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1 [The R.M.C. 803 session was called to order at 1116,
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. The Special Review Team has been
6 replaced by the regular prosecutors.

7 And, General Martins, the same crew now that was here
8 last time?

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

10 MJ [COL POHL]: Okay. I wanted to talk to the government,
11 and this is kind of a scheduling issue. It deals with your
12 response, 334C. Who is going to speak for the government on
13 that? Mr. Trivett.

14 Okay. Here -- I just want to understand the
15 government's position.

16 MDTC [MR. TRIVETT]: Okay.

17 MJ [COL POHL]: And this deals with the severance of the
18 Binalshibh case from the other four. And the government
19 adamantly opposes that severance; is that correct?

20 MDTC [MR. TRIVETT]: That's correct.

21 MJ [COL POHL]: Okay. Now, understanding that the 292
22 series, which you are not a party of, I understand that, is
23 unresolved as far as it deals with Mr. Binalshibh's team, and

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1 there is an argument that it's also unresolved for the other
2 teams, but I want to give you a hypothetical because I want to
3 understand the government's position on this.

4 Assuming it is resolved for the other four teams, but
5 not for Mr. Binalshibh's team, and therefore until it is
6 resolved by Mr. Binalshibh's team, if it is not severed, then
7 that will slow down all five other -- all the other four
8 cases, okay? Do you have the factual predicate to my
9 question?

10 MDTC [MR. TRIVETT]: Yes, sir.

11 MJ [COL POHL]: So the government's position is no matter
12 how long it takes, that even if we could move the other four
13 forward, you oppose severance of the Binalshibh case?

14 MDTC [MR. TRIVETT]: I wouldn't say it's our position no
15 matter how long it takes. Clearly we think that there is
16 significant progress that has been made recently with the
17 disclosure of classified information to Mr. Binalshibh's
18 detailed independent counsel, but clearly we feel like
19 additional time to resolve that, if necessary, is still in the
20 interests of justice to maintain the joint trial, even if the
21 other four are not moving forward.

22 MJ [COL POHL]: When we first had this discussion in
23 August, it was when you asked me to reconsider the severance

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1 motion, and I held it in abeyance at the government's request.
2 In August the timeline was, well, this will be resolved by
3 October, okay? The October hearings were canceled because
4 there was nothing productive that could have been done because
5 it wasn't resolved. December rolls around, and again not
6 resolved, and the hearings are essentially canceled because of
7 that reason. We conducted two 802s with counsel, but nothing.

8 Now it is February, okay, and 292 is again
9 unresolved, and again I may be privy -- well, I am privy to
10 information that you are not.

11 MDTC [MR. TRIVETT]: Correct.

12 MJ [COL POHL]: And I am just saying, you say more time.
13 If it takes another year to resolve it for Mr. Binalshibh's
14 team and the other four are resolved, the government says we
15 want to wait a year to try this case, to get this case back on
16 path? Is that what you are saying?

17 MDTC [MR. TRIVETT]: One year from the date today, sir, is
18 that your hypothetical?

19 MJ [COL POHL]: That's what I am saying, one year next --
20 what I am saying is you say the government doesn't say, no
21 matter how long it takes.

22 MDTC [MR. TRIVETT]: Right.

23 MJ [COL POHL]: Again, when this first discussion started,

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1 the timeframe was August to October. So already, quite
2 frankly, this has delayed everything since last April. I'm
3 not placing blame on either side, but at least since July,
4 when 292QQ was issued -- and, again, it has been asked to be
5 reconsidered, so I'm not deciding that it doesn't apply to the
6 other two -- other four, I'm sorry.

7 But since July, 292QQ was being issued, it's been
8 focused on one particular team. In August you said if it
9 takes until October it doesn't make any difference. Now we
10 are seven months later -- six months later in February and we
11 are still -- it's unresolved, and the government's pleading
12 saying unless the issue of severance has already been
13 predetermined -- and quite frankly, I don't predetermine
14 issues until I hear from the parties, the outstanding motions
15 surrounding the potential conflict of interests must and
16 should be resolved first. And so I'm just trying to figure
17 out how long are we talking about.

18 MDTC [MR. TRIVETT]: Right. And clearly I am at a little
19 bit of a disadvantage in this argument, only because I don't
20 know everything that you believe to be unresolved. I do know
21 from the public filings of the Special Review Team that the
22 Special Review Team believes that you have everything that you
23 need to be able to make a determination yourself as the

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1 military judge as to whether or not a conflict exists.

2 MJ [COL POHL]: Okay. At the end of the day, I understand
3 that a decision is going to be made about when it is resolved.
4 Okay? The SRT has got their view on it.

5 MDTC [MR. TRIVETT]: Right.

6 MJ [COL POHL]: Other counsel may have their view on it
7 and, quite frankly, the only view that counts is when I think
8 it is resolved.

9 MDTC [MR. TRIVETT]: Correct.

10 MJ [COL POHL]: And I don't think it's resolved today.

11 MDTC [MR. TRIVETT]: I understand.

12 MJ [COL POHL]: And my question is how long -- and I
13 want -- how long does the government maintain that we should
14 delay the other four until this issue is resolved? We have
15 already resolved it -- it's been seven months since you
16 requested reconsideration of the severance order.

17 MDTC [MR. TRIVETT]: Correct.

18 MJ [COL POHL]: Do you wish to confer?

19 MDTC [MR. TRIVETT]: At some point I am going to need to
20 confer, but I think what's important from the prosecution's
21 standpoint is that a severance right now is -- whatever little
22 short-term gain we receive, is going to be followed by a lot
23 of long-term pain for the government, for the judiciary, for

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1 all of the resources that need to be used ----

2 MJ [COL POHL]: Don't worry about the judiciary, okay? We
3 will take care of that. I understand you are trying the case
4 twice. I got that. But don't worry about the judiciary.

5 MDTC [MR. TRIVETT]: I understand. But it's not just
6 trying -- it's not just trying the case twice, it's litigating
7 all of these intertwined pretrial issues that may take quite a
8 long time prior to trial.

9 And at some point -- and I was trying to anticipate
10 what type of questions you may ask. And clearly there may be
11 a time when severance would be appropriate, and that's if
12 trial is set, we are on the eve of trial -- at some point due
13 to no fault of the prosecution, maybe an entire defense team
14 is disqualified on the eve of trial, at that point it might be
15 appropriate for severance. We are not there. We are not at
16 that stage because we have no deadlines set. There's no
17 discovery deadlines, there is no motion deadlines, there is no
18 trial deadlines, there is no evidentiary hearing deadlines.

19 MJ [COL POHL]: Isn't one reason why there are no
20 deadlines because we have to resolve 292 first? You say that
21 in your own pleading. How could I set deadlines for anything
22 if there is still an outstanding question about defense
23 counsel on one team?

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1 MDTC [MR. TRIVETT]: There hasn't been deadlines at any
2 point in time with the exception of the signing of the MOU
3 from the beginning. So that's just -- that's the reality of
4 what we are dealing with. Had there been deadlines and had we
5 been bumping up against deadlines, then I think the analysis
6 for severance is different. But in the absence of those
7 deadlines, without explaining or blaming anyone for the lack
8 of deadlines, because we have the lack of deadlines, because
9 we do not have any certainty moving forward, that it is still
10 appropriate to maintain this trial as a joint trial and
11 resolve the AE 292 issues.

12 And this is -- certainly in light of the events of
13 this morning it's clear that all five defense counsel believe
14 that they have to litigate issues that arose this week. So
15 because of that, those are all going to be joint issues as
16 well. We are certainly not conceding that the Special Review
17 Team has to handle those, but at some point they are going to
18 be joint regardless. So there is a tremendous amount of
19 discovery coming down the pipe.

20 Just within this last month the defense counsel
21 requested the 6 million pages that the Senate Select Committee
22 on Intelligence used in their drafting of their report. They
23 want to see the entire 6,000-page report. These are all

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1 issues that they are joining together. These are all
2 discovery issues that are going to come up as we proceed
3 toward trial that all need to be handled under -- many of them
4 under the 505 process. There is a tremendous amount of hard
5 litigation to come, and that's going to have to come at some
6 point after -- and should come after the resolution of 292.
7 It's clearly not the government's position that it's going to
8 take another year to resolve it.

9 Again, I don't know what I don't know. I'm at a
10 disadvantage here. Your Honor, you know far more about what
11 you are thinking about in regard to the conflict and what you
12 are thinking about in regard to what else needs to be
13 resolved. But we have made significant progress -- the SRT
14 has made significant progress in the continual updates to, as
15 well as the providing of classified information to independent
16 defense counsel.

17 And it's important to note too that this is the
18 visible part of the trial. But in actuality right now the
19 hearings for this trial are a very small portion of what's
20 going on. And what's going on, there is a tremendous amount
21 of work that can go on and continue to go on throughout
22 whatever delays it takes for the Special Review Team and
23 independent counsel to resolve this 292 issue. There is

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1 discovery requests that come in almost every day. There is
2 discovery responses that goes out. There is affirmative
3 discovery that go out. There is continual filings, none of
4 which are stopping, including from Mr. Harrington himself, who
5 is also filing continuing motions. So there is tremendous
6 amount of progress that's being made, it's just not visible.

7 And I can understand the frustration in that there
8 are some things that are outstanding that Your Honor feels he
9 can't get to and resolve, but there still is a tremendous
10 amount of activity going on, there is a tremendous amount of
11 progress being made, and we think that that progress is still
12 best utilized by continuing to work the process outside of the
13 court while the court resolves the 292 issue.

14 So we don't anticipate it being a year. Again, I
15 don't know what I don't know on that, but it is clearly our
16 position that it should be resolved in a fairly timely manner,
17 again notwithstanding how this recent development may impact
18 that as well.

19 So our position -- and I would like to confer -- if
20 you need a specific answer on this, if it takes one year, I
21 would like to confer on that.

22 MJ [COL POHL]: My only -- my real question is this: This
23 thing, like many investigations or many processes, gets

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1 piecemealed. And when we sit in August -- we say August,
2 that's two full months away, it doesn't seem that far away.
3 And now we are in February from August and maybe it will be
4 resolved by next summer, maybe not. I don't know. Next week
5 would be hardly unlikely, but it may be resolved in a month,
6 it may not be. But the government position is because we
7 don't know, I'll tell you I don't know, okay, when it's going
8 to be resolved, or resolvable. I just want to make it very
9 clear, the government position is, as in your pleading, that
10 until 292 is resolved, we can't go forward on other stuff.
11 Now 350 may create a different issue which we may be able to
12 go forward on, I got that. But the substantive -- as you list
13 48 motions that are out there that need to be discussed and
14 resolved, the government position is until 292 is resolved,
15 the government wants -- opposes severance, for want of a
16 better term, no matter whether it takes two months, four
17 months, six months -- it's already taken seven, and I'm doing
18 it from July now. It has already taken since that time. So
19 just so I am clear, the government position is we oppose any
20 severance at this time, understanding it may be months before
21 292 is resolved?

22 MDTC [MR. TRIVETT]: Yes, that is the government's
23 position. At some point if we are told by the Special Review

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1 Team, without getting into classified information, that this
2 is going to take -- if we have a more definitive timeframe and
3 that timeframe is a longer time than we are willing to wait to
4 maintain a joint trial to bring justice to the families, then
5 we may come back at some point and say at this point we
6 would ----

7 MJ [COL POHL]: Let me ask you a question, because your
8 response precipitates this: Do you understand the need for
9 the Special Review Team to do the substantive work on 292 and
10 the regular prosecution team be walled off?

11 MDTC [MR. TRIVETT]: Yes.

12 MJ [COL POHL]: Do you feel that wall would prevent the
13 SRT from telling you about when they anticipate an
14 investigation or whatever or resolution of this thing?

15 MDTC [MR. TRIVETT]: I would like to confer on that, if I
16 can get a second.

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

18 Mr. Trivett.

19 MDTC [MR. TRIVETT]: Thank you, sir. We have obviously
20 had limited coordination with the SRT mostly on administrative
21 matters. There is always someone there monitoring to ensure
22 that nothing that may be privileged is made privy to the
23 normal prosecution team. That being said, it's an

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1 administrative -- we believe it's an administrative process to
2 ask them how long they believe, that will be appropriate for
3 us to talk to them about. And we would actually like to be
4 able to do that now, to get as much information as possible
5 under the protocol that we have in place to determine how long
6 they think this may be to resolve before giving you a final
7 answer. But clearly it would have to be a period longer than
8 April or June timeframe. Clearly within those next two
9 sessions we believe it's completely appropriate.

10 MJ [COL POHL]: You understand they will give you their
11 view of what the timeline is ----

12 MDTC [MR. TRIVETT]: I understand that.

13 MJ [COL POHL]: ---- which may not be the same as my view,
14 you understand that? That was the nature of my question.
15 Okay.

16 But, again, remember it's -- okay. If your position
17 changes on severance, it was your motion that asked me to
18 reconsider it, so if you want me to reconsider the
19 reconsideration because of the timeframe, feel free to do it.

20 MDTC [MR. TRIVETT]: Yes, sir.

21 MJ [COL POHL]: Are you with me on the procedure in this?
22 What I am saying is it was placed in abeyance at the
23 government's request.

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1 MDTC [MR. TRIVETT]: Right.

2 MJ [COL POHL]: I brought it back up this time just to
3 make it clear as to where we are going forward, and I may be
4 bringing it up every time we meet ----

5 MDTC [MR. TRIVETT]: I understand.

6 MJ [COL POHL]: ---- just to see -- because the government
7 appears to be adamant no severance and equally adamant that
8 292 must be resolved and obviously 350. Okay. Got it. Thank
9 you. That's all I want on that.

10 MDTC [MR. TRIVETT]: Thank you.

11 MJ [COL POHL]: Mr. Connell, on the 505(h) hearing?

12 LDC [MR. CONNELL]: With respect to 350, sir.

13 MJ [COL POHL]: Yes, we are back to 350 on that. Given
14 that -- and I don't know -- well, given that I have no
15 response from the defense on the pleadings or anything else,
16 is it ripe to have that hearing now, or would it be more
17 useful to have it once the issue is more fully developed?

18 LDC [MR. CONNELL]: Yes, sir, that will be fine.

19 MJ [COL POHL]: I mean, it just strikes to me it's not
20 ripe.

21 LDC [MR. CONNELL]: No, no, I was rushing to get my
22 materials together for it. So, I mean, it makes sense to me
23 that additional facts may emerge in the near future.

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1 MJ [COL POHL]: Okay. That being said, is there anything
2 else we can accomplish during these sessions? I am turning to
3 the government. General Martins?

4 CP [BG MARTINS]: Your Honor, our position is that we have
5 lots of motions to address. If the commission's resolve is
6 that we are not going to complete 292, we are here. If 350 is
7 something the commission seeks to proceed to, I draw attention
8 to our pleading on 350, which was -- and it's on page 4 of
9 that -- if the commission decides to go down this road.

10 There were representations of counsel this morning,
11 defense counsel, that we were seeking this relief regardless.
12 We are seeking that relief if the commission decides it needs
13 to take it up and continue. So we are here. We are all here.
14 It's an accelerated timeline. Why don't we get that done?
15 Let's work on it.

16 MJ [COL POHL]: I'm not sure, what do you mean, "Get that
17 done."

18 CP [BG MARTINS]: In terms of if that's on the docket, we
19 are all here. You approved an accelerated timeline,
20 Your Honor, and we have a 505(h), we do a
21 use/relevance/admissibility of what needs to be done in a
22 classified session or closed session, if necessary, we request
23 that you make an 806 determination for all of that. There is

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1 lots of work that we could do. We are all down here.

2 MJ [COL POHL]: One moment, please. In the 334C, dealing
3 with the government motion for amendment of the docket sheet,
4 the government says, "The outstanding motions surrounding the
5 potential conflict of interest, including the SRT's motion to
6 reconsider, must and should be resolved first."

7 If that needs to be resolved first, how can we do
8 anything on 350 this week?

9 CP [BG MARTINS]: That was before 350 and we have ----

10 MJ [COL POHL]: Let me ask you this: Conceptually, why
11 does 350 change that? What I am saying is 292 needs to be
12 resolved before we can do anything else because the issue is
13 whether or not one defense team should be -- can or should be
14 representing one accused. Does 350 change that?

15 CP [BG MARTINS]: We haven't received their pleadings on
16 it and ----

17 MJ [COL POHL]: I'm sorry, on what?

18 CP [BG MARTINS]: We haven't received their pleadings on
19 it, don't know what relief they seek, we don't know what
20 allegations they make, if it's something deserving relief. We
21 prefer to examine that before we determine what the impact is.
22 There was some suggestion by defense counsel for
23 Mr. Binalshibh that he was fusing it somehow with 292, so we

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1 would like to view that, give them an accelerated timeframe
2 to respond, let's have the 505(h) that counsel have sought and
3 appear to be gearing up to do and ----

4 MJ [COL POHL]: What are we going to accomplish with the
5 505(h)?

6 CP [BG MARTINS]: I'm sorry?

7 MJ [COL POHL]: What's going to be accomplished with the
8 505(h) hearing given the fact that we have no other pleadings.
9 Right now all we have is your pleading.

10 CP [BG MARTINS]: Right. Your Honor, we would just ----

11 MJ [COL POHL]: Which isn't really a pleading, it is
12 simply a request for a court order.

13 CP [BG MARTINS]: If the court sees it necessary to take
14 it up -- you had spoke this morning about giving them a chance
15 to respond. Let's do that while we are here and look at what
16 we have got at that point and then have another scheduling
17 determination. We could then meet with across -- using the
18 protocol, meet with the Special Review Team on this aspect of
19 seeing if there is anything we can appropriately get regarding
20 to timeline, but do not -- we are not supporting calling it
21 quits for the week.

22 MJ [COL POHL]: But how can Mr. Binalshibh's team
23 participate in the 350 litigation when 292 is still out there?

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1 CP [BG MARTINS]: Your Honor, we are getting discovery
2 requests, all sorts of pleadings in writing from defense
3 counsel right now.

4 MJ [COL POHL]: Well then, how do you say the positions of
5 292 ----

6 CP [BG MARTINS]: That was prior to this arising of this
7 350 matter.

8 MJ [COL POHL]: The 350 matter, okay. Let me ask you
9 this: Prior to 350 being raised, why was it the government's
10 position that 292 must be resolved before anything else can be
11 addressed?

12 CP [BG MARTINS]: Your Honor, I prefer not to answer 292
13 questions. You have got the position of the United States on
14 292 from the Special Review Team. My position is that we not
15 simply recess until some other time, that we at this point
16 allow us to meet with the Special Review Team, we have this
17 350 matter, which was not present, as you have acknowledged,
18 when we filed our 334 filing, and let's hold open the
19 possibility we can get some productive work done.

20 MJ [COL POHL]: No, I understand your position, but I find
21 it a little inconsistent that on the one hand you say I don't
22 want to address the 292 issues because that's for the SRT, but
23 in a pleading submitted by I believe you and Mr. Trivett, you

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1 do address the 292 issues.

2 And again, my question goes back to why can't we --
3 you had that position before 350, because I am assuming it
4 meant that you had concerns whether one team could
5 participate.

6 CP [BG MARTINS]: Your Honor, I understand you perceive
7 that we are on the horns of a dilemma and inconsistent. I
8 would like to confer and we would like to have an opportunity
9 to provide you an answer to that. What I am requesting is
10 that we not just quit for the week.

11 MJ [COL POHL]: Okay. Well, I will listen to an argument
12 if we can do anything more. I'm sure the defense wants to be
13 heard on it also.

14 Let's do this. You need to confer. Defense probably
15 needs to talk to each other. I'm always amenable to move
16 things along if they can be moved along. What is your
17 proposed timeline there, General Martins, so the defense knows
18 what you are talking about to see so they can provide a cogent
19 response?

20 CP [BG MARTINS]: It is 1142. I recommend we recess for
21 lunch and if there is a prayer time near that ----

22 MJ [COL POHL]: I think it's 1215.

23 CP [BG MARTINS]: ---- we have a chance to do what we

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1 said, talk to the Special Review Team, come back after that,
2 and then we can discuss those scheduling matters and I may
3 have a better answer to your question.

4 MJ [COL POHL]: Let's do this. We will take an extended
5 lunch break. No decision obviously has been made about going
6 forward. We will reconvene at 1400. During that time, Trial
7 Counsel, you obviously do what you need to do. Also confer
8 with defense, when you talk about an expedited schedule, what
9 you mean in reality. And then, defense, you will get your
10 opportunity to respond, and then after 1400 we will decide the
11 way forward. All is clear?

12 LDC [MR. NEVIN]: Just one question.

13 MJ [COL POHL]: Sure.

14 LDC [MR. NEVIN]: Would we be permitted to sit in on the
15 discussion with the Special Review Team about an estimate of
16 time? It seems to me we should be permitted to do that.

17 MJ [COL POHL]: Trial Counsel?

18 LDC [MS. BORMANN]: I join that.

19 MJ [COL POHL]: Trial Counsel?

20 CP [BG MARTINS]: We oppose that, Your Honor.

21 MJ [COL POHL]: Do you have any authority for that
22 position, Mr. Nevin?

23 LDC [MR. NEVIN]: They are supposedly walled off from the

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1 Special Review Team, but now the wall is going to come down a
2 little bit or a brick is going to get pulled out or something.
3 And we are walled off as well because the Special Review Team
4 is not providing us with this information.

5 So again it's a situation where the information is
6 not going to be spread evenly and it's not classified. There
7 is nothing -- there shouldn't be any problem with conveying
8 that information.

9 MJ [COL POHL]: Your concern is that it may extend beyond
10 the discussions of time?

11 LDC [MR. NEVIN]: My only concern is that if -- the
12 regular prosecution team has taken the position that it's
13 walled off from this part of the case. If they are not going
14 to be walled off anymore, then we are having kind of a change
15 in circumstances here, and I would just like to be part of it.
16 It seems that that would only be fair.

17 MJ [COL POHL]: General Martins, you understand what the
18 risk of any contact with the SRT is?

19 CP [BG MARTINS]: We do, Your Honor. We do, Your Honor.

20 MJ [COL POHL]: Okay. And so any discussions you have
21 with them ----

22 CP [BG MARTINS]: Your Honor, we have a protocol in place
23 to ensure that no privileged matters, and that the wall has

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1 integrity and that it's in place.

2 MJ [COL POHL]: Do you envision there is anything you
3 would discuss with them that you could not disclose to the
4 defense?

5 CP [BG MARTINS]: Your Honor, I would propose that we
6 recess, allow us to confer. You have posed a number of
7 questions. We oppose this suggestion of the defense.

8 MJ [COL POHL]: Mr. Nevin, I understand your position.
9 There may be many ways to document the communication between
10 the two. The risks the government takes are obviously the
11 risk the government takes on how far they go on it.

12 Since the issue just came up, I am going to give time
13 for people to think their way ahead. So at this time I am not
14 going to order you that the defense be there for any type of
15 discussion between the SRT and the regular prosecutors.

16 That being said, we are in recess until 1400.

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