

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1406, 16 June
2 2014.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties are again present that were present when the
5 commission recessed.

6 Mr. Harrington, do you have anything you wish to add?
7 Or are we going to do it in a different order?

8 LDC [MR. CONNELL]: Yes.

9 MJ [COL POHL]: Okay. Mr. Connell.

10 LDC [MR. CONNELL]: Good afternoon, Your Honor.

11 MJ [COL POHL]: Good afternoon.

12 LDC [MR. CONNELL]: Three points I'd like to make in
13 response to the prosecution. The first is the prosecution's
14 argument that "there is no investigation" is heavily dependent
15 upon tense. It is heavily dependent on in fact the simple
16 present tense, and that's significant because of the
17 procedural posture that this has happened.

18 So on 14 April, when the government filed 292A, if
19 they had had to say, is there an investigation, they would
20 have had to say yes. And on 16 April when they filed 292F,
21 they would have also had to say yes, there is an
22 investigation.

23 And on 21 April, when they filed 292I, they would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 have had to say yes, there is an investigation. When I left
2 for the Middle East on 9 May, they would have had to say, yes,
3 there is an investigation. It's only by essentially extending
4 the time that they had to reply until 21 May that they're able
5 to say, now there is no investigation because, in the
6 bureaucracy of the FBI, the FBI has closed its preliminary
7 investigation.

8 Now, there's a real question about what that closure
9 means, because we know that at least one person was
10 interviewed in November of 2013, which is three months before
11 the preliminary investigation was formally opened. So we know
12 there's -- and from that and the regulations that we cited in
13 our brief, we know that there's no restriction on the FBI
14 actually investigating things, with a lower case I, even if
15 there is no capital P, Preliminary, capital I, Investigation,
16 going on.

17 The part of the significance of that is is the
18 time -- is the question, at least for Mr. al Baluchi, of what
19 is the relevant time for analysis. The relevant time for
20 analysis that I identified when I feel the conflict arose was
21 in the middle of May before the closure of the investigation
22 on 12 May, and before the prosecution advised of the closure
23 of the investigation on 21 May.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The second point that I'd like to make is with
2 respect to the cases that the prosecution relies on, and the
3 briefs heavily discuss the cases, so I'm not going to go into
4 too much detail. But there's one extremely significant
5 distinction between the two bodies of law that occur on the
6 Sixth Amendment side of the conflict of analysis question, and
7 that's the difference between post-conviction analysis of a
8 conflict of interest, which is governed by Mickens and a
9 variety of other cases, including the Montana case and the
10 Novaton case that the prosecution talks about here, where a
11 court is second-guessing defense counsel, usually on the basis
12 of a hypothetical that a defendant has presented in
13 post-conviction, "My attorney must have had a conflict of
14 interest several years ago because" X, Y and Z, now we know
15 that he was under investigation or whatever.

16 The -- it's that's the context in which the sentence
17 of "if there was no investigation at the relevant time."
18 Surely, there was no conflict of interest arise.

19 The situation that we have here is the one that's
20 governed by Holloway, which is a prospective question, which
21 is when you have defense attorneys who know all of the facts
22 and are acting in good faith, advising the judge of -- as they
23 are required to do, of the conflict of interest, or the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 potential conflict of interest, as they see it. There's a big
2 difference between those two. One is second-guessing the
3 person who knows or can assess the conflict under the ethical
4 rules, and the other one is deferring to the person who can --
5 not deferring, but recognizing the knowledge that the defense
6 counsel has in that area and the responsibility that they have
7 under the ethical rules.

8 MJ [COL POHL]: How do you respond to the special trial
9 counsel's remark that if we conducted an evidentiary hearing,
10 by definition, you guys couldn't do it?

11 LDC [MR. CONNELL]: Right. It shows a fairly weak
12 understanding of the conflict of analysis procedure which is
13 set out under Holloway, because it flips two things, or maybe
14 it shows an exceptionally deep one and very cleverly
15 strategic. I don't know. But it flips two parts of the
16 analysis. So the analysis should go in the decision tree that
17 I laid out. It should go, inquiry, adjudication of whether
18 there's a conflict. That's the first decision point that I
19 talked about. And then if there is a conflict, you go off
20 into waiver analysis, et cetera.

21 The -- what the prosecution describes is, well, what
22 if you declare from the beginning that there's a conflict,
23 that the judge of the tribunal declares from the beginning

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that there's a conflict. Then you have litigation about it.

2 That's not what we're suggesting. We're suggesting
3 the opposite. The way that the cases say that it has to
4 happen, which is that defense attorney -- or, in some cases,
5 prosecution attorney -- has a responsibility to raise to the
6 court or the commission or whatever tribunal there is the
7 question of whether -- of a suspected conflict of interest.

8 Then the thorough inquiry takes place that Holloway
9 talks about. And during that inquiry, of course, the -- the
10 judge has to talk to the defense about what they know or
11 suspect or believe, because normally they're the ones in
12 possession of the facts. Here it happens that the prosecution
13 possesses a lot of the facts.

14 Then you come to the stage, the decision point of,
15 well, all right, is there a conflict, no? Full stop. Is
16 there a conflict, yes? We go to the question of waiver.

17 MJ [COL POHL]: So your position is contrary to theirs,
18 that defense counsel who think they may have a conflict
19 litigate whether or not a conflict exists?

20 LDC [MR. CONNELL]: Until there's a determination of
21 whether there's a conflict, yes. And there are two -- there
22 are two possible variations on that theme.

23 The first one is, is that if the conflict were so

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 serious that no defense attorney could -- that there's never
2 going to be a waiver analysis, no reasonable person would ever
3 waive this analysis. If, for example, that during the middle
4 of trial it was determined that there was a new unadjudicated
5 bad act against the defendant and it was killing the spouse of
6 the defense attorney. Right? No one's going to waive that
7 conflict. It's impossible; just too serious a conflict. In
8 that situation it would make sense to intervene at an earlier
9 stage before we know, really know -- have the determination of
10 a conflict. But even that analytically is just moving the
11 determination of the conflict up because obviously it's a
12 conflict. Obviously, it is too significant to be waived.

13 The other variation on the theme involves independent
14 counsel. If there is really a question of some element of the
15 litigation that could not be conducted by counsel operating
16 under the shadow of a conflict or a potential conflict, then
17 that's where independent comes into the question. And
18 independent counsel relieves the conflict problem, because if
19 counsel who is independent, and thus by definition has no
20 conflict or even suspected conflict, comes to the same
21 conclusion as defense counsel who is operating under the
22 shadow of a conflict, then the conflict has not actually
23 affected the decision.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 So if there were a situation ----

2 MJ [COL POHL]: So to litigate the conflict, we have to
3 appoint new counsel for all five?

4 LDC [MR. CONNELL]: No. I mean, the prosecution decided
5 that they had to do that. And I don't second-guess their
6 decision on that. That's what they wanted to do, that's what
7 they decided to do. I -- in fact, the place where I started
8 is that the main theme is that while you're litigating whether
9 there is a conflict or not, who else is going to carry on the
10 case, other than the defense counsel? I mean, if the
11 prosecution's idea that one can never litigate once the
12 question of conflict has been raised, then raising a conflict
13 would be a full-stop for the case.

14 It would mean that if either the defense or the
15 prosecution or somebody else suggested, oh, I think the
16 defense counsel or any particular defense counsel has a
17 conflict of interest, then if that meant that the defense
18 counsel could no longer operate in the case, then everything
19 would come to a full stop; there's no way out of that bind.
20 So, of course, that's not the law, when in fact the law is
21 that in the ordinary case, the defense counsel continues to
22 participate until there's an adjudication of a conflict.

23 Once the conflict is adjudicated, then you have to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 make the decision, is it waivable or not waivable. If it is
2 waivable, is there a knowing, voluntary and intelligent
3 waiver? If there is a concern -- all I meant about the
4 independent counsel was at the beginning, if this was the sort
5 of conflict where there was a concern that counsel could not
6 litigate it properly, then that problem could be addressed by
7 the appointment of independent counsel.

