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1 [The R.M.C. 803 session was called to order at 0905, 16 June
2 2014.]

3 MJ [COL POHL]: Please be seated. The commission is
4 called to order. Representing the government today is a
5 special trial counsel team. Please put your detailing
6 qualifications on the record.

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

8 MJ [COL POHL]: Good morning.

9 STC [MR. CAMPOAMOR-SANCHEZ]: Fernando Campoamor, special
10 trial counsel. With me today as well is Maia Miller, Kevin
11 Driscoll, and Heidi Boutros Gesch, all special trial counsels.
12 We have been detailed to the military by the chief prosecutor
13 pursuant to memorandums 3(c) and 3(e). We are qualified under
14 the Rules for Military Commissions on 502(3)(D) and we have
15 been previously sworn under Rule For Military Commission 807.
16 We have not acted in any manner that might tend to disqualify
17 us from this proceeding.

18 MJ [COL POHL]: Thank you. Mr. Nevin, are all members of
19 your team here today?

20 LDC [MR. NEVIN]: They are, Your Honor.

21 MJ [COL POHL]: By name, please. I'm sorry.

22 LDC [MR. NEVIN]: Your Honor, I have Captain Wright, Major
23 Poteet -- Major Wright, excuse me, and Major Poteet and

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1 Mr. Sowards and I are at counsel table. I believe that's all
2 our personnel in the courtroom.

3 MJ [COL POHL]: Ms. Bormann, the attorneys here for
4 Mr. Bin'Attash?

5 LDC [MS. BORMANN]: Attorneys only, Judge, are Lieutenant
6 Commander James Hatcher, Captain Michael Schwartz, and Captain
7 Ted Swensen, and myself.

8 MJ [COL POHL]: Thank you.

9 LDC [MS. BORMANN]: Judge, I advised special trial counsel
10 of this issue already and I need to address the court just
11 very briefly.

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: We had an 802 conference on Saturday
14 at the request of the defense because we needed time to
15 prepare our clients. You remember back in the day when we had
16 it and we couldn't prepare our clients because there was no
17 way to meet with them, and so the commission ordered --
18 started doing 802s on Saturday.

19 So when we finished our 802, I prepared notes to
20 brief my client on what happened at the 802 and all of the
21 motions that were filed on Friday. I tried to schedule a PRT
22 appointment pursuant to your order, 18U, the protective order.

23 MJ [COL POHL]: PRT.

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1 LDC [MS. BORMANN]: PRT, Privilege Review Team.

2 MJ [COL POHL]: Okay.

3 LDC [MS. BORMANN]: Because as Your Honor ordered, my
4 notes can't even go into a meeting with my client without
5 being reviewed by the PRT. The PRT refused to meet with
6 counsel -- any counsel on this case, but I'm specifically
7 going to talk about myself -- in order to facilitate a meeting
8 where I could brief my client on what was going to be
9 happening over the next two days pursuant to the 802. So the
10 first available appointment they said they had was this
11 morning at 8:00 a.m.

12 Sergeant Gregory, one of the paralegals for
13 Mr. Bin'Attash, just brought me in the materials that I would
14 have had marked for the meeting with my client yesterday. I
15 was able to remember almost everything I needed to brief him
16 on; but when I got back from my meeting yesterday and reviewed
17 my notes, I had missed a few things.

18 So before we begin today, I'm asking to take some
19 time, a limited period of time, just so I can brief him with
20 the notes that should have been marked by the PRT yesterday.
21 I was told that the PRT, and I will quote, are military
22 contractors, and so they don't work on weekends. My response
23 was, I, too, am a military contractor, and I'm calling from my

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1 office. I work on weekends.

2 So I don't know what the answer is, but the immediate
3 request is to just take a brief period of time so I can speak
4 with Mr. Bin'Attash.

5 MJ [COL POHL]: Okay. Should be no problem. Let me go
6 through the preliminary matters and then we'll take a recess
7 for it.

8 LDC [MS. BORMANN]: Thank you.

9 MJ [COL POHL]: Mr. Harrington.

10 LDC [MR. HARRINGTON]: Good morning, Judge.

11 MJ [COL POHL]: Good morning.

12 LDC [MR. HARRINGTON]: We are asking to also detail
13 Commander Tri Nhan. It's T-R-I, N-H-A-N.

14 MJ [COL POHL]: Okay. And as we discussed earlier,
15 Mr. Binalshibh wants Commander Nhan to be a member of the
16 defense team?

17 LDC [MR. HARRINGTON]: That's correct, Judge, he has been
18 a member of the team for several years and we are asking for
19 him to be formally detailed now.

20 MJ [COL POHL]: It's Commander Nhan?

21 LDC [MR. HARRINGTON]: He's here.

22 MJ [COL POHL]: He needs to put his detailing
23 qualifications on the record.

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1 ADDC [CDR NHAN]: Good morning, Your Honor.

2 MJ [COL POHL]: Good morning.

3 ADDC [CDR NHAN]: My name is Commander Tri Nhan, United
4 States Navy. I have been detailed to serve as Mr.
5 Binalshibh's military counsel by Colonel Mayberry. I am
6 qualified to serve as military defense counsel under Rule 502
7 of the manuals of military commissions and I have not acted in
8 any manner which would tend to disqualify me from serving as
9 military defense counsel for Mr. Binalshibh. My detailing
10 memorandum is filed as Appellate Exhibit 004F(RBS) and a copy
11 has been served to the prosecutor.

12 MJ [COL POHL]: Thank you.

13 ADDC [CDR NHAN]: Thank you, Your Honor.

14 MJ [COL POHL]: Mr. Connell.

15 LDC [MR. CONNELL]: Your Honor, I am present, Lieutenant
16 Colonel Sterling Thomas, United States Air Force, is present.

17 MJ [COL POHL]: And Mr. Ruiz.

18 LDC [MR. RUIZ]: Judge, Lieutenant Colonel Sean Gleason
19 joins me at counsel table.

20 MJ [COL POHL]: Thank you. I'm now directing this to all
21 of the accused. This is a standard rights advisement I give
22 you when we begin each session. I'm going to ask you to
23 listen to what I say, and then I'm going to ask the standard

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1 question of whether you understand what your rights are.

2 Each of you has a right to be present during all
3 sessions of the commission. If you request to absent yourself
4 from my session such absence must be voluntary and of your own
5 free will. Your voluntary absence from any session of the
6 commission is unequivocal waiver of the right to be present
7 during that session. Your absence from any session may
8 negatively affect the presentation of the defense in your
9 case. Your failure to meet with and cooperate with your
10 defense counsel may also negatively affect the presentation of
11 your case.

12 Under certain circumstances, your attendance at a
13 session can be compelled regardless of your personal desire
14 not to be present. Regardless of your voluntary waiver to
15 attend a particular session of the commission, you have the
16 right at any time to decide to attend subsequent sessions. If
17 you decide not to attend the morning session but wish to
18 attend the afternoon session, you must notify the guard force
19 of your desires. Assuming there is enough time to arrange
20 transportation, you will then be allowed to attend the
21 afternoon session.

22 You will be informed of the time and date of each
23 commission session prior to the session to afford you the

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1 opportunity to decide whether you wish to attend that session.

2 Mr. Mohammad, do you understand what I have just
3 explained to you?

4 ACC [MR. MOHAMMAD]: Yes.

5 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I
6 have just explained to you?

7 ACC [MR. BIN'ATTASH]: Yes.

8 MJ [COL POHL]: Mr. Ali, do you understand what I just
9 explained to you?

10 ACC [MR. AZIZ ALI]: Yes.

11 MJ [COL POHL]: Mr. Hawsawi, do you understand what I just
12 explained to you?

13 ACC [MR. AL HAWSAWI]: Yes.

14 MJ [COL POHL]: Ms. Bormann, how much time do you need?

15 LDC [MS. BORMANN]: I can't imagine I need more than half
16 an hour.

17 MJ [COL POHL]: Okay.

18 LDC [MS. BORMANN]: But if the court will indulge me, I
19 can inform either Mr. Polley or Mr. Chalmers.

20 MJ [COL POHL]: And just these particular prosecutors, I
21 don't think we need to address this problem with since I'm not
22 sure it's in their bailiwick, but we will raise it to the
23 other ones.

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1 LDC [MS. BORMANN]: I would really appreciate it.

2 MJ [COL POHL]: Yeah.

3 LDC [MS. BORMANN]: This has affected all teams here
4 today.

5 MJ [COL POHL]: Yeah. My suggestion is to do this,
6 because I think this can be resolved and not wait until August
7 to resolve it, is you file something in writing and then we
8 can simply issue an order from there, because it doesn't seem,
9 given the times of sequence, we do these things in a certain
10 way that's most efficient, and this does not seem to be the
11 most efficient use of time.

12 LDC [MS. BORMANN]: I would agree.

13 MJ [COL POHL]: Okay. The commission is in recess until
14 0945.

15 [The R.M.C. 803 session recessed at 0912, 16 June 2014.]

16 [The R.M.C. 803 session was called to order at 0950, 16 June
17 2014.]

18 MJ [COL POHL]: The commission is called to order. All
19 parties are again present that were present when commission
20 recessed.

21 LDC [MR. NEVIN]: Your Honor, I wanted -- and I recognize
22 that we don't have the normal -- you know, the regular
23 prosecution team here today, but I wanted to bring to the

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1 court's attention another matter with the privilege team that
2 we'll be presenting to you shortly, and that is this matter of
3 submitting bound books. And I will say we submitted the -- I
4 have just recently wanted to submit to my client the 9/11
5 Commission Report for him to review. And we're told that we
6 can't do that, and that our solution to that is to make a
7 photocopy of every page of the book and to submit the
8 photocopy. And aside from that violating -- no doubt
9 violating copyright rules, it's really unworkable for us as a
10 practical matter. That's a matter I want to address to the
11 commission's attention.

12 MJ [COL POHL]: Okay.

13 LDC [MR. NEVIN]: And we'll do that soon.

14 MJ [COL POHL]: Okay. Thank you, Mr. Nevin.

15 Okay. That brings us to 292, and although there's
16 been a number of pleadings back and forth on it, in essence,
17 it is a defense motion to abate the proceedings, and
18 therefore -- I said at the 802, Mr. Harrington, I was going to
19 go to you first, but anybody can go. But the defense, ball is
20 in your court. Go ahead.

21 LDC [MR. HARRINGTON]: Judge, before I address that,
22 there's one other issue that I have to bring to the court's
23 attention again.

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1 We have -- the last time when we were here we were
2 scheduled to do the 909 hearing and you also had on the
3 calendar 152 proceedings, which goes to our complaints about
4 the treatment of Mr. Binalshibh in the facility, and
5 obviously, the calendar was abated this time. But we are in a
6 situation where, for a short period of time, things were
7 better. They got worse. I sent a letter to Colonel Bogdan on
8 May 8th. Immediately, things got very bad again, extremely
9 bad, and people approached Mr. Binalshibh and complained about
10 my complaining.

11 I wrote another letter to Colonel Bogdan on May 28th
12 confirming that, that the denial that these things are
13 happening has actually been confirmed by the actions of his
14 guard force after I had written a complaint letter.

15 And unfortunately this has escalated. And last night
16 was an extremely, extremely bad night for our client. He went
17 to sleep at quarter to 12:00. He was awakened at quarter to
18 1:00, and he immediately wrote a letter complaining about it.
19 During the evening he had contact with some of the guards, and
20 he was so upset that he was slamming the door to the -- what
21 they call the Charlie room, which is adjacent to his cell. He
22 said that the guards laughed at him and mocked him.

23 At 4:30, the SJA came and asked him if he was going

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1 to the commissions. He attempted to address that issue with
2 her and attempted to address the issue with the assistant
3 watch commander who was with her, and he later spoke to the
4 watch commander and this conduct goes on and on, and it is
5 reminiscent of past behavior by our government. It amounts to
6 torture. Mr. Binalshibh was extremely, extremely disturbed
7 this morning, and we have to get a remedy from the court about
8 this.

9 I know that you say you want to consider this in a
10 procedural manner, but it goes on and on and on, and it
11 clearly interrupts our ability to have a relationship with
12 him. It clearly interrupts our ability to defend him. It
13 clearly interrupts his ability to participate in these
14 proceedings because it is the dominant issue for him in these
15 proceedings.

16 And we are asking the court to enter another order.
17 We have got to get this conduct stopped. And I think the
18 behavior after I sent the letters to Colonel Bogdan is
19 confirmation, in our opinion, that this is not something
20 that's in his mind. It is something that's being deliberately
21 done to him.

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

23 LDC [MR. HARRINGTON]: Oh, and one other point, Judge.

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1 Mr. Binalshibh has been on hunger strike since May 25th. That
2 has been ignored. He has not been referred to the doctor. He
3 is being belittled because of that, also. And obviously, this
4 is something that seems to be calculated and a response to
5 him. Whether they don't like him or whatever the reason for
6 it is, I don't know. But that also has to be addressed.

7 Judge, with respect to 292, this is another chapter
8 in the saga of "we're from the government and we're here to
9 help you." The backdrop we have here are the problems with
10 the security light in the courtroom; the monitoring of the
11 tables in the courtroom, the defense tables; an intrusion into
12 defense e-mail; the listening devices in the interview rooms
13 that we use, and then we come to this issue.

14 After the motion was filed by us regarding our
15 defense security officer being interviewed by the FBI a week
16 before we were here at the last hearing session, you made an
17 order that directed the team members, directed the leader and
18 learned counsel to contact all team members and ask the team
19 members to respond whether they had been contacted by any
20 government agents.

21 I complied with that for our team. We attempted to
22 contact even past members of the team, as you directed. We
23 got very, very many of them. But it appears that the

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1 intrusion into our team was related to a member of the team
2 who was current, and not somebody who was in the past.

3 After we left the court and returned back to the
4 mainland, the following week, I was in Rosslyn at the defense
5 counsel offices and met with Mr. Ruiz and Mr. Connell and
6 Mr. Nevin, all of whom were present. And Mr. Ruiz, in one of
7 our meetings, advised us that one of his team members, in
8 response to his letter to his team members, had come to him
9 and said that a member of another team had come to -- well,
10 Mr. Ruiz's person repeatedly, and complained that he was
11 troubled by conduct on the team that he worked on.

12 And eventually, Mr. Ruiz's member contacted a friend
13 in the FBI. Mr. Ruiz's investigator had been a former law
14 enforcement officer, and apparently had worked with FBI agents
15 in a different city. And a meeting was set up with agents
16 in from Washington with Mr. Ruiz's member and the member from
17 another team. Mr. Ruiz's member -- and he can address this
18 with the court, but it's laid out in our declaration -- would
19 not tell Mr. Ruiz who the person was or what team the person
20 worked on; but he indicated to Mr. Ruiz that this person was
21 still on a team, and that the person had not responded to the
22 learned counsel's e-mail, as you had directed be done.

23 The following day was a Saturday. I checked my

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1 e-mail responses, and I realized that one of my team members
2 had not responded. The -- I sent him an e-mail that day, and
3 he responded to me on Monday and said that he had not been
4 contacted or spoken with the FBI, and those e-mails are
5 attached to the -- to our motion papers.

6 On May 1st I returned to Rosslyn and attempted to get
7 my team member to come to work. He had been off for several
8 days the previous work, off for the week that -- of May 2nd,
9 and apparently had asked to be off for the following two
10 weeks.

11 I had to make arrangements to go to his home to
12 interview him, and I went with Commander Nhan. And at that
13 time he denied to my face that he had had any contact with the
14 FBI. And I told him -- I said, based upon the information
15 that I had, I believed that he was not telling me the truth.

16 We also reached an agreement that he would no longer
17 be on our team. So at that point in time, our team had lost
18 two key employees, one being an investigator, and also we had
19 lost our DSO because of the previous contact that he had had
20 with the FBI.

21 MJ [COL POHL]: The investigator -- what's difficult
22 following this and reading all of the pleadings is, I'm seeing
23 names and then descriptions of individuals by letters.

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1 LDC [MR. HARRINGTON]: Right.

2 MJ [COL POHL]: And I'm gleaning that we may be talking
3 about the same person. Now, is there any reason why we can't
4 use names? I'm talking about everything that's in the
5 unclassified pleadings. I'm just trying to keep the players
6 here straight, I mean, because ----

7 LDC [MR. HARRINGTON]: Right.

8 MJ [COL POHL]: ---- and it's difficult when we keep
9 talking about it in another context.

10 LDC [MR. HARRINGTON]: I do not have a problem with using
11 their names, Judge, at this point.

12 MJ [COL POHL]: Trial Counsel, do you see any issue using
13 the names of any of the individuals involved here?

14 STC [MR. CAMPOAMOR-SANCHEZ]: No, Your Honor, to the
15 extent that the ----

16 MJ [COL POHL]: It's just going to be easier as we follow
17 this down.

18 Mr. Nevin.

19 LDC [MR. NEVIN]: Your Honor, I have referred to the
20 person on my team who was questioned as our linguist.

21 MJ [COL POHL]: Yeah, now -- in your particular case, I
22 know exactly who we're talking about, because we're just
23 talking about one person. Okay. So that's ----

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1 LDC [MR. NEVIN]: We can continue that. I have not even
2 identified that person by gender because ----

3 MJ [COL POHL]: Yes.

4 LDC [MR. NEVIN]: ---- I want to protect that person's
5 privacy to the greatest extent possible. If we can continue
6 that, I would appreciate it.

7 MJ [COL POHL]: That's fine for this, but on the other
8 investigation there's just too many players.

9 So let's -- okay, so let's go through who the players
10 are, as you think they are, Mr. Harrington.

11 LDC [MR. HARRINGTON]: Okay. The player from Mr. Ruiz's
12 team is Thomas Gilhool, G-I-L-H-O-O-L.

13 MJ [COL POHL]: And he was, to your knowledge?

14 LDC [MR. HARRINGTON]: He was an investigator for
15 Mr. Ruiz's team up until I think November of 2013.

16 MJ [COL POHL]: Okay.

17 LDC [MR. HARRINGTON]: Or December of 2013.

18 MJ [COL POHL]: Okay.

19 LDC [MR. HARRINGTON]: And the investigator from my team
20 who is the person that I believe had gone to Mr. Gilhool and
21 then to the FBI is Albert, A-L-B-E-R-T, Cruz, C-R-U-Z.

22 MJ [COL POHL]: Okay. Is he no longer a member of your
23 team?

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1 LDC [MR. HARRINGTON]: He's no longer a member of our team
2 as of May 2, 2014.

3 MJ [COL POHL]: Okay. The DSO?

4 LDC [MR. HARRINGTON]: The DSO is Dante, D-A-N-T-E, last
5 name is James, J-A-M-E-S.

6 MJ [COL POHL]: Is he still a member of your team?

7 LDC [MR. HARRINGTON]: He's not a member of our team.

8 MJ [COL POHL]: As of -- as best you can -- was it after
9 the April -- he was the one that was interviewed in April?

10 LDC [MR. HARRINGTON]: Yes, it would have been the Monday
11 after the April hearing, Judge.

12 MJ [COL POHL]: Okay, so -- okay.

13 LDC [MR. HARRINGTON]: Those should be the names that we
14 have.

15 MJ [COL POHL]: Now, isn't there a -- we don't necessarily
16 need to go with the name, but all of these individuals were
17 not the focus of the investigation, were they? Wasn't it
18 another member of your team that was the actual focus of the
19 investigation?

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

21 MJ [COL POHL]: Okay.

22 LDC [MR. HARRINGTON]: And I would prefer not to name that
23 member of the team, Judge.

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1 MJ [COL POHL]: That's fine. That's fine. I can
2 understand that. Is that person still a member of your team?

3 LDC [MR. HARRINGTON]: Yes.

4 MJ [COL POHL]: Okay. Okay, go ahead.

5 LDC [MR. HARRINGTON]: Judge, just by way of background,
6 Mr. Cruz had, many years before he came to work for us, had
7 been an agent for the ATF, a federal agent for the Alcohol
8 Tobacco and Firearms agency. And in that capacity he had
9 worked undercover. And in that capacity as an undercover
10 agent, obviously, although with the sanction of the
11 government, was used to not being truthful as part of his job.

12 But when I met with Mr. Cruz on May 2nd, another
13 bizarre issue came up. One of the other -- my other team
14 members had told me that Mr. Cruz had been contacted by the
15 U.S. Attorney's office in Washington, D.C., and told that he
16 might be a witness on a post-trial proceeding regarding the
17 conviction of Chandra Levy -- the person convicted of killing
18 Chandra Levy in Washington, D.C.

19 And it's my understanding that Mr. Campoamor-Sanchez
20 was one of the prosecutors in that case. Mr. Cruz had
21 apparently been contacted by the prosecutors that he may be a
22 witness in this post-conviction proceeding, although it was a
23 remote possibility.

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1 The reason Mr. Cruz might have been a witness is
2 because in his capacity many years before this as an
3 undercover ATF agent he had participated in a sting operation
4 and the arrest of an individual who ended up being a roommate
5 in federal custody with the person convicted of killing
6 Chandra Levy, and where that person supposedly confessed. And
7 it's my understanding that there's a hearing or some
8 proceedings pending now because that person had not been
9 completely forthright about his previous cooperation with the
10 government, and that leads back to Mr. Cruz's case.

11 And I'm not accusing anybody of anything with this,
12 but it just was another factor that came in that just was very
13 troubling and very bizarre, or a remarkable coincidence.

14 But in any event, we were at the position that we
15 thought we know who the person was that had cooperated with
16 the FBI, but we still had no information about what that
17 person had done. We were aware, obviously, from Mr. Gilhool's
18 representation to Mr. Ruiz that it started in November of
19 2013, and we were now talking about May of 2014, and -- which
20 means that, presuming it was Mr. Cruz, he had been working on
21 our team for that entire six-month period, and we did not know
22 and still don't know what cooperation he gave to the FBI, what
23 information he shared with the FBI, and what other intrusions

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1 into the protected attorney-client privilege there were.

2 Which means that we now are in a situation where we
3 have to represent to our client that we have had basically a
4 spy within our team for a number of months, and that we don't
5 know what activities that spy did. We have to go back, and we
6 have done that, and looked at the work that Mr. Cruz did to
7 determine if we found anything improper in that, and we have
8 not, to date. But it obviously is certainly very, very
9 troubling to us, and we are in a position of standing before
10 you now with no real more substantive information than what I
11 have presented to you from two months ago.

12 And only because of your order did Mr. Nevin's
13 situation arise, and he will address that, obviously, in
14 detail; but that's another extremely troubling incident to all
15 of us where now we know that this intrusion into the
16 attorney-client privilege for one or more of our defense teams
17 goes back a year and a half. And, again, we don't know
18 anything.

19 The government's response is, "We want to file
20 ex parte proceedings because there's an ongoing investigation,
21 and we don't want to disclose our sources," or whatever, which
22 is a common thing, but they've also advised you now that
23 they've closed their proceedings. And I've been doing cases

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1 for almost 45 years in federal court and I know a lot of the
2 procedures within the federal agencies, and I know that
3 closing a file is an administrative thing. It just means
4 moving it from one place to another. It does -- no case is
5 ever closed with them, and it's always closed subject to
6 getting new information and reopening it.

7 But we need to know all of the information that has
8 been extracted from any members of our teams. You need to
9 know it. And more importantly, our clients need to know it,
10 because they're the ones that have to make an informed
11 decision about any conflict or any potential conflict.

12 And the government response is, "Well, there's no
13 investigation of the lawyers on the team right now, and there
14 never was an investigation of the lawyers on the team," and
15 they cite a series of cases where the court says those words.
16 But if you look at those cases, it's like every other typical
17 case; it's one lawyer for one client. It's not a team of
18 lawyers. And we have cited cases in the filings that we have
19 that the defense team, the privilege applies to everybody on
20 the team. It's not a question of whether it's the lead
21 counsel, the detailed counsel, or a paralegal or anybody else
22 on the team. The same privilege applies to all of us.

23 And, Judge, there's a secondary issue here which goes

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1 to Mr. Gilhool. It means that not only did somebody
2 purportedly from my team, is what we're told, share
3 information with the FBI, but he shared information with
4 Mr. Gilhool, which is also a violation of the attorney-client
5 privilege. Now, there's a response to that that says you have
6 a joint defense agreement, and the sharing of information
7 within a joint defense agreement is permissible, and we
8 acknowledge that.

9 The problem is there's still a restriction in the
10 joint defense agreement on somebody from another team
11 disclosing what our team tells them. The privilege just gets
12 to a bigger group. It doesn't go to the outside.

13 MJ [COL POHL]: Mr. Harrington, if a member of your
14 defense team, hypothetically, became aware of misconduct,
15 okay, that involved other members of the defense team and the
16 accused -- I'm not saying that happened; I'm just saying if
17 that were to happen -- is it your position that he has no
18 right to go to any outside agency to report the alleged
19 malfeasance?

20 LDC [MR. HARRINGTON]: No, it's not our position at all,
21 Judge.

22 MJ [COL POHL]: Okay. So what I'm going -- so if that
23 were to occur, the fact that he went -- one went outside the

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1 defense team to report the allegation to be investigated, that
2 would be -- would you take objection -- let's bring it closer
3 to this case.

4 If they believed that there was improper
5 communications that violated the classified privilege, let's
6 say, for example, you reported it, would it be appropriate to
7 report that to the FBI to investigate?

8 LDC [MR. HARRINGTON]: I think -- it depends on what you
9 are talking about.

10 MJ [COL POHL]: Okay.

11 LDC [MR. HARRINGTON]: And obviously ----

12 MJ [COL POHL]: I'm not saying this is right or wrong, I'm
13 just trying to figure it out.

14 LDC [MR. HARRINGTON]: I understand.

15 MJ [COL POHL]: What if there is -- if a member of the
16 defense team believes something is being done wrong by the
17 defense team, does he have a -- is there anything to prohibit
18 him from reporting this to the FBI, for example, without going
19 through the defense team that he thinks may be part of the
20 problem?

21 LDC [MR. HARRINGTON]: I think it -- first of all, it
22 depends on what the conduct is, and I think every one of the
23 teams will tell you that we struggle with problems with

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1 respect to classified information all the time and there have
2 been some incidents with each team where things have happened
3 that they shouldn't have happened, and that we tried to
4 address them.

5 Now, if a person, say, on my team says something is
6 being illegally done or improperly done by Harrington, who is
7 the lead counsel, who is he supposed to go to if Harrington is
8 the top guy? He has to go to somebody else.

9 But, I think, depending on the nature of it and the
10 scope of it, would determine where it is that you go, whether
11 you go to another security person. We obviously have higher
12 levels of security people within, you know, the resources that
13 we have, where you can go and get advice or guidance.

14 But going to the FBI indicates that you -- you
15 believe in good faith, presumably, that there's been a crime
16 committed. Right? Not some minor transgression of
17 complicated rules or something like that, but there's been a
18 crime committed.

19 And I think if a person has a well founded and
20 good-faith basis for believing that, then nothing restricts a
21 person from reporting a crime. And we have an obligation to
22 report crimes. The fact that we have an attorney-client
23 privilege does not give us the right not to participate in

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1 criminal behavior or to conceal criminal behavior. We're not
2 arguing about that.

3 But we also have a situation where we have agents now
4 who go to somebody -- they get information presumably from
5 Mr. Cruz, and then they go to Mr. James, right, and they
6 ask -- they ask him questions at a vulnerable time, 3:00 on a
7 Sunday afternoon when he comes home from church, where he is
8 scared to death, and they come in and they have him sign a
9 nondisclosure agreement and ask if they can continue to talk
10 to him, which means that they are -- have an ongoing intrusion
11 into the attorney-client privilege, or potential one.

12 Now, they, I'm sure, would represent, "We are very
13 careful. We wall it off." They'd love to say, "We wall it
14 off." They love to say, "We compartmentalize things."

15 But how do we address that with our clients? How do
16 we go to our clients and say, "I don't know what it is, but
17 you've got to trust these guys"?

18 MJ [COL POHL]: If you knew what it was, how would that
19 solve the problem with your client anyway? Because the client
20 wouldn't know whether this would continue in the future.

21 LDC [MR. HARRINGTON]: I'm not following your question,
22 Judge.

23 MJ [COL POHL]: What I'm saying, you're saying, "How do I

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1 maintain the trust of my client if members of the team have
2 been talking to the FBI?" And the question is, is members of
3 your team have apparently discussed things with the FBI.
4 Going forward, if you knew everything that has already been
5 discussed, is that your relief you want, to know what was
6 discussed and so we can go forward?

7 LDC [MR. HARRINGTON]: Well, we need to know what was
8 discussed so we can say to our client, "Here's what we believe
9 is a real and actual or a potential conflict of interest."

10 We have an ethical obligation not only to report to
11 our clients what it is, but to make an affirmative statement
12 to our clients of whether we believe it's a conflict and
13 whether we believe that we can continue representing our
14 clients despite this conflict. And we also agree that they
15 need independent counsel, and cannot solely rely on the
16 representations of us. But one of the factors they have to
17 consider is the information that they get from us.

18 So -- and in this particular case, Cruz hasn't even
19 been identified as the person that did it. So what do I say
20 to Mr. Binalshibh? "Lieutenant Commander Bogucki or Commander
21 Nhan may be the person that's there and he's still
22 representing you and you meet with him," and so how do you
23 trust him? Obviously, we have to know as much as we possibly

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1 can in order to share it with them so they can make an
2 intelligent and a rational decision. And you need to get that
3 from them also.

4 Judge, in addition to the substantive argument here,
5 it's our position that we have received little or no
6 information from the prosecution, and that we need full
7 disclosure of that, but that we also need discovery. And some
8 of the other attorneys are going to address some of the
9 discovery issues.

10 But one of the pleadings that we ask you to look at
11 right away is 292W, which is a request to be able to depose
12 Mr. Gilhool by Friday of this week, because a week from today
13 he is leaving the United States and will not be back until
14 September, and so we believe that his testimony is crucial for
15 a number of reasons. One, what information did Cruz or
16 somebody else provide to him; two, what information did
17 Gilhool provide to the FBI with respect to Cruz or somebody
18 else, because it's our understanding that Gilhool actually sat
19 in on interviews with the FBI.

20 And the emergency nature of it obviously is because
21 Mr. Gilhool will not be available. If you make a decision
22 this week with respect to this and decide we're going to have
23 discovery, if we don't get an order from you to depose him by

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1 the end of the week, then we will not be able to depose him
2 until September. Or he will not be available to testify, I
3 should say, until September.

4 MJ [COL POHL]: Of course, I have another motion for an
5 order that Gilhool can't be interviewed without the defense
6 counsel for Mr. Hawsawi being present.

7 LDC [MR. HARRINGTON]: Yes. That's a separate issue,
8 Judge, yeah.

9 MJ [COL POHL]: Okay. I mean ----

10 LDC [MR. HARRINGTON]: Well, obviously -- obviously,
11 Mr. Ruiz would want to be there, Judge, because he wants to
12 make sure that Mr. Gilhool is not violating releasing
13 information from his team.

14 MJ [COL POHL]: Okay. Got it. Go ahead.

15 LDC [MR. HARRINGTON]: We have no objection to --
16 certainly to Mr. Ruiz being present for any deposition, and
17 obviously, all of the defense counsel would be there under any
18 circumstances.

19 That's all I have, Judge.

20 MJ [COL POHL]: Okay. Thank you. Any other defense
21 counsel wish to be heard on 292?

22 LDC [MR. NEVIN]: I do, Your Honor.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. NEVIN]: Your Honor, I, on behalf of Mr. Mohammad
2 have a slightly different situation, and I think than
3 Mr. Harrington has on behalf of Mr. Binalshibh, because I have
4 a slightly different set of facts, but at the bottom, it's the
5 same -- we're really in the same place.

6 First, what we have in terms of facts from the
7 government at this point is two declarations from Supervisory
8 Special Agents that have been attached to pleadings, and these
9 affidavits do not provide us with information that we need in
10 order to understand the situation on the one hand, and on the
11 other they conflict with accounts that we have provided to the
12 military commission about the nature of the inquiries that --
13 of the investigations that were conducted by the FBI.

14 What I mean is this: You know from Mr. Harrington's
15 declaration that was attached, if I'm not mistaken, to 292,
16 the original pleading, you know that the questioning of the
17 DSO for the Binalshibh team was not limited to a non-attorney
18 member of the Binalshibh team. And just so we're tracking
19 here, the -- Mr. Mastroianni's declaration attached to the
20 government's reply in 292R says that that investigation was
21 solely focused on a non-attorney member of the Binalshibh
22 team. But the questioning that the agents who confronted the
23 DSO after church on that Sunday, the questioning that they

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1 confronted him with were about all of the defense teams. They
2 were directed toward counsel, and they were directed
3 specifically toward my team, toward the Mohammad team, "Is
4 there anything improper going on on the Mohammad team?"

5 And the military commission will recall that that's
6 why, when you issued, I believe it's 292H, you directed that
7 independent counsel be made available for Mr. Binalshibh and
8 for Mr. Mohammad because that's the way -- that's the way that
9 questioning was focused.

10 So I -- this recurs when we get to the questioning of
11 our linguist as well but there is a disconnect here between
12 these facts that hasn't been resolved -- between these
13 assertions, these descriptions of the investigation.

14 There's a disconnect that remains today that hasn't
15 been resolved, despite the fact that we're at -- we filed FF
16 today. So that means we're 30 pleadings into this thing.

17 We still have this disconnect. We still don't have
18 that question answered. And as I say, the same thing is true
19 about the investigation that focused on my linguist in January
20 of 2013.

21 The declaration -- my linguist says that this
22 interview occurred on January the 2nd. The declaration says
23 that it -- there was an interview that occurred on January

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1 the 3rd, and that the person who was interviewed on January
2 the 3rd was the target of the investigation, and that it was a
3 full investigation as opposed to a preliminary investigation.
4 And so I am not clear at this point whether it's the same
5 person or whether there are two separate people here, and I
6 think that would be fairly simple to resolve.

7 But more -- but more to the point, with respect
8 neither to Mr. Harrington's investigation nor the one directed
9 toward my linguist, we don't know what confidential
10 information was revealed. We know that my linguist was
11 questioned about that person's activities on my team. We know
12 that questioning went that way.

13 **[Military Judge handed note and he read it].**

14 LDC [MR. NEVIN]: Am I good to go?

15 MJ [COL POHL]: Yeah. Go ahead.

16 LDC [MR. NEVIN]: All right. Thank you.

17 But we don't know, in either case, what information
18 was revealed, and we are within a joint defense agreement.
19 We -- so it's entirely possible that the questioning of the
20 Binalshibh DSO goes toward representations that may have come
21 originally from my team. It's at least possible. And
22 certainly with respect to the questioning of the linguist on
23 my team, we know that that person that -- that questions were

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1 asked of that person about Mohammad team activities, and we
2 don't know at this point what information was provided.

3 So the declarations, the information that the
4 military commission has at this point doesn't exclude the
5 possibility that there are other investigations going on now;
6 in other words, that there are investigations other than of
7 the linguist on our team, and of the -- that are associated
8 with the questioning of the DSO on the Binalshibh team. There
9 may be other investigations out there.

10 And these declarations also don't exclude the
11 possibility that there are team members -- teams or team
12 members who are under investigation currently. So we have
13 both the question of -- we have left blank both the question
14 of whether other investigations have come into existence and
15 gone out of existence in the past, and we also have left blank
16 whether there are other investigations going on now.

17 Let me just say, just so we're clear, what I'm
18 talking about. These declarations say they don't think there
19 are other investigations currently in place, but the last
20 investigation indicates that that's not a question that can be
21 authoritatively answered until they have the names and dates
22 of birth of the people on the defense teams.

23 And I'll have to say, for one, when I read that, I

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1 had to go back and read that a couple of times to be sure I
2 was reading -- understanding what I was reading. We have been
3 told in repeated statements that there are no other
4 investigations pending of anybody on any defense teams, and
5 then we hear that we can't really answer that question until
6 we know the names and the dates of birth.

7 I -- aside from being surprised that the FBI can't
8 figure out my name and date of birth, which I think is highly
9 unlikely, no one has asked me. No one has called me up and
10 said, "Hey, give us the names and dates of birth of your team
11 members. That's what we need. We'll run it through our
12 databases, and then we can be sure." No one has bothered to
13 do that. But certainly with respect to the question of
14 whether there are other investigations that have -- that have
15 begun and ended in the past, we don't have any information
16 about that.

17 And you can infer something, though, because you know
18 that when the government -- when the government first filed
19 their response in 292R they said -- they provided you
20 information about the Binalshibh DSO being approached, and
21 their understanding of what that was. They didn't say
22 anything about my linguist being approached a year previous.
23 And that only comes up when we raise it with a discovery

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1 request to the special trial counsel. And we have a motion to
2 compel discovery pending in front of you, and it's been
3 responded, and we provided a reply just this morning in 018FF.

4 So that came from us. That did not come from the
5 special trial counsel, and I think -- and I -- I have no
6 information, and I make no assertions with respect to why that
7 was, and I'm certainly not accusing special trial counsel of
8 anything improper. But in any event, that information was not
9 provided to the military commission until we provided it. And
10 honestly, we wouldn't even have had that in our hands at all
11 in this case if you, the military commission, had not issued
12 292C and said, "I order you to reach out to your team and to
13 your team members and find out if they've been approached."
14 Because our linguist was not, having been told not to,
15 impliedly at least, not to reveal the meeting or the
16 communication.

17 That is to say, the linguist was told to -- if asked
18 about the meeting, to say simply that the -- the security
19 clearance re-investigation was going well. That was the ruse
20 which was used to approach the linguist, was that this was
21 supposedly connected to the linguist's -- the re-upping of the
22 linguist's security clearance. But the linguist was told,
23 "Just say that your -- just say that your security clearance

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1 re-investigation is going fine."

2 In other words, "Don't say what the nature of the
3 questioning was, and don't say that the truth is it didn't
4 really have anything to do with that. Lie about that."

5 So I say this to make the point that we don't know
6 about other investigations which have come into existence and
7 allegedly been closed, whatever "closing" means.

8 So if I understand counsel's argument at this point,
9 it is this: We've shown you that there were two
10 investigations. They were opened. They were closed. They
11 weren't focused on lawyers. Here are these three cases --
12 Montana, Moss and Lafuente, here are these three cases that
13 say if the lawyers aren't under investigation, there's no
14 conflict and so therefore, we're done. There's no conflict.

15 And in this most recent round of pleadings that were
16 filed on Friday, counsel takes a variation on this tack and
17 says discovery about some of these matters may be relevant on
18 some other issues, and I assume that refers to the idea of
19 invading the defense camp improperly, some sort of outrageous
20 government conduct idea, but this is not a conflict. So let's
21 have the military commission just order there's no conflict
22 here. We're good to go, and then we can talk about this other
23 stuff later.

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1 So the suggestion is that because it's not focused on
2 the lawyers, then at the outset it's -- there's no conflict,
3 and you know, I -- we've -- I'm -- we've -- I know the
4 military commission has tracked our pleadings and there are,
5 first of all, plenty of cases that deal with the situation
6 where it's not a lawyer, but rather some other team member, an
7 investigator, who -- the investigation of whom gives rise to
8 the conflict, and the courts treat that just as if it were an
9 attorney who was under investigation.

10 We went to Professor Larry Fox, who is a -- who
11 teaches ethics at Yale and asked him to address this question
12 as well, and his declaration is attached as an exhibit to our
13 reply to 292R, the supplement to 292R.

14 And what he says in one sense is common sense. I
15 mean, the -- these defenses are conducted by teams, and if
16 you -- if you put -- if you create the possibility that one of
17 the team members is under threat, it creates the tendency in
18 everyone to pull their punches, to protect that person. It's
19 not just the lawyer to whom these kinds of considerations
20 extend. And as I say, you can take the example of the
21 linguist, because the linguist is really a poignant example
22 because it's the way you communicate with the client.

23 So at least in some communications, everything that

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1 the lawyer and the client are saying to each other filters
2 through the linguist. That doesn't happen in every instance
3 in our case, because -- just because of Mr. Mohammad's limited
4 ability to communicate in English, so it's not ever -- I
5 didn't mean to represent that everything goes through our
6 linguist, but how do you say this person is not a lawyer, and
7 therefore no conflict can arise with respect to this person.

8 Everybody on this team has confidential information,
9 and everybody has an obligation to protect it. And I
10 recognize the question you asked Mr. Harrington, the --
11 exceptions to that can arise certainly, but none of them are
12 presented in our present situation.

13 So this -- the other component of their argument is
14 that these investigations that have been identified so far are
15 closed, and that also doesn't remove the obligation of the
16 military commission to conduct an inquiry because the fact
17 that these -- first of all, we know, of course, that the
18 investigation of the non-attorney member of Mr. Harrington's
19 team is not closed. It's just been referred to another agency
20 that also has criminal investigative powers and plenty of
21 other powers to affect that person.

22 MJ [COL POHL]: Of course, that referral to the Department
23 of Defense was focused on the past record of the individual.

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1 LDC [MR. NEVIN]: I disagree with that, Your Honor.

2 MJ [COL POHL]: Oh, really?

3 LDC [MR. NEVIN]: I think that that investigation says,
4 "We are referring this to you for anything you may deem to be
5 appropriate." And certainly, the letterhead memorandum has
6 attached to it a memorandum having to do with that matter.

7 MJ [COL POHL]: Well, we can maybe read it any way you
8 like. I'm just looking at the exhibit myself. You know, the
9 introductory paragraph talks about how this person came under
10 the FBI's current interest. The bulk of it deals with
11 qualifications for this person to keep its clearance ----

12 LDC [MR. NEVIN]: Yeah.

13 MJ [COL POHL]: ---- totally unrelated to the
14 investigation that we're talking about now.

15 LDC [MR. NEVIN]: I agree with that. I agree with that.
16 But my only point is that the FBI can't say here's
17 information, and you may -- you but you may use this
18 information only for the purpose of doing X or Y or Z with it.
19 They're offering it to DoD, and DoD will be obligated to do
20 whatever they choose to do with it, to follow it to wherever
21 it leads, whatever it is they choose to do. I only mean to
22 say the investigation's not closed, so it isn't correct as a
23 factual matter to say that it's closed.

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1 But the other part of the problem, even if you assume
2 they're closed -- and we've addressed this extensively in the
3 briefing, and I'm not going to simply reiterate it all now.
4 But the point is, just as Mr. Harrington said, investigations
5 can be reopened at any time. The only thing that ultimately
6 protects you is the running of the statute of limitations.

7 MJ [COL POHL]: But that -- under that -- under your point
8 that you just made, what's the resolution, then?

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

10 MJ [COL POHL]: Investigations, we can look back to what's
11 been done and what the current status is.

12 LDC [MR. NEVIN]: Yes.

13 MJ [COL POHL]: But there's no way, is there, that going
14 forward we can say today there will never be another
15 investigation or another piece of evidence may generate a
16 reopening of an investigation? I mean, that's ----

17 LDC [MR. NEVIN]: Right.

18 No, we can never exclude that possibility, but what
19 we can do is provide information about what's been done to
20 date so that we can understand whether there's something
21 seriously under this or not. And obviously, I think you -- I
22 mean, the example you raised before of an actual crime being
23 committed is -- I recognize is something -- everybody

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1 recognizes that going forward, that there's -- we don't have a
2 grant of immunity, blanket immunity, for anything that --
3 within the defense of these cases.

4 But we can -- we can know whether there was anything
5 behind these -- these approaches to our team.

6 You know, I think you have these questions that are
7 asked of the Binalshibh DSO, are you doing -- have you seen
8 anything on any other defense teams that raises concerns or --
9 I don't remember the exact language from his -- from
10 Mr. Harrington's declaration as I stand here, but the point is
11 it has the quality of a fishing expedition. And so what
12 you -- you have these FBI agents showing up, questioning a
13 member of the team who is within the privilege, asking them,
14 "Have you seen anything that looks fishy to you," and swearing
15 them to silence, and implying that you're creating a
16 relationship with them that will be ongoing; in other words,
17 that they will continue to provide information to you as they
18 make observations.

19 And in that, you see this improper desire to get
20 inside the teams and to know what the teams are doing. We can
21 set aside the question of whether the prosecution team in this
22 case is walled off from that, knows about it or not. Never
23 mind, set that aside. That is not the kind of thing that is

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1 focused on -- let's say some team member has committed a
2 separate crime, has been driving under the influence, let's
3 say, and is suspected of driving under the influence on the
4 weekend or whatever, completely unconnected with the team.
5 Are you going to call that person up? Of course, you are.
6 You are going to call that person up and you're going to say,
7 "I want to ask you some questions. I want to make sure that
8 you don't provide me any information about your teams because
9 I have some awareness and sensitivity to the situation that
10 you're in. But you were observed weaving and swerving on
11 Friday night, and I need to ask you some questions about that.
12 Got it?"

13 "Yeah, I have it. Okay. Go ahead. What are the
14 questions?"

15 And now you're asked, "How much have you had to
16 drink? Where were you going? Where were you coming from?"
17 That kind of thing. You don't say to that person, "Have you
18 been -- have you seen anything weird going on on your defense
19 team down there at Guantanamo?"

20 That's a wholly separate matter. And I also
21 recognize the point the court made, that there could be an
22 investigation of criminal activity on the part of defense team
23 members in the process of doing their work. But these are not

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1 the kind of focused questions that you get when you -- when
2 you aren't investigating counsel. Really, you begin with
3 counsel in this situation, I think. I think you start off by
4 going to the lawyers and saying, "Listen, we have a concern
5 about a member of your team. Here's what we're seeing.
6 What's your observation of that?" And the fact that the
7 lawyers are being circumvented here implies that the lawyers
8 are suspected, and I think that's something that's -- that
9 suspicion, at least, is something that's not dispelled by the
10 government's affidavits.

11 So I finally -- yes. I finally just want to address
12 the matter that I referred to before that was raised in the
13 pleadings the last -- on Friday, that this doesn't really go
14 to a conflict, that this actually -- this kind of thing
15 doesn't really go to a conflict. It goes to maybe some other
16 things, other motions that you might file, and if you expand
17 Special Trial Counsel's detailing, we could deal with those at
18 a later time.

19 And I just want to say, I think it's true, in one
20 sense. I think these things do go to a bigger question. And
21 it -- just as Mr. Harrington said, we've had a long series, a
22 long string of events within the military commission that
23 raise some very serious questions, and I think we need to

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1 present those to the military commission at some point in an
2 organized way. I agree with all of that.

3 But I don't agree with the idea that these things do
4 not -- that these issues and incidents don't present a
5 conflict problem. And I will tell you, they do. They have a
6 direct impact on me, personally, and I can't do anything more
7 than just stand here and tell you that. I had a trip planned
8 to the Middle East to do investigative work, and I canceled
9 it. It had been arranged. I had people lined up, a number of
10 people lined up to talk with me and to work with me to try to
11 move the ball up the field in a number of ways -- obviously,
12 I'm not going to talk about all of those -- but I canceled
13 that trip when this arose because I feel that I'm under
14 scrutiny.

15 See, no mention of 018Y in any of this, and I know
16 that's for other prosecutors to argue, or I gather it is. But
17 no mention of 018Y. And you see, 018Y feels like a really big
18 deal to me, because, you know, Your Honor, you hear about the
19 Lynne Stewart case. You hear that mentioned. We've had
20 Lynne Stewart thrown in our face a half dozen times during the
21 process of these proceedings, in briefing and in argument.

22 Well, remember the Lynne Stewart case, and remember
23 what happened in the Lynne Stewart case. Well, that may be

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1 something that goes right past the casual observer, but it
2 does not go right past criminal defense lawyers, because
3 Ms. Stewart got imprisoned and got convicted, and yes, she
4 made -- is alleged to have made inflammatory statements about
5 events in the Middle East that directly came from her client.
6 It was extremely flagrant. But what she got charged with was
7 conspiracy to defraud the United States. And the conspiracy
8 to defraud the United States, the theory of it was that she
9 had defrauded the United States of the operation of its lawful
10 functions, which is to say, its SAMs, special administrative
11 measures that governed what she could say about Mr. -- about
12 her client, Sheikh Omar Abdel-Rahman, and she violated those
13 rules, but that's the basis for her prosecution.

14 So when the government files a pleading in this case
15 that says my team violated a bunch of rules having to do with
16 communication with the outside world, I don't look at that as
17 just a sort of a passing thing, that, hey, it doesn't really
18 present all that many problems, and that's -- you may have
19 looked at the responses that we filed in that case, even the
20 extensive briefing we did in support of our motion for
21 extension of time, for crying out loud, and thought to
22 yourself, what are these guys so wound up about?

23 Well, that's what we're wound up about is that

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1 they're telling us we're breaking these rules. Now, we I
2 think made a pretty conclusive demonstration that we weren't
3 breaking the rules and that the government missed a bunch of
4 things that were factually -- that they just were wrong about
5 it, but you know, you take this stuff seriously.

6 And there's a little bit of a feeling here like
7 you're sitting around your campfire and you hear the wolves
8 howling out in the woods, and you think, surely there's
9 nothing here they want, but on the other hand, you're
10 extremely vulnerable. And so when you see that there is a
11 full investigation of your linguist that has been initiated --
12 not a preliminary one, but a full one -- and you see that your
13 linguist is questioned in order to keep it secret, and you see
14 that you're accused in open pleadings of breaking rules and
15 they are questioning Mr. Harrington's DSO about my team, and
16 you ask, do I have a reasonable fear of this?

17 And my answer is, I would be delusional if I didn't
18 have a reasonable fear about this. I do have a reasonable
19 fear. I am trimming my sails. I am pulling my punches. I am
20 being extremely careful about how I proceed. And I don't mean
21 careful in the sense of just being careful to follow the law.
22 I'm -- I am pulled back.

23 MJ [COL POHL]: Are you saying that you have a conflict

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1 that means you have to withdraw?

2 LDC [MR. NEVIN]: I'm saying I have ----

3 MJ [COL POHL]: I mean, isn't that -- isn't that what you
4 just told me?

5 LDC [MR. NEVIN]: Yeah.

6 MJ [COL POHL]: But the reason that there's a conflict is
7 because of a concern that counsel will pull their punches?

8 LDC [MR. NEVIN]: That's right.

9 MJ [COL POHL]: And if you believe you have such a
10 conflict where you are pulling your punches do you have a
11 responsibility to withdraw at this point?

12 LDC [MR. NEVIN]: Yes. Of course.

13 MJ [COL POHL]: Are you withdrawing at this point?

14 LDC [MR. NEVIN]: If you leave it right here -- if you
15 leave it right here, I think that's where I am. And I am
16 going to -- before I file a motion for leave to withdraw and
17 allege that -- because I understand the implications of that,
18 too, and what it would do -- I am going to get additional
19 advice from counsel before I make a decision to file that
20 motion.

21 But this is why we have to have this inquiry that the
22 cases speak of. It's entirely possible that these concerns
23 would be resolved by that kind of an inquiry, and, you know,

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1 we are not even in a position now to know whether or not this
2 is a conflict of interest which could be waived, because some
3 conflicts can't be waived.

4 But, you know, you see what Professor Fox says, the
5 lawyers involved in the Guantanamo defense cases do not know
6 what was being investigated, who was being investigated, and
7 why the investigation was being conducted.

8 MJ [COL POHL]: First of all, Mr. Nevin, all Professor Fox
9 is doing is what you told him what the status is. You are
10 quoting him, who is quoting you.

11 LDC [MR. NEVIN]: No.

12 MJ [COL POHL]: I do not dispute the fact that you don't
13 know, but the fact that Professor Fox says you don't know is
14 simply because you've told him you don't know.

15 LDC [MR. NEVIN]: Well, no, I told him what the
16 record ----

17 MJ [COL POHL]: Okay.

18 LDC [MR. NEVIN]: I provided him the pleadings that were
19 important in this case, and he reviewed them. I mean, if I
20 know -- if there's something in the record that shows me what
21 I know, that I know and have enough information to dispel the
22 concern that he's talking about, then show me where it is.

23 But -- but his point is that without a complete

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1 investigation into an explication of the earlier events, these
2 lawyers continue to operate in a world of suspicion. That's
3 the point that I'm trying to make to you is that's the
4 situation where we are now, and information which could be
5 obtained from the -- from the inquiry that we've asked the
6 court to make, have the -- have the ability to dispel that and
7 to put all of this at rest. And I hope that it does.

8 As I said to the military commission the last time we
9 were here, I don't want to be investigated. I don't want to
10 be -- I have been through this before. You saw the footnote,
11 the reference to the Kiriakou case. I've been through this
12 before, it's not pleasant, I don't like it. It wasn't fair
13 then, and it's not fair now. I'd like to have it demonstrated
14 that it has stopped, and that I don't -- and that my fears are
15 not well justified.

16 I would dearly love for that to happen. And I just
17 want to say, finally, before I sit down that the idea that the
18 security clearance -- that the loss of the security clearance
19 would be the only thing that was the subject of the Binalshibh
20 team member's -- the inquiry, the referral to the Department
21 of Defense, that's a livelihood. That's a way of earning a
22 living and providing for one's family. That's not a small
23 matter. That can give rise to a conflict as well.

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1 MJ [COL POHL]: A conflict by whom?

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

3 MJ [COL POHL]: Let's say that the DoD referral -- and
4 again, it focuses on all of the other alleged issues that the
5 interpreter had.

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

7 MJ [COL POHL]: Okay. And again, it's Mr. Harrington's
8 interpreter. Well, that may or may not impact that person's
9 ability to make a living, but does that mean that the
10 proceedings are now abated?

11 LDC [MR. NEVIN]: Well, I ----

12 MJ [COL POHL]: The remedy is if this person is
13 disqualified because he or she loses security clearance based
14 on those -- on that -- what the FBI told DoD, that's not a
15 showstopper, is it?

16 LDC [MR. NEVIN]: Well, I don't know -- I mean, I don't
17 know what the remedy turns out to be. All I mean to say is
18 that it can generate a conflict of interest, and it's a reason
19 to conduct an inquiry. I mean, in other words, whatever is in
20 those -- those -- the material in that letterhead memorandum
21 is from years ago, and this person has been serving on
22 Mr. Binalshibh's defense team for some considerable period of
23 time now. I don't know exactly what it is, but suddenly now

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1 this becomes an issue, and suddenly this is going to be
2 referred -- specifically directed at high levels to the
3 attention of the Department of Defense. Why? Why is this an
4 issue now? Why has this suddenly become an issue?

5 I mean, in other words, I just -- I think to say,
6 "We're going to put you in jail," or "We're a going to take
7 away your ability to earn your living in order to do your
8 work," which requires a security clearance, they both have the
9 effect -- they both have the chilling effect that can lead to
10 a conflict of interest.

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

12 LDC [MR. NEVIN]: Thank you for hearing me out.

13 MJ [COL POHL]: No problem.

14 Ms. Bormann.

15 Just for planning purposes, we're going to break for
16 lunch probably about 1245. In about 15 minutes or so,
17 depending where you are at, we'll take the morning recess.

18 LDC [MS. BORMANN]: I'm going to be quick, because I don't
19 know what I don't know. And so I listened to Mr. Nevin and I
20 listened to Mr. Harrington talk about facts, and I sat there
21 and I turned to Captain Schwartz and I said, "How do they know
22 all of this?" Because I don't know it. I don't know that
23 those are the facts.

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1 I know that what happened when we were here last was
2 that we determined that DSO for Mr. Binalshibh had been
3 approached by the FBI and had been asked to sign a
4 nondisclosure agreement, two of them, which at least on its
5 face asked him to become a confidential informant.

6 I know that you ordered me to send out a request, an
7 order, to former and present team members for
8 Mr. Binalshibh -- or I'm sorry, Mr. Bin'Attash, to report to
9 me whether or not they had been approached by any members from
10 law enforcement, whether or not they had signed an NDA. I
11 know that special trial counsel filed a public filing along
12 with an ex parte filing to you.

13 I don't know what the ex parte filing said. I have
14 no idea. They've filed, since then, I think, a total of three
15 ex parte filings. I have no idea what they say. Assuming
16 they are correct and complete and contain all information
17 pertinent to any investigation of any defense team here, you
18 are in possession of much more information than I have, and
19 frankly, much more information than anybody sitting on this
20 side of the room has.

21 According to the public filing made by
22 Mr. Campoamor-Sanchez, there were two people involved in this.
23 One was, I think, named Witness 1, and the other one was

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1 called Person A. That's what I knew after the public filing.

2 Then, as a result of defense investigation and the
3 sending out of orders that you drafted, the defense -- and we
4 have a joint defense here -- sort of crafted and put together
5 their own idea of what might have happened. And so when I
6 listen to Mr. Nevin speak and when I am listening to
7 Mr. Harrington speak, they're pretending, I think, that those
8 are the real facts. But the truth is, we don't know what the
9 real facts are. The truth is, we don't know what
10 Mr. Mohammad's linguist said to the FBI. I have no idea. I
11 don't know if Mr. Mohammad's linguist said, "You know, I have
12 suspicions that Ms. Bormann is violating the law, and you need
13 to -- you need to investigate her." I don't know if that's
14 the case.

15 What we found out when the defense tried to put
16 together -- because, of course, the defense is operating in a
17 vacuum. We don't have the information you have. So we're
18 trying to craft together every little scrap of information we
19 have. And so Mr. Ruiz finds out, by sending out your order,
20 that there's a guy named Mr. Gilhool, who used to work for him
21 as an investigator, who facilitated interviews with the FBI
22 and participated in some. No idea what he said. Don't know
23 whether or not he said, "Captain Schwartz on the Bin'Attash

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1 team is violating the law, and he's meeting with people,
2 terrorists, known terrorists, and providing information."
3 Don't know if that was the case or not. Don't have any clue,
4 because Mr. Gilhool won't talk to the defense.

5 Then we find out that there's a guy named Mr. Cruz.
6 Mr. Cruz, Mr. Harrington suspects might be Witness 1, but we
7 don't know that. That's only the suspicion of Mr. Harrington.
8 Why don't we know that? Because we haven't been provided any
9 information. It could be that Mr. Cruz doesn't have anything
10 to do with this and it's just a strange coincidence and that
11 in fact one of the men sitting at counsel table right now is
12 Person A. We have no idea, because we've not been provided
13 the information.

14 What we found out by sending out those 292C orders
15 was that more than two people were involved with the FBI
16 intrusion into the defense function. The defense was able to
17 identify four individuals, or at least what they suspect are
18 four individuals. One of those individuals, and this is
19 uncontroverted, has not come forward to any of the defense
20 teams' lead counsel. There is one person who is yet
21 unidentified, and who Mr. Harrington believes is Mr. Cruz, but
22 can't be sure of. So somebody lied in their submission to one
23 of the lead counsel on this case. We don't know who it is.

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1 That leads me to wonder whether or not anybody on my
2 team, present or former, may have done the same to me. And
3 the truth is, I don't know. And I don't know because you've
4 permitted the government to file ex parte communications with
5 you which presumably -- and I'm going to, you know, assume the
6 government is operating in good faith and has apprised you
7 completely -- which would be able to tell me whether or not I
8 should have concerns or my concerns be assuaged.

9 MJ [COL POHL]: Just to be clear, Ms. Bormann, as I told
10 Mr. Nevin in April, the fact that I let them permit --
11 permitted them to submit them ex parte does not necessarily
12 mean they would stay ex parte, but I can't make that
13 determination until I actually see them.

14 LDC [MS. BORMANN]: Okay.

15 MJ [COL POHL]: So...

16 LDC [MS. BORMANN]: So I, unlike Mr. Harrington and
17 Mr. Nevin, don't have much to argue factually because I don't
18 know what I don't know. And not knowing has an amazingly
19 chilling effect on defense function. We, too, have put off
20 investigations that are very sensitive during this time period
21 because we're not sure whether or not we are being monitored,
22 and, if we're being monitored, by whom, and for what purpose,
23 and whether or not what should remain privileged, and that is

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1 our work product, our investigation, would somehow be
2 disclosed to persons who it shouldn't be disclosed to. That
3 is a big concern when you're operating in a case of this
4 complexity and this seriousness. So it's had an immediate
5 chilling effect, at least with respect to how we operate now.

6 I would like to be informed that we have nothing to
7 worry about. But given the situation we find ourselves in,
8 that at least one defense team member here has lied to the
9 lead counsel, that we haven't been given any facts on which to
10 base an actual decision, and that requests for discovery in
11 this case have gone unanswered, I can't possibly say to my
12 team, and, more importantly, to Mr. Bin'Attash, we have
13 nothing to worry about.

14 Now, I want to talk a little bit about what the joint
15 defense agreement means. It means that we share information
16 and we share resources.

17 So it is quite possible that one of the individuals
18 who -- you know, Mr. Harrington talked about the apparent
19 target of the investigation. I can't tell you if that's true
20 or not because I can't tell whether or not we've been given
21 all of the information on this case. I assume we haven't.

22 So let's just talk about what Mr. Harrington assumed.
23 Mr. Harrington assumed that there was no criminal conduct that

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1 arose to the level that would require somebody to report it to
2 the FBI. I think that's what he argued. I don't know if
3 that's the case. I don't know if somebody told the FBI that
4 they suspected me of committing homicide. I have no idea.
5 Why? Because we haven't been given that information.

6 Now, with a joint defense agreement, I rely upon the
7 resources of other teams in this joint defense agreement. So
8 it is quite possible that one of the targets or one of the
9 witnesses actually became involved in some work for
10 Mr. Bin'Attash, and that that work product then was told to
11 the FBI. In fact, depending on what information is provided
12 to the defense, I may be able to fill the court in on more of
13 that issue, depending on how -- I can't speak about it in an
14 open forum because it's privileged, but I can tell you that I
15 have some serious concerns with respect to that.

16 Lastly, and I brought a copy for the government
17 because they're not involved with this, but this is -- here,
18 this is AE 284. So although it's not on the docket, I just
19 want to draw the court's attention to it and point out why I
20 have such serious concerns.

21 In AE 284 we asked the court to compel the government
22 to give us certain information. Back in November of 2013 we
23 requested from the government -- and I'm just going to

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1 paraphrase -- whether or not and to what extent we were being
2 monitored, meaning the defense team for Mr. Bin'Attash, by the
3 FBI, the DIA, the NSA and the CIA. Together we called that
4 IC, intelligence community. And we asked them, please tell us
5 to what extent we're being monitored and whether our
6 telephones are being monitored, whether our homes are being
7 monitored, whether our cars are being monitored, whether we're
8 being listened to surreptitiously, whether lawfully or not.

9 And the response was crafted by the then-prosecutor,
10 Joanna Baltes, now working for the FBI, and I thought it was
11 odd that Ms. Baltes responded to a motion for discovery,
12 because generally she doesn't. Normally it's one of the other
13 prosecutors who responds.

14 And the response is crafted in a very strange way.
15 It doesn't say that the information doesn't exist. It doesn't
16 say there is no monitoring. It says, "We decline to provide
17 that information." That motion to compel is currently pending
18 before you. We filed that motion to compel because we had
19 serious concerns that the defense function was being
20 compromised, even before the April hearings.

21 Now, that has made this job exponentially more
22 difficult, and to say -- I can't say whether or not I'm
23 operating under a conflict now because I don't know. So what

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1 I need you to do is to allow us to argue those motions for
2 discovery, allow us to argue those productions for
3 witnesses -- I'm assuming we're going to get to that -- and
4 then provide the discovery, provide the ex parte
5 communications, and have a full inquiry on this so that I can
6 make a decision about whether or not I'm operating under a
7 conflict and I can, if possible, advise Mr. Bin'Attash. If
8 not possible, ask for independent counsel. And we can then
9 protect Mr. Bin'Attash's right to have effective assistance of
10 counsel.

11 MJ [COL POHL]: Thank you. Commission will be in recess
12 for 15 minutes and we're going to reconvene at 1120.
13 Commission is in recess.

14 [The R.M.C. 803 session recessed at 1105, 16 June 2014.]

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