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1 [The R.M.C. 803 session was called to order at 1153,  
2 25 October 2015.]

3 MJ [COL POHL]: The commission is called to order. Just a  
4 note for the record, I had an incorrect prayer schedule, so we  
5 are going to go for another hour, and then we will take the  
6 lunch break.

7 All defense counsel are again present that were  
8 present before the commission recessed. Mr. Binalshibh is  
9 still here. The prosecutors are represented by the Special  
10 Review Team. Is it the same members who were here the other  
11 day?

12 STC [MR. CAMPOAMOR-SANCHEZ]: The same members as last  
13 Monday, Your Honor.

14 MJ [COL POHL]: Okay. I don't know whether you know this  
15 or not, but all defense counsel have now signed the MOU, so as  
16 we go forward on this, that is no longer an issue, if that is  
17 an obstacle about discovery.

18 Now, I want to direct this to the Special Review  
19 Team: Is there any ongoing -- there was an ongoing  
20 investigation. Is it complete?

21 STC [MR. CAMPOAMOR-SANCHEZ]: Yes, Your Honor. And if I  
22 may, as a preliminary matter, I think we may have discussed  
23 this last Monday, I would move to unseal a redacted version of

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1 a filing, AE 292TTTT. Mr. Harrington has agreed to the public  
2 release of that redacted version, and he has also indicated  
3 his consent, personally and on behalf of his team, that that  
4 document be unsealed.

5 MJ [COL POHL]: Okay. And just so I clarify, because we  
6 will get to this in a minute on discovery, a lot of this only  
7 deals with Mr. Harrington's team. And so as far as any work  
8 product or privileged information, it's going to him and him  
9 only, and then if he decides to release it to the other  
10 parties or to third parties, that's his choice?

11 STC [MR. CAMPOAMOR-SANCHEZ]: That's correct, Your Honor.  
12 And we -- in fact, I was having discussions with Mr. Nevin  
13 about the original full investigation. We had reached an  
14 agreement as to the MOU as to 16 documents, classified  
15 documents that we will provide, and we will do the same thing  
16 with him.

17 MJ [COL POHL]: I will come back to the discovery point at  
18 the end, but currently this whole -- when the commission  
19 issued 292QQ, it held for the proposition that under these  
20 circumstances that, if there was an ongoing investigation and  
21 the defense was aware of it, it could create at least an  
22 appearance of a conflict of interest that needed to be  
23 resolved prior to going forward. At that time the commission

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1 held that four of the five teams it did not impact on. It  
2 only impacted on Mr. Harrington, and he had certain questions  
3 about it.

4           Since that time there has been an investigation, and  
5 it's currently -- my understanding is it's now complete?

6           STC [MR. CAMPOAMOR-SANCHEZ]: May I approach the lectern.

7           MJ [COL POHL]: Sure.

8           STC [MR. CAMPOAMOR-SANCHEZ]: Yes, Your Honor, that is  
9 correct. And as the court may recall, this was started as a  
10 result of information that was provided to the commission in  
11 late August of 2014. That led the commission to then issue  
12 292XX, the order, where the commission forwarded that  
13 information to the SRT for the SRT to forward then that  
14 information over to responsible officials at the Department of  
15 Defense.

16           Initially the Department of Defense looked at this  
17 information, conducted a review, an internal review. And that  
18 led ultimately in December of 2014 for the Department of  
19 Defense to forward to the United States Department of Justice  
20 a referral for a potential criminal investigation.

21           A criminal investigation was ultimately opened by the  
22 FBI. Also a different U.S. Attorney's Office, not mine and  
23 not the SRT, an additional U.S. Attorney's office participated

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1 in that investigation. That investigation was ultimately  
2 closed in August of 2015.

3 In addition, DoD was then notified of the closure of  
4 that investigation, and as we had filed in 292TTTT, the  
5 Department of Defense has also now determined that there is  
6 going to be no security access consequences as a result of  
7 that investigation that was consulted.

8 So to summarize, since August of 2014 there has been  
9 a new investigation. That investigation pertained to the RBS  
10 team. There were allegations that were made against defense  
11 team members, including counsel of record, and that's  
12 different from the prior two investigations. And those  
13 allegations were looked at, they were investigated, and  
14 ultimately the FBI closed that investigation. The  
15 U.S. Attorney's Office for the Northern District of Illinois  
16 also declined to prosecute or file any charges, and DoD has  
17 now also decided there will be no security access  
18 repercussions as a result of that investigation.

19 MJ [COL POHL]: So just to summarize, the investigation is  
20 closed, and the United States Government is taking no further  
21 action in any way, shape or form, administrative or criminal,  
22 as far as the investigation is complete?