8 It's our position, it's my position, that
9 Mr. al Baluchi needs to be appointed independent counsel not
10 for the purpose of litigating this or anything else in this
11 court. The -- he needs independent counsel for independent
12 advice on the question of whether he should waive the
13 conflict, or potential conflict, created by the investigation
14 and its effect on the investigation.

15 Does that make sense?

16 MJ [COL POHL]: I heard you.

17 LDC [MR. CONNELL]: That tells me something, because it
18 means I need to keep talking. There has to be -- right, all
19 problems have to have some sort of solution to them, and what
20 I am -- what I am proposing here is -- is how do we have --
21 once there's been the question of a conflict raised, how do we
22 get from there to continuing with the rest of the case? And
23 the way we get to there is that the court conducts a thorough

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 inquiry, but the court can't do that by itself, with the
2 assistance of the parties into the -- into whether there's a
3 conflict or not. And it's at that point the determination
4 gets made. The court decides, yes, there's a conflict, no,
5 there's not a conflict. And the idea that just the initial
6 raising of the question, is there a conflict, immediately
7 means that all of the defense are temporarily or permanently
8 discharged is just not accurate.

9 And sometimes it works the other way. Sometimes,
10 especially in state court, a prosecutor has a conflict because
11 they might have more than one job. They might have been in a
12 different -- they might have been a defense attorney before.
13 They might have represented the victim in a personal injury or
14 something like that. The fact that a conflict question gets
15 raised by one side or the other, about one side or the other
16 doesn't disqualify those attorneys from participating; it just
17 means that in -- normally, they participate in the litigation
18 until they -- until the court decides, yes, there is a
19 conflict, I have to do something about it. No, there's no
20 conflict, I don't have to do anything about it.

21 MJ [COL POHL]: How do you respond to the position of the
22 government that since there is no investigation, there is no
23 conflict?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: Well, the -- a couple of responses to
2 that. The first one is the sort of highly technical sense in
3 the way the prosecution is using the word "investigation."

4 They're equivocating inquiry into the -- whether the
5 defendants' defense counsel had violated any laws with the
6 question of whether the FBI has done the administrative task
7 of closing the preliminary investigation or not.

8 But setting that aside, and especially for -- and the
9 briefs address this at some length about the significance of a
10 security clearance investigation, the criminal investigative
11 power of the Department of Defense after the referral has
12 taken, and the highly technical sense in which even today the
13 prosecution doesn't deny the existence of an investigation;
14 they only say that the FBI has closed its preliminary
15 investigation into ----

16 MJ [COL POHL]: What more do you want them to say?

17 LDC [MR. CONNELL]: Well...

18 MJ [COL POHL]: That there will never be another
19 investigation, that new evidence ----

20 LDC [MR. CONNELL]: No.

21 MJ [COL POHL]: I understand what you are saying. And
22 putting the security clearance one aside for a second ----

23 LDC [MR. CONNELL]: Sure.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: ---- is the government keeps saying that
2 the FBI is closed, there is no current investigation of the
3 defense or the defense team. Again with that thing aside, I
4 mean, what more do you want them to say?

5 LDC [MR. CONNELL]: Well, let's -- they also are very
6 careful to maintain the position under oath that -- under
7 oath, that facilitating communications between defendants and
8 third parties is a violation of the federal criminal law. You
9 compare that with the Kiriakou situation that Mr. Nevin spoke
10 about.

11 MJ [COL POHL]: Oh, but, okay. Okay. They have some view
12 of -- taking your argument -- some view of what is a violation
13 of federal criminal law. And if you do this in the future,
14 they say it's a violation of federal criminal law.

15 Okay. So under that analysis, does that mean -- what
16 do we do then. I mean, you seem to be saying that if because
17 there may be a potential investigation on something else given
18 their view of the law, therefore, what?

19 LDC [MR. CONNELL]: Therefore, it's necessary to advise
20 the defendants of the risk of ----

21 MJ [COL POHL]: Of what?

22 LDC [MR. CONNELL]: Of the right to conflict-free counsel.

23 MJ [COL POHL]: No. I'm saying, what is the prospective

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 conflict that you keep talking about?

2 LDC [MR. CONNELL]: Well, in ----

3 MJ [COL POHL]: I mean, how would I explain to them is
4 that if your counsel commits a crime in the future, that may
5 create a conflict?

6 LDC [MR. CONNELL]: No, certainly not. Because committing
7 a crime in the future may easily -- I mean, that would be a
8 true statement, but that's not the situation that we face
9 here.

10 The situation that we face here is -- and let me just
11 take Mr. al Baluchi as an example. I know you might have a
12 larger question.

13 But for Mr. al Baluchi as an example, there's no
14 prospective aspect to this. I mean, in candor to
15 Mr. al Baluchi and to the military commission, I described the
16 actual effect that the investigation, which no one -- which
17 lasted at least from February, in its narrowest technical
18 sense of investigation, capital I "Investigation," from
19 February to May 12, there was an FBI investigation into the
20 third-party communications which actually affected my
21 investigation.

22 So for the prosecution to come now and say, now
23 there's no harm and no foul because now we got a long enough

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 extension from the court to close our investigation, does not
2 affect the fact that their investigation has had an effect on
3 the defense, and that that investigation, closed, open,
4 somewhat open, or ready to be sprung again at any time,
5 affects the operation of the defense in the future.

6 Now, your fundamental question before that was, well,
7 what does that mean that we do? And it's one -- that's why I
8 began this conversation with -- earlier, with this is not a
9 judgment call about someone should stop doing something, or
10 someone should have done something else. This is not a
11 judgment call about who's been bad.

12 This is a -- a procedural question of a conflict of
13 interest having arisen, how does one proceed from there?
14 There's a set decision tree. Conflict of interest having
15 arisen, there has to be advice to the defendant and
16 independent advice of counsel and a waiver.

17 MJ [COL POHL]: If the government's position that since
18 there is no investigation, there is no conflict of interest is
19 correct, is there anything more to be done?

20 LDC [MR. CONNELL]: The ----

21 MJ [COL POHL]: What am I -- I mean, what am I to advise
22 the accused? "There was an investigation, it was closed out
23 without any finding. Do you still want to keep your lawyers?"

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: So if you find -- I began with this as
2 well -- if you find that there is no conflict for
3 Sixth Amendment purposes, then there is nothing that the
4 military commission does further.

5 The -- I also in my main argument, however, raised
6 the fact that there's a separate ethical inquiry that has to
7 be made, and which is why I asked the court to consider 292L
8 separately from whatever decision it makes on 292. Let's say
9 on 292 you say, "I find that there's no conflict, there's no
10 actual conflict, there's no potential conflict. Game over.
11 We're done with this issue. We're moving on."

12 In that situation, each attorney still has an ethical
13 obligation to their client under the rules of their state bar,
14 and that ethical -- when that ethical obligation includes
15 independent advice of counsel because the -- at least
16 Mr. al Baluchi, if I'm going to advise him on the right to
17 conflict-free counsel, I'm going to advise him on the risks of
18 proceeding with his current counsel, and I'm going to ask for
19 a waiver of his -- of that conflict.

20 MJ [COL POHL]: A waiver of what conflict? If you say
21 there is no conflict ----

22 LDC [MR. CONNELL]: No Sixth Amendment conflict.
23 Sixth Amendment conflict requires an actual effect on the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 defense, and you and I are allowed to disagree. And, in fact,
2 you disagree with me quite often.

3 The -- you can decide that there's no conflict for
4 Sixth Amendment purposes, but there still could exist a
5 conflict for ethical purposes. Because the definition that
6 counsel read of a conflict of interest is the constitutional
7 conflict; that is, the interests of the attorney and the
8 client diverge with respect to a course of action, like
9 showing an introduction letter to a witness.

