's motion without the
12 opportunity for the defense to respond.

13 MJ [COL POHL]: How long will it take you to respond?

14 LDC [MR. CONNELL]: We have -- I was counting last night.
15 We have multiple witnesses on the topic of the government's
16 interference with our ability to vet interpreters specifically
17 just from Mr. al Baluchi's team. It has come up -- we have
18 had at least three major controversies over attempting to vet
19 interpreters and on some occasions have turned down
20 interpreters simply because we could not vet them, not because
21 our vetting was so useful that it discovered information.

22 MJ [COL POHL]: But that's -- you say you have had
23 problems in the past vetting, but what's that got to do with

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the issue before me today?

2 LDC [MR. CONNELL]: Well, what the prosecution's position
3 is that we have never had any interaction, I can't -- in
4 recent times with the linguist at issue here, but that's not
5 what the government's motion says. The government's motion
6 accuses the entire Office of the Chief Defense Counsel,
7 including Colonel Mayberry and all the staff in the Office of
8 the Chief Defense Counsel, of inadequately vetting
9 interpreters. The government's motion is not limited to
10 Mr. Binalshibh's team or Mr. Harrington. It is a broad ----

11 MJ [COL POHL]: Is a remedy to discuss previous vetting or
12 to discuss a way to vet going forward? By that I mean I'm not
13 taking -- I don't know what was said in the vetting process.
14 There may have been a reluctance to disclose previous activity
15 on behalf of the United States. I don't know that. There may
16 have been NDAs signed with other people that prevented a full
17 vetting.

18 So isn't the issue really going forward as to how can
19 we modify the vetting process to permit the defense to have
20 confidence, at least that they are getting straight answers --
21 well, are getting -- are getting what on their face are full
22 answers? Whether they are actually accurate or not, of
23 course, you can't verify that. But you can ask certain

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 questions, and if they say -- which could move it forward.

2 LDC [MR. CONNELL]: That is certainly one of the issues,
3 and by coincidence, last week I submitted a memorandum to the
4 convening authority with my suggestions for how we might be
5 able to accept interpreters in the future. It's not related
6 to this, but it certainly is current and within the timeframe.
7 And I do have suggestions, which I have made to the convening
8 authority and I would be happy to make to the military
9 commission, but that's not the government's motion.

10 The government's motion is a historical inquiry of
11 how did we get to this point, and if the government is seeking
12 a historical inquiry, then we should be able to respond with
13 historical facts as recently as last week.

14 MJ [COL POHL]: I understand. The government files a
15 motion, you are entitled to file a response, they file a
16 reply. I got it. And then I will decide whether this road is
17 useful or not. In fact, the government has taken a position,
18 at least initially, of what they think is useful information
19 to resolve the issue, is their position.

20 LDC [MR. CONNELL]: Sure.

21 MJ [COL POHL]: We will get a response and we will go from
22 there.

23 LDC [MR. CONNELL]: I have no issue with that, Your Honor.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The point I wish to make is that the military commission -- I
2 haven't seen this proposed ruling, but it sounded from the
3 prosecution's presentation that they were asking the military
4 commission to rule forthwith, and my point was that there is
5 substantial information to be received and that we should have
6 our ordinary time for response.

7 MJ [COL POHL]: Well, when I get a pleading that says
8 certificate of conference that at least two -- two have
9 indicated opposition to it, Mr. Binalshibh and Mr. Bin'Attash,
10 and it indicates the other three haven't replied, and I can
11 almost sense what your position is, of course I am going to
12 give ----

13 LDC [MR. CONNELL]: Of course.

14 MJ [COL POHL]: ---- the other side an opportunity to
15 respond before granting a motion.

16 LDC [MR. CONNELL]: Thank you, Your Honor.

17 MJ [COL POHL]: While you are standing there, you think
18 it's useful to have a 505(h) hearing?

19 LDC [MR. CONNELL]: I think it is pretty much mandatory.

20 MJ [COL POHL]: Okay. Got it.

21 Mr. Nevin?

22 LDC [MR. NEVIN]: Your Honor, I listened carefully when
23 General Martins stood here a minute ago, because I had written

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 this down carefully from 350 last night when I was thinking
2 what to say to you this morning, and what the government says
3 is this, that the government -- the prosecution, excuse me,
4 states affirmatively that the presence of a former CIA
5 linguist on one of the defense teams is, in italics,
6 "absolutely not due to any action by any agency of the
7 executive branch to gather any information regarding defense
8 activities from any of the defense teams." And General
9 Martins repeated that verbatim twice in his argument to you.