23 STC [MR. CAMPOAMOR-SANCHEZ]: That's correct. Exactly as

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1 we stated in TTTT, as we shared with defense counsel, I  
2 believe it was back on September 22 ----

3 MJ [COL POHL]: Okay.

4 STC [MR. CAMPOAMOR-SANCHEZ]: ---- of this year.

5 MJ [COL POHL]: Now, I want to talk to another side issue  
6 before we come back to that, and that deals with Lieutenant  
7 Colonel Pitvorec's representation as independent counsel.

8 I received AE 292AAAAA, which was a motion from the  
9 Chief Defense Counsel, indicating that he had concerns of a  
10 potential conflict of interest of Lieutenant Colonel Pitvorec  
11 continuing to perform as independent counsel for  
12 Mr. Binalshibh.

13 On reviewing the document, it appeared to me that the  
14 alleged conflict issues, the factual predicate to  
15 General Baker's motion, were known to both Mr. Harrington and  
16 Colonel Pitvorec. Is that correct, Mr. Harrington?

17 Mr. Harrington?

18 LDC [MR. HARRINGTON]: Judge ----

19 MJ [COL POHL]: Have you seen the motion?

20 LDC [MR. HARRINGTON]: Which? I'm sorry.

21 MJ [COL POHL]: I am talking of General Baker's motion.

22 LDC [MR. HARRINGTON]: Yes.

23 MJ [COL POHL]: You are aware of the allegation?

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1 LDC [MR. HARRINGTON]: I'm sorry, yes.

2 MJ [COL POHL]: And Colonel Pitvorec, you have also seen  
3 it?

4 IDC [Lt Col PITVOREC]: Yes, Your Honor.

5 MJ [COL POHL]: When the issue of a conflict of interest  
6 comes up, it strikes to me, as we have discussed before, that  
7 if counsel is aware of it, counsel has an affirmative sua  
8 sponte responsibility to inform the court, or in this case the  
9 commission, about the conflict.

10 Colonel Pitvorec, do you agree that that's the state  
11 of the law?

12 IDC [Lt Col PITVOREC]: I do.

13 MJ [COL POHL]: And, Mr. Harrington, you also agree?

14 LDC [MR. HARRINGTON]: Yes, sir.

15 MJ [COL POHL]: So given what I have before me from a  
16 third-party supervisor asking me to do something, which quite  
17 frankly amounts almost to an advisory opinion, that the  
18 counsel involved are aware of the -- "allegations" is too  
19 strong a word, aware of the surmise of Colonel Baker or  
20 General Baker and his general counsel, the court, the  
21 commission finds that he lacks standing to raise that issue,  
22 and therefore his motion for me to do something is denied.

23 That being said, I have nothing from either

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1 Mr. Harrington or Lieutenant Colonel Pitvorec indicating that  
2 they have an issue about a potential conflict, and as I just  
3 stated, if they do, they know it's their responsibility to  
4 raise it to me. It has not been raised to me by counsel, and  
5 until and unless it is done, as far as I am concerned, there  
6 is no issue before the commission to address.

7 That being said, does either Mr. Harrington or  
8 Lieutenant Colonel Pitvorec wish to be heard on whether or not  
9 anything needs to be done at this time?

10 Mr. Harrington.

11 LDC [MR. HARRINGTON]: Judge, on this particular issue,  
12 the information that was presented to you by General Baker was  
13 something that maybe I should have known about sooner. All I  
14 knew was that Lieutenant Colonel Pitvorec had been transferred  
15 to a different assignment, and I was not aware of whether that  
16 was potentially a problem. I think when General Baker came  
17 in, he was the one that really noticed that.

18 My position was that I was in a position where I am  
19 alleged to have a conflict, and I thought that by him raising  
20 the issue with the court, that would satisfy it. And it's  
21 very difficult for me to take a position on that one way or  
22 the other when she is -- whether I have a conflict.

23 MJ [COL POHL]: I understand. And, Mr. Harrington, I was

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1 not meaning to imply that somehow I thought you had a sua  
2 sponte responsibility to do it. I am simply saying the way it  
3 was worded was that you knew about it. I wanted to make sure  
4 that this wasn't coming as a surprise to you.

5 LDC [MR. HARRINGTON]: No, it's not. But, Judge, in the  
6 context that we have, I think that I should adopt  
7 General Baker's request of you, if you are finding that he  
8 does not have standing. I think that it's an issue which  
9 maybe goes away, maybe you get by, maybe you don't get by, but  
10 it's an issue that the court really should address.

11 MJ [COL POHL]: Okay.

12 LDC [MR. HARRINGTON]: And earlier, Judge, we raised on  
13 the record the issue -- the secondary issue of the fact that  
14 Colonel Pitvorec is not capital counsel either.

15 MJ [COL POHL]: I got you. Okay. Okay.

16 Colonel Pitvorec.

17 IDC [Lt Col PITVOREC]: Thank you, Your Honor. I just  
18 wanted to put on the record that the policy in the Air Force,  
19 as I know it to date, is that unless you are released by your  
20 client from a case, that you would maintain your defense  
21 clients until they are resolved or until you are released.