10 But there's the separate question of the ethical
11 definition under 1.7, which is does another interest of the
12 attorney -- a personal interest of the attorney materially
13 affect the litigation. And I could decide ethically that
14 that -- that that has occurred, even if the military
15 commission decides the -- that there's no conflict for
16 Sixth Amendment purposes. That's what I'm asking ----

17 MJ [COL POHL]: And if I conclude that there's no conflict
18 for Sixth Amendment purposes, I then still conduct a hearing
19 so you can handle your ethical concerns?

20 LDC [MR. CONNELL]: No.

21 MJ [COL POHL]: I mean, what -- I'm trying to figure out
22 where this goes procedurally.

23 LDC [MR. CONNELL]: Maybe I'm not being clear. I'm saying

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that 292L, not 292D or 292J or 292EE, are separate -- is
2 separate from 292. 292L is the request for independent
3 counsel, which would allow me to discharge the ethical
4 responsibility of independent counsel. That doesn't impose
5 any duties upon the military commission for a hearing or
6 anything else.

7 292L is a request for essentially, as we've said
8 earlier, the logistical aspect of being able to provide
9 independent counsel, advice to the defense ----

10 MJ [COL POHL]: Let me see if I got -- just kind of the
11 way forward here Mr. Connell, just so I understand.

12 LDC [MR. CONNELL]: Yeah.

13 MJ [COL POHL]: Hypothetically, if, after reviewing the
14 pleadings, I decide there's not a conflict.

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: Then that meets ----

17 LDC [MR. CONNELL]: I understand that.

18 MJ [COL POHL]: Then I still order an independent counsel
19 to advise the accused of the conflict that I did not find, and
20 then do we still do an evidentiary hearing?

21 LDC [MR. CONNELL]: No.

22 MJ [COL POHL]: Okay.

23 LDC [MR. CONNELL]: Because for Sixth Amendment purpose,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 you will have disposed of the question. But there still --
2 let me say that -- if you were not at Guantanamo Bay ----

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: ---- and this issue came up, the
5 defendant would get on the phone, call, you know, just go down
6 the list of attorneys which are posted there in front of the
7 jail, call them up and say, "Listen, my attorney says there's
8 this conflict of interest. He says that, you know, he doesn't
9 think it's a big deal, that it's waivable, whatever --
10 whatever it is that the attorney said. What do you think? He
11 could get a second opinion.

12 But because Mr. al Baluchi can't communicate with
13 anyone, he can't communicate with the American Bar
14 Association, he can't communicate with the Virginia state bar,
15 he can't communicate with the International Human Rights
16 Organization. He can't communicate with anybody. He can't
17 call an attorney said say, "I need a second opinion," which is
18 something that everyone else in the whole United States can
19 do.

20 The reason why 292L is necessary is, even if you say,
21 "There is no conflict whatsoever, I'm stopping the
22 Sixth Amendment inquiry here," 292L is still independently
23 necessary because the intervention of the court is the only

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 way that he can get a second opinion.

2 MJ [COL POHL]: Okay.

3 LDC [MR. CONNELL]: The last small point that I wish to
4 make is the -- is that in some questions it has seemed like
5 there has been an equivocation of conflict and withdrawal or
6 discharge, as if a conflict by itself is disqualifying for an
7 attorney. That is not correct. Almost every defense attorney
8 has at some point in their career represented co-defendants,
9 either in an investigation, husband and wife who are charged
10 with the same thing, and under the ethical rules, there's even
11 a specific ethical rule in 1.8 that discusses concurrent
12 representation, and it's because conflicts are waivable.

13 Conflict is not the equivalent of mandatory discharge
14 or withdrawal. There's still the waiver analysis, which is
15 what Holloway talks about for Sixth Amendment purposes, what
16 Rule 1.7 talks about for ethical purposes, and it's an
17 important link in between a finding of conflict and the
18 ultimate remedy of what happens with the attorneys.

19 Thank you very much.

20 MJ [COL POHL]: Thank you.

21 Any other defense counsel like to be heard?

22 Mr. Nevin.

23 LDC [MR. NEVIN]: Your Honor, some of what I wanted to say

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Connell said, so I'm not going to repeat it.

2 MJ [COL POHL]: Thank you.

3 LDC [MR. NEVIN]: Unless you would like me to.

4 MJ [COL POHL]: No.

5 LDC [MR. NEVIN]: All right. But I'm going to touch on
6 two or three things. I heard the discussion between the
7 military commission and Mr. Campoamor about the question of
8 whether there would even be jurisdiction to prosecute the --
9 any of the members of the defense teams in the office of
10 the prosecutor's office for the Office of Military
11 Commissions. And I just want to point out to the military
12 commission that before we were gone from here last April, when
13 we were here for hearings, we had an appearance from
14 Mr. Campoamor of the Department of Justice. He's an Assistant
15 United States Attorney in the district of the District of
16 Columbia, and you have three or four lawyers at any given time
17 on that side of the table at our regular hearings who are
18 Department of Justice employees.

19 There is complete overlap here in these prosecuting
20 agencies. In any of that, it would be the United States;
21 speaking from a higher view, say, a view from 10,000 feet, the
22 issue as we see it from where we're sitting is that we have
23 the United States opposed to us, and it is the United States

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 who would be the operative plaintiff in a lawsuit against us,
2 if it came to that.

3 So we -- I hope the court -- the military commission
4 won't be diverted by the proposition that we could not be in
5 any harm's way from these prosecutors who sit to our right
6 on -- in normal hearings.

7 Second, we've heard discussion, and Mr. Connell spoke
8 to some of this, about the question of whether the fact that a
9 conflict exists now means that we are not competent to
10 represent the defendants now on the question of whether
11 there's a conflict. And I think Mr. Campoamor raised that in
12 a -- in the way of saying -- in conjunction with an argument
13 that we have heard many times, which is, you know, "Your
14 ability to defend these defendants isn't compromised at all.
15 Look at all the work you're doing. Look at how hard you're
16 working, look at how diligent you are. Look at how you're out
17 on all of these fronts opposing us everywhere."

18 We hear that a lot, and I take it that that's what
19 Mr. Campoamor was really saying. But Your Honor, the Holloway
20 says that the obligation to conduct a thorough inquiry,
21 quote/unquote, falls to the court or to the military
22 commission in this case. It is the military commission which
23 is charged with assuring that there's conflict-free

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 representation. It's not -- and if I remember correctly when
2 we were here in April, you, the military commission, made the
3 remark, "I'm not going to go out and conduct depositions
4 myself," and I assume that that's true. But you would
5 presumably give us the power to conduct a deposition and set
6 the limits upon which we could -- within which we could do
7 that, and you would allow us then to present you with
8 evidence. But the point is at the bottom of it, it's an
9 inquiry that the military commission is making.

10 But more broadly, our interests don't diverge with
11 respect to whether there's a conflict. Our interests don't
12 diverge from our clients' on the question of whether or not
13 there's a conflict. We both have an interest in learning
14 whether or not we have a conflict of interest. So we don't --
15 I don't think that there is a conflict with respect to the
16 question of whether there is a conflict on the larger question
17 of representation in the case itself.

18 And that brings me, finally, just to the last point,
19 which is the suggestion that when the government recites that
20 there are no open investigations now, that's the end of the
21 story.

22 I think somehow that's become an accepted proposition
23 that their mere recitation of that is the end of the story,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 period, full stop, that's it. And that's not right. That's
2 not what their cases say. That's not what "the" cases say.
3 But it's not what the cases the government has cited say. And
4 we've talked about this extensively in the briefing, and I'm
5 not going to rehash it all now, but the -- the one case that
6 keeps coming up is Lafuente. And in Lafuente, the -- the --
7 there's a determination that the lawyer may have had -- the
8 defendant, if I'm not mistaken, was acting in this appeal --
9 yes -- the defendant was acting pro se, and this is a
10 proceeding that's taking place before the Seventh Circuit, and
11 the defendant is saying, "My attorney had a conflict," and
12 it's the same different procedural posture that Mr. Connell
13 was referring to.