10 And this is, after all, a suggestion that we have
11 been -- that we have failed in some respect because we didn't
12 detect this person's prior affiliation, and it urges us to do
13 due diligence and quotes -- as we have quoted in many
14 pleadings, quotes the ABA guidelines for the defense of death
15 penalty cases to us about what our obligations are.

16 So I want the opportunity to do due diligence on that
17 statement, and I want to know who they inquired of -- the
18 military commission will recall that in dealing with the SRT,
19 we have seen affidavits from persons who conducted searches of
20 particular databases and have stated in detail how they were
21 able to come to a conclusion about peoples' affiliations or
22 the lack thereof.

23 And here we have within, I don't know, I would say

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 something on the order of 12 hours -- maybe it's a little more
2 or a little less than that, I don't know -- we have a
3 comprehensive statement that no agency of the executive branch
4 has had anything to do with this or, well, has done this for
5 the purpose of gathering any information regarding defense
6 activities from any of the defense teams. And the fact that
7 has been repeated verbatim three times, I think in doing our
8 due diligence we have to ask was this person sent here for
9 another reason -- and there are some other reasons that he
10 might have been and I'll get to that in a second -- other than
11 gathering any information regarding defense activities from
12 any of the defense teams, quote/unquote.

13 Now, these are -- I emphasize that this is something
14 in doing our due diligence that we have to get to the bottom
15 of, that we have to come to understand. And it may be a
16 matter of modifying the process going forward, but just as we
17 did before with 292VV, I believe it is, where we have asked
18 the Special Review Team please give us the information about
19 what you did, never mind the conflict now for purposes of this
20 motion, just tell us ----

21 [The security classification button was pushed in the
22 courtroom which caused the video feed to terminate at 0919,
23 11 February 2015.]

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The Military Commission resumed at 0920, 11 February 2015.]

2 MJ [COL POHL]: Mr. Nevin, I directed the court security
3 officer to turn on the red light because you made a statement
4 that was very close to being classified information.
5 Obviously we are not in a classified setting right now, so I
6 can't exactly tell you what it is, but rewind in your own mind
7 what you were saying and then move on to a new subject, and
8 then if we need to explore this in a classified setting, we
9 can. Are you with me on this?

10 [The security classification button was pushed in the
11 courtroom which caused the video feed to terminate at 0921,
12 11 February 2015.]

13 [The Military Commission resumed at 0922, 11 February 2015.]

14 MJ [COL POHL]: Okay. We are back on the record. Again,
15 the mute button was pushed. The reason it was pushed that
16 time, Mr. Nevin, was even though I couldn't hear it, that mic
17 picked up what was being said.

18 LDC [MR. NEVIN]: Oh, when Mr. Sowards spoke to me?

19 MJ [COL POHL]: Exactly. So back to what I was discussing
20 earlier, if you feel you need to explore the point you were
21 on, we can do that in a closed session.

22 LDC [MR. NEVIN]: I understand, Your Honor, and maybe -- I
23 don't want to -- I thought a lot about how to articulate this.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I feel very confident that what I said before and what I am
2 about to say is not classified and doesn't get into any
3 problem, and it seems to me if we are going to talk now about
4 where we go, that these are things that I have to say, and
5 basically they have to do with Mr. Mohammad's reactions to the
6 events of Monday.

7 MJ [COL POHL]: I think let's focus on -- because you are
8 getting into facts -- no, not now -- okay. Let's talk about
9 procedure going forward, okay? Because you are kind of
10 saying -- what you are raising is this is what happened, this
11 is what I -- this is what -- okay. What do you want to go
12 forward on? If you are arguing for discovery, I understand
13 that, but we are just -- the first pleading was filed
14 yesterday.

15 LDC [MR. NEVIN]: Yes.

16 MJ [COL POHL]: And if you say I need time to file
17 pleadings to get this stuff, I understand that, but I don't
18 need at this point to discuss the factual predicate, do I?

19 LDC [MR. NEVIN]: Well, it depends on whether -- it
20 depends on whether the court is going to agree with me or not,
21 and if you ----

22 MJ [COL POHL]: Agree with you to do what?

23 LDC [MR. NEVIN]: If you agree with me, I don't need to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 make any more argument. So I think I understand what you are
2 saying. I mean, I want to just say to you that we cannot go
3 forward in any way until we figure out what's going on here.

4 MJ [COL POHL]: Okay. You want time to file pleadings?

5 LDC [MR. NEVIN]: Yes, and to do due diligence and to
6 conduct an investigation ----

7 MJ [COL POHL]: I got it.

8 LDC [MR. NEVIN]: ---- and to find out what this means.
9 And this is not a simple matter -- just a simple matter of
10 saying, well, he's gone, problem over, because it is much,
11 much more complicated than that. And that is what I need
12 to ----

13 MJ [COL POHL]: And also I am not in a position to do
14 anything because I don't know what your positions are because
15 you have not filed anything because you have not had time to
16 file anything. I got it.

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

18 MJ [COL POHL]: Anything else?

19 LDC [MS. BORMANN]: Yes.

20 MJ [COL POHL]: Ms. Bormann?

21 LDC [MS. BORMANN]: Well, all due respect to the
22 prosecution and to General Martins, the bald assertion made by
23 General Martins this morning that the prosecution states

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 affirmatively that the presence of a former linguist in one of
2 the defense teams is absolutely not due to any action by any
3 agency or executive branch, I think he is talking about the
4 CIA, but it could be anybody else, is simply that, a bald
5 assertion, it's not a fact.

6 And I want to draw the court's attention to some
7 facts that will be filed this morning. It's in the process of
8 being ----

9 MJ [COL POHL]: Don't -- just what I told Mr. Nevin, I
10 don't want to hear motions being verbalized now that are going
11 to be filed later. If you are going to file a motion, file
12 it.

13 LDC [MS. BORMANN]: I am.

14 MJ [COL POHL]: I am going to give you time. If anybody
15 thinks I am going to say right now the government filed
16 something, it's granted, and you won't have a chance to
17 respond, that's not what I do. So what I'm saying, if you are
18 going to file a motion, file a motion, but I don't need a
19 preview.

20 LDC [MS. BORMANN]: That's not what I was saying. This
21 has nothing to do with a response to the government's motion,
22 which I assume you are going to give us opportunity to do.
23 This has to do with exactly what you said, what's the way

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 going forward.

2 The way going forward is to have vetting of every
3 former, present defense team member done by appropriate
4 agencies. And here is the real issue, and this is the
5 falsehood in what the government has alleged, and this is
6 leading us down a path we can't go to. The particular CIA
7 linguist formerly assigned to the Bin'Attash team was
8 asked ----

9 MJ [COL POHL]: Don't get -- Ms. Bormann, how many times
10 have I got to tell you this? If you want to go forward -- I
11 heard it from Mr. Nevin, I heard it from Mr. Connell -- go
12 forward, but don't start telling me about the facts. We are
13 not at that point. You are saying -- you are about to tell me
14 something about the former linguist and maybe how he was
15 vetted or not vetted. I read the government's pleading, I
16 know what they are saying and I understand what the defense
17 position is on it, but let's just do this in the normal course
18 of business. I don't need for you to stand up there and tell
19 me, oh, by the way ----

20 LDC [MS. BORMANN]: I mean, it's just an out and out
21 falsehood.

22 MJ [COL POHL]: File a pleading.

23 LDC [MS. BORMANN]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: That's what I'm saying, if we get into
2 this position where you -- and I understand -- I understand
3 the advocacy of both sides, and I understand this thing just
4 came up. I got it. And I understand when the government
5 makes an assertion and the defense disagrees with it, you feel
6 a need to respond. I got it. And they are the same way. I
7 got that. You will have an opportunity to respond, that's
8 what I keep telling you, and I don't need a response now.

9 LDC [MS. BORMANN]: Okay. Then I won't respond with the
10 facts other than this: This has so decimated any trust on
11 this team. We can't go forward.

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

13 Mr. Ruiz and Mr. Harrington?

14 LDC [MR. HARRINGTON]: Judge, this is not a response to
15 the filing, but it raises another issue. Although it's styled
16 as a conflict of interest, that's not really what's alleged in
17 it. It's alleging really ineffective assistance of counsel,
18 but as it is styled as a conflict of interest and trying to
19 cite to various codes of responsibility for the lawyers
20 involved in this case, it brings up the issue of another
21 potential conflict issue, which means, I think, that the court
22 should consider involving Mr. Binalshibh's conflict counsel
23 early on because it is going to spill over into the other

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issues that we have not resolved yet, although this particular
2 part of it may be one that is done with the trial counsel
3 rather than the Special Review Team.

4 MJ [COL POHL]: Okay. I understand. Thank you,
5 Mr. Harrington.

6 Mr. Ruiz?

7 LDC [MR. RUIZ]: Good morning, Judge.

8 MJ [COL POHL]: Good morning.

9 LDC [MR. RUIZ]: Judge, what I would say to you is that
10 from where I am sitting, we absolutely need to have the 505(h)
11 hearing because General Martins' statement is absolutely in
12 some respects misleading regarding this individual's
13 involvement with the defense.

14 I'm in a position now where I cannot communicate to
15 you in open court the full extent of that information. And so
16 we need to sort that out in terms of what evidence is
17 classified and what evidence is not classified, because what
18 they have chosen to declassify, as I have been told this
19 morning, puts me in a position where we cannot rebut the
20 statement he just got up and made, and I think that's where we
21 have fundamentally a problem.

22 I understand the court doesn't want to get into
23 facts, but the Chief Prosecutor had the opportunity to get up

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 here and parade his version of facts, not just once but
2 multiple times. And when we have an issue and we need to
3 rebut that issue, well, now we are at the point where we can't
4 rebut those facts publicly, we have to put it on paper, and
5 obviously that puts us at a disadvantage.

6 We absolutely need to go ahead and have this hearing
7 so we can sort out what facts remain classified and what facts
8 are not classified. And if in fact some of those are going to
9 remain classified, then we need to look at our options in
10 terms of filing classification challenges on those kinds of
11 issues.

12 So that's my portion, and we do need the time to do
13 that.

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

15 At this time, I am going to come back to the way
16 ahead on this issue. I want to address the 292 issue and the
17 other issue we discussed. As far as the 505(h) hearing, we
18 will schedule that, so -- the rule, quite frankly, doesn't
19 give me that much leeway anyway when it is a request from the
20 parties, we decide whether or not we have the hearing, we go
21 from there. So what we are going to do now is we are going to
22 recess. I want the SRT to come back. We are going to address
23 the 292 issue as discussed in the 802. When that's done, we

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 are going to switch them back out, bring the prosecutors back,
2 this group of prosecutors back, discuss the severance issue.
3 And when that's done I'll discuss the way forward this week
4 and thereafter.

5 Mr. Nevin?

6 LDC [MR. NEVIN]: Your Honor, on behalf of Mr. Mohammad, I
7 ask you not do those things. I ask that you stop this until
8 further proceedings, until we get to the bottom of this issue
9 that has been presented on Monday. As I think you can see in
10 Ms. Bormann's reaction to this, we are -- this has changed
11 many things for us.

12 MJ [COL POHL]: I understand that, Mr. Nevin, but -- okay.
13 I understand your position, but I want to address those other
14 issues. I don't think they are going to take that much time.

15 LDC [MR. NEVIN]: I'm not talking about a matter of time,
16 Your Honor.

17 MJ [COL POHL]: What?

18 LDC [MR. NEVIN]: I'm not talking about a matter of time,
19 I am talking about a relationship with a client in a capital
20 case. And we have been -- we have been put right back on our
21 heels over this. And I don't think it's right to go forward
22 until we figure this thing out. I ask you to stop until we
23 can get to the bottom of this issue.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Trial Counsel?

2 CP [BG MARTINS]: Your Honor, we oppose that course of
3 action. I believe that your course of action was appropriate.

4 MJ [COL POHL]: Mr. Nevin, I understand your position, but
5 today I want to do those other two things also. So court will
6 be in recess until 1000 and then we will pick up with the 292.
7 [The R.M.C. 803 session recessed at 0934, 11 February 2015.]

8 [END OF PAGE]

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT