[The R.M.C. 803 session was called to order at 1118, 14 August 2014.]

MJ [COL POHL]: The commission is called to order. All defense counsel are again present that were present when the commission recessed. All five accused are also present, but we switched out from the special trial team to different prosecutors.

General Martins, who is here for the government today?

CP [BG MARTINS]: Your Honor, here today is myself, Brigadier General Mark Martins, Robert Swann, Clayton Trivett. Also at counsel table is paralegal Mr. Rudolph Gibbs.

MJ [COL POHL]: I don't know whether you told this or not, one of the other issues we are going to add after 299 was the 283 dealing with Major Wright's continued representation. It struck me as an issue we could address now.

CP [BG MARTINS]: Thank you, sir. Your Honor, since we are at somewhat of a disadvantage, any other scheduling matters that we should be apprised of?

MJ [COL POHL]: The only thing I wanted to address was there was a potential issue also with some other defense counsel, but they are apparently not ripe to be discussed, so the only thing would be we will do 299 and then we are going

1 to do 283, which is the Major Wright issue, and then given the
2 status of 292 still needs to be resolved, I would suspect that
3 will be all we will get this set of hearings.
4 CP [BG MARTINS]: Thank you, Your Honor. We would
5 normally do any communications through actually a third party
6 with the Special Review Team. Counsel -- rights to presence
7 were given this morning?
8 MJ [COL POHL]: Yes.
9 That being said, Mr. Ruiz.
10 I'm sorry; Mr. Harrington.
11 LDC [MR. HARRINGTON]: Judge, you reiterated before we
12 broke that 292QQ is in play, your order is in effect right
13 now, which essentially means that we are in this conflict
14 situation and I want the court to understand that we are not
15 consenting to the argument or to the adjudication of any other
16 motions at this time, but we understand that Mr. Ruiz has
17 filed his motion. We have not filed any papers or any
18 response to it, but by the court hearing this, we are not
19 consenting to any other motions being addressed at this time.
20 MJ [COL POHL]: Okay. Thank you, Mr. Harrington.
21 Mr. Ruiz.
22 LDC [MR. RUIZ]: Judge, in AE 299, on behalf of
23 Mr. al Hawsawi, we have moved to sever his case from the rest

1 of his co-accused. We have asked the commission to separate
2 his case into an individual trial so that we can proceed with
3 a number of motions that remain.
4 I would suggest to Your Honor that there is a third
5 course of action here today that does not involve just simply
6 addressing Major Wright's issue and then simply closing down
7 the commissions until the next session, which I believe is in
8 October, and that option is that if you listen to our
9 severance motion, rule on it, sever our case, we are prepared
10 to proceed with the docket as it currently exists.
11 Certainly I know that the commission has not
12 prejudged our motion and it wasn't your intention to imply
13 that, but certainly that would be a set of facts that could
14 potentially play out if you, in fact, hear arguments that have
15 been briefed, now we are going to argue them, I believe
16 General Martins will get his chance to argue his portion
17 fully. The commission could issue a ruling, and tomorrow we
18 can show up back here on Mr. Hawsawi's case and move forward
19 with individual motions that we are prepared to address and
20 prepared to move forward with and that are of great importance
21 to Mr. Hawsawi and are of continued importance to our progress
22 and the progress of his case, so I would ask the court to
23 consider that alternative option. I am not sure what type of

1 timeline you are looking at in terms of ruling on this motion,
2 but certainly that is something that we would ask the
3 commission to consider after you have heard our final
4 arguments on this issue.
5 Judge, the fundamental reason we are asking you to
6 sever Mr. al Hawsawi's case at this point in time is because
7 it has become unmistakably clear that through a series of
8 events, of no fault of Mr. al Hawsawi -- and this is not to
9 fault any co-accused, this is a nature to some extent of a
10 complex case such as this one. But it is very clear now,
11 particularly given your ruling in yesterday's case where you
12 held your previous severance order of Mr. Binalshibh in
13 abeyance. Mr. Binalshibh has now been, at least for the time
14 being and really without any indication of how long that will
15 be the case, has been rejoined to our case and continues to be
16 a part of the case as it was before.
17 As the commission has indicated a number of times
18 during the past couple of days, the 909 issue, which was an
19 issue which was not brought to the forefront by
20 Mr. Binalshibh's team or Mr. Binalshibh's defense team. The
21 706 being the mental health competency evaluation that was
22 requested by the prosecution. The 909 hearing, the additional
23 hearing and the presentation of evidence was an issue that was

1 requested by the prosecution, has been pressed by the
2 prosecution, and continues to be pushed by the prosecution as
3 late as the colloquy between yourself and Mr. Trivett where he
4 acknowledged that they still seek to engage in a colloquy with
5 Mr. Binalshibh in order to satisfy themselves that their 909
6 concerns are allayed.
7 The 292 conflict-of-interest issue goes without
8 saying. You have litigated that earlier this morning. I
9 think we have made our position very clear that at this point
10 Mr. al Hawsawi does not acquiesce to additional delay,
11 additional pretrial delay attributed to this motion. And the
12 reason, Judge, that I felt that it was important to articulate
13 that on the record, to make it very clear is because the case
14 law talks about codefendants' silence as potentially being
15 acquiescence in additional pretrial litigation. I know we
16 have briefed that, I know we have been vocal for that, but
17 again, for the sake of completeness, I thought the record
18 should continue to reflect that at least at this procedural
19 juncture in the case, we are prepared to proceed with other
20 business and we are no longer party to the 292 issue.
21 I think predictable response and argument on that
22 from the prosecution was something that Mr. Trivett referred
23 to previously, and I think he said that while we may no longer

1 be a party -- we, meaning Mr. Hawsawi's case -- we were in
2 fact a party to the 292 litigation at its inception when we
3 first learned that, in fact, there had been an infiltration
4 into one of the defense teams and then subsequently, as you
5 know, based on your order, we also learned that there was at
6 least threats, some threatening meetings with some of the
7 other teams. And that's true, Judge, the record is very clear
8 that we joined that motion.
9 But I think what is important for the commission to
10 factor in when you hear that argument, when you hear that
11 analysis, is a very simple analogy. And the way I think about
12 it is I happened to be standing on the sidewalk with my
13 colleagues when somebody came up behind us and slapped us on
14 the back of the head. When somebody did that, through no
15 fault of our own, we turned around, we looked them in the eye
16 and we said "What gives?" And "why is this happening?" And
17 then we engaged in advocacy and litigation in response to a
18 situation that was not brought on by any defense action, that
19 was not filed upon by any defense team.
20 We did not bring this motion to the court's
21 attention. We only brought it to the court's attention until
22 we had facts that came to light, there were facts that were
23 directly attributable to government action. And so for the

1 prosecution now to turn around and say, well, yes,
2 Mr. al Hawsawi was a part of the 292 litigation and that
3 should somehow count against us in the severance analysis
4 because we chose to engage in that litigation would simply, I
5 would submit to this commission, be transparent and
6 self-serving, and I would ask you to reject that analysis.
7 As it is very clear on the record, once we received
8 additional information -- and Mr. Nevin was very correct when
9 he talked this morning about us being in a slightly different
10 position from his team and from the other litigants in this
11 case, which is ----
12 MJ [COL POHL]: I would just ask you, because the
13 government has made an effort to wall these people off, this
14 team from that Special Review Team, to be very cautious of
15 referring to anything in the 292 series of substance, because
16 otherwise ----
17 LDC [MR. RUIZ]: I understand. I will do my best.
18 MJ [COL POHL]: Generically it took a while to get
19 through, but it seems to me once you slide into substance of
20 anything in the 292 series, we run that risk that the
21 government is trying to avoid by having two separate trial
22 teams address 292 and a different team addressing everything
23 else, so let's just keep the 292 thing very generic. For

1 example, when you talked about you joined it and then why you
2 joined it and then you came back, that's the generic stuff.
3 But as again the specifics, you were talking about
4 what Mr. Nevin said earlier today about it, that just causes
5 me pause that we may be sliding over into a line that's not
6 really necessary for this motion and has a potential to cause
7 problems down the road with the trial team.
8 LDC [MR. RUIZ]: Sure, and I will be mindful of that. Of
9 course, it's difficult for us because we are all one team.
10 The essential point I think I am trying to make,
11 Judge, in this issue is that after we received additional
12 information and having had access that other counsel in this
13 case have not had, we made a determination, based on the
14 information that we had, that we were not operating under a
15 conflict or a potential conflict. We communicated that to
16 this commission, and we indicated that we were ready to
17 proceed with the litigation in this case.
18 Of course, one of the other caveats that I asked the
19 commission and that I referred to when we talked last time was
20 that if the commission had information in its possession via
21 the ex parte submissions that were made to the commission and
22 if any of that information was the sort that should be
23 factored into my analysis, then by all means I know that the

1 commission knows it has an independent duty to provide that to
2 us or to appoint a counsel if, in fact, the commission felt
3 that there was any potential conflict of interest.
4 Where we stand right now on this is decidedly that we
5 have no information that we continue to labor under either an
6 actual conflict or a potential conflict, where procedurally,
7 it seems inevitable that we are, and I say that just on your
8 latest comments, is that the progress of this litigation, the
9 progress of these motions, at least for today, seem to be
10 headed only in one direction, and that direction was to
11 address this motion, to address the Khalid Shaikh Mohammad
12 severance of counsel issue, and then perhaps to wait until the
13 next hearing and address additional, additional motions. And,
14 of course, that is precisely one of the things that we point
15 to the commission as additional prejudice.
16 And in that sense, it brings me back to the point why
17 we have asked for a severance, Judge, and one of the arguments
18 that has been made in response to our motion for severance is
19 that when you raised the initial concerns in 2012 in AE 039,
20 the position that we took, Mr. al Hawsawi's team, was that we
21 did not advance the position at that time, and that is
22 correct. To the extent we did that, we continued to litigate
23 and some of the motions were joined, some of the motions were

1 not.
2 But I wanted to be very clear on the appellate record
3 that there is in existence in this commission the rule that
4 unless we affirmatively remove ourselves from a motion that we
5 are considered to be joined, and of course there is a plethora
6 of motions where we have not joined or we have filed
7 individually or we have differing positions.
8 But there is another motion that I ask this
9 commission prior to the next session that needed to be
10 addressed that was of paramount importance to Mr. al Hawsawi,
11 that motion was AE 303. And the reason I am going into this
12 other motion is because we wanted to highlight for you what we
13 believed to be some of the prejudice, which is the continued
14 delay keeps us from addressing motions and issues that
15 directly impact Mr. al Hawsawi's health, his wellbeing, his
16 ability to continue to engage with us and to have the
17 resolution to some longstanding issues that will facilitate
18 our communications with Mr. al Hawsawi, will give us the
19 opportunity to assess where we are procedurally and continue
20 to build upon our procedural record.
21 303 is a motion where we challenge Mr. al Hawsawi's
22 current conditions of confinement as violative of
23 international conditions of law and humanitarian standards.

1 We were very clear in our previous docketing memorandum that
2 there was an issue that we asked the commission to address,
3 and in the June session, in our docketing memorandum, which is
4 302 -- excuse me, it's not -- I don't have it in front of me,
5 Judge, but the previous docketing memorandum, we had asked the
6 commission to address our severance motion, address the
7 conditions-of-confinement motion and we objected to making
8 AE 292 the only order of business for that proceeding.
9 The record is clear on that issue and on that point
10 as to where Mr. al Hawsawi has been, and it is also clear that
11 previous to that particular docketing motion, we have been
12 consistently pressing for this commission to address
13 longstanding motions, and we have been asking the commission
14 to get to some of these issues.
15 The conditions-of-confinement motion, 303, is not
16 even on this current docket and presumably will not be heard
17 until much later. A significant fact that I think ----
18 **[Pause for interpreter interruption.]**
19 MJ [COL POHL]: Wait, I was hearing some ----
20 LDC [MR. RUIZ]: I did as well.
21 I think another significant factor to be aware of
22 with respect to 303 is that while we believe for many good
23 reasons, and we filed that along with an ex parte submission,

1 under seal submission with ICRC records that support our
2 position we think it is of critical importance to address
3 these issues now.
4 Four other teams actually filed an affirmative
5 pleading withdrawing from that pleading and unjoining in our
6 request. Their position was that because their
7 investigations -- and this is a generalized argument, a
8 generalized characterization, but generalizing their
9 characterization was they had not had adequate opportunity to
10 complete their independent investigations in order to mount
11 their challenges to the conditions of confinement of their
12 respective clients, so on that motion they unjoined and have
13 essentially said that they will save that for another day. So
14 it's a difference of a position.
15 Judge, what it really comes down to -- and I will get
16 into some of the legal analysis and the expected legal
17 analysis -- is we are asking for Mr. Hawsawi to be tried
18 separately because we believe that it will be the best vehicle
19 for him having a fair and a just verdict based on the honest
20 and sincere assessment of facts as they relate to him, as they
21 relate to his case, as they relate to the allegations that
22 will be brought forth and will bear upon Mr. al Hawsawi's
23 eventual guilt or innocence. That's it. That's at the heart

1 of this case.
2 We do have an interest in moving forward. Despite
3 Mr. Trivett's characterizations of what a victory is or a
4 victory is defined for defenses advocates, I would submit that
5 that is short-sighted and inaccurate. We are interested in
6 moving forward, we are interested in addressing these issues,
7 and Mr. al Hawsawi will face whatever evidence the prosecution
8 wishes to bring forth and have an honest assessment of
9 individual facts.
10 But the fact of the matter is, Judge, that the
11 prosecution very well understands that whenever you bring a
12 group of co-accused into a courtroom, it sets the conditions
13 and it sets the climate for guilt by association. That's very
14 simple. And that's why you have a prosecutor standing up and
15 arguing before this commission that Mr. Binalshibh somehow
16 received a gift, a gift of severance, which he was referring
17 to during his argument yesterday, which I thought was a very
18 curious but a very revealing choice of words.
19 Why would that be considered a gift to an advocate or
20 somebody in this type of commission? Well, the reason it
21 would be considered a gift, I would venture to say, is because
22 they understand that when a person is in the courtroom
23 individually, they are going to be based and they are going to

1 be judged on individual facts, and I guess from their
2 perspective that's somehow a gift. And that's what we are
3 asking for I guess in some ways, Judge, is we are asking for
4 Mr. Hawsawi to be put in the best position to get some modicum
5 of justice.
6 Now, as we have candidly articulated in our
7 pleadings, we do not think that ultimately that is something
8 that is achievable in a system such as the Guantanamo system,
9 a system created from the ground up for one purpose and one
10 purpose only, which is to convict and to kill. We understand
11 that. We reflect on that. We know that.
12 But there is still a portion of us that holds on to
13 some foolish idealism, and that in Mr. Hawsawi's case, if we
14 can somehow wrestle him away from the collective guilt, from
15 the collective type of result that he is going to encounter in
16 a joint trial, that perhaps, that perhaps we could be at least
17 one step closer to having an independent assessment of the
18 facts against him, of the evidence against him, and to have a
19 verdict that is based not on associations, not on blanket
20 characterizations, but it is based on evidence that is
21 directly related to whatever accusations or allegations are
22 made against Mr. al Hawsawi. That's all we are asking for.
23 The prosecution, as you have seen, furiously fights

1 against that, and I would submit to you that the reason for
2 that is because they understand very well -- they understand
3 very well that having multiple codefendants in one case under
4 these conditions in this place gives them a greater chance of
5 conviction by association.
6 Now, we can talk all day legal analysis, and we will
7 do that, but that's the bottom line, and at least that's our
8 position. We believe that to be the case. And I don't and
9 won't hold my breath for the prosecution necessarily admitting
10 that, but that is what is at the heart of this case, is we are
11 seeking an independent assessment of guilt versus the
12 collective approach to the government's own brand of justice
13 in this case.
14 Judge, you have heard a great deal of discussion, and
15 I find this -- I find this interesting, because the
16 prosecution typically takes the position that this is a
17 military commission, it is a military courtroom and,
18 therefore, you are to look to the Military Commissions Act
19 when you are making determinations such as that the
20 Constitution of the United States doesn't apply and all these
21 other issues that we have litigated throughout time down here.
22 But in this case, the prosecution shifts gears
23 continually and brings the court's attention to federal case

1 law and they cite Zafiro and they cite a host of other federal
2 cases that expresses a preference for joint trials and joint
3 prosecutions, Judge. And Mr. Trivett's argument, at least in
4 respect to Mr. Binalshibh's case was that, hey, joint trials
5 just are not common in the military, but they are not common
6 not because there is a policy reason, but because they just
7 don't happen that often. And to some extent I think that's
8 getting towards the issue I think that I would ask the
9 commission to look at, but it doesn't quite get you there.
10 Judge, when you -- and I think federal case law is
11 what we are talking about, but, Judge, when you engage in that
12 analysis, and the analysis particularly as it relates to
13 efficiency, administration, all these arguments that the
14 prosecution has continued to make -- Judge, what I am going to
15 go back to is to think about the fundamental character of
16 federal courts, district courts, and the manner in which they
17 handle cases and the amount of cases which they handle.
18 We are talking about two systems that are
19 fundamentally different in just about every way that you can
20 think of. This military commission system was created for one
21 purpose and one purpose only, and that was to prosecute a
22 discrete group of individuals and discrete group of trials.
23 The federal system, Judge, tries hundreds, if not

1 thousands, of cases individually in every year. So when you
2 are talking about administration of justice, when you are
3 talking about moving cases along, and you are looking to
4 federal cases that talk about these issues, you are looking at
5 courts that handle hundreds of cases, and you are looking at
6 courts that have to be concerned when one courtroom is out of
7 commission, how it affects the different courtrooms.
8 Now, Judge, I will tell you that most of the people
9 on this side of the room understand that from having practiced
10 in federal court, that that's just the reality of federal
11 courts. That is not a reality for Guantanamo Bay. It has
12 been very clearly seen that right now we have I think six or
13 seven active cases. I think there are a couple of new ones
14 that have come forth.
15 But I would submit to you, Judge, that asking the
16 military commission's judiciary to keep a calendar, to
17 schedule multiple hearings that are meant to be had in one
18 courtroom -- we are not talking more than ten right now -- is
19 not any grand or great endeavor.
20 And the fact that the prosecution continues to make
21 this administration of justice argument in a vacuum on less
22 than ten cases is -- I would just simply ask you to reject
23 that because I have confidence in the military commission

1 judiciary's ability to utilize their resource to the best of
2 its abilities, to schedule appropriately so that when one case
3 is in session, another case is not, and they can continue to
4 progress with their trial preparation, and then there is a
5 separate week for a separate case just like in every court in
6 the United States of America where this happens every day.
7 And, of course, the argument will be that there is
8 the complexity of the trial, that there is classified
9 information that needs to be addressed, and I would say to
10 you, Judge, that because we still have a relatively small
11 number of cases, we can continue to do that. We can continue
12 to do that without any great disruptions.
13 And at least to the extent the prosecution wishes to
14 analogize federal court with the kind of dockets that federal
15 courts keep with military commissions where we are asking a
16 system of justice created for a specific purpose to
17 appropriately schedule and administer a handful of cases, but
18 that should not be given great weight when you are asking --
19 or looking at the severance motion in our case.
20 Judge, with respect to the Military Commissions Act,
21 with respect to the rules in there, what we ask you to look at
22 first is Rule for Military Commission 602(a)(3) and
23 602(a)(3) -- excuse me, (e)(3) -- is cited for the proposition

1 by the prosecution that joint or common trials are appropriate
2 means of trying cases in military commissions. Judge, but
3 602(e)(3) also talks about cases being complicated on
4 procedural and evidentiary rules and it warns of that
5 particular complication when you are looking at your analysis
6 as it relates to a severance motion.
7 MJ [COL POHL]: Go ahead.
8 LDC [MR. RUIZ]: Judge, I think that's exactly -- Judge, I
9 think that warning in 602(e)(3) is on point when it talks
10 about complications in procedure in evidentiary rules. I can
11 make an argument on that but I think the best argument is the
12 facts as they exist.
13 They speak for themselves in terms of the procedural
14 complications. Certainly you have had a front-line seat to
15 the procedural complications in this case and the evidentiary
16 hurdles that we face, and certainly I think that, as I have
17 said, you have seen it for yourself, you see it continuing to
18 impact on this case.
19 The military commissions analysis or the Rules for
20 Military Commissions is two things: Is there prejudice and
21 has good cause been shown? Those are the directives and that
22 come from 906(b)(8), Rule for Military Commission 906(b)(8),
23 and then we have referenced the additional ruling. Judge, is

1 there good cause and is there prejudice? That's military
2 commissions directions and that's what we are asking you to
3 focus on, Judge, in your severance analysis.
4 MJ [COL POHL]: Go ahead.
5 LDC [MR. RUIZ]: I thought you were reading something.
6 MJ [COL POHL]: I can read and listen at the same time.
7 Go ahead.
8 LDC [MR. RUIZ]: So that's one point, Judge, that I want
9 the court to think through, which is that we do have those
10 standards that are set forth in the Military Commissions Act,
11 and even though I know the prosecution has chosen to argue
12 this issue based on federal case law largely, I think it is
13 important to come back to the Military Commissions Act and the
14 rules that we do have that give guidance to the commission in
15 terms of severance, prejudice, and good cause. We believe, as
16 we will continue to articulate, that there is prejudice and
17 there is good cause that we have shown for why Mr. Hawsawi's
18 case should be severed.
19 But turning our attentions to
20 Zafiro v. United States, which is the preeminent case and
21 certainly a case that you have certainly heard quite a bit
22 from the prosecution and that we have spent some time talking
23 about -- at least we haven't, but you have heard those two

1 issues. And the two particular issues that you have heard
2 with respect to Zafiro have to do with a specific trial right
3 and a reliable judgment. These are the two points that the
4 prosecution continues to bear down on and that the prosecution
5 continues to attempt to carry the argument with respect to
6 their own opposition to severances in Mr. al Hawsawi's case.
7 But, Judge, there are a couple of other principles
8 that are also articulated in Zafiro's case, and I would like
9 to bring those to the commission's attention. I am sure you
10 have taken a look at that case, but nevertheless, Judge, here
11 are some additional statements from Zafiro. "Joinder may work
12 to the detriment of the accused." "There is a varying risk of
13 prejudice with the facts of each case." "The district court
14 may find prejudice in situations not discussed here." "Where
15 the risk is high, the court is more likely to determine that
16 separate trials are necessary."
17 And Zafiro goes on to highlight two particular issues
18 where that may be the case: A complex case with markedly
19 different degrees of culpability. If you have a complex case
20 with markedly different degrees of culpability, it says the
21 risk of prejudice is heightened.
22 Certainly I think that in terms of the complexity of
23 this case, the facts speak for themselves. We have five

1 capital litigation trials rife with new issues, challenges
2 that are constitutional in magnitude. We have classified
3 information issues and you have complexity of facts that span
4 nationally, internationally. And so certainly I think -- I am
5 not going to expend a great deal of time making the argument
6 that this is not a complex case. I would simply say that for
7 most of us I would -- daresay almost all of us, this may be
8 the most complex case we have ever seen in terms of complexity
9 and in terms of logistics in terms of the evidence and in
10 terms of the challenges and the advocacy that we must bring
11 forth to comply with our advocacy and ethical standards.
12 So Zafiro does very much say that, Judge, and when --
13 if we get away from just looking and pinpointing and picking
14 and choosing different quotes from Zafiro -- which is tempting
15 to do when you have predictable patterns of advocacy, right?
16 The prosecution picks the two points that they want -- that
17 they want to bring forth to the court and they keep hammering
18 and hammering and hammering on that, and I understand that.
19 And the defense will also bring forth some arguments and will
20 hammer and hammer and hammer on that.
21 But, Judge, when you look at Zafiro and you do a
22 reading of Zafiro itself, what Zafiro did was it rejected
23 bright line rules. It rejected the proposition that once the

1 circumstances necessitated severance, per se, and in that case
2 they rejected the defense's argument -- it was a marijuana
3 conspiracy case -- and the defense had asked the court to make
4 a per se determination that when you had antagonistic defense
5 that it required that the parties be severed, and, as we know,
6 the court in Zafiro rejected that bright line approach and in
7 fact talked about not having a bright line approach.
8 And what Zafiro is is an affirmation of the
9 judiciary's discretion and the sound judgment of a judge. And
10 it acknowledges that every case is not the same, every case
11 will have different facts, and despite the fact that on these
12 facts they found that there was -- the case should not be
13 severed. That's not to say that in another case with a
14 different set of facts that may not be the case.
15 And that's what Zafiro empowers and affirms the court
16 to do. It doesn't say, which is what I think the prosecution
17 is asking you to do, which is the reverse of Zafiro's intent,
18 which is asking you to adopt a bright line test and a bright
19 line rule that says there is a preference always for a trial
20 to remain joint or a trial not to be severed, and that is
21 absolutely not what Zafiro stands for. Despite the fact that
22 the prosecution tries to fit that into the mold, it is not
23 what it stands for. Zafiro stands for discretion. Zafiro

1 stands for each judge who is on the front line of every case
2 taking a dispassionate look at the complexity of that case and
3 making a determination, based on the facts of that case, to
4 the best of their ability, whether justice would be better
5 served by keeping a trial together joint or by severing and
6 having separate defendants in that case.
7 As I have said, Judge, two of the things Zafiro talks
8 about, the complexity of the case, the degrees of culpability
9 and then the facts of the case. Now, two things on degrees of
10 culpability, Judge. I'm going to resist the temptation to
11 engage in a lengthy argument about the degree of
12 Mr. al Hawsawi's culpability, but suffice it to say that I
13 disagree and that the facts will not support the type of
14 culpability that the prosecution has alleged here and
15 certainly not that that culpability is on par with some of the
16 co-accused in this commission.
17 On two separate instances the prosecution has made
18 this statement in their pleadings to the commission, "The
19 arguments of counsel on facts should not be considered by this
20 commission in determining severance." They made that argument
21 in AE 039 in response to your motion for an order to show
22 cause, and they made it in responses to Mr. al Hawsawi's
23 motion.

1 And to that extent that is true, we need not get into
2 a lengthy argument about our differing advocacy positions on
3 Mr. al Hawsawi's culpability, but suffice it to say that we do
4 expect that there are going to be markedly different degrees
5 of culpability in this case, and I would ask you to take that
6 into account when you are looking at the severance motion in
7 this case.
8 I would also ask you to pay particular attention to
9 Justice Stevens' concurrence in Zafiro which the prosecution
10 has very I think conveniently failed to refer to during their
11 advocacy on this point, but Justice Stevens in Zafiro concurs
12 in the decision concerning the severance, in not necessitating
13 the severances. But here is what Justice Stevens says in
14 addition in that opinion. He does not join the enthusiastic
15 preference for a joint trial, so where he kind of parts
16 company is in saying that we are going to affirm or we are
17 going to set forth the proposition that we enthusiastically
18 advance the position that there is a preference for joint
19 trials in all of these cases, and here is what he says. He
20 says, "There will almost certainly be multi-defendant cases in
21 which a series of separate trials would not only be more
22 reliable, but also more efficient and manageable than some of
23 the mammoth conspiracy cases which the government often elects

1 to prosecute."
2 Judge, I would submit to you that that is sound
3 advice, that is good law, and in this analysis that should be
4 applicable here. This is certainly -- if there ever was a
5 multi-defendant case where a series of separate trials could
6 lead to more reliable results, this is certainly the time,
7 this is certainly the place, and this is most certainly the
8 system that demands that type of credibility or that type of
9 step towards that type of credibility.
10 There are already enough indications that this is not
11 that type of system: Government intrusions, monitoring, FBI
12 investigations. Certainly if we are to take a step towards a
13 modicum of justice, certainly if we are to take a step towards
14 more reliability, certainly if we are to take a step towards
15 more efficient and more manageable trials, certainly this is
16 the case that Justice Stevens in Zafiro had in mind.
17 He also goes on to say in all cases that the court
18 should be mindful of the serious risk of prejudice and
19 overreaching that are characteristic of joint trials. Now,
20 Judge, I am an advocate for Mr. al Hawsawi. It is my job and
21 my duty. Justice Stevens is stating a truth that we all know
22 and that is there is serious risk of overreaching and a
23 serious risk of prejudice in joint trials.

1 Justice Stevens from Zafiro also refers to the case
2 of Krulewitch v. United States cited in Zafiro 336 U.S. 440,
3 and he cites to Justice Jackson's opinion in the Krulewitch
4 case, Judge, and that's 336 U.S. 440. And what he invites the
5 reader of Zafiro to do, and in this case, Judge, invite you to
6 do as well, because it is easy to miss that case, it is to
7 read that opinion where Justice Jackson talks in great detail
8 about the concerns in joint trials, particularly ones where
9 you have a conspiracy that is charged as part of the offense
10 because he recognizes what everyone recognizes, which is that
11 when you bring a conspiracy count, it gives the prosecutor the
12 best tool and tool box to try and take people with disparate
13 degrees of culpability and try to convict them as well as
14 people at all higher levels of the conspiracy. And so
15 Justice Jackson cites to Judge Learned Hand and makes a couple
16 of statements that I think are appropriate and that mirror our
17 concerns in this case, and it says so many prosecutors seek to
18 sweep within the dragnet of conspiracy all those who have been
19 associated in any degree whatever with main offenders. The
20 opportunities for great oppression is great with such a
21 doctrine.
22 And that is the case, Judge. Again, it's not -- it's
23 not about engaging now and what the degree of culpability is,

1 what alleged facts or what alleged evidence exists against
2 Mr. al Hawsawi, but the recognition that in a joint
3 prosecution, particularly with a conspiracy count, there is
4 that great risk of prejudice and that's the starting point.
5 That's the starting point only I think for prejudice for the
6 analysis. Zafiro says all of these things and I thought it
7 was only fair to highlight some of those since the prosecution
8 has shied away at best from making an honest and full
9 discussion of Zafiro.
10 So, Judge, you may talk about the prejudice to
11 Mr. al Hawsawi. Well, Judge, certainly you recognize one of
12 the concerns that we have, which is the orderly progress of
13 this case and the speedy trial, which as you indicated in your
14 order to initially sever Mr. Binalshibh's case is an
15 individual right to each accused under 707 Military
16 Commissions Act, and you identified that, and that is correct.
17 So I know the question, without saying goes -- and I
18 know you know the answer to that, the question is have I filed
19 a demand for speedy trial. The answer is, no, Judge, I have
20 not filed a demand for speedy trial. And I know that is a key
21 ingredient and that is a salient point the prosecution makes
22 in their response to us. But, Judge, I would tell you that
23 that's not the end of the analysis.

1 When you are asking a court, when you are asking the
2 commission to vindicate to protect a right of an accused, the
3 only circumstance under which you are called to act is not one
4 I've actually put pen to paper and filed a written demand for
5 discovery -- excuse me, for a speedy trial -- and one of the
6 cases that the prosecution cited to you in argument with
7 Mr. Harrington on Mr. Binalshibh's motion talks about the
8 affect of a speedy trial and what it means when an accused
9 files a motion for severance. That case is Vasquez. Vasquez
10 was at 918 F.2d. 329. And here is what it says about a motion
11 for severance.
12 It says, "A motion for severance alerts the court to
13 a claim of a defendant of pretrial prejudice and it also acts
14 to prevent the accused from acquiescing to pretrial delays and
15 later claiming that somehow they were prejudiced."
16 So in the Vasquez court's opinion, when a litigant, a
17 codefendant files a motion for severance, it does two things:
18 It alerts the commission, it alerts the court that there is a
19 potential claim of pretrial prejudice that will hopefully spur
20 the court to act, to take some action to address that issue,
21 but it also puts a responsibility on the codefendant to make
22 that affirmative step so later they can't be heard to complain
23 and say, well, I didn't move for a severance, I didn't take

1 affirmative acts to protect that right, but now I am
2 complaining there should have been a speedy trial. And in
3 that case what they actually did was they rejected the
4 defendants on those facts, the defendants' motion on those
5 facts because they hadn't filed a motion for severance.
6 So while we have not filed an actual demand for
7 speedy trial, we have taken the affirmative step of filing a
8 motion for severance. We are alerting this court that we no
9 longer acquiesce to sustained and long pretrial litigation
10 delays that are unrelated to Mr. Hawsawi's case and we are
11 asking the court to act to protect that and to protect the
12 orderly progress of Mr. al Hawsawi's case.
13 Now, what do I mean by orderly progress? What I mean
14 simply is to get to the next motion and the next motion and to
15 address the legal issues that need to be addressed so we can
16 progress towards some kind of resolution. It does not mean I
17 am asking you to take us to trial the next week or the week
18 after that. Let me be clear about that. But it does mean
19 that we believe that we need to be separate in order for you
20 to protect Mr. al Hawsawi's modicum, as you said, of timely
21 justice, and I'm going to borrow your phrase. I know you like
22 it when we quote you back, or maybe you don't, but that's the
23 language that was used and I think it's appropriate.

1 Having said that, Judge, there is a very lengthy
2 list, and we have highlighted some of those for you in terms
3 of issues that need resolution. We of course have AE 008
4 which the very first day of arraignment I asked the commission
5 to address, and of course that's morphed into much larger
6 litigation, but there is a host of other issues that remain on
7 the docket that we could get to, that we could address, that
8 we could dispose of, that we could make positive progress on
9 if Mr. al Hawsawi was allowed to be in a more manageable
10 situation, a more efficient situation, one that doesn't
11 involve promises to the court of either the judge is going to
12 take two years to hear that or we have no idea how long that
13 is going to take, or the more optimistic hey, Judge, we are
14 going to be done with this in a month, we are going to be done
15 with this in two months. Trust us. I promise you everything
16 will be just fine if you just stick together, and you keep us
17 all together, and you keep the accused altogether. If you
18 just give it a little bit more time, everything is going to be
19 just fine, which is the prosecution's argument, in essence.
20 Now, Judge, I think you raise a good point, which is
21 let's not try to predict the future, let's look at what has
22 been, and let's look at the way that we have litigated and the
23 progress that we have had. And is there really any realistic

1 idea or aversion or reason we think that type of litigation
2 will not be what we will see moving forward with four, five
3 co-accused in one courtroom? There isn't. It's not. It's
4 not realistic to say that.
5 And I would ask you to reject that rationale. I
6 would ask you to reject it based on not being any fact, it's
7 based on fiction, and it's based on saying to the commission
8 it's going to be fine, and we will be past this very quickly
9 and then we will get back to business as usual.
10 Judge, business as usual has not been -- I am not
11 faulting anybody or anything, but it has not efficient, it has
12 not been what the prosecution is telling the commission that
13 it will be, and I think this is a case that like
14 Justice Stevens talks about if there ever was a case that
15 requires this type of efficiency, this is such a case.
16 We have also seen, Judge, in the prosecution's
17 responses to our motion where they have admitted that it is
18 their intention to introduce acts of uncharged misconduct
19 against Mr. al Hawsawi. The prosecution's position legally is
20 that charge, on a charge of misconduct, on charges of
21 misconduct such as additional plots, additional operations or
22 different instances where people were killed or maimed are and
23 will be relevant to establish the existence of hostilities.

1 So we know that the prosecution has a legal theory
2 that they are submitting to the commission for which they
3 intend, they don't call it uncharged misconduct, but that's
4 what it is. It is conduct that relates to other accused where
5 Mr. al Hawsawi had absolutely no involvement in or allegation
6 of involvement and there is not even a scintilla of evidence
7 or facts that there was any kind of involvement in his case.
8 Look at their response. It's in there. It's clear and as
9 plain as day. They have telegraphed their intent, and we know
10 that that's where they are going. We seek to avoid that.
11 And, again, going back to the premise that we want
12 Mr. al Hawsawi, if he is to be judged, to be judged based on
13 facts and an honest assessment of the facts as they are
14 alleged against him.
15 Judge, we have in the past few months over 600
16 redacted -- well, not redacted, but they are summarized
17 statements presumably that were obtained in the period of time
18 where Mr. al Hawsawi and his co-accused were detained in black
19 sites or in CIA rendition sites. There is still the subject
20 of litigation in this commission about how much information is
21 provided in the documents, but the point is we have over 600
22 of those statements. We expect that there will be over a
23 thousand statements when we take into account the statements

1 of the so-called clean team and the statements that were
2 provided to each accused concerning their interrogations with
3 the FBI.
4 So you have thousands of statements with thousands of
5 assertions about what one person did or didn't do, what one
6 person's role was or wasn't. And what the prosecution is
7 telling you -- well, they are telling you multiple things. On
8 the one hand, and I am still not clear on this, they are
9 telling you we are not going to use any statements, but on the
10 other hand they are telling you but we are going to work with
11 you closely on the redactions to those statements. So -- and
12 you have heard both of those motions, you have heard it from
13 General Martins, you have heard it from Mr. Trivett, you have
14 heard it constantly, step to the left, step to the right, and
15 they continue to make both of those assertions.
16 Well, the fact is there are over a thousand
17 statements. There are over a thousand statements
18 attributed -- attributed I say to these men because the
19 litigation on those conditions and the techniques used to
20 extract those statements is going to be extensive. But the
21 fact of the matter, Judge, you know there are thousands of
22 statements that we are going to litigate and their remedy to
23 that is that redactions, that redactions in that instance will

1 be an appropriate remedy.
2 We also have concerns concerning what I think you
3 identified in your original AE 039A where you asked the
4 question about sentencing issues, if sentencing issues or
5 sentencing becomes necessary, what happens when you have the
6 aggravator/mitigator problem of statements between co-accused.
7 And those are all -- those are all real; those are all issues
8 that aren't going to go away; those are all issues that would
9 be better served by an independent trial, Judge, independent
10 facts. You don't have to engage in all these gymnastics and
11 all these different positions that the prosecution has put
12 forth to now.
13 I do not think -- and I do think that if
14 Mr. al Hawsawi's case was to be tried on his own merits, it
15 would be a more efficient process; it would be a more reliable
16 process; it would be a process that would bring us closer to
17 some -- some pursuit of individual justice based on those
18 facts. Again, that's the essence, that's the essence of our
19 request to this commission.
20 Judge, that's all we have for now.
21 MJ [COL POHL]: Trial Counsel?
22 CP [BG MARTINS]: Good afternoon, Your Honor.
23 MJ [COL POHL]: Good afternoon.

1 CP [BG MARTINS]: Your Honor, Mr. Hawsawi has not met his
2 burden in this motion seeking severance of his trial from the
3 other accused. After first briefly reviewing the standard
4 which has been visited over the last couple of days, reviewing
5 it for a couple of points of emphasis that apply here, I would
6 like -- so that's first. I would like, second, to examine and
7 rebut some of the arguments made by counsel; and finally,
8 third, I would like to highlight some of those factors that go
9 into a trial judge's discretion and how the trial judges,
10 among the cases cited by the parties, tend to weigh those
11 factors in complex cases.
12 MJ [COL POHL]: Just to be clear, because Commander -- or
13 Mr. Ruiz also referred to it, and it is part of the record, is
14 on Monday and Wednesday I had a separate hearing altogether
15 with just Mr. Binalshibh's team that dealt with severance.
16 Mr. Ruiz made a number of references back to what happened at
17 that hearing. Technically, I am not sure that that hearing is
18 part of this case, so just to make that clear.
19 CP [BG MARTINS]: I understand. This stands on its own
20 before you in your considering each accused individually, and
21 that of course is required under the rules, Rule 812, that
22 each individual accused receive the rights and privileges
23 accorded him in a separate trial. So we acknowledge that.

1 Your Honor, so first, the legal standard for
2 severance -- and you have referred to it, counsel has referred
3 to it. The Zafiro case is the leading case, an eight to
4 one -- actually, a unanimous decision of the court with eight
5 justices joining Justice O'Connor on the preference for joint
6 trials, and I will get to that a bit later.
7 But the standard, we believe that when defendants
8 have properly been joined, a district court should grant
9 severance only if, one, there is a serious risk that a joint
10 trial would compromise a specific right of one of the
11 defendants or prevent the jury from making a reliable judgment
12 about guilt or innocence, and that standard is important. I
13 would like to just point out a few things.
14 The initial language about when a defendant has
15 properly been joined is critical. This case has been joined
16 properly and the Zafiro court actually cites to the rules
17 under the Federal Rules of Criminal Procedure, Rule 8(b),
18 which is the standard for joining defendants, and the rule,
19 Rule 14, which is the standard for relief from prejudicial
20 joinder. Importantly, Rule 8(b) is the same language as our
21 rule for joinder, and counsel referred to it. It's actually
22 601(e)(3).
23 We have a series of acts or transactions in the

1 allegations that are the same, so joinder is proper here.
2 These accused have all been charged with the identical
3 offenses and the identical overt acts in the common plan and
4 conspiracy. All of the charges are identical, and they have
5 been sworn out, they have been referred after the convening
6 authority received advice and have been put before this
7 commission.
8 And then Rule 14 in the Zafiro court's references is
9 to our -- it tracks the same standard as our 906(b)(8) that
10 counsel also cited this. This is motions for appropriate
11 relief. One of them is severance where the government or the
12 accused would be prejudiced.
13 And then there is language in the rule also relating
14 to a common trial. Your Honor, we submit that the language
15 with regard to common trials relates to a different legal
16 analysis. Common trial, although often said to be the same,
17 relates to a situation where you can have defendants who have
18 different charges and the evidence is very much overlapping,
19 so there can be reasons to bring the same -- the different
20 accused in front of the same commission or court.
21 So the joint trial, though, where the allegations
22 state the same acts or series of acts or transactions or
23 series of transactions is what applies here. And I bring that

1 up because within our rules, Rules 8(b) and 14, the analysis
2 to the Rules for Court-Martial -- which the Joint Committee on
3 Military Justice tells where they got the language. They
4 actually refer to the Federal Rules, and so the correct body
5 of law is Zafiro. We are pointed to that same standard which
6 is construed by the federal courts, and so that Zafiro
7 standard is important when an accused is -- or when a trial
8 is -- or charges are properly joined. So that's the standard.
9 I would like to go down and rebut some of the claims
10 of counsel. He begins with speedy trial. So specific trial
11 right, compromises a specific trial right. Counsel talks
12 about speedy trial but concedes that he hasn't asked for one
13 under the mechanism given him in Rule 707. So 707(c)(2)
14 actually gives him a remedy, and he acknowledges he hasn't
15 sought it. He does state that Mr. Hawsawi is not acquiescing.
16 He states that what I really mean is I want to get to my
17 motions, but this is not the specific trial right that the
18 court speaks of that he speaks to -- that he needs to show
19 compromise of in the standard, in that Zafiro standard.
20 He refers to Vasquez. Your Honor, Vasquez is the
21 case that indicates when you have defendants who have been
22 properly joined, then you have a unitary clock and the
23 Rule 707 language related to interests of justice is fully

1 consistent with the reasonable delay standard that you see in
2 Vasquez. In there you have a very significant delay that
3 because you had proper joinder in Vasquez, speedy trial was
4 not compromised. And, again, we have to speak of a specific
5 trial right that has not been invoked here. And, Your Honor,
6 so that's the rules relating to speedy trial.
7 There is also a reasonableness and a common sense
8 aspect to this. Mr. Hawsawi has significantly joined many
9 motions, is in this proceeding joining many motions with the
10 other accused on many matters, and the other things in the
11 case that are resulting in delay can be attributable to
12 Mr. Hawsawi's counsel.
13 There is a discussion of -- and we should get, we
14 would hope, to 013, I think it's II today, relating to the
15 memorandum of understanding. This is certainly before
16 Your Honor, but to speak about speedy trial while at the same
17 time not signing a memorandum that would enable counsel to
18 receive classified discovery when the memorandum was ordered
19 in the second amended memo or the amended memorandum of
20 understanding that you filed as part of the protective order
21 was last December, to not sign that and not get classified
22 discovery underway, certainly has a right to object to it and
23 file legal motions.

1 But the convention against torture motion, the CAT
2 motion, you have resolved. He long since could have signed
3 that, and to state that he is seeking speedy trial, which is
4 the colorable specific trial right here, and to not be signing
5 a memorandum that statute, because it is a standard used in
6 CIPA cases, requires he sign, is something that ought to be
7 factored into that reasonable delay test that is part of the
8 interests of justice analysis in Rule 707. So that speedy
9 trial has clearly not met a burden of showing that a specific
10 trial right in the area of delay or speedy trial is met.
11 Counsel spoke of prejudicial spillover, Your Honor,
12 and he quoted or -- he quoted from Krulewitch,
13 Justice Jackson's eloquent statement about the risks of
14 associating individuals. Your Honor, that is not this case.
15 Justice Jackson importantly was also prosecutor in an
16 important conspiracy and common plan case and spoke eloquently
17 of the need for group doctrines of criminal liability. And
18 the prejudicial spillover discussion again does not speak to a
19 specific trial right that is going to result in a compromise
20 of that at trial or render a jury's verdict unreliable. He
21 hasn't addressed that.
22 The common plan allegations specifically and
23 individually name his client and his -- and the connection of

1 those acts that are alleged to the larger common plan, and in
2 fact the case -- cases that are cited by both parties indicate
3 that joint trials get at that kind of relative liability,
4 actions relative to the others in the common plan effectively.
5 And in fact that's one of the justifications for them in the
6 cases, that complexity actually weighs in favor of joint
7 trials.
8 Now, the commission has important tools and important
9 mechanisms for protecting against prejudice and prejudicial
10 spillover, instructions, the rules of evidence apply, classic
11 examples of this are in the whole Bruton series of cases.
12 Richardson v. Marsh is one of these cases where a redaction --
13 redactions are made to statements to ensure that an accused is
14 not mentioned, and it is in this vein that the Zafiro
15 statement that severance is a drastic remedy, that those
16 things should be understood.
17 I'm sorry, go ahead.
18 MJ [COL POHL]: When you talk about statements, the
19 government indicates that they intend not to use any
20 statements from one accused against another accused; is that
21 correct?
22 CP [BG MARTINS]: That is correct, Your Honor.
23 MJ [COL POHL]: That includes findings and sentence?

1 CP [BG MARTINS]: Correct, Your Honor. The Bruton
2 doctrine we are very much mindful of. The convening authority
3 was advised in the very rules that counsel is citing in 601 to
4 be aware of evidentiary complications that could come from
5 joinder. This was charged and referred with an understanding
6 of those rules, and Bruton counsels that we must remove and
7 redact and not allow statements that are very relevant -- may
8 be very relevant to one accused to allow that spillover
9 effect. So yes, we do not intend to use them.
10 MJ [COL POHL]: And about your response to Mr. Ruiz's
11 comment about what he characterizes as 404(b) evidence?
12 CP [BG MARTINS]: Absolutely. We are not going to use
13 uncharged misconduct. He puts a caveat on his term. If one
14 reads the charge sheet there is a description of the elements.
15 One of those is to prove up the agreement and the overt acts
16 and what was that agreement to do.
17 It also -- it also requires us to prove one of the
18 elements of each of the offenses, that it occurred in the
19 context of and associated with hostilities, but we are going
20 to establish the accused's role in this common plan and that
21 is, that is the prerogative of ----
22 MJ [COL POHL]: I understand, but do you intend to prove
23 hostilities? Do you intend to introduce other evidence of

1 al Qaeda activities unconnected -- or not on the discharge
2 sheet, for want of a better term?
3 CP [BG MARTINS]: No. We are going to prove all of the
4 overt acts. We are going to describe that common plan.
5 Certainly the charge sheet isn't all of our proof.
6 MJ [COL POHL]: I understand that, but what I am saying is
7 there are other acts of al Qaeda, alleged acts of al Qaeda
8 that could be used to show hostilities that aren't on --
9 aren't charged to these particular accused, correct? And my
10 question is does the government ----
11 CP [BG MARTINS]: Your Honor ----
12 MJ [COL POHL]: I'm trying to -- I am not quite ----
13 CP [BG MARTINS]: ---- I can't tell if counsel was
14 referring to the 119 issue relating to unprivileged
15 belligerency. I couldn't understand what he was referring to.
16 If you might give me a moment, I would like to talk to counsel
17 about what specifically he was raising there.
18 MJ [COL POHL]: Sure.
19 CP [BG MARTINS]: Your Honor, the existence of hostilities
20 at the time of the attacks is an important issue related to
21 jurisdiction, and ultimately it's going to be something that's
22 got to be proved. So the existence of hostilities with regard
23 to there not being a declared war, authorization to use

1 military force, we do intend to present evidence of al Qaeda
2 acts, attacks that occurred prior to the September 11 attacks
3 to establish that we were in an armed conflict at the time of
4 the conduct that's on the charge sheet. So we will -- we will
5 refer to those.
6 MJ [COL POHL]: Okay. I'm not making any ruling. I just
7 wanted to clarify this.
8 CP [BG MARTINS]: I understand. And we submit that there
9 is still a requirement to show this accused's connection to
10 this plan beyond a reasonable doubt and all of those rules,
11 mechanisms for preventing prejudicial spillover Your Honor
12 has.
13 But we are proving that we are in a state of armed
14 conflict with al Qaeda and those -- describing that those
15 things took place and that we were in an armed conflict with
16 al Qaeda is going to be relevant upon proving membership, but
17 would take exception to the notion that that is going to
18 create prejudicial spillover that brings us within the
19 severance standard of Zafiro and the prejudice rule in 906.
20 Your Honor, counsel also then went on to
21 administration of justice issues and spoke about inconvenience
22 and so forth here. And although he did not specifically bring
23 up his second supplement which is attached, I believe an

1 e-mail related to the difficulty of getting a meeting, we
2 would ask that if you are going to consider that in this,
3 under the rubric of administration of justice, judicial
4 economy, that you also take notice of -- we have tried to pull
5 together the fuller picture of counsel and getting meetings
6 and so forth, and we would seek that you also consider in that
7 vein our submissions in Appellate Exhibit 254.
8 So we would ask that if you are going to consider his
9 second supplement on this issue under the rubric of judicial
10 administration, economy and so forth, that you also consider
11 our submission, which is our effort to get the full picture of
12 counsel's ability to -- opportunities to speak with his
13 client, to put the e-mail that you have got into that larger
14 context. And those are our attachments and our argument in
15 the 254 series.
16 Your Honor, he spoke about use of the Federal Rules
17 being convenient, and, again, we are using the same standards.
18 I wanted to emphasize that this commission is in a closely
19 analogous situation to federal district courts who are
20 considering complex cases and would commend the cases among
21 those cited that are federal district judges dealing with this
22 case to you to show that that Zafiro standard is not cited as
23 just a case about judges' discretion and individual

1 case-specific analysis, which is true, but it does state a
2 strong preference.
3 And Justice Stevens' concurrence differing on that
4 point where he says I don't share this preference and I
5 wouldn't have expressed it that way is precisely what shows
6 how the eight justices who decided Zafiro and are in the main
7 opinion, the majority opinion, see this rule. This does
8 establish a strong preference. So this citation to Federal
9 Rules, you are dealing with a complex case with five
10 defendants charged in a tightly alleged conspiracy and common
11 plan that took place across 167 overt acts, we would commend
12 that to you.
13 Your Honor, he spoke about differing degrees of
14 culpability, did mention Zafiro being an antagonistic defense
15 case, didn't necessarily analogize that here, but he did speak
16 heavily of differing degrees of culpability. The cases direct
17 us to look at what is really the case. He is alleged to have
18 done very culpable things, very serious things of -- counsel
19 does quote, as he must, the more than 20 overt acts that he is
20 specifically mentioned in and their seriousness.
21 So the differing degree of culpability discussion
22 that you see in the briefs, we would ask you to look at the
23 larger picture of what he is alleged to have done. And when

1 one thinks about what evidence may come in about culpability,
2 to consider whether that can be impeached if it is seen as --
3 as exculpatory, consider what that larger body of evidence,
4 how it impeaches that, how it shows it not to be as
5 exculpatory as possible.
6 The cases cited about whether someone may testify in
7 one's behalf from among codefendants are these Boscia factors,
8 Your Honor, and in that light we would ask the court to
9 consider the case of United States v. Cooya, spelled
10 C-O-O-Y-A. We cite it in our brief. It's the 2012 case from
11 the Middle District of Pennsylvania.
12 And it cites these factors from the Third Circuit in
13 Boscia -- I spell B-O-S-C-I-A, for the reporter -- 1978 case.
14 The four factors are that one must consider whether a
15 co-accused is going to testify and what's the real likelihood
16 of that, the specific likelihood of that, and then whether
17 it's truly going to be exculpatory, whether it can be
18 impeached and then the economic factors, administration of
19 justice factors are the fourth one. And we would submit that
20 under that test this whole discussion of differing degrees of
21 culpability, the ability to establish that weighs heavily in
22 favor of continued joinder and against the accused on
23 severance.

1 Your Honor, the third thing I wanted to just briefly
2 touch on is the factors and how they are weighed by trial
3 courts, I would commend to you the U.S. v. bin Laden case,
4 Southern District of New York, 2000 case 109 F.Supp.2d at 211,
5 and in that case you have a trial judge, we would submit with
6 a lot of similar issues as Your Honor, looking through. It
7 starts with that Zafiro standard and he spends 11 pages going
8 through these different issues and how to weight them. I
9 believe it's an instructive case and it's not an appellate
10 case ruling on an action that has already occurred down at
11 trial level. This is a trial judge actually wrestling with
12 it.
13 And importantly Judge Sand talks about complexity.
14 He says that's one of the things that contributes to the fair
15 administration of justice in a joint case. He talks about the
16 need for specific trial rights to be compromised and for the
17 analysis of whether some other remedy that's less drastic can
18 be used, instructions making sure that statements that are
19 used aren't used against the particular accused seeking
20 severance and so on.
21 And then very importantly, the judge there considers
22 economic factors, but it's not purely judicial economy. It's
23 the larger factors of fair administration of justice, the

1 witnesses having to be called many times, in this case over a
2 hundred, the trauma to witnesses. So we would ask you to look
3 at that case, Your Honor, and see why in this case severance
4 is not the proper remedy, and it hasn't been established by
5 counsel to his burden.
6 If -- Your Honor, if I could just check with counsel,
7 see if there's anything else.
8 MJ [COL POHL]: Sure.
9 CP [BG MARTINS]: Your Honor, on that issue of
10 hostilities, we are not going to be alleging that the
11 individual accused were actually involved in those. We are
12 going to be using it for that limited purpose of establishing
13 that this armed group, that we do state that they were a part
14 of and had joined, was in a state of armed conflict with the
15 United States, and that limiting instructions would be
16 appropriate on that. But in order to establish that we were
17 in a state of armed conflict, which is a part of the subject
18 matter jurisdiction of those offenses, it is something we have
19 to establish, but we are mindful of the need to ensure that
20 that is not attributed -- those specific acts are not
21 attributed to these accused.
22 Subject to your questions, Your Honor.
23 MJ [COL POHL]: I have none. Thank you.

1 CP [BG MARTINS]: Thank you.
2 MJ [COL POHL]: Mr. Ruiz, anything further?
3 LDC [MR. RUIZ]: Judge, on the issue of speedy trial and
4 the discussion with respect to the Vasquez case that we have
5 asked you to consider, General Martins indicates that for --
6 the proposition that once the case is properly -- properly
7 joined, it is in fact what carried the day in Vasquez, and I
8 think the inference is proper joinder of co-accused thereby is
9 the end of the analysis, and I don't think that at all was the
10 analysis was in Vasquez.
11 And the point that I wanted to make for the
12 commission is the one that is discussed in the decision
13 itself, and I'm going to quote for you right now. This is
14 what the Vasquez court says, and, again, it's in relation to a
15 comparison between two co-accused, one who was seeking
16 severance, one who had additional delays that were unrelated.
17 In this case one of them had a competency evaluation that took
18 about eight months to get that defendant to his competency
19 evaluation, the second defendant was not part of that. So
20 that's kind of the underlying fact pattern. And what the --
21 despite proper joinder, despite them being properly joined,
22 what the court says is that it seems sensible to require a
23 greater level of justification for the exclusion of a period

1 of delay from the speedy trial clock when the delay affects
2 the codefendant on the sidelines, rather than when you know it
3 affects a defendant whose competency is at issue.
4 It then goes on to address the defendant on the
5 sidelines and says, however, Renteria presents a stronger
6 claim under the act because he is the codefendant in the
7 situation described above and receives greater protection
8 under the act, so the codefendant being on the sidelines
9 receiving greater protection under the Speedy Trial Act.
10 And I'm not saying that we are working under the
11 Speedy Trial Act, but the comparison is the same, which is
12 Mr. Hawsawi is decidedly the co-accused on the sidelines in
13 this case. There are a number of issues that the commission
14 is working through that are not of his own doing and that have
15 nothing to do with Mr. al Hawsawi's conduct.
16 And the prosecution tries to nevertheless make the
17 argument that it is counsel's conduct that can be attributable
18 to the delay, and in order to do that you have got to do some
19 gymnastics here, but what it keeps coming back to is the
20 memorandum of understanding and what the prosecution has
21 characterized as our decision to not receive classified
22 information.
23 And also, quite frankly, Judge, you made that

1 characterization earlier this morning, that it is the
2 defense's actions that continue to inhibit that, Judge, and
3 with all due respect, I take issue with that characterization.
4 The comment you made was proper. The rule does say that you
5 can issue a protective order when it has been requested by the
6 prosecution as you have done in this case. You did, in fact,
7 go ahead and issue the protective order. There is no
8 requirement in that rule for a memorandum of understanding.
9 In essence, I think it says what ought to be obvious, that if
10 you issue a rule, it applies, and it applies to the counsel in
11 the case.
12 So the fact that we have sought to litigate and
13 advance legal positions that push back on what we see as a
14 fundamental encroachment on Mr. Hawsawi's right to complain as
15 a victim of torture, inconsistent with U.S. law, inconsistent
16 with our stated intentions of not prohibiting victims of
17 torture to seek recourse, that's the law. I didn't make it
18 up. None of the counsel on this side of the table made it up.
19 We brought legal challenges, you ruled on those
20 challenges, Judge, we looked at your ruling, we looked at the
21 language in the ruling. This is what advocacy is. And then
22 we made additional charges. Our challenge in Mr. al Hawsawi's
23 case is 013EEE. Now, there has been a lot of reference to

1 013III. 013EEE asked you simply to conform the language that
2 remains in the protective order with the language of the
3 opinion which you issued in AE 002 -- I can't remember the
4 number, but the convention against torture decision. That's
5 what we asked you to do.
6 And we are the only ones who have subverted the
7 ability to obtain discovery is fundamentally wrong. You have
8 issued an order that applies to us. I suspect that if we were
9 to violate that, there will be repercussions. So that is an
10 existing order, even though we continue to challenge it. You
11 engaged in the same analysis with respect to 292 and affirmed
12 today that there is an existing order ----
13 MJ [COL POHL]: So it is your position that the current
14 protective order applies?
15 LDC [MR. RUIZ]: Is that not your position, Judge, that
16 the protective order you have issued applies?
17 MJ [COL POHL]: I am just saying ----
18 LDC [MR. RUIZ]: I mean, doesn't it require our
19 acknowledgment and a signature ----
20 MJ [COL POHL]: No, but the question is, since you brought
21 this issue up, is that you wish -- we litigated it a lot, I
22 made changes, then I issued a memorandum of understanding
23 which struck to me is relatively innocuous. And now we're

1 refusing to sign it because it prevents -- as I understand the
2 pleading, it prevents defense counsel from giving classified
3 information to their accused.
4 LDC [MR. RUIZ]: No. Then you fundamentally misunderstand
5 our motion, Judge, and that's an issue. That's not what we
6 have raised.
7 MJ [COL POHL]: I'm talking about III.
8 LDC [MR. RUIZ]: I am talking about Mr. Hawsawi's motion,
9 013EEE. Mr. Nevin can talk about 013III. He raised the
10 motion, we joined and are a part, and I am not prepared to
11 address 013III ----
12 MJ [COL POHL]: Let's not go down the 013 road because it
13 is not before us.
14 LDC [MR. RUIZ]: General Martins went down the 013 road,
15 and I just wanted to have an opportunity to respond and to
16 push back on the characterizations, not only of the
17 prosecution, but this court that it is our conduct that has
18 prohibited us from receiving classified information, because
19 it is fundamentally wrong.
20 We are properly cleared counsel. The case law that
21 was cited for the proposition that we should somehow face an
22 inquiry or we will be removed from this case or cases where
23 defense counsel refused to obtain or to go through a security

1 clearance process ----
2 MJ [COL POHL]: Mr. Ruiz, we are not discussing 013. Move
3 on.
4 LDC [MR. RUIZ]: General Martins discussed 013.
5 MJ [COL POHL]: Move on.
6 LDC [MR. RUIZ]: The fact of the matter is the conduct in
7 that case and the point that he has made has nothing to do
8 with this now.
9 MJ [COL POHL]: Then you don't need to discuss it. Move
10 on to the rest of 299.
11 LDC [MR. RUIZ]: Judge, if the prosecution wants to
12 provide me with classified information, I will receive it and
13 treat it accordingly. There is nothing impeding that.
14 MJ [COL POHL]: I will say it for the last time. Move on
15 from that issue.
16 LDC [MR. RUIZ]: Very well.
17 MJ [COL POHL]: Anything further on 299?
18 LDC [MR. RUIZ]: Mr. Hawsawi has a specific right.
19 Individualized justice is one that we have discussed and one
20 that we are seeking to have the court vindicate in this case.
21 General Martins also raised the administration of justice
22 argument.
23 I know that this commission is planning on having

1 basically a logistics meeting on the 18th when we return to
2 Washington, D.C., but that is the reality. And there is the
3 second supplement we submitted with respect to 292 addresses
4 that issue, because one of the problems that we continue to
5 face, and I know Ms. Bormann has briefed this extensively in
6 254, we are part of that litigation because for the sake of
7 see efficiency and convenience, it is important to have those
8 issues in the same place.
9 But to the extent you have people who are
10 administering the facilities in Guantanamo Bay, the detention
11 facilities, telling counsel that they cannot support visits,
12 they cannot provide access to the accused in this case because
13 there happens to be another hearing ongoing is simply not
14 acceptable, and it actually betrays the argument that having a
15 codefendant case is somehow more efficient.
16 If we do have an independent docket where the
17 commission administers that docket, then we may have a better
18 opportunity to continue to have visits, but the fact of the
19 matter is that the facts as they exist are that
20 JTF-Guantanamo, the detention facilities, have not been
21 responsive and have not been able to provide visits when
22 multiple counsel visit the island at the same time for
23 multiple hearings, and that is something that we supplemented.

1 General Martins wants to simply dismiss that, and I understand
2 that, because it is not a reality of his representation, but
3 it is a reality of ours.
4 Judge, of 167 -- of 167 overt acts or let's say
5 accusations, 28 of those mention Mr. al Hawsawi. General
6 Martins mentions a tightly knit conspiracy. Only six of those
7 even mention two -- two individuals, including Mr. al Hawsawi,
8 so another co-accused. So I wanted to give the court the full
9 context of how those accusations are laid out in the charge
10 sheet.
11 Judge, with respect to role differentials and
12 relative culpability, I would suggest to you that the best --
13 the best evidence you have in front of you right now is that
14 supplement we submitted to you in terms of what type of
15 evidence we expect to introduce, and when the time comes we
16 will establish relative culpability. The case law refers to
17 declarations, and a declaration in the first supplement has
18 been submitted to this commission.
19 Judge, we ask you to sever Mr. al Hawsawi's case. We
20 do believe that the facts, the evidence, and the burden in
21 this case supports the fact that a separate trial would not
22 only be more efficient, but would more approximate some
23 modicum of justice. So we ask you to sever Mr. Hawsawi's case

1 from the four co-accused.
2 MJ [COL POHL]: Thank you.
3 Trial Counsel, anything further?
4 CP [BG MARTINS]: No, Your Honor.
5 MJ [COL POHL]: Okay. That brings us to 283. Let me hear
6 from Mr. Nevin or Major Wright. Major Wright.
7 DDC [MAJ WRIGHT]: Good afternoon, Your Honor.
8 MJ [COL POHL]: Good afternoon.
9 DDC [MAJ WRIGHT]: In 283 you have a fairly lengthy
10 procedural posture. 283, the notice was filed on 13 March of
11 2014 regarding my pending separation from the U.S. Army. I
12 have a separation order from the U.S. Army. I can tender it
13 if you like for the appellate record.
14 MJ [COL POHL]: No, I will take your word for it. What
15 date is that?
16 DDC [MAJ WRIGHT]: 26 August. I have 12 days left on
17 active duty.
18 MJ [COL POHL]: Okay.
19 DDC [MAJ WRIGHT]: Then you also have before you several
20 pleadings and attachments there under the 283A series to
21 include a 283A supplement submitted on 30 June 2014.
22 MJ [COL POHL]: If I understand it correctly,
23 Major Wright, you were given a choice, go to the Judge

1 Advocate General's Advanced Course or REFRAD?
2 DDC [MAJ WRIGHT]: That's right, Your Honor.
3 MJ [COL POHL]: Both of which events would have prevented
4 you from continuing to represent Mr. Mohammad?
5 DDC [MAJ WRIGHT]: That's correct.
6 MJ [COL POHL]: And of those two choices, you took door
7 number two?
8 DDC [MAJ WRIGHT]: That's right, Your Honor.
9 MJ [COL POHL]: And you said -- the date again, please?
10 DDC [MAJ WRIGHT]: 26 August 2014.
11 MJ [COL POHL]: So let me ask you this. What remedy can I
12 give you? What remedy do you want that is within my authority
13 to give?
14 DDC [MAJ WRIGHT]: Well, Your Honor, we set forth the
15 remedy in 283A that we would ask for you to grant.
16 MJ [COL POHL]: What was that again, please?
17 DDC [MAJ WRIGHT]: Which was to compel my appointment in
18 the case as a civilian attorney.
19 MJ [COL POHL]: And what is my authority to order the
20 United States Government to hire you as a civilian attorney?
21 DDC [MAJ WRIGHT]: You would have the same authority, I
22 would assume, that the convening authority would have and also
23 the Deputy Secretary of Defense would have. You have --

1 within the Office of Military Commissions you have -- as of
2 the most recent order from the Deputy Secretary of Defense,
3 you have 84 civilian positions that are allotted to both the
4 Trial Judiciary, to the Office of the Chief Prosecutor and
5 also to the Office of the Chief Defense Counsel.
6 MJ [COL POHL]: Well, let me ask you this, Major Wright:
7 Have you talked to the Chief Defense Counsel and say, hey, I'm
8 leaving active duty, I would like to continue as a GS
9 employee, will you hire me?
10 DDC [MAJ WRIGHT]: Yes, I have, Your Honor, and the Chief
11 Defense Counsel, this is laid out in some of the
12 pleadings ----
13 MJ [COL POHL]: I understand that. I just want to put it
14 on the record. Go ahead.
15 DDC [MAJ WRIGHT]: She requested the convening authority
16 provide 15 civilian billets for the office I believe back from
17 April 2014 to the convening authority. As of July 10, 2014,
18 the convening authority has neglected to act on that request
19 from the Chief Defense Counsel. There may be more information
20 subsequent to that.
21 MJ [COL POHL]: So what you are telling me is that there
22 is no current authorized billet for you to be hired as a
23 civilian?

1 DDC [MAJ WRIGHT]: That's my understanding.
2 MJ [COL POHL]: And you want me to order the convening
3 authority to provide said billet?
4 DDC [MAJ WRIGHT]: That's correct.
5 MJ [COL POHL]: Got it.
6 DDC [MAJ WRIGHT]: In order to continue the
7 attorney-client relationship.
8 MJ [COL POHL]: I understand. Okay.
9 DDC [MAJ WRIGHT]: I have three additional documents I can
10 submit to you.
11 MJ [COL POHL]: If you wish to. It's up to you. It's
12 kind of your motion.
13 DDC [MAJ WRIGHT]: Sure. If you would like to have
14 another session that is out of the purview of other parties,
15 because it does relate to confidential defense matters, we can
16 certainly ----
17 MJ [COL POHL]: If you want to submit things ex parte
18 under seal, you can, and I will consider them.
19 DDC [MAJ WRIGHT]: Okay. I will do that on paper.
20 MJ [COL POHL]: I am much more comfortable doing that than
21 having a separate session. If you wanted to file a
22 supplemental pleading, feel free.
23 DDC [MAJ WRIGHT]: Thank you. Since I will become a

1 civilian in 12 days, we will get this to you as soon as
2 possible ----
3 MJ [COL POHL]: Okay.
4 DDC [MAJ WRIGHT]: ---- and would request to the greatest
5 extent possible some notice.
6 MJ [COL POHL]: Understanding your requested relief
7 presupposes you are no longer on active duty.
8 DDC [MAJ WRIGHT]: That's correct, Your Honor.
9 MJ [COL POHL]: But you wanted to keep the hiatus of
10 representations to a minimum. By that I mean you leave active
11 duty and then there will be a period of time for the hiring
12 process before, if you get your relief you can be rehired or
13 hired and you want to keep that period of time in between
14 there to a minimum, I suspect?
15 DDC [MAJ WRIGHT]: That's right, Your Honor. In terms of
16 the nature of civilian hire, though, it does not necessarily
17 have to be a GS position. This court has previously provided
18 contract positions to the defendants. It did so with the
19 defense security officers.
20 MJ [COL POHL]: That's true. That's true. But under the
21 Military Commissions Act, other than learned counsel, is there
22 any authority for me to hire -- to direct an attorney to be
23 hired? I mean, the contractors, DSOs fall in the expert

1 consultant category.
2 DDC [MAJ WRIGHT]: Right.
3 MJ [COL POHL]: I think an attorney may be a different
4 animal altogether.
5 DDC [MAJ WRIGHT]: It might be.
6 MJ [COL POHL]: But I am willing to listen to an argument
7 of why it would apply.
8 DDC [MAJ WRIGHT]: It may be -- perhaps I should address
9 that later in briefing, but I would add there is a conflict
10 within the statute, at the very least.
11 MJ [COL POHL]: Okay.
12 DDC [MAJ WRIGHT]: That the passage of the 2014 National
13 Defense Authorization Act which directed the Secretary of
14 Defense and all associated departments to fully and equitably
15 resource the defense.
16 MJ [COL POHL]: If you want to file a supplemental
17 pleading, I will consider it.
18 DDC [MAJ WRIGHT]: Okay.
19 MJ [COL POHL]: Thank you.
20 Trial Counsel, do you want to be heard on this?
21 Mr. Swann.
22 TC [MR. SWANN]: As I see it, Your Honor, AE 283 is simply
23 not a motion, it was simply the major's desire to put the

1 government on notice of the possibility his departure might
2 take place sometime in August. He made a choice.
3 As I look over there right now, one of the things
4 Hutchins tells the court is to see what other available
5 resources are available on this team. Mr. Nevin is hired as a
6 learned counsel. Mr. Sowards provides pro bono service.
7 Major Poteet is a detailed counsel in this case, but my
8 recollection is it's kind of a default proposition in that, if
9 I remember correctly what occurred at the arraignment, that's
10 what we were left with. I know this team has at least two
11 other individuals, two other attorneys that file requests for
12 discovery, so I assume that they are on this case for that
13 purpose.
14 As Your Honor looks to that team, they are resourced,
15 they are available. I too question whether the court has the
16 authority to direct the hiring of a civilian. This is not the
17 Lawyers' Full Employment Act. But that said, I believe that
18 Major Wright has done his share of the work, but the Reserves
19 is a possibility for him to come back if he goes into the
20 Reserves, but the court really does not have the ability to
21 hire him as a civilian attorney. That's Colonel Mayberry's
22 call. She can either get the resources, not get the
23 resources, but that's her call to hire civilians.

1 So with that, Your Honor, we have nothing further.
2 MJ [COL POHL]: Thank you. Major Wright, the last word if
3 you want it.
4 DDC [MAJ WRIGHT]: Your Honor, we will just set forth any
5 additional information on papers.
6 MJ [COL POHL]: Okay. Thank you. Okay.
7 As discussed, not with this prosecution team, but
8 consistent with the 292 litigation from the +start is the
9 commission is of the view that that needs to be resolved
10 before we can get to anything else. As such, I know there was
11 a mention of going to 013 this week, but I don't see how that
12 can be done. Therefore, we will be in recess until the next
13 session.
14 The commission is in recess.
15 **[The R.M.C. 803 session recessed at 1300, 14 August 2014.]**
16 **[END OF PAGE]**
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