14 We're now at ground zero looking forward. They -- in
15 essentially every one of these cases except Holloway, they are
16 on a post-conviction action looking rearward, and that's why
17 when there is no allegation of any kind of, except that the
18 attorney was under investigation, that's why the courts say
19 things like, "if the attorney's not under investigation, then
20 there's no conflict." And the special trial counsel converts
21 that into a principle of law. If there's no investigation of
22 the attorney, then that's the end of the story. There's no
23 conflict. No, those statements come out of cases where there

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 was no allegation except that.

2 But in Lafuente they say, no, you've got a point
3 here, that if the -- if the lawyer is under investigation,
4 this is not something that should have been dismissed out of
5 hand as it was. This is something that we should have --
6 we're going to remand this for further proceedings.

7 And they go on to say something that is -- has been
8 pointed to by the special trial counsel. But I want to tell
9 the court -- I want to read to the court a sentence, and read
10 to you what it says because they say, "We note that a full
11 evidentiary hearing is not the only available option to the
12 district court to resolve the essential disputed facts. The
13 essential disputed facts: Whether Gambino was actually
14 investigated by the U.S. Attorney's office or whether she
15 feared such an investigation."

16 You see, these cases are looking -- when you're in
17 the post-conviction process, it's a 2255 action, and you're
18 come -- the defendant is coming in after he has been convicted
19 or she has been convicted and it's saying, please let's look
20 back at what happened and -- because I've learned some facts
21 since that indicate that my attorney had a conflict of
22 interest. And the court is saying, wait, if there's no -- if
23 there's not any investigation -- if there was not an

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 investigation, and actually what they say is if there was
2 never an investigation. If there was never an investigation
3 of your lawyer, there can't have been a conflict.

4 I mean, now you've -- later you've found out that the
5 attorney may have done some bad things and been sanctioned for
6 it, but unless that was happening at the time, unless there
7 was -- unless your attorney had something to fear, then there
8 can't have been a conflict. But that makes perfect sense when
9 you are down the road looking backward. But now again, we're
10 at ground zero. So the question is not only is there an
11 investigation; the question is whether we reasonably have a
12 fear.

13 Now, the cases will also say that a bare fear on the
14 part of the defendant that the attorney was under
15 investigation is not enough to satisfy -- to satisfy the
16 suggestion that there was a conflict of interest. And if I
17 have an unreasonable fear that I'm being investigated, that's
18 one thing, and one could imagine a delusional fear that I
19 might have that I was being investigated. But, you know, in
20 our -- in the situation that we have here, we have -- as we've
21 said repeatedly, we have -- our affidavits show that the
22 investigation was not limited to a non-attorney member of each
23 defense team. The questions were more wide-ranging than that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 If they really are only related to the investigation of a
2 non-attorney member, why are they asking about attorneys? Why
3 are they asking about counsel?

4 I don't know who's telling the truth here, so to
5 speak. I don't know that it's necessarily a matter of
6 truth-telling, but what I mean is the suggestion -- the simple
7 statement, this was an investigation of a non-attorney team
8 member. No, it wasn't. It was an investigation of counsel.
9 And based on that affidavit, we are now asked to conclude that
10 there's also no other investigation, and we can't really be
11 sure of that until we give over names and dates of birth. But
12 really, there's no investigation.

13 Well, I'm sorry, but the circumstances of this case,
14 they've probably never arisen before and they'll probably
15 never arise again. This is an unusual case, and we know that.
16 We've known that all along. It's a very unusual case. And
17 this is one where I'm not calling -- I'm not saying these
18 people have made any overt misrepresentations. That's not my
19 point. But I believe we are under investigation and we're
20 under scrutiny all the time, and my -- and my analogy of
21 sitting around the campfire and hearing the wolves howling out
22 there is not based on my imagination. I'm not saying, "Was
23 that a wolf," and my companion is turning to me and saying,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 "What are you talking about, that was my pack creaking."

2 No, we have been down this road many times.

3 MJ [COL POHL]: So, Mr. Nevin, I understand that, but I'm
4 saying, going forward -- going forward, you may fear you're
5 going to be investigated.

6 LDC [MR. NEVIN]: Yes.

7 MJ [COL POHL]: You maybe fear that you are being
8 investigated now based on lack of disclosure.

9 LDC [MR. NEVIN]: Yes.

10 MJ [COL POHL]: Okay. That's -- but my question becomes
11 is, we have the representations of the United States here, and
12 then, to say a negative, there is no investigation going. Do
13 we keep calling witness after witness from the government to
14 say there is no investigation? At what point do you stop
15 calling witnesses to prove a negative? Or present evidence to
16 disprove a negative -- because isn't that what you are asking
17 me?

18 LDC [MR. NEVIN]: At what point do we start? Never mind
19 when we stop. Let's start.

20 MJ [COL POHL]: Well, you've got to answer my question
21 first, and then I'll answer yours. No, I'm just saying
22 is ----

23 LDC [MR. NEVIN]: No, I mean that very literally. We

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 haven't started. They've filed an affidavit -- two
2 affidavits, excuse me, that are inconsistent with the known
3 facts and that are incomplete on their face, and we're saying,
4 it's all good. Where is this going to end?

5 MJ [COL POHL]: So who do you want to hear from to say
6 there is no FBI investigation?

7 LDC [MR. NEVIN]: 292D.

8 MJ [COL POHL]: Okay.

9 LDC [MR. NEVIN]: 292D or some -- I mean, whatever.

10 MJ [COL POHL]: Do you want a declaration from the -- what
11 I'm saying is I understand what you're saying and you are
12 reading the declarations. They're not good enough for you.
13 The representations of the trial counsel aren't good enough
14 for you. So let's keep calling more and more people from the
15 FBI to say there is no investigation. Is that what you are
16 asking me to do?

17 LDC [MR. NEVIN]: No. What -- the military commission
18 said tell us what an investigation of this would look like,
19 and we did that. We did it in 292D and then we supplemented
20 292D.

21 MJ [COL POHL]: I know. But I'm talking about your point
22 that you've spent time on ----

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

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: ---- that "I don't believe I'm not being
2 investigated, I don't believe all of the investigations are
3 done," and that -- that's the narrow point that I'm addressing
4 here.

5 LDC [MR. NEVIN]: Yes.

6 MJ [COL POHL]: And what I'm asking you is, is you have
7 two declarations. You read them one way. The government
8 reads them another way. The representative of the United
9 States says there are no investigations and you want me to
10 call more witnesses or more witnesses to be called to say the
11 same negative thing?

12 LDC [MR. NEVIN]: I have to say that what I really want is
13 to know the scope of the investigations that were conducted.

14 MJ [COL POHL]: That's a different issue.

15 LDC [MR. NEVIN]: I want to know ----

16 MJ [COL POHL]: Mr. Nevin, that's a different issue.
17 That's going -- I've got that. That's not the issue that I'm
18 asking about. You're the ones raising this about -- about
19 this "I don't know there's more investigations going on."
20 That's my question. I'm not talking about going -- what's
21 been done. I'm talking about going forward on this question,
22 not to minimize the other questions.

23 Go ahead.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. NEVIN]: Well, they've never -- the -- the agents
2 who came and got Mr. Harrington's DSO to sign a non-disclosure
3 agreement, those -- we haven't heard from them, and the
4 allegations contained in Mr. Harrington's declaration have
5 never been denied. There's just simply no statement of those
6 and there's no statement, there's no refutation of the cases
7 that we presented that say that investigating non-attorneys
8 can also give rise to a conflict. So I take it that there's
9 no dispute about any of that.

10 The proposition is, simply, "We've closed the
11 investigation, so we're good to go." And I understand your
12 point about the -- I understand counsel's point as well as the
13 military commission's point about the distinction between a
14 conflict -- a conflict inquiry and one that goes to invasion
15 of the defense camps, whatever you want to call it. I
16 understand those are two separate things. And either way,
17 whatever happens, we may well get to that.

18 But my point is, a fear is enough, and unless I
19 know -- unless we all know what was going on, why something
20 that's never happened in the collective experience of any of
21 us took place, that an infiltration, an attempted infiltration
22 of the defense camp, why -- what they were after, what they
23 were looking at, some degree of detail about it, there's an

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 allegation with respect to my linguist that there was the
2 commission of a federal crime or the threatening of national
3 security. What was it? How do I deal with that? What did my
4 linguist say, in the opinion of the FBI? What information was
5 revealed? And what information was revealed by
6 Mr. Harrington's DS0?

7 Until we know that we're in a position to protect
8 client confidences, we can't engage in defense work. I
9 recognize that's an aspect of another motion, but my point
10 here is -- and I really -- that's why I explained to the --
11 that's why I used this analogy about the campfire and why I
12 talked to the court about Lynne Stewart and why I talked to
13 you about the trip to the Middle East that I canceled. These
14 are not hypothetical matters that I'm throwing out here for
15 argumentative purposes.

16 These are things that restrict our ability to defend
17 the case. And if we know what was going on, if we have
18 insight into why you were conducting this investigation, what
19 it is that you think we're doing wrong, our defense team now,
20 non-attorney members of our defense team, but our defense
21 team, if we have that information, then we're in a position to
22 sit down with our clients and say, look, I -- I see what they
23 were doing. They thought this, and they thought that, based

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 on this or the other, and we're good on that. I get it.

2 Fine. Let's go. We can do that.

3 But it's this -- it's why I quoted you Professor Fox
4 before and I got the distinct impression that you didn't want
5 me to do that anymore, he just said it well.

6 MJ [COL POHL]: Quote whoever you like, that's fine.

7 LDC [MR. NEVIN]: But he just said it well. Really, it's
8 a matter of common sense. We act, we act, we live in a state
9 of uncertainty. And the inquiry that we have proposed in
10 292D, or some form of it, is what will allow us to pull back
11 the clouds, get some sunlight in here, and let us see where we
12 stand. And then we can go forward. Okay.

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

14 Ms. Bormann.

15 LDC [MS. BORMANN]: Briefly, because Mr. Nevin and
16 Mr. Connell have made most of the points that I wish to make,
17 a couple of things.

18 Mr. Campoamor talked about the difference between
19 U.S. Attorneys investigating the matter and here in an
20 Article I court, and you rightly pointed out, then you would
21 never be able to have a conflict here because, well, they can
22 never investigate here, at least according to them.

23 But I would point out that the FBI is a law

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 enforcement agency charged with investigating the crimes my
2 client is charged with, and is specifically cited in this
3 particular issue. So we certainly have that in common.

4 Mr. Campoamor responded to your question. You said
5 in an argument about, well, how about in this instance where
6 the investigation at issue is actually related to the conduct
7 of the defense counsel and their teams related to this case.
8 And Mr. Campoamor started to say, "Well, if the defense can
9 show it was related," and then he stopped.

10 And he stopped, I submit, because he knows we can't
11 show it. Why can't we show it? Because the government has
12 stood between us and the evidence we could use to show it.
13 And so he stopped and he said, "Well, Judge, in that case, you
14 would have a different issue, but that's not what happened
15 here."

16 Lastly, I want to talk a little bit about
17 Mr. Campoamor's statement that the defense is inviting error
18 by asking you to do an inquiry. I have read every case cited
19 by the defense and every case cited by the government. There
20 is not -- and case law on my own. There is not a single case
21 that exists that I'm aware of that finds a court committed
22 error by protecting a defendant's rights more, by protecting a
23 defendant's rights to conflict counsel -- conflict-free

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 counsel more. Because the truth is that courts only commit
2 error when they gloss over the rights of defendants.

3 And so for those reasons, and because, of course, I
4 don't want to too vociferously argue for fear that
5 Mr. Campoamor might argue I'm not burdened by conflict. So to
6 avoid that argument, I'm going to sit down. Thank you.

7 MJ [COL POHL]: Mr. Harrington? Mr. Ruiz?

8 Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, I have a few comments, but
10 before I do that, I spoke to Mr. Campoamor, and it's my
11 understanding that he is going to stipulate with me that on
12 AE 292R, for Attachment D, with that is an Attachment 1 to
13 Attachment D, which is a communication from the FBI to the
14 Department of Defense that he would agree that that document
15 would be sealed, the reason being that it contains some
16 information in there which would require extensive litigation
17 which we believe might be inflammatory and very prejudicial to
18 an individual, and that the points have been made in argument,
19 I think, that cover the issue that he wanted to make, and
20 other counsel. And you've made reference to it, too, without
21 going into the specifics.

22 MJ [COL POHL]: Yes.

23 STC [MR. CAMPOAMOR-SANCHEZ]: That's correct. In other

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 words, but to make sure that the record is clear, we're
2 talking about the attachment to Supervisory Special Agent
3 Sundberg's declaration, just the attachment.

4 MJ [COL POHL]: You're talking about Attachment 1.

5 STC [MR. CAMPOAMOR-SANCHEZ]: Attachment 1.

6 MJ [COL POHL]: Dated 21 May 2014.

7 STC [MR. CAMPOAMOR-SANCHEZ]: Correct, the letterhead.

8 MJ [COL POHL]: Under seal and protect the privacy
9 interests of the ----

10 STC [MR. CAMPOAMOR-SANCHEZ]: We don't have an objection
11 about that. For that, we just wanted to make sure that we
12 could show that to the court and make the arguments in
13 response to the claim of the defense.

14 MJ [COL POHL]: Without objection, it would be sealed.

15 So sealed. Go ahead, Mr. Harrington.

16 LDC [MR. HARRINGTON]: Judge, I just want to elaborate a
17 little bit on what has been said before. I think the best way
18 to look at this is if we do an example that was even more
19 egregious than what has happened here and say, for example, I
20 had somebody in a case that I had, who was working for me, who
21 had -- part of my investigation, and saw in my investigation
22 that I gave them a document and he went out and talked to a
23 witness, and he decided that if he -- if this witness would

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 say what was in the investigation, it would be helpful to our
2 team, and he offered him some money maybe because he was
3 friends with my client, but I had nothing to do with it and
4 this came to light, obviously, there would be attorney-client
5 information in there that would be part of a subject of a
6 crime, and the U.S. Attorney or the prosecutor would decide
7 that while I had no direct participation in it, was not going
8 to be charged, somebody on my team was, and obviously, it had
9 confidential information.

10 I'm just throwing that out as an example. In that
11 situation, clearly, the lawyers may have been somewhat under
12 investigation, may not have been under investigation, but it's
13 a situation where certainly the client has to know about it,
14 and the client has to be advised of it, and the client has to
15 know of the potential conflict. And that's what we have here.
16 Mr. Campoamor kept talking about there is no conflict, there
17 is no conflict, but there's always been a potential conflict.
18 And we don't have the information to determine the extent of
19 that.

20 Now, when -- if I'm correct that Mr. Cruz is the
21 person that was interviewed, and they now say the lawyers are
22 not under investigation, I cannot believe that FBI agents
23 interviewed him and asked him about what he believed to be

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 some impropriety, and they didn't ask, does Nhan know about
2 it, does Balfantz know about it, does Bogucki know about it,
3 does Harrington know about it? And I have been with FBI
4 agents and they haven't done -- thousands of proffers been
5 made to them that they don't ask the general questions because
6 you don't know the information about the information that you
7 are going to get and you always ask about other people and the
8 question becomes: Does that mean that they are under
9 investigation? I say yes, maybe not as seriously as the
10 person who has been initially reported about it, but they have
11 been under investigation.

12 And as Mr. Nevin, the use of the cloud -- this cloud
13 is still here and the cloud is here until we know what it is,
14 our clients know what it is, and they make an intelligent
15 information -- an intelligent decision about whether that
16 cloud is too much, or they feel that that cloud, as Mr. Nevin
17 says, is going to discourage us from going forward in the
18 future. Thank you.

19 MJ [COL POHL]: Thank you. Mr. Ruiz, anything further?

20 LDC [MR. RUIZ]: No, thank you, Judge.

21 MJ [COL POHL]: Thank you.

22 Trial counsel? Last bite.

23 STC [MR. CAMPOAMOR-SANCHEZ]: Would it be possible to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 respond to some of the arguments?

2 MJ [COL POHL]: Sure. Yeah.

3 STC [MR. CAMPOAMOR-SANCHEZ]: Good afternoon again, Your
4 Honor.

5 MJ [COL POHL]: Good afternoon.

6 STC [MR. CAMPOAMOR-SANCHEZ]: Very briefly, I just want to
7 make the point, because I just want to make sure it doesn't
8 get lost, that the Special Review Team and the United States
9 has an interest in making sure that the accused here are
10 represented by conflict-free counsel; and actually, that's
11 probably the one place where we meet in terms of analysis.
12 Why? Because we want to make sure of the integrity of this
13 proceeding and that there's a fair trial that's being
14 conducted. We have the same interests in that regard and
15 that's why the SRT, the Special Review Team, has taken the
16 efforts that it has taken to provide those assurances and
17 those declarations that have been submitted.

18 Now, during the responses that the court heard from
19 defense counsel, there's three -- or actually, I should say
20 two cases that were mentioned to the court, sort of for the
21 proposition that frankly, apparent I will -- we have the case
22 law wrong or we're not reading it correctly. The first one
23 was the Supreme Court case of Holloway. And you know, the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Holloway case is very different from the facts in this case.

2 In Holloway, one lawyer was representing three
3 defendants in a murder and, I believe, rape prosecution. And
4 so the lawyer that's jointly representing all three of the
5 defendants goes to the court and says, "In light of what I
6 have learned, I have a conflict of interest because their
7 version of events and their interests diverge, so I can't -- I
8 can't represent them," and in spite of that, the court did not
9 conduct the inquiry, did not, you know, help and inquire and
10 go through, and that's what led to the case being reversed.
11 That is not the situation that we have here.

12 Similarly, we -- defense counsel and Mr. Nevin talk
13 about Lafuente, and Lafuente we believe is a case that the
14 commission should take a very close look at. And Mr. Lafuente
15 was convicted, and then he's moving pro se afterwards. And
16 what transpired in that matter is while he's moving pro se to
17 have his conviction reviewed, he says that his attorney, at
18 the time of his trial, was actually being investigated by the
19 same U.S. Attorney's Office that was conducting the trial, and
20 there was no hearing and his motion was denied.

21 So now in this review, they're saying, the court is
22 saying, wait a minute, he made some allegations that there was
23 an actual conflict that would have been a conflict if indeed

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 his lawyer was being investigated by the same prosecuting
2 authority who was conducting his trial. So there should be a
3 hearing about that. He should be allowed to find out if that
4 was the case.

5 MJ [COL POHL]: Of course, in all of these cases that you
6 are citing -- and as Mr. Nevin says, most of them are looking
7 back and post-conviction relief -- but in all of these cases,
8 it appears that there is no real factual dispute of the state
9 of the evidence. By that I mean is in Lafuente, for example,
10 I believe she had some type of a Bar issue with having an
11 affair with an ex-client, or -- unless I'm mixing that up with
12 another one.

13 But anyway, but both sides know what the issue is.
14 Both sides know what the factual predicate is. Okay.

15 STC [MR. CAMPOAMOR-SANCHEZ]: Right.

16 MJ [COL POHL]: And it goes up there and the court said,
17 you should have had a hearing or you shouldn't have had a
18 hearing, whatever the case may be.

19 What's somewhat different in this case is that you've
20 provided one -- some facts to the government. You've provided
21 other facts to me, additional facts to me, with a reluctance
22 to give them the additional facts unless I've already resolved
23 there is no conflict.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Now, so they're in the position -- and you say I can
2 decide this without those facts. But if I feel I need those
3 facts to decide it, then where are we?

4 STC [MR. CAMPOAMOR-SANCHEZ]: Well, I will address that
5 hypothetical and I then I will come back to make a few points.

6 MJ [COL POHL]: Sure.

7 STC [MR. CAMPOAMOR-SANCHEZ]: The hypothetical is if, in
8 fact, this commission felt that there had to be some kind of
9 evidentiary hearing or inquiry to elicit more facts to
10 actually resolve the conflict issue, then we, the Special
11 Review Team, would finally be in agreement that independent
12 counsel needs to be appointed. Independent counsel needs to
13 be the one to review those facts and conduct that hearing.

14 MJ [COL POHL]: No, that's not -- no. You're a step ahead
15 of me.

16 STC [MR. CAMPOAMOR-SANCHEZ]: I'm sorry.

17 MJ [COL POHL]: No, that's okay.

18 The position you're taking is that whether or not
19 there is a conflict -- and understand, when I ask a question,
20 doesn't mean I have made up my mind one way or the other.

21 STC [MR. CAMPOAMOR-SANCHEZ]: I understand.

22 MJ [COL POHL]: I'm asking you because of -- and as I
23 said, in this case, there's other additional facts that have

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 not been provided to the defense.

2 STC [MR. CAMPOAMOR-SANCHEZ]: Right.

3 MJ [COL POHL]: Okay. And so they're in the position of
4 not having those facts.

5 STC [MR. CAMPOAMOR-SANCHEZ]: Right.

6 MJ [COL POHL]: Okay. And is it your position that they
7 shouldn't get those facts until they determine that there is
8 no conflict?

9 STC [MR. CAMPOAMOR-SANCHEZ]: Our position is certainly
10 they're not entitled and they're not necessary for purposes of
11 determining the conflict. And we're not saying that they're
12 not -- if -- if the conflict issue is resolved, and this
13 commission were to determine that in fact they're
14 conflict-free, and then a motion is made where arguments that
15 make that information relevant for the legal arguments that
16 are going to be made, then we are going to be in a different
17 position and through the regular process evaluate the
18 discovery request and provide the discovery, and if we
19 disagree, the commission will rule.

20 MJ [COL POHL]: Okay. Then let me ask you this. Maybe
21 I'm just slow on this. Why did you bother giving me this
22 ex parte stuff, then? If you are saying, well, I can resolve
23 the conflict without it and they don't have a right to it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 until I find there is no conflict, then why give it to me?

2 STC [MR. CAMPOAMOR-SANCHEZ]: We made a determination, and
3 maybe, you know, it was a wrong determination to make. But in
4 light of the type of allegations that were made in this
5 initial filing, we wanted to make sure that the commission had
6 a full context about what was really going on here. The
7 commission might remember there were even thoughts that maybe
8 this related to some material that was under litigation that
9 may have been released from the KSM team. And we made the
10 determination at that time that it was important to provide
11 the commission with that information so it had the context
12 while we had the chance to actually investigate the issue and
13 do the research and decide what was actually necessary to
14 provide and to happen here.

15 MJ [COL POHL]: But if that information is important for
16 the context, then -- again, I'm trying to understand this.
17 It's for the context for me to make a determination of whether
18 or not there's a conflict?

19 STC [MR. CAMPOAMOR-SANCHEZ]: Right. No, it ----

20 MJ [COL POHL]: What's the context it's giving me?

21 STC [MR. CAMPOAMOR-SANCHEZ]: Right. So I want to be
22 clear, because this is part of the argument that they made.
23 The commission does not need that information to make this

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 determination. In fact, we would urge the commission to set
2 that aside and focus on the two affidavits that have been
3 submitted by the two Supervisory Special Agents that contain
4 the information that goes to the legal analysis of whether
5 there's a conflict. That's all the commission needs to
6 resolve this issue.

7 MJ [COL POHL]: Okay. Just disregard anything else.

8 STC [MR. CAMPOAMOR-SANCHEZ]: Yes.

9 MJ [COL POHL]: Okay.

10 STC [MR. CAMPOAMOR-SANCHEZ]: The commission can disregard
11 the ex parte filings to make the determination as to whether
12 there is a conflict or not and whether the commission can rule
13 on that issue. Absolutely.

14 And maybe -- I guess I misunderstood what the
15 commission was asking, but if the commission were to disagree,
16 and in fact believes that there needs to be information
17 provided so that there can be a determination that there's a
18 conflict, and that information being detailed to the
19 preliminary investigation or the full investigation, whatever
20 the commission were to decide, then we would urge the
21 commission that if that's going to be the case, then
22 independent counsel should be appointed, and those counsel
23 should be the ones to get that information, litigate that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 issue and advise the accused.

2 Because in light of particularly what we've heard
3 today and the arguments that were made and the statements that
4 have been made, I mean, many of the defense counsel appear to
5 be saying that they believe they're under a conflict and they
6 believe that, you know, this fear that they're talking about
7 is influencing their decisions.

8 So if -- particularly if that's the case, to protect
9 this prosecution, this proceeding, and the fairness of it,
10 then independent counsel should be appointed. But again ----

11 MJ [COL POHL]: Is it your position, then, that -- your
12 position is the investigations are complete, and therefore,
13 there is no conflict.

14 STC [MR. CAMPOAMOR-SANCHEZ]: Right.

15 MJ [COL POHL]: Okay. But if defense counsel have this
16 fear they may be investigated or Mr. Nevin isn't sure whether
17 he is being investigated, then they get an independent
18 counsel?

19 STC [MR. CAMPOAMOR-SANCHEZ]: No. No. They -- I'm not
20 explaining clearly. No, the independent counsel comes in only
21 if we believe that the commission thinks that additional
22 factual development and litigation needs to take place before
23 the conflict determination is made.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Okay. I understand.

2 STC [MR. CAMPOAMOR-SANCHEZ]: Only in that instance.

3 But going back to Lafuente, the point I was hoping to
4 make is that, you know, again, Mr. Nevin and I keep reading
5 these cases differently, obviously. But what the court stated
6 was, and it's very clear here at 947, following the quote that
7 the commission was provided by Mr. Nevin, "if she," that being
8 defense counsel, "was not investigated or at least was unaware
9 of the investigation, there would be no conflict of interest."
10 I mean, that is a definitive statement.

11 In addition to that, the court goes on. Again, they
12 were talking about whether the accused, the defendant, didn't
13 have the ability to prove the facts that he was alleging
14 without some kind of hearing. And the court went on to say,
15 "The government could obviate the need for an evidentiary
16 hearing by simply confirming through an affidavit that
17 Gambino," the defense counsel, "was never under
18 investigation," and, you know, an affidavit from Gambino would
19 therefore confirm whether she feared prosecution or not.

20 So again, this issue of the fear that they're
21 claiming after repeated assertions by members of the FBI,
22 under perjury, that there is no investigation is frankly not
23 reasonable and isn't supported by the law. And ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: You changed the verb there, and I just
2 want to make sure that I understand your position.

3 STC [MR. CAMPOAMOR-SANCHEZ]: Sure.

4 MJ [COL POHL]: The quote you read was, "She was never
5 under investigation, as opposed to "is not under
6 investigation."

7 STC [MR. CAMPOAMOR-SANCHEZ]: Right. If she was not --
8 I'm going to read it again.

9 MJ [COL POHL]: No, no, no. Back.

10 STC [MR. CAMPOAMOR-SANCHEZ]: If she was not investigated.

11 MJ [COL POHL]: Yeah. If she was not investigated, which
12 implied there is no investigation at all.

13 STC [MR. CAMPOAMOR-SANCHEZ]: Right, but ----

14 MJ [COL POHL]: Do you equate that with an investigation
15 that is complete. Was investigated? Do you understand what
16 I'm saying?

17 STC [MR. CAMPOAMOR-SANCHEZ]: I understand, and that is --
18 and I would agree with this, that is because the court is now
19 looking backward. At that time when the representation was
20 going on at trial, when the defendant was convicted, was there
21 an investigation at that time.

22 MJ [COL POHL]: I see you what are saying. Okay. I
23 understand.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 STC [MR. CAMPOAMOR-SANCHEZ]: Right. That's what I'm ----

2 MJ [COL POHL]: So you're reading it because they're
3 looking retrospectively.

4 STC [MR. CAMPOAMOR-SANCHEZ]: It is.

5 MJ [COL POHL]: That's why they say was not at the time.
6 I got it.

7 STC [MR. CAMPOAMOR-SANCHEZ]: It is. Because it is
8 referring to the past.

9 MJ [COL POHL]: I got it.

10 STC [MR. CAMPOAMOR-SANCHEZ]: One last case I want to
11 bring to the court's attention is Harrison v. Motley is a case
12 out of the Sixth Circuit, and in that case, the -- there are
13 two defense counsel that were obtaining -- they were trying to
14 secure alibi witnesses for the trial. And before trial, one
15 alibi witness recants, and then during the middle of the
16 trial, the second alibi witness recants also and then says,
17 "and one of the defense lawyers tried to bribe me to get me to
18 say this false statement in court."

19 So again, obviously, they're looking backward at that
20 point, but the argument is, obviously, when that allegation is
21 made that the defense counsel had facilitated the bribe for a
22 witness, that that defense counsel was operating under a
23 conflict, which mandated the reversal of the case.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And this is what the -- and the allegation is
2 summarized at -- where is the page number here -- 478 F.3d
3 750, at 756. And the court says, "Although a conflict of
4 interest may arise where defense counsel is subject to a
5 criminal investigation," and he quotes Taylor v. United
6 States. "We have noted previously that there lacks any
7 controlling authority to support the proposition that an
8 attorney's fear of investigation may give rise to a conflict
9 of interest, and then it goes on to Moss.

10 And, again, while all defense counsel are making
11 great arguments about the fear that they assert -- that they
12 have, even in light of the repeated assertions by the FBI,
13 that is entirely speculative in light of the evidence,
14 frankly, that the commission has as a result of its inquiry.

15 That is -- this idea that fear is enough is just
16 simply not supported by the case law, and they haven't cited
17 to you or provided to you with any authority for the other
18 proposition. So I believe I had even heard that we had
19 acquiesced or not objected to that, but we're sorry, we
20 disagree. That's just not the law.

21 And the last thing I wanted to address is, you know,
22 there's Mr. Nevin made some comment about sort of the evidence
23 from the defense on this issue, and he cited to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Harrington's declaration, which I believe was the one
2 filed with AE 292T. In paragraph 32, essentially
3 Mr. Harrington gives a summary of what the concern is and
4 believes that that establishes a conflict of interest. But in
5 sub (B) of that Mr. Harrington summarizes what the concern is,
6 and he says, I quote, "All members of the defense team are
7 concerned that they may be the subject of a federal
8 investigation by the FBI, the Department of Defense, or other
9 federal agency."

10 And that, I guess, is part of what's being proffered
11 to the commission to establish that somehow, you know, there
12 needs to be more facts, and that the commission cannot decide
13 the conflict issue now. And respectfully, we submit that that
14 has been addressed directly by the affidavit. That is why the
15 Special Review Team, with the help of the FBI, went back and
16 submitted the additional affidavit from Supervisory Special
17 Agent Sundberg, because the FBI went beyond what we believe to
18 be the legal requirement, that is defense counsel are not
19 under investigation, to expand that search to try to ensure
20 that in fact no defense teams were under investigation, and
21 finally, that there were no moles or informants within the
22 defense camp.

23 The FBI has done that. The commission has all it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 needs to decide that conflict issue. All of these other good
2 points and arguments that they make sounds like the great
3 beginnings of another motion that they're going to write, if
4 and when the commission decides this issue of the conflict of
5 interest.

6 MJ [COL POHL]: I don't like encouraging other motions,
7 but...

8 STC [MR. CAMPOAMOR-SANCHEZ]: Nor do I, but...

9 MJ [COL POHL]: Thank you.

10 STC [MR. CAMPOAMOR-SANCHEZ]: Thank you.

11 LDC [MR. NEVIN]: Your Honor, can I respond to that
12 briefly, just what was in ----

13 MJ [COL POHL]: Well, Mr. Nevin ----

14 LDC [MR. NEVIN]: Where do we end?

15 MJ [COL POHL]: I've given everybody two chances to talk.

16 LDC [MR. NEVIN]: But it was our motion, and normally ----

17 MJ [COL POHL]: What, normally. No, you don't get a
18 third.

19 LDC [MR. NEVIN]: No, but I -- but I mean, normally, the
20 person with the burden has -- gets to speak last.

21 MJ [COL POHL]: Oh, Mr. Nevin, that's not the way we've
22 done things.

23 LDC [MR. NEVIN]: But still, how about if I keep it under

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 90 seconds?

2 MJ [COL POHL]: Okay. I'll apply the 90-second rule once,
3 but understand it's two times apiece, which we have done it
4 every time. I'm not sure where you got this "the burden gets
5 to go last theory," but go ahead. I don't want to take your
6 90 seconds away from you.

7 LDC [MR. NEVIN]: All right. Thank you. First, counsel
8 spoke to this question of there being no authority for the
9 proposition that fear is enough, but counsel just read to you
10 from the case that establishes that fear is enough, Lafuente.
11 That's exactly what Lafuente is saying, and counsel choked a
12 little bit as he read that quote because it's something that
13 comes after the semicolon. Let me read the whole thing. "The
14 government could obviate the need for an evidentiary hearing
15 by simply confirming through an affidavit that the lawyer was
16 never under investigation," semicolon; "an affidavit from
17 Gambino would confirm whether she feared prosecution." From
18 the lawyer would confirm whether she feared prosecution.

19 They're saying it's two things. You're going to need
20 to have -- you're going to need to say there was never an
21 investigation and you're going to need to say that she never
22 feared an investigation. That's a case that the government
23 cited, Your Honor. There is plenty of ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: So is it your position that if the defense
2 counsel fear an investigation, that's enough to -- to have
3 these inquiries?

4 LDC [MR. NEVIN]: It's got to be a reasonable fear, and
5 this is what I was speaking to before, it's got to be a
6 reasonable fear. If it's something unreasonable, okay. But
7 we're dealing with a situation here where I've tried to
8 demonstrate to the court, I think we all have, tried to tell
9 you where our fear comes from. And then second, the
10 Harrington declaration that I was quoting from was not the one
11 at 292T. It's the one attached to 292 itself, the original
12 motion.

13 It says what Mr. Harrington's DSO told him, which was
14 that the questions were about counsel and they were about
15 other defense teams, not simply a single non-attorney member
16 of the Binalshibh team. They were -- the questions that the
17 FBI agents asked that person went farther, and therefore the
18 affidavits that we have now don't fully answer the question,
19 because they say something that's inconsistent with what
20 happened. That was the point I was trying to make.

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

22 LDC [MR. NEVIN]: Thank you.

23 MJ [COL POHL]: Okay. The commission will take the issue

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 under advisement and issue a ruling in due course. That's all
2 we have to do today.

3 Defense, you indicate usually you like to spend some
4 time with your client. You will have all day tomorrow. I
5 just wanted to give the guards a heads up of when they can
6 start transporting them.

7 LDC [MR. NEVIN]: I wonder if we could -- could I have
8 just one moment.

9 MJ [COL POHL]: Wait, I'll tell you -- okay.

10 LDC [MR. NEVIN]: Yes. I can do this very quickly.

11 DDC [MAJ WRIGHT]: Your Honor, while we're waiting I just
12 wanted to notify the court, the reference 283, the Directed
13 Severance of the Attorney-Client Relationship, I'm going to
14 have a submission for you, additional facts to support
15 appropriate relief therein, and we'll have that to you
16 tomorrow, Your Honor.

17 LDC [MR. CONNELL]: Your Honor, did we understand you to
18 be offering that we could come here tomorrow?

19 MJ [COL POHL]: No.

20 LDC [MR. CONNELL]: Because you said we'll have all day
21 tomorrow.

22 MJ [COL POHL]: No. No. What I'm saying is I'm not
23 coming here tomorrow.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. CONNELL]: I'm asking you ----

2 MJ [COL POHL]: Therefore you have tomorrow off. I'm
3 saying therefore you go visit them in the normal prison.

4 LDC [MR. CONNELL]: This is far too short. We've
5 submitted requests for tomorrow. They haven't been granted.
6 It's far too short for a normal visit turnaround, so we don't
7 know if we're going to be allowed visits tomorrow here or not.

8 MJ [COL POHL]: Okay. So you want to spend some time with
9 them now?

10 LDC [MR. CONNELL]: Yes. But if you're offering that we
11 could have the courtroom for tomorrow, I mean, not with you in
12 it, not with anybody else ----

13 MJ [COL POHL]: No. I'm not offering that.

14 LDC [MR. CONNELL]: Okay.

15 MJ [COL POHL]: Okay. That's -- we're now getting into
16 the bailiwick of the confinement facility. I'm not offering
17 that.

18 LDC [MR. NEVIN]: Could we ask for that?

19 MJ [COL POHL]: Well, I -- okay.

20 LDC [MR. NEVIN]: Aside from ----

21 MJ [COL POHL]: I knew I would get into this. Okay.

22 What happens in this courtroom when the commission is
23 not in session is not my purview. If you want to ask them if

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 they will transport them over here to discuss it and back,
2 that's up to them.

3 LDC [MR. NEVIN]: All right.

4 MJ [COL POHL]: Okay. Again, that's not my lane.

5 LDC [MR. NEVIN]: The commission wouldn't object to us
6 doing that?

7 MJ [COL POHL]: I have no position on it, because I have
8 no standing to object or agree to what's done inside this
9 courtroom when the commission is not in session.

10 LDC [MR. NEVIN]: Yes, sir. But may we stay until 5:00
11 this afternoon?

12 MJ [COL POHL]: Okay. We were going to go until 5:00.
13 Okay. But at 1700, they're going to take them back. And
14 prayer time is about 1630, so as soon as that's over with.

15 STC [MR. CAMPOAMOR-SANCHEZ]: Sir?

16 MJ [COL POHL]: Yes.

17 STC [MR. CAMPOAMOR-SANCHEZ]: Would the commission like
18 the Special Review Team to be back on Wednesday? I just want
19 to make sure we're available at the pleasure of the
20 commission. Whenever the commission needs.

21 MJ [COL POHL]: I don't think we have anything more to
22 talk about, but ----

23 STC [MR. CAMPOAMOR-SANCHEZ]: I agree.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [COL POHL]: Everything has been fully argued and fully
2 briefed ----

3 STC [MR. CAMPOAMOR-SANCHEZ]: Right.

4 MJ [COL POHL]: ---- and fully briefed, so I think we're
5 done here. If something changes between now and Wednesday,
6 I'll let you know. There's an arraignment going on on
7 Wednesday, but that's okay. Commission is in recess.

8 [The R.M.C. 803 session recessed at 1515, 16 June 2014.]

9 [END OF PAGE]

10
11
12
13
14
15
16
17
18
19
20
21
22
23