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1 [The R.M.C. 803 session was called to order at 1000,
2 11 February 2015.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties are again present that were present when the
5 commission recessed with the exception of the SRT has replaced
6 the regular prosecutors. And just to note for the record,
7 Lieutenant Colonel Pitvorec is in the courtroom. Is that
8 correct, ma'am?

9 IDC [Lt Col PITVOREC]: That's correct, Your Honor.

10 MJ [COL POHL]: Trial Counsel, you have a motion?

11 LDC [MR. NEVIN]: Your Honor, if I could, please.

12 MJ [COL POHL]: Sure.

13 LDC [MR. NEVIN]: I want to just again state my objection
14 on behalf of Mr. Mohammad to going forward. We are in the
15 realm of a Sixth Amendment violation here and not analyzed for
16 harmlessness, this is structural error. I object to going
17 forward.

18 MJ [COL POHL]: Thank you. The objection is overruled.
19 Go ahead.

20 STC [MR. CAMPOAMOR-SANCHEZ]: Good morning, Your Honor.

21 MJ [COL POHL]: Good morning.

22 STC [MR. CAMPOAMOR-SANCHEZ]: Your Honor, that is correct,
23 the Special Review Team has filed a motion requesting that a

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1 closed hearing be held, and we have done so for primarily two
2 reasons: First of all, of course we want to have the
3 opportunity to complete the arguments that we began before the
4 commission last June of 2014, but secondly, and perhaps most
5 importantly, we want to put the commission in the best
6 position to decide the pending allegations of conflict as it
7 relates to Mr. Binalshibh's team.

8 In other words, if the court were to actually hold
9 this hearing as we have requested, we believe that the
10 commission will be in a position to do either of two things:
11 First, decide that, as we have argued, that based upon the
12 current pending allegations made by the defense team for
13 Mr. Binalshibh, that there is no conflicts of interest; and
14 two, in light of what the court -- the commission has heard,
15 it does believe that there is a conflict and, therefore, we
16 should proceed to advise the accused, Mr. Binalshibh, of at
17 least the potential for conflict and see if he will waive that
18 conflict.

19 MJ [COL POHL]: Who do you envision to be present at this
20 closed hearing?

21 STC [MR. CAMPOAMOR-SANCHEZ]: At this hearing we envision
22 independent counsel for Mr. Binalshibh to be present at this
23 hearing and the SRT and nobody else. And indeed, the way I

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1 would like to address this argument today is I want to cover
2 three things: One is I want to review some of the facts that
3 we believe relate to the pending conflict allegations and that
4 have a bearing on whether this commission should grant us that
5 hearing; two, I want to talk very briefly also about as to why
6 it needs to be closed; and finally, which is related to that,
7 I want to address some of the objections that I understand
8 Mr. Harrington has made to our request.

9 So in terms of the facts that I think are relevant to
10 this -- of course, as the commission remembers, this all began
11 back in April of 2014 as a result of an FBI interview of a
12 former defense team member for Mr. Binalshibh. Shortly after
13 that a number of pleadings, affidavits were filed.
14 Mr. Harrington had the opportunity to file those. In fact, he
15 filed affidavits, he filed briefs.

16 The Special Review Team responded, and in June of
17 2014 we argued before the commission about this issue.
18 Mr. Harrington had a full opportunity to argue about those
19 issues, as everybody else did. And it was not until July 1 of
20 2014 that a new allegation was brought forth by
21 Mr. Harrington, and that had to do with some alleged
22 statements made by Ms. Stephanie Flannery out of the Office of
23 Special Security. So that was the second sort of conflict

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1 issue that was alleged again by Mr. Harrington. And in
2 response to that, again Mr. Harrington has had the opportunity
3 to file briefs, affidavits. The SRT has responded and we have
4 briefed that issue and in fact had additional argument at the
5 August session.

6 But in between, and as a result of the allegations
7 that Mr. Harrington has made before the commission, the
8 commission took -- made the decision to appoint independent
9 counsel for Mr. Binalshibh, and that's counsel Lieutenant
10 Colonel Pitvorec, who is here today. The order for that
11 appointment was issued by the commission as part of order
12 292QQ back in July of 2014, and in that order this commission
13 stated that as part of her role, Lieutenant Colonel Pitvorec
14 would guide and represent Mr. Binalshibh as it related to this
15 conflict issue.

16 Independent counsel assumed her duties in earnest, as
17 I understand it, in October of 2014. By December of 2014 this
18 commission entered a protective order, and as of last month,
19 January of 2015, independent counsel has signed the MOU and
20 the SRT provided additional classified discovery related to
21 this issue. So that's where we are now and that's precisely
22 why we need a closed hearing.

23 First of all, Mr. Harrington has made the allegations

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1 that he believes his team may be operating under a conflict of
2 interest. This commission certainly had enough of a question
3 as to whether that was the case or not to go and take the step
4 of appointing an independent counsel precisely to address that
5 issue and to guide and represent Mr. Binalshibh, and this
6 information now that we would like to have the opportunity to
7 argue to the commission really relates to that last part of
8 the argument, that is, the classified information that was
9 provided to independent counsel so that independent counsel
10 was in the best opportunity possible to make whatever
11 arguments were necessary to resolve this issue.

12 The other question or the other reason that indeed
13 this needs to be a closed session, a closed hearing, is, as
14 the commission is of course aware, Mr. Harrington and anybody
15 else on his team has refused to sign a memorandum of
16 understanding and, in fact, is not entitled to receive
17 classified information from the Special Review Team. In
18 contrast, special counsel has and has, in fact, received and
19 reviewed that information.

20 Finally, I know that there's been other teams that
21 have, of course, objected to this hearing, but I would simply
22 say that the information that's going to be discussed pertains
23 only to Mr. Binalshibh's team and, therefore -- and not only

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1 that, but this commission has already ruled that the other
2 four teams are not operating under a conflict of interest and,
3 in fact, has denied a motion to reconsider that prior decision
4 already. And that's through the amended order 292QQ that was
5 issued in December of 2014.

6 So really then what we are left with is
7 Mr. Harrington's objection to our request, and primarily as I
8 understand his objection he is saying the accused is of course
9 entitled to learned defense counsel in proceedings in this
10 case, and I understand that. But what we are dealing with
11 here is precisely the issue of whether the learned defense
12 counsel and the rest of his defense team are in fact operating
13 under a potential conflict of interest or not. And if, in
14 light of the allegations that have been made, he or his team
15 should not be the ones advocating to this commission one way
16 or another or evaluating the evidence. Indeed, that is
17 precisely, we believe, the reason that the commission decided
18 to appoint Lieutenant Colonel Pitvorec to do that.

19 And so, Your Honor, we really believe that either
20 way, whatever way the commission ultimately decides, having
21 this closed session will be moving the issue forward, it will
22 be resolving the pending conflict allegations that have been
23 made by the team, and we frankly believe that after this

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1 hearing that the issue will be ripe for decision before the
2 commission and for those reasons we urge the commission to
3 grant our request.

4 MJ [COL POHL]: Thank you.

5 Mr. Connell?

6 LDC [MR. CONNELL]: Thank you, Your Honor. On 4 April
7 2012 the convening authority referred this trial for a joint
8 capital trial under Rule for Military Commissions 601(e)(3).
9 The military commissions's order regarding that joint trial
10 severing Mr. Binalshibh is currently in abeyance. And today
11 the government asks for something that this military
12 commission has never did in three years, to hold a hearing
13 closed both for the public and to most of the counsel.

14 The government made this exact same argument with
15 respect to the 505(h) hearing, not an 803 hearing but the
16 505(h) hearing over AE 200R which, to refresh the court's
17 recollection, was the argument over Mr. -- Mr. al Baluchi's
18 classified medical records. The government argued that the
19 other defense counsel should not be present because they
20 hadn't signed the MOU and that they -- that the medical
21 records were just about Mr. al Baluchi. The military
22 commission rejected the argument then and should do the same
23 now. In fact, the authority against the government's position

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1 is even stronger here because the government is asking for a
2 closed 803 and not a closed 505(h).

3 There are essentially five flaws in the government's
4 position: The first is that it violates the right to the
5 defendant's presence, the second is that it violates the right
6 to counsel, the third is that it violates the right to a
7 public trial, the fourth is that 292RR is legally interrelated
8 with Mr. al Baluchi's interests, and the fifth is that 292RR
9 is factually interrelated with Mr. al Baluchi's interests.

10 Taking these flaws in order: First, the right to be
11 present. The Fifth, Sixth and Eighth Amendments on their own
12 force as well as the Detainee Treatment Act require the
13 defendant's presence at capital proceedings unless it has been
14 waived. 10 U.S.C. 949a(b)(2)(B) provides the right, and I
15 quote here, "to be present at all sessions of the military
16 commission other than those for deliberations or voting,
17 except when excluded under Section 949d of this title."
18 R.M.C. 804(a) is to the same effect, "Except for certain in
19 camera and ex parte proceedings as may be permitted under
20 R.M.C. 701 to 703 and M.C.R.E. 505 the accused shall be
21 present at every stage of the trial including sessions
22 conducted without members."

23 Now, of course, 949d and 804(b) allow the military

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1 judge to excuse the accused to ensure the physical safety of
2 any individual and to prevent disruptions of the proceedings
3 by the accused. Neither of those exceptions applies here.
4 There is not a discovery issue, a safety issue or a
5 disruptions issue.

6 Rather, this is an 803 session relating to the
7 substantive rights of the defendants. In fact, 949d(b) and
8 R.M.C. 803(b) say that unless an exception applies, any
9 session shall be conducted in the presence of the accused,
10 defense counsel and trial counsel.

11 I think I need to note that excluding the defendants
12 from military commission was the precise flaw of Military
13 Commissions Order #1 which was struck down in the Hamdan case.
14 Article 75 of Additional Protocol 1 provides a defendant must
15 be present for his trial and privy to the evidence against
16 him.

17 We addressed this issue in the abstract in AE 136A,
18 which is Mr. al Baluchi's pleading, and the military
19 commission's ruling was AE 136E. And the issue was which of
20 two Second Circuit cases was more persuasive to the military
21 commission, that of In re Terrorist Bombing, where a defendant
22 was excluded from one hearing involving four classified
23 documents, or United States v. Clark, where the Second Circuit

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1 held that the district court had erred in excluding the
2 defendant from a hearing -- a suppression hearing involving
3 classified evidence. The court has found at 475 F.2d 240, a
4 Second Circuit case from 1973, the difference between these
5 two cases, which one doesn't overrule the other, is the
6 relationship of the issue of the defendant. In In
7 re Terrorist Bombing, the Second Circuit said that the issue
8 which was being heard had nothing to do with the defendants
9 whatsoever. On the other hand, here the issue is critically
10 important to the defendants themselves. As I just mentioned
11 to the military commission in the arguments over AE 350,
12 Mr. al Baluchi's concern with this conflict of interest has
13 been intense, both personally and in his papers.

14 The second flaw with the prosecution's position is
15 the violation of the right to counsel. The Sixth and Eighth
16 Amendments on their own as well as under the Detainee
17 Treatment Act provide a right to counsel. 10
18 U.S.C. 949a(b)(2)(C) and R.M.C. 506 provide the right to be
19 represented by counsel including by learned counsel in a
20 capital case. R.M.C. 805(c) requires that at each session at
21 least one qualified counsel for each party is present. It
22 admits no exceptions for that. And in fact the commentary to
23 805(c) says that ordinarily no military commission proceeding

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1 should take place if any defense or assistant defense counsel
2 is absent unless the accused expressly consents to the
3 absence. 949d(b) and R.M.C. 803(b) require not just the
4 presence of the accused but the presence of defense counsel as
5 well.

6 The third flaw in the prosecution's position is the
7 right to a public trial, which adheres both to the defendants
8 and to the public at large and is guaranteed by the First and
9 Sixth Amendments. Procedurally the prosecutions's argument is
10 defective. They have given no notice to the public of a
11 potential closure. When at last check, which was yesterday,
12 AE 334D had not been released to the public and AE 334F was
13 not even listed on mc.mil. Both of those are in violation of
14 the regulations, Regulation for Trial by Military Commission
15 19-4(c)(1), which requires posting within one business day on
16 the mc.mil website unless a classification review is
17 necessary.

18 Now, the military commission has also addressed this
19 precise issue before in its orders. In AE 081A, the military
20 commission granted in part the argument of a coalition of
21 media made in AE 081 and AE 163, press intervenors, and the
22 military commission said that the press would have notice and
23 opportunity to be heard before any closure of the military

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1 commission. The Privilege Review Team has -- excuse me, the
2 Special Review Team has not followed that requirement of the
3 military commission.

4 That to the side, the closure authority comes from
5 949d (c) which requires a finding that closure is necessary to
6 protect national security. The closure in this case fails the
7 test of Press-Enterprise, found at 478 U.S. 1, the 1986 case.
8 First, there has been no proper invocation of the national
9 security privilege by the head of a department or an agency
10 under M.C.R.E. 505(c). There has been no public invocation
11 whatsoever under the D.C. authority of Ellsberg v. Mitchell,
12 709 F.2d 51, D.C. Circuit from 1983. Finally there has been
13 no narrow tailoring of the closure.

14 And why is that? Because there has been no pretrial
15 conference per 949p-6 or 505(d). And the reason why there has
16 been no pretrial conference is that the Special Review Team
17 did not provide notice to the defense under 949p-6(b)(1),
18 which provides before any hearing is conducted pursuant to a
19 request by the trial counsel under subsection A, meaning
20 closed, trial counsel shall provide the accused with notice of
21 the classified information that is at issue. It has simply
22 not done that here because they are attempting to hide the
23 classified information at issue.

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1 Turning from the legal problems to the
2 interrelationship between the argument which the government --
3 the closed hearing which the government seeks in 334D ----

4 MJ [COL POHL]: Slow down, Mr. Connell, please.

5 LDC [MR. CONNELL]: ---- there is a direct legal
6 interrelationship between the arguments that the Special
7 Review Team wishes to make in AE 292RR and the legal interests
8 of Mr. al Baluchi. AE 292QQ, the military commission's order,
9 addresses Mr. al Baluchi's alleged conflict of interest as
10 well as that of Mr. Binalshibh. In AE 292SS Mr. Mohammad and
11 Mr. al Baluchi filed a motion for reconsideration of AE 292QQ,
12 which was argued in August but has not yet been ruled upon by
13 the military commission.

14 In AE 292RR itself, the government conferenced its
15 position with all the defendants, and I would point the
16 military commission to its certificate of conference, that
17 Mr. al Baluchi, as recited in their certificate of conference,
18 agrees that the military commission should reconsider AE
19 292QQ, recognize the potential conflict, and appoint conflict
20 counsel.

21 After filing 292RR, the Special Review Team has
22 conducted an extensive ex parte practice with the military
23 commission, all of which has been objected to by

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1 Mr. al Baluchi. The Special Review Team filed an ex parte
2 pleading in 292Z, to which Mr. al Baluchi objected in 292EE.
3 The Special Review Team filed an ex parte pleading in 292ZZ
4 which Mr. al Baluchi objected to in 292BBB. The Special
5 Review Team filed an ex parte pleading in 292EEE to which
6 Mr. al Baluchi objected in 292FFF. The Special Review Team
7 filed an ex parte pleading in 292GGG, to which Mr. al Baluchi
8 objected in 292JJJ. The Special Review Team filed an ex parte
9 pleading in 292III, to which Mr. al Baluchi objected in
10 292KKK. The Special Review Team filed an ex parte pleading in
11 292000, to which Mr. al Baluchi objected in 292QQQ. The
12 Special Review Team filed an ex parte pleading in 292RRR, to
13 which Mr. al Baluchi objected in 292SSS. The Special Review
14 Team review team filed an ex parte pleading in 292UUU, to
15 which Mr. al Baluchi objected in 292VVV. The Special Review
16 Team filed an ex parte pleading in 292AAAA, to which
17 Mr. al Baluchi objected in 292BBBB. Finally, the military --
18 the Special Review Team has most recently filed an ex parte
19 pleading in 292DDDD. Mr. al Baluchi has prepared a response
20 and will file it as soon as the trial judiciary issues an AE
21 number for it.

22 These ex parte communications, I surmise, but I don't
23 know, are probably based on the classified information

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1 obtained by the military commission and given to the Special
2 Review Team as the military commission has documented in its
3 orders. That information itself is the subject of AE 292YY
4 filed by Mr. Mohammad with the joinder of Mr. al Baluchi,
5 direct legal interests related to the hearing that the
6 government seeks to close.

7 And finally, in 292LLL the military commission
8 ordered -- really show-caused the defense to address the
9 conflict issue and Mr. al Baluchi responded in AE 292MMM,
10 which also seems to be relevant to the argument that the
11 prosecution seeks to close.

12 Finally, I would like to address the factual
13 interrelationship between the hearing that the government
14 seeks to close and Mr. al Baluchi's interests. I have
15 previously provided a copy of slides to the court security
16 officer under cover of 292VV and I have provided a copy to the
17 prosecution. I would ask permission to display two of those
18 slides and ask for the feed from Table 4.

19 MJ [COL POHL]: Yeah, sure. Go ahead.

20 LDC [MR. CONNELL]: Let's see if I can clear the -- may I
21 have slide two, Colonel? I would request permission to
22 display these slides to the gallery.

23 MJ [COL POHL]: Go ahead.

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1 LDC [MR. CONNELL]: The first factual interrelationship
2 that I want to talk about briefly is the issue of how these --
3 the issues that the closed hearing would address interrelate
4 with the issues that are of direct concern to Mr. al Baluchi.

5 The court will recall that there were really three
6 known elements of FBI penetration into the defense. I can't
7 address the issue which the military commission brought to the
8 attention of the Special Review Team, of course, because I
9 don't know what it is. The first of those was Mr. Mohammad's
10 linguist, which I would like to remind the court conducted a
11 joint investigation in the Middle East with Mr. al Baluchi's
12 team. The third of those was Mr. James, the defense security
13 officer, who does not have a direct relationship to
14 Mr. al Baluchi.

15 But the second, the middle, which is really the most
16 factually intense question in the 292 series is the
17 relationship between Mr. Cruz, the investigator for
18 Mr. Binalshibh's team and the person identified in the
19 pleadings as "Person A." It has never been confirmed by the
20 government or by other persons that the Person A is, in fact,
21 Mr. Cruz, although I believe it to be true.

22 I will tell the military commission that we attempted
23 to interview Mr. Cruz. He was very short with us, but he did

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1 tell us that he did not go to the FBI. So he denied it. So I
2 don't know if he is Person A or not. But Person A, who I
3 believe to be Mr. Cruz -- and, you know, that's one of the key
4 issues, mysteries that surrounds this FBI intrusion -- was
5 involved directly in two joint investigations with
6 Mr. al Baluchi, one in a western country that is not the
7 United States, and one in the investigation of the computers
8 which were seized from the defendants some years ago and then
9 later turned over to the defense. The need to know more about
10 this situation, especially the Person A, Mr. Cruz situation,
11 is the basis of 292VV itself, which has an interrelationship
12 with the hearing that the prosecution seeks to close.

13 I would also like to make the point that the Special
14 Review Team has promised to provide discovery to
15 Mr. al Baluchi's team related to this. In 292BB, which the
16 Special Review Team filed on 13 June of 2014, the Special
17 Review Team wrote that it also recognizes that the defense may
18 be entitled to discovery and that the Special Review Team is
19 prepared to respond to discovery requests made by
20 conflict-free defense counsel, including providing the defense
21 with appropriate discovery.

22 I am done with the slides if we want to cut off the
23 feed.

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1 The point that I make there is really the prosecution
2 is only changing the timing of what it reveals to
3 Mr. al Baluchi's team because it has promised to provide the
4 discovery once it has been vetted for privilege anyway.

5 The last point that I would like to make is with
6 respect to the memorandum of understanding. As the military
7 commission knows, Mr. al Baluchi's defense team signed that
8 memorandum of understanding in February of 2014, and we have
9 consistently since then followed the rule that we -- even we
10 may not provide classified evidence to other co-counsel. The
11 most recent example of that is found in 254VV, which is a
12 motion to compel discovery. The significance of it is we
13 didn't even provide our own discovery request which we had
14 drafted to the other defendants because they had not signed
15 the MOU.

16 In 13 -- AE 013QQQ we made the point that the MOU is
17 essentially meaningless, it doesn't add anything; and the
18 prosecution has in recent times demonstrated that we were
19 right, most recently, two times within the last two weeks. In
20 AE 331A, which is the response to the military commission's
21 show clause on classification guidance, the prosecution
22 provided classified Attachment B to all defense counsel.
23 Yesterday the prosecution provided AE 350, which is

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1 classified, to all defense counsel.

2 The point that I make is that the MOU doesn't really
3 add anything to the many other layers of security and
4 restriction which were placed upon the defense counsel and the
5 prosecution seems to recognize that in handing over classified
6 information to all defense counsel when it sees that it serves
7 its interests.

8 Nothing further.

9 MJ [COL POHL]: Any other defense counsel want to be heard
10 on this? Mr. Harrington?

11 LDC [MR. HARRINGTON]: Judge, if I could, just for a
12 minute, just a brief history, which I know you are familiar
13 with, but I think it is important in terms of discussing this
14 issue.

15 We start in November of 2013 where Mr. Cruz allegedly
16 goes to the FBI and that starts the ball rolling, although we
17 don't know about that until April of 2014. After that
18 happens, Mr. Cruz agrees that he should leave our team, which
19 he did, but what it means is that for a period of five months
20 Mr. Cruz worked on our team, if we assume that he is the
21 person that was the one that went to the FBI. We have every
22 reason to believe that he did. He denied it to my face and to
23 Commander Nhan's face, but we don't believe him and we have no

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1 reason to believe that anybody else on our team was in fact
2 that person.

3 But based upon what information we obtained up until
4 the court's invitation to the SRT to investigate something
5 else, we did not know of anything Mr. Cruz provided to the FBI
6 or anybody else that was after November of 2013, which means
7 that he was allowed to remain on our team apparently for the
8 purpose of obtaining more information.

9 Also in August of 2014, the FBI goes unsolicited to
10 our defense security officer and interviews him. Several
11 months later our interpreter is -- loses his security
12 clearance as a result of this investigation, and as the court
13 is aware from the various filings after that, that there is
14 some factual dispute about interviews conducted by the
15 convening authority security officer and me and Lieutenant
16 Commander Bogucki, and there is some disputes of facts in
17 there. At that point in time when the SRT was appointed, they
18 came in and they argued very vigorously to the court that
19 there was no conflict of interest and in fact this issue was
20 over and that the court should -- need not do anything
21 further.

22 The court did appoint conflict counsel for
23 Mr. Binalshibh and, as they have argued this morning, she has

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1 been working on this case since that time. And the court
2 obviously, based upon the filings that you have had, indicated
3 to all counsel that you would receive some information,
4 apparently ex parte from a third source, and pass that on to
5 the Special Review Team to investigate.

6 And as Mr. Connell has gone through the litany of the
7 filings here, there have been filings up until several days
8 ago, and neither I nor anybody else on my team have been privy
9 to any of that information and do not even know what the
10 substance of it or the issue is. And now we come to February
11 of 2015 and we have a situation where the circumstances that
12 came up the other day happened, of another alleged intrusion
13 into our team and into the defense counsel function. That's
14 the brief, I think, factual history of this.

15 But apparently several weeks ago the court conducted
16 an 802 conference with the Special Review Team and the
17 conflict counsel. There was no notice given to us about that.
18 The court did advise us when these proceedings started that it
19 had happened, but we learned about it after the fact. I don't
20 know of any exception that says that we weren't entitled to
21 notice, whether we were invited to attend or not. We
22 certainly were entitled to notice. At that conference,
23 Mr. Binalshibh, not represented by capital counsel -- I know

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1 of no exception that says that he cannot, should not be
2 represented by capital counsel in any proceeding that this
3 court conducts.

4 And we now are being asked to have the court conduct
5 a closed session again where Mr. Binalshibh will not be
6 represented by capital counsel, and this proceeding and this
7 issue is a critical part of this case. It goes to
8 Mr. Binalshibh's decision of whether he continues with his
9 current defense team or parts of it or he refuses to waive any
10 potential conflict, if there is one, or any actual conflict,
11 if there is one. And that's obviously a critical stage of
12 these proceedings, especially where, certainly from my
13 situation, I have been involved in it for over three years and
14 many of the other members of my team have been involved in it
15 for that long or for extended periods of time. And it leads
16 us to ask what's the purpose of this closed hearing?

17 Now, you and the Special Review Team and the conflict
18 counsel have apparently shared information, and at this
19 hearing, which I would not attend, the other lawyers on my
20 team would not attend, my understanding is Mr. Binalshibh will
21 not attend because you are talking about classified
22 information -- apparently the three of you are going to have
23 this conversation about what? About what the conflict counsel

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1 has done to verify it? About what the conflict counsel has
2 done?

3 I am not quite sure what it is that the purpose of
4 this particular closed hearing is, but, again, Mr. Binalshibh
5 will not be represented there by someone who has interviewed
6 him or talked to him about the facts that are being talked
7 about there. He has no input or information from me or
8 anybody else on my team about this information. And it seems
9 to me that this is an attempt to compartmentalize things in a
10 way that denies him of his rights, especially to capital
11 counsel.

12 Judge, Rule 803 says that all sessions require the
13 presence of the accused, except in special circumstances where
14 special notices have been filed. None of that -- none of that
15 has been done. As Mr. Connell argued, it's a denial of a
16 number of his rights, including his right to be present.

17 Judge, one of the responsibilities that I and the
18 other lawyers on my team have, whenever there is an allegation
19 of a conflict of counsel, is to be able to tell the accused
20 what it is that we believe the facts to be, whether we believe
21 that there is a conflict or a potential conflict, if we
22 believe that there is a potential conflict or a conflict,
23 whether we can in fact proceed to vigorously and properly

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1 represent the client. And that's a factor that the client is
2 supposed to take into account when the client makes a decision
3 on whether to waive or not waive the conflict. But we are not
4 in that position because we don't have the information, and so
5 it deprives us of our ethical responsibility that we have to
6 our client.

7 And we cannot even say to our client we don't know
8 whether this investigation is for potential criminal
9 violation, for a potential administrative violation, for a
10 potential ethical violation because we don't have any of the
11 facts to share with the client.

12 And at some point in time you are going to be asking
13 Mr. Binalshibh whether he can make a knowing and intelligent
14 decision about what happens with this issue -- unless there is
15 a decision made that there is in fact no conflict at all, at
16 some point in time you are going to be asking him whether he
17 can make a decision, and he is going to have to say to you how
18 can I make a decision when I don't have any information? The
19 conflict counsel is going to come to him and say I have been
20 looking at all of this information, here is what I think it
21 is, a potential conflict, an actual conflict, no conflict, but
22 I can't tell you why and I can't tell you what the facts are.
23 So how you can ever have a knowing and intelligent decision

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1 with respect to that is beyond me.

2 And Mr. Campoamor, he raised it in his pleadings,
3 recent pleadings, and raised it again this morning, the issue
4 about you can't turn things over to the lawyers on my team
5 because we haven't signed an MOU, I don't recall anybody
6 asking me to sign an MOU. Certainly he did not send me any
7 proposed protective order. He sent one to the conflict
8 counsel, and he sent an MOU to them. Whether I would sign it
9 or not is another question. I don't know. I haven't seen
10 what it is that he might propose to do.

11 If I signed that, is he telling me now that he would
12 turn the information over? The answer is no. He is not going
13 to turn it over to me. That's a bogus argument, and I am not
14 going to repeat all the arguments that have been made before,
15 but an MOU is not necessary for this particular issue or this
16 particular case. The court can enforce a protective order
17 without the need for an MOU.

18 So, Judge, again, I cannot properly assess what this
19 situation is, and I don't know why it is that the court would
20 not want to have the full facts. And the full facts don't
21 just involve what somebody else said or what somebody else is
22 investigating, the full facts involve my response or someone
23 else on my team's response to whatever this information is for

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1 you to properly make a decision about whether in fact in your
2 opinion there is a conflict that needs a waiver, I'm not sure
3 why Ms. Pitvorec would not want to know all of the facts so
4 she can properly advise Mr. Binalshibh about what the entire
5 situation is, and I'm not sure why Mr. Campoamor wouldn't want
6 that response or that information from all of us.

7 But most importantly, Judge, the person who is really
8 at the heart of this is Mr. Binalshibh. He should be entitled
9 to all of the facts, including any allegations that are made,
10 any other information that has been dragged up by whatever
11 agency it is that's doing this, whether it's the FBI or the
12 lawyers themselves, and to have a proper response from me and
13 the other members of my team.

14 Thank you.

15 MJ [COL POHL]: Okay. Mr. Harrington, before you go, I
16 just want to make sure that I understand a certain factual
17 allegation you said, because it's contrary to what -- at least
18 the pleadings that I show. You said, and I think you may
19 have -- or what you said was a few weeks ago the commission
20 had an 802 with the independent counsel and the SRT team
21 without notice to the defense.

22 LDC [MR. HARRINGTON]: Yes.

23 MJ [COL POHL]: I have a pleading sitting in front of me

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1 of 2 February, okay, requesting the 802 saying they
2 conferenced with you and you objected to it. The 802 that was
3 conducted was on the 5th of February subsequent to that
4 notice. And just to clarify, there was no other 802 had in
5 this case.

6 LDC [MR. HARRINGTON]: All right. I stand corrected then.

7 MJ [COL POHL]: Thank you.

8 Any other defense counsel want to be heard in this?
9 Mr. Nevin?

10 LDC [MR. NEVIN]: Your Honor, again, we object to going
11 forward in this until the matters that arose on Monday are
12 resolved. And I will say that, you know, in those materials
13 that the government filed in 350, we were chided for not doing
14 our due diligence, but at the same time now we are put in the
15 position of having to make an argument to you in a situation
16 in which the team is in disarray. And I feel, you know,
17 whipsawed again, and I think this is something I have
18 expressed to the military commission before: If you argue --
19 if you don't argue, you are ineffective. If you do argue, you
20 are in effect waiving the arguments that you were not able to
21 go forward. But I understand the military commission's rule
22 on that and I am going to make just brief remarks.

23 The first is I do not understand that the military

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1 commission has ruled on our motion to reconsider your
2 conclusion in 292QQ that there was no -- there is no conflict
3 of interest on my team. I understand we have argued that and
4 fully presented that, arguments from both sides. I do not
5 understand -- and I may have misheard Mr. Campoamor when he
6 addressed this, but I do not understand that the motion to
7 reconsider has been denied.

8 We also object to the military commission holding an
9 802 without our presence, without the presence of counsel for
10 Mr. Mohammad, and we were not put on notice that that was
11 going to occur.

12 With respect to the legal arguments that surround the
13 right to presence, of course it's fundamental in a capital
14 case, in any case, that a defendant has a right to be present
15 and a right to know of the proceedings going forward and a
16 right to be represented. And I think the law is quite clear
17 that the requirements that have to be met for the military
18 commission to close a proceeding are not present here, and I
19 think Mr. Connell stated that, you know, in a complete way,
20 and I join his remarks. Although I will say as well I
21 understand the rule of court as it exists now regarding
22 joinder to be that we are automatically joined to the
23 pleadings of other parties unless we affirmatively take steps

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1 to unjoin ourselves. And so even though some of those motions
2 were filed only with the signature line for counsel for Mr. --
3 for any individual party, we have joined those as well.

4 And finally, just so there is not any
5 misunderstanding about it, there is considerable factual
6 interconnection between Mr. Mohammad's team and
7 Mr. Binalshibh's team on this question. And we -- as we have
8 told the military commission previously, we have traveled on
9 at least one and possibly two occasions to the Middle East
10 with Mr. Binalshibh's team. There was a linguist on
11 Mr. Binalshibh's team that was removed from his team and a
12 security clearance taken away as a result of we know not
13 exactly what, but nonetheless, that is a person that we
14 traveled with as well.

15 And the military commission I hope will recall that
16 when the FBI approached the defense security officer for
17 Mr. Binalshibh's team at church on a Sunday and questioned
18 him, the subject of the questioning was specifically directed
19 at Mr. Mohammad's team as well. And so there is considerable
20 factual interconnection with our team as well. And for all
21 those reasons, we object to the military commission holding a
22 closed hearing.

23 MJ [COL POHL]: Thank you.

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1 Ms. Bormann, do you wish to be heard on this?

2 LDC [MS. BORMANN]: Mr. Connell's argument was good and we
3 adopt all of it. We also adopt the argument of Mr. Nevin and
4 Mr. Harrington as they relate to Mr. Bin'Attash.

5 With respect to the factual and legal interconnection
6 between what has occurred in the Binalshibh team and
7 Mr. Binalshibh's interests, I need to lay out for you just a
8 little bit of the history. So the intrusion into the defense
9 function is not a new issue. It didn't simply arise when the
10 DSO's door got knocked on way back in April of 2014, it's
11 happened over and over and over. It began early on with
12 microphones in smoke detectors. It happened when things were
13 overheard at defense table in ungated feeds. It happened when
14 legal materials were seized from my client along with
15 everybody else, translated and read by members of JTF-GTMO,
16 members of the government. It happened when the DSO was
17 interrupted that day after church by FBI agents who eventually
18 got him to sign a confidential informant agreement and he was
19 asked a variety of questions, none of which I really know
20 except for one: Please tell us about the information you have
21 learned about your team and every other one of the 9/11
22 defense teams. That's Mr. Bin'Attash's team. And now this
23 morning we are discussing yet another intrusion, that

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1 intrusion by a former CIA interpreter utilized by the defense
2 teams.

3 So to say that Mr. Bin'Attash doesn't have an
4 interest in the factual scenario involving governmental
5 intrusion into the defense team is ignoring the entire history
6 of this case, and so I don't think I need to make a further
7 argument about the interconnection factually except to say he
8 has a keen interest in determining to what extent and how that
9 governmental interference occurred and continues to occur.
10 And though we haven't been privy to the ex parte filings
11 between you and the Special Review Team prosecution team, so
12 we can't point to specific facts, the very existence of the
13 allegation is enough to provide the necessary interconnection.

14 I also need to note for the record that this is a
15 joint prosecution, not because Mr. Bin'Attash chose that it be
16 a joint prosecution, but because the United States Government
17 did. And the statute requires that in an 803 hearing, all of
18 the parties be present, unless it falls under one of those two
19 exceptions Mr. Connell talked about and, in fact, it doesn't.

20 So unless the government wishes to take a different
21 position about joint trials, Mr. Bin'Attash has the same right
22 as any other person in this room to attend that 803 session.
23 And if the court wishes to close it because it's classified,

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1 that you can -- you can arguably make a decision that excludes
2 the public and the media, but because it's an 803 hearing and
3 not an 802 hearing, you legally can't exclude the defendants
4 nor their counsel. And so for those reasons we object.

5 MJ [COL POHL]: Thank you.

6 Mr. Ruiz?

7 LDC [MS. BORMANN]: May I? I forgot one thing.

8 MJ [COL POHL]: Go ahead.

9 LDC [MS. BORMANN]: I just want to make a comment about
10 the MOU because it is kind of a red herring here. We were not
11 provided discovery, not because we didn't sign an MOU, nobody
12 gave us the offer. The SRT sent us the MOU ----

13 MJ [COL POHL]: You are referring to the MOU ----

14 LDC [MS. BORMANN]: For this particular issue.

15 MJ [COL POHL]: The one along with the original protective
16 order or the amended one, whichever one we are talking about.

17 LDC [MS. BORMANN]: I'm not sure but it is really
18 irrelevant here because what we are talking about is a hearing
19 in a classified setting. The MOU doesn't pertain to that, it
20 pertains to the handling of discovery matters. This isn't a
21 discovery matter, this is an actual hearing involving some
22 substantive rights. So the MOU really doesn't matter.

23 MJ [COL POHL]: Thank you.

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1 Mr. Ruiz?

2 LDC [MR. NEVIN]: Excuse me, Your Honor, can I just say I
3 join Ms. Bormann's arguments?

4 MJ [COL POHL]: I am always going to assume joinder on
5 these arguments on a common issue.

6 LDC [MR. RUIZ]: Judge, don't assume that with Mr. Hawsawi
7 on this issue, please.

8 MJ [COL POHL]: Because you have stood up and said not to.
9 So exactly.

10 LDC [MR. RUIZ]: Yes, sir. I just simply want to
11 reference a couple of important dates for the court on this
12 issue. In 21 May of 2014, I think, as the court is well aware
13 and we have discussed a number of times, Mr. Hawsawi's team
14 and Mr. Hawsawi moved and asked this commission to separate --
15 sever his case so that we could get to the business of moving
16 forward with Mr. Hawsawi's case. Also on May 21st, 2014. On
17 June 16 of 2014, in a hearing before this commission, we
18 stated very clearly on the record in regards to this 292 and
19 FBI issue, given the information that had been provided to us
20 and to my team as well as the opportunity I had to interview
21 one of the people that were involved, that it was our belief
22 that we were no longer part of the 292 litigation; based on
23 that review, we believed that we were not operating under a

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1 conflict.

2 To this date that continues to be our position. We
3 have seen no additional evidence or information or received no
4 additional evidence or information that would indicate
5 otherwise. Obviously there are approximately I think it's 12
6 ex parte submissions that only you have had the opportunity to
7 view, but based on the information that I have, that is where
8 we are.

9 Clearly our position continues to be that
10 Mr. Hawsawi's case should be severed so that we should
11 continue with motions that are of importance to him, but
12 obviously the commission has seen otherwise. As long as we
13 are continuing to be a part of this case, then we would ask
14 not to be excluded, Judge. Otherwise it would basically give
15 the government everything they want, right, so we won't sever
16 your case, but we will pick and choose when Mr. Hawsawi will
17 be able to listen to these issues.

18 And as long as we remain joined to this case, there
19 is an interest in the information that is relayed, there is an
20 interest in the arguments that are made, it continues to
21 affect the progress of Mr. al Hawsawi's case, and to the
22 extent that affects our judgment and strategic decisions that
23 we make, we believe that we should not be excluded from that

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1 hearing as long as the commission's position continues to be
2 that we are a party to this joint trial.

3 MJ [COL POHL]: Lieutenant Colonel Pitvorec, do you want
4 to be heard in this?

5 IDC [Lt Col PITVOREC]: Thank you, Your Honor. I just
6 want to point out just a couple of dates that I think become
7 very relevant. AE 292RR, which is the subject of what is
8 proposed to be a closed hearing, was filed on the 4th of
9 August of 2014. The appointment of independent counsel was
10 not accomplished until the 8th of August 2014 and then two
11 months later to get the requisite clearances that were
12 necessary in order to be -- to make an appearance in this
13 case.

14 Since the 4th of August of 2014 -- and I think
15 Mr. Connell went through this very clearly, but there have
16 been two under-seal orders and eight under-seal filings by the
17 Special Review Team, none of which has been provided to any
18 member of any defense team, to include the independent
19 counsel.

20 In fact, the defense was provided a lone ex parte
21 under-seal filing which was provided to the judge as AE 292K
22 on April 21, 2014. Clearly since that time, in the eight
23 filings by the Special Review Team, much has changed in terms

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1 of facts and, therefore, applicable law. How could the
2 defense possibly be prepared to argue whether or not a
3 conflict currently exists in this case when there are at a
4 minimum eight filings that were ex parte and under seal and
5 have not been provided?

6 The prosecution erroneously argues that the many
7 conflict issues in this case can be bifurcated or
8 compartmentalized. There is but one conflict issue in this
9 case with many parts and many issues that pertain to it. And
10 at the heart of this lies the government investigation into
11 the activities and the infiltration of the RBS defense team,
12 an issue that continues with the revelation of the past few
13 days. And ultimately what would be required, as
14 Mr. Harrington eloquently stated, was that Mr. Binalshibh
15 would be required to waive any possible or potential conflict
16 or actual conflict in this case. At this time he cannot even
17 be apprised of those issues, let alone make a knowing,
18 intelligent waiver.

19 I have nothing further, Your Honor.

20 MJ [COL POHL]: Thank you.

21 Trial Counsel, do you have a brief response?

22 STC [MR. CAMPOAMOR-SANCHEZ]: Thank you, Your Honor.

23 Briefly, I think factually it needs to be said that Mr. Nevin

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1 and others aren't correct. The SRT gave notice of its request
2 for a separate 802 and as well as for a closed hearing for all
3 defense counsel in a public filing before the 802 happened or
4 before we were here to argue this. So I want it to be clear
5 that they were on notice that that's exactly what we were
6 seeking to do. Any other statement to the effect is simply
7 incorrect.

8 Secondly, most of what the commission has heard today
9 are arguments that are trying to say we have to be present
10 because all these facts are interrelated. And what those
11 arguments fail to recognize is that whether the facts are
12 interrelated or not, the issue -- the legal issue for the
13 commission to decide is whether counsel of record for
14 Mr. Binalshibh has a conflict or a potential conflict of
15 interest at this moment. That is it. It's not a decision as
16 to whether there was an alleged intrusion of the defense camp
17 or not or what the FBI did or did not do. And what I
18 understand has happened, that has nothing to do whatsoever
19 with the legal issue to be decided by the commission, and
20 therefore the request that we have made is simply to have a
21 closed hearing to complete the arguments.

22 And what do I mean by that? Mr. Harrington has had
23 the opportunity as learned counsel to file briefs, affidavits,

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1 to have argument before this commission. The only thing that
2 is left is the classified information that related to that
3 investigation and which has been shared with independent
4 counsel as it relates to the two allegations that have been
5 made: One, the alleged -- or the FBI investigation of a
6 nonattorney defense team member of Mr. Binalshibh's team, and
7 two, the statements by Ms. Flannery. Those are the two
8 pending allegations that are before the commission and that
9 the commission can in fact resolve as to whether a conflict
10 exists or it doesn't exist.

11 So with all due respect to all the learned defense
12 counsel, the closed hearing that we are requesting has nothing
13 to do with any other team except for the RBS team, and all we
14 want is the opportunity to have and complete those arguments
15 to the commission.

16 And respectfully, we also disagree with Lieutenant
17 Colonel Pitvorec. She is in a position to answer and say
18 whether those additional facts do have an impact on the
19 analysis that the court has to make as to whether there is a
20 conflict or not, and we simply want that opportunity to make
21 that argument to the court, because either way, as we said in
22 the beginning, this issue we believe is ripe for decision.

23 Ultimately the court might disagree, but it can be

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1 resolved one of two ways, either there is a pending conflict
2 currently or there isn't. If there is one, then
3 Mr. Binalshibh should be advised, and we will see if he waives
4 or not. But if there isn't, then the court should rule
5 otherwise.

6 And finally I just want to say Mr. Harrington can't
7 have it both ways. He can't be advocating on one hand that he
8 may be operating under a potential conflict while at the same
9 time continuing to advocate for his client in this commission.
10 That's what this independent counsel is for. We should have
11 this hearing and resolve this issue and move this matter
12 forward. Thank you.

13 MJ [COL POHL]: Thank you. The Special Review Team's
14 request for a closed hearing is denied. We will be in recess
15 for 15 minutes, and then we are going to have the other
16 prosecutors come back and we are basically going to talk about
17 scheduling and nothing more, and then we will -- after that we
18 will figure out the way ahead, if there is a way ahead,
19 currently.

20 The commission is in recess until 1115.

21 [The R.M.C. 803 session recessed at 1115, 11 February 2015.]

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