22 In my experience, I have spent approximately eight  
23 years as a defense counsel in the Air Force, and after each

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1 assignment as a defense counsel, I have moved over into an  
2 assignment with the base legal office, and in that capacity I  
3 maintained those clients until the issue was resolved.

4 In this case I actually have -- I still maintain five  
5 defense clients after moving over to be the Staff Judge  
6 Advocate at Barksdale, Mr. Binalshibh, as well as four other  
7 clients that are in various stages of resolution. In my  
8 experience, that is -- because there is no direct conflict, I  
9 am the Staff Judge Advocate, I am advising the Second Bomb  
10 Wing commander over issues pertaining to her installation as  
11 well as cases that are arising out of her installation.

12 The Air Force is substantially different than I think  
13 was originally asserted by the Chief Defense Counsel. I do  
14 not have an operational role. We do not -- in the Air Force  
15 as a Staff Judge Advocate, we do not deploy because our unit  
16 doesn't deploy as a whole. So unless there is some extreme  
17 measure where we would pick up and deploy together, which has,  
18 as far as I know, never been the case in the Air Force, I  
19 would not ever be in an operational capacity to advise in  
20 those manners.

21 So from my experience in the Air Force, I have  
22 maintained additional clients and have never had an issue. I  
23 have asserted to Mr. Binalshibh that I would remain his

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1 counsel until he fired me, so ----

2 MJ [COL POHL]: Okay. So just so it's clear, because I  
3 think we can put this to bed relatively quickly: You were in  
4 a defense billet. You transferred from a defense billet to  
5 become Staff Judge Advocate at Barksdale. At that time you  
6 have some supervisory responsibilities over trial counsel.

7 IDC [Lt Col PITVOREC]: That is correct. Right.

8 MJ [COL POHL]: Those clients you had as defense counsel  
9 who you formed an attorney-client relationship with after  
10 being informed of the change, you keep them?

11 IDC [Lt Col PITVOREC]: That's correct.

12 MJ [COL POHL]: Quite frankly, that's not particularly an  
13 unusual practice. It's very similar to what the Army does.  
14 So therefore, you don't feel you have any conflict?

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

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

17 The commission agrees with the defense counsel that  
18 simply changing a different assignment doesn't raise the  
19 appearances of a conflict and therefore she has no conflict.  
20 She has disclosed her current job to the accused, and as far  
21 as the commission is concerned, that addresses the issue, and  
22 therefore -- again, I denied General Baker's motion as a lack  
23 of standing, but, just at the request of Mr. Harrington, the

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1 commission would find that there is no actual or even apparent  
2 conflict given Colonel Pitvorec's new duties.

3           That being said, let's turn back to 292 on the  
4 discovery issue. We talked earlier about discovery in this  
5 case. It strikes to me that's kind of the stage we are at  
6 with 292, of which discovery the government will give and what  
7 the defense would get. I mean, I have heard the discussion  
8 here. Mister -- and I'm going to mispronounce your name,  
9 Mr. Campoamor, could you summarize the government's view of  
10 with which discovery the government will provide and which  
11 members of the defense team will get it?

12           STC [MR. CAMPOAMOR-SANCHEZ]: Yes, Your Honor. As a  
13 result of the investigation we have previously disclosed and  
14 argued about in 292 issues, and they pertain to two teams,  
15 primarily Mr. Binalshibh's team and Mr. Mohammad's team, the  
16 proposal from the government in terms of discovery is to first  
17 see what relevant discovery they may need in order to make any  
18 other claims of violation of sort of the attorney-client  
19 privilege or the work product or something like that. In  
20 other words, we anticipate they are going to try to assert  
21 some sort of Weatherford v. Bursey claim and requests related  
22 to those issues and then provide that discovery just to those  
23 counsel for those teams and then they can make a determination

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1 whether that discovery can go to other defense teams.

2           But I want the commission to be clear that our  
3 position is that, first of all, that discovery as it pertains  
4 to Mr. Harrington's team needs to go to him if and when he is  
5 deemed by this commission to be conflict free. And the  
6 decision by the commission as to whether he is conflict free  
7 or not is separate and apart from whether there is discovery  
8 obligations on behalf of the government as to what information  
9 they are entitled from those investigations to make whatever  
10 other claims they may have.

11           In other words, for the commission to decide the  
12 conflict, the defense team does not need any additional  
13 discovery. They know that there were investigations, they  
14 know what the investigations were generally about, they know  
15 what the allegations generally were, and that's the stage that  
16 we are at.

17           So I believe last Monday the commission had asked us,  
18 and I expected today to discuss what's the path forward today,  
19 how we can move these issues forward, certainly as to the  
20 conflict part in the 292. And our suggestion to the  
21 commission in that respect is that the court has -- the  
22 commission is very familiar with conflict case law at this  
23 point. It has issued 292QQ. It has already found four of the

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1 teams do not have a conflict. And all defense counsel have  
2 had a chance to tell the commission their position on  
3 conflicts and how that's decided.

4           For today what I would suggest the commission do is  
5 if it -- if it believes that it needs additional argument  
6 that, that it hear from additional counsel from  
7 Mr. Binalshibh, that it hear from Mr. Harrington if he has any  
8 additional arguments to make at this point, and that we be  
9 provided an opportunity to respond, and then the commission  
10 would be in a position to decide the issue.

11           We believe the commission is thereby making the  
12 assertions that we have made and the filings that we have made  
13 before. There is no investigation; therefore, there can be no  
14 conflict. There is not even an additional sort of security  
15 concern about security access for these teams in light of the  
16 declaration that has been submitted. So we believe this issue  
17 can be, in fact, decided today by the commission with a  
18 finding of no conflict.

19           If the commission does that, then we certainly are  
20 going to be in a position to discuss with Mr. Harrington the  
21 discovery that he believes he needs, and now that he has  
22 signed the MOU, we are going to be able to provide him also  
23 with classified discovery.

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1 MJ [COL POHL]: Thank you. Mr. Harrington, do you wish to  
2 be heard on this?

3 LDC [MR. HARRINGTON]: Judge, this is an issue of  
4 discovery, but it really goes into whether ----

5 MJ [COL POHL]: No, I think, I think where we are at is --  
6 and I have heard from all the other counsel, I believe, on  
7 292QQ's holding. If you want to be heard one more time, I  
8 suspect I will let you, and -- okay.

9 But really the threshold issue right now is, given  
10 the status of the investigation, in that it has been closed  
11 with no further action being taken, do you believe there is  
12 still a conflict issue that needs to be resolved?

13 LDC [MR. HARRINGTON]: I do, Judge.

14 MJ [COL POHL]: And what would that be?

15 LDC [MR. HARRINGTON]: Judge, when we initially started  
16 these proceedings about the conflict, the Special Review Team  
17 represented to this court a number of times that there was, in  
18 fact, no conflict at all, that you should -- you didn't even  
19 have to address this issue other than finding that there was  
20 no conflict.

21 And I can represent to the court that I do know some  
22 of the allegations that were made that led to this issue  
23 arising, but there came a point in time last year where a

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1 filing was made by the Special Review Team to you which led to  
2 your making a decision that there was indeed a potential  
3 conflict that needed to be investigated, and that led to a  
4 preliminary FBI investigation, a full FBI investigation, the  
5 involvement of a separate United States Attorney's Office to  
6 conduct this investigation. And all I knew about were things  
7 that were represented, Mr. Campoamor had said there is no --  
8 there is no conflict investigation going on.

9           So I'm not aware of what's in these reports. I have  
10 an ethical obligation to say to Mr. Binalshibh I believe there  
11 is no conflict, I believe there is a potential conflict, I  
12 believe there is an actual conflict. I have an obligation to  
13 say to him if there is a potential or an actual conflict, I am  
14 representing to you that that does not affect me, I can  
15 continue on as your counsel; or say to him it does affect me,  
16 it may affect me in some way in representing you, and I cannot  
17 continue as your counsel. And I cannot do that without having  
18 been provided with -- with that information.

19           And, Judge, in AE 292TTTT, which is the report that  
20 was filed, you will note that each time that they say there is  
21 no investigation, the thing is closed, a caveat is put in  
22 there "at this time," at that time. They put it in there, "at  
23 that time." All right?

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1           What does that indicate? It indicates maybe there  
2 will be something in the future, like they said. I don't  
3 know, but that's what they put in the report, so ----

4           MJ [COL POHL]: Mr. Harrington, let me ask you this. If  
5 you read that to say at this time, meaning that the  
6 information -- meaning that they cannot make any type of  
7 representations as to what could happen in the future if there  
8 was additional allegations made?

9           LDC [MR. HARRINGTON]: There is no need for it. There is  
10 no need to put it in there, Judge. If somebody came along and  
11 made an allegation afterwards, there is nothing that prohibits  
12 them from reopening this or preventing the U.S. Attorney from  
13 reopening an investigation, as long as it is within the  
14 statute of limitations. They do it all the time.

15          MJ [COL POHL]: Is it your position the investigation is  
16 not closed until the statute of limitations runs?

17          LDC [MR. HARRINGTON]: No. But unless there is a more  
18 firm representation that there is nothing pending and they  
19 have no intention of reopening this allegation, I still think  
20 that it hangs out there.

21          MJ [COL POHL]: Okay.

22          LDC [MR. HARRINGTON]: And I want to be able to represent  
23 that to Mr. Binalshibh.

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1           And the other thing is that I am in the dark, as I  
2 said before, about what's in the investigation. So how do I  
3 make this representation to him, that I am comfortable saying  
4 to him this doesn't bother me, this won't affect my  
5 representation, this won't affect what I do. And I have an  
6 ethical obligation to make that representation.

7           Lieutenant Colonel Pitvorec can make her statements  
8 to the court about what she believes about this, but I think,  
9 Judge, that I need the discovery before I can say -- make any  
10 representation to him about what should be done.

11           MJ [COL POHL]: Thank you.

12           Colonel Pitvorec.

13           IDC [Lt Col PITVOREC]: Your Honor, I think that it is a  
14 misnomer to say just because there is no current  
15 investigation, there can be no conflict. In this case, three  
16 attorney members of the Binalshibh team were investigated for  
17 the very manner in which they were representing him. This is  
18 not a case -- there are no cases on point that actually  
19 address this.

20           If you take a look at the actual investigation, there  
21 is a couple of things that are important to note. We talk  
22 about that original investigation that involved an interpreter  
23 on the Binalshibh team, and that was purported to be closed.

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1 And yet if you look at TTTT you will see that six to eight  
2 months after that investigation was closed, it was then  
3 provided in total to the FBI as a -- as information or  
4 additional evidence or a starting point for this further  
5 criminal investigation that finally took place.

6           The other thing that's interesting is that  
7 Harrison v. Motley talks about that a conflict of interest may  
8 arise when a defense counsel is subject to criminal  
9 investigation. In this case, even though it was not done by  
10 the same entity that is prosecuting Mr. Binalshibh, it is an  
11 investigation into the very manner in which the defense team  
12 was conducting their representation of Mr. Binalshibh. There  
13 is nothing on point that actually addresses the fact that  
14 there can be no conflict in those issues. I think at a very  
15 minimum we are looking at the appearance of a conflict in  
16 terms of that team.

17           The other issue is that I think it is incorrect to  
18 say that no member of the team has been affected by this  
19 investigation. Commander Nhan is currently without a security  
20 clearance, and we can only surmise that this is part of the  
21 reason why that security clearance is now suspended.

22           I think what we need to look at here is the overall  
23 appearance of fairness, and this is more than a fear of an

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1 investigation, as cited in a number of cases. But this is an  
2 actual investigation that went into the criminal stages for  
3 the FBI. And when you look at that, the appearance of a  
4 conflict or the appearance of fairness, you have to look at  
5 each level of this and how can this not have a chilling effect  
6 on the defense team, knowing that everything that they have  
7 done is now subject to investigation and will continue to be  
8 subject to investigation, similar to the prior investigation  
9 of Mr. [REDACTED]. It is all subject to being reopened.

10 MJ [COL POHL]: But isn't that true for all these lawyers,  
11 that if there is an allegation -- I'm talking about going  
12 forward, not going backwards, going forward, that if there is  
13 an allegation of some type of misconduct, that they are  
14 subject to an investigation?

15 IDC [Lt Col PITVOREC]: I think it is true that if there  
16 is some future misconduct, that they would be subject to an  
17 investigation.

18 MJ [COL POHL]: And that can't be a basis to say you have  
19 a conflict, would it?

20 IDC [Lt Col PITVOREC]: It would be a basis to  
21 prospectively say there would be a conflict.

22 MJ [COL POHL]: So retrospectively, if the allegations  
23 were fully investigated, okay, and all the appropriate parties

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1 say no further action is going to be taken, where is the  
2 conflict?

3 IDC [Lt Col PITVOREC]: I think at this point, Your Honor,  
4 we are looking at the FBI or Department of Justice has  
5 declined to prosecute, not that there wasn't a basis to  
6 prosecute. So just because there are no current charges  
7 pending doesn't mean there could never be charges pending for  
8 the exact same things.

9 MJ [COL POHL]: This comes back to my question of  
10 Mr. Harrington then, that the only bar or the only safe harbor  
11 then would be after the statute of limitations run.

12 IDC [Lt Col PITVOREC]: But, Your Honor, I think this is  
13 incredibly different, though, in that -- from any case that's  
14 out there, in that they were investigated, fully investigated,  
15 and found that there were some issues. And they just -- the  
16 Department of Justice just declined to prosecute.

17 It's not that there were not criminal matters  
18 investigated. They got to a point ----

19 MJ [COL POHL]: I don't understand. What's your remedy  
20 then? What I am saying is there was an investigation taken  
21 and what you said -- I'm not going to talk about what's in  
22 there necessarily, but what you said there was some type of  
23 allegations that you believe may have been substantiated, but

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1 they chose to do nothing about them.

2 IDC [Lt Col PITVOREC]: At this time.

3 MJ [COL POHL]: Well, that's the time we are talking  
4 about. I live in the moment. It's at this time. I can't  
5 tell you what's going to happen in the future, okay? And if  
6 later on, you know -- I mean, the government's position --  
7 quite frankly, the commission's position has been about no  
8 investigation or investigation complete, probably no conflict,  
9 okay?

10 Now, if I am being misled -- and I'm not saying they  
11 are, and the facts change, that a month from now or a year  
12 from now or whatever, they come back and do this, okay, there  
13 is remedies for that, okay? Because basically you are saying  
14 that they are playing word games and offering kind of in bad  
15 faith, and there are remedies for that.

16 But right now what I have before me is these  
17 allegations were fully investigated, there is no criminal  
18 prosecution, there is no administrative sanctions pending,  
19 everything is currently closed. And to speculate that it  
20 could be reopened, as long as we are within the statute of  
21 limitations -- and that's only talking about the criminal part  
22 of it, the administrative part of it, as far as security  
23 clearances, I am not sure there is a statute of limitations.

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1 But be that as it may, then we will have to wait years before  
2 we can proceed.

3 IDC [Lt Col PITVOREC]: Your Honor, I think there is a  
4 greater issue here, though. We are looking at -- we are  
5 looking not only at whether or not this commission is fair,  
6 but also whether or not it appears fair. And looking at it  
7 from the outside, taking a look at having an attorney who is  
8 investigated for the manner in which they were conducting  
9 their representation of a client, how can there be no  
10 conflict, or at least how can there be no appearance of a  
11 conflict?

12 And we have the luxury of being able to look  
13 prospectively here. We are not looking at the end of this  
14 case and going back and recounting what happened, but instead  
15 we have the luxury of going forward and saying we need to at  
16 least be able to look at this and say there is a potential  
17 conflict, the appearance of a conflict, and then move forward  
18 from that point.

19 And realistically, I think you can look at this from  
20 the outside, and even internally, and say given the fact that  
21 they were investigated for the manner in which they were  
22 conducting their representation, it gives rise to, at a  
23 minimum, an appearance of a conflict.

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1 MJ [COL POHL]: I don't want to go into the exact facts on  
2 this thing ----

3 IDC [Lt Col PITVOREC]: I understand, Your Honor.

4 MJ [COL POHL]: ---- because some of it is only unique to  
5 the particular team.

6 IDC [Lt Col PITVOREC]: Yes, Your Honor.

7 MJ [COL POHL]: By hypothetically -- hypothetically, let's  
8 use the Lynne Stewart example, okay? Okay? She was sent to  
9 jail for -- for disclosing things from her client to a third  
10 party in contravention to the protective order, and she went  
11 to jail for a long time. I know she got out because she got  
12 ill, I got that.

13 So you are saying if you investigated a defense  
14 counsel, of how they are doing it, therefore there is a  
15 chilling effect to the public on the outside ----

16 IDC [Lt Col PITVOREC]: I am not saying there is a  
17 chilling effect to the public on the outside, but how can  
18 there not be a chilling effect to that team?

19 MJ [COL POHL]: Let me ask you this. You have signed the  
20 MOU. They have all signed the MOU. They have all signed the  
21 classification requirements to do what there is, okay? They  
22 know if they break their rules -- you all know, I know, I do  
23 the same thing -- that you are subject to sanctions, okay? Is

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1 that a chilling effect?

2 IDC [Lt Col PITVOREC]: No, but I wasn't currently  
3 investigated. I think the issue becomes is, they were  
4 investigated during the time that they were representing their  
5 client.

6 MJ [COL POHL]: Let me ask you this: When does this end?  
7 Or is it your position that it never ends?

8 IDC [Lt Col PITVOREC]: I am not saying it never ends, but  
9 I think at a minimum you need to look at the appearance of a  
10 conflict that currently exists and at least be able to go  
11 through something with the client that gives him the right to  
12 continue forward if he chooses to waive. I'm not saying this  
13 is the appearance of a conflict that cannot be waived.

14 MJ [COL POHL]: I would have to find that there was a  
15 conflict or an appearance of a conflict based on the state of  
16 the record today.

17 IDC [Lt Col PITVOREC]: That is correct.

18 MJ [COL POHL]: Okay. And your position is -- to  
19 understand it, is that if there is an investigation that is  
20 completely closed with no additional -- no additional action  
21 being taken by the U.S. Government at this time, that that  
22 creates an appearance of a conflict?

23 IDC [Lt Col PITVOREC]: I ----

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1 MJ [COL POHL]: It requires some type of waiver?

2 IDC [Lt Col PITVOREC]: I believe, yes -- I believe the  
3 state of the law right now does not actually explain the fact  
4 that there cannot be a conflict in that regard. I understand  
5 that the SRT's position is, and that the commission has  
6 adopted that same position, that if there is no current  
7 investigation, there can be no conflict, but I don't think  
8 that the law is as clear as that.

9 Reading from Harrison v. Motley, it actually talks  
10 about the fact that there is no evidence on the record to  
11 suggest that either, if the counsel were ever criminally  
12 investigated for the representation of Harrison, and going  
13 through this, they say, you know, that it could be a different  
14 story if they were. There was no evidence on the record that  
15 they were ever criminally investigated for their  
16 representation.

17 In this case it is on the record that they were  
18 criminally investigated for their representation of  
19 Mr. Binalshibh. I know this isn't dispositive because it's  
20 all done in the negative. But in this regard, how can there  
21 not be, at a minimum, the appearance of a conflict when they  
22 were investigated for their representation of Mr. Binalshibh?

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

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1 IDC [Lt Col PITVOREC]: Thank you, Your Honor.

2 MJ [COL POHL]: Any others? Mr. Harrington wanted to add  
3 to that.

4 LDC [MR. HARRINGTON]: Just a couple of comments. I think  
5 the Lynne Stewart question really wasn't fair or appropriate  
6 because the question would be when Lynne Stewart was charged  
7 with violating the administrative order, could she have  
8 continued to represent her client. That's really where the  
9 conflict is.

10 MJ [COL POHL]: It was an imperfect analogy. I know that.  
11 I was just trying to pick another set of facts to address the  
12 issue. But go ahead.

13 LDC [MR. HARRINGTON]: It's hard because there are so few  
14 cases like this, but now the record that you have is that the  
15 conflict counsel, who has been given the discovery, is saying  
16 to you that she believes there is at least an appearance of a  
17 conflict, if not even a potential conflict.

18 So what I am saying to the court is that fortifies my  
19 request that I be given the information, whatever it is, so I  
20 can make that judgment, especially if Mr. Campoamor is saying  
21 that as soon as I am conflict free he is willing to give it to  
22 me for other purposes.

23 I mean, I don't see the distinction here of why I

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1 shouldn't have it now. What am I going to do with it? If he  
2 believes I am conflict free now, just that you haven't put  
3 your imprimatur on that, and why shouldn't it be turned over  
4 to me so I can make a good-faith representation to you and a  
5 good-faith representation to Mr. Binalshibh? And maybe my  
6 representation will be I don't think there is a potential  
7 conflict after looking at it.

8 MJ [COL POHL]: Thank you.

9 Mr. Nevin.

10 LDC [MR. NEVIN]: Thank you, Your Honor. The  
11 Lynne Stewart -- the distinction with Lynne Stewart is that --  
12 and you might say this in another way: People don't have the  
13 right to break the law and you might break the law. In many  
14 ways in the course of day-to-day life or in the course of  
15 representing someone. You don't have the right to do that.  
16 That maybe presents a chilling effect. So Lynne Stewart  
17 doesn't have the right to announce to a terrorist organization  
18 that it should lift -- in the opinion of her client, that it  
19 should lift its cease fire.

20 But here we have a different situation. And I do  
21 know that 292SS, our motion to reconsider your decision in  
22 292QQ, is still pending. You haven't ruled on it yet, and my  
23 request is that you not rule on it. The reason is this: What

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1 Mr. Harrington's team was investigated for for the last year  
2 and a half was doing something that we are all required to do  
3 in the course of defending this case.

4 Let me illustrate to you what I mean. I have  
5 previously shown the court security officer an article that I  
6 would like to place on the -- actually, may I approach and  
7 have it marked as the next appellate exhibit?

8 MJ [COL POHL]: Sure.

9 LDC [MR. NEVIN]: Your Honor, this is ----

10 STC [MR. CAMPOAMOR-SANCHEZ]: The SRT has it.

11 LDC [MR. NEVIN]: Your Honor, this is an article, and this  
12 is the sum total of what we know about this at this point.  
13 This is an article from Reuters that was written by David  
14 Rohde and ran on Friday, October 2, 2015. I am going to put  
15 it on the presenter here, if I could have access to that,  
16 please.

17 MJ [COL POHL]: Okay. Turn it on. Go ahead and publish  
18 it. Go ahead, Mr. Nevin.

19 LDC [MR. NEVIN]: The story says based on Mr. Rohde's  
20 investigation ----

21 MJ [COL POHL]: Mr. Rohde is who?

22 LDC [MR. NEVIN]: He is a reporter for Reuters.

23 MJ [COL POHL]: So based on this reporter from Reuters'

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1 investigation, he arrived at this conclusion?

2 LDC [MR. NEVIN]: This is what I know. I am telling you  
3 what I know at this point.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: And I take the meaning of the way -- I  
6 think I take the way -- the meaning of the way the military  
7 commission asked the question, which is you are telling me  
8 that this is evidence, and maybe -- and I don't know. Of  
9 course, this is second or thirdhand, but I offer it as an  
10 illustration of how little we know at this point. But the  
11 idea is that there is a telephone call to the brother in Yemen  
12 saying that Ramzi wants his nephew to do well in school. And  
13 I am going to move this down lower in the article, and a  
14 government official says the conversation appears to have been  
15 innocuous. It turned out to be much ado about nothing.

16 Now, the point and the reason that I stood up and  
17 wanted to be heard is this: A year-and-a-half investigation,  
18 including a full criminal investigation in which an outside  
19 United States Attorney's Office becomes involved, Department  
20 of Defense is involved, the Department of Justice is involved,  
21 and the commission proceedings were delayed for a year and a  
22 half is because of a telephone call of the type that's  
23 described there.

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1           If that's true, the -- what we have been waiting for  
2 the last year and a half about is an investigation based on  
3 something we are required by law to do in this case. We are  
4 required to -- in the course of doing a mitigation  
5 investigation, to reach out to the family, to maintain a  
6 relationship with the family, and to provide them information  
7 about our clients and vice versa, and with an eye some day  
8 toward having that be part of our mitigation presentation.

9           This is not something -- this is not against the law.  
10 It's not something that's optional. It's not in any way akin  
11 to the kind of remarks that Ms. Stewart made. On the  
12 contrary, the ABA guidelines require us to do this.

13           This has two -- this does two things to the question  
14 of whether a conflict still exists. This implies that if we  
15 do the basic actions of conducting our defense, we are going  
16 to be subject to this kind of scrutiny.

17           Now, it was found that Mr. Harrington wasn't doing  
18 anything wrong, but I don't know what the basis for that  
19 finding was. I don't know what -- how close Mr. Harrington  
20 was to a line. I don't know what it would have taken for him  
21 to have been judged to have been on the other side of that  
22 line. And we are now all -- we are having this discussion in  
23 the context of something that I have to do in this case and

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1 that my team has to do in this case.

2           So my request is that you not decide the motion to  
3 reconsider 292QQ. So 292SS is the motion to reconsider 292QQ,  
4 which was made by the defense. And I ask you not to decide  
5 yet that there is no conflict of interest or no potential  
6 conflict of interest because even by -- and the military  
7 commission will recall that I agreed that the absence of a  
8 current live investigation means that there can't be a  
9 conflict. I argued with the military commission about that,  
10 and I lost. I recognize that.

11           But even by those lights, even though assuming -- not  
12 assuming, even as I know that we have to live with the  
13 military commission taking that position, here we have a  
14 suggestion that going forward, when we do the things that we  
15 have to do to do our work, we are going to be the subject of a  
16 criminal investigation, at least potentially, and that creates  
17 a conflict even though there is not an active investigation  
18 going on right now.

19           And I just in passing will point out that in addition  
20 this implicates the issues in 018Y, and some of the -- which  
21 was the government's argument that we had violated the mail  
22 and communications rules in certain respects. And there was  
23 litigation about what 018U, 018-Uniform, your mail, your

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1 written communications order, what it actually means, that has  
2 never been resolved. And that came up again. Where those  
3 lines are came up again in the case of AE 371, the motion  
4 relating to the Obama letter. So I think we are far from  
5 being able to declare that there is no conflict here.

6 I am not going to talk about the motions for  
7 discovery that are pending. They are implicated by this  
8 discussion as well, but I take it that's not on the table at  
9 this moment.

10 MJ [COL POHL]: You are talking about for the 292 series?

11 LDC [MR. NEVIN]: Yes, Your Honor.

12 MJ [COL POHL]: I will address that in a minute.

13 LDC [MR. NEVIN]: Okay. Thank you.

14 MJ [COL POHL]: Anybody else want to be heard?

15 LDC [MS. BORMANN]: A couple of housekeeping issues,  
16 actually. We sought leave to file a supplement to 292SS, and  
17 in a ruling, AE 292-27, the commission denied us the ability  
18 to supplement that and gave us leave to file our supplement to  
19 292SS as a supplement to AE 350A.

20 AE 350A -- I'm sorry, AE 350C. Let me back up.

21 AE 350C is a classified, under seal motion filed by

22 Mr. Connell on behalf of Mr. al Baluchi. I have never seen AE

23 350C. There is a motion pending before you in the 350 series

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1 to allow me to see it so that I can supplement it with the  
2 facts.

3 MJ [COL POHL]: Was the reason you couldn't see it was  
4 because it was classified and you had not signed the MOU?

5 LDC [MS. BORMANN]: Well, that's part of it, I think, but  
6 we both filed motions. I filed a motion for you to unseal it  
7 so I could supplement it, and then Mr. al Baluchi filed a  
8 concurrent motion to be able to release it to me, and it's  
9 never been granted or denied.

10 MJ [COL POHL]: It's in the 350 series?

11 LDC [MS. BORMANN]: Yes. So if it's granted and it's only  
12 based on the MOU -- and I have no way of knowing that.

13 MJ [COL POHL]: I got it.

14 LDC [MS. BORMANN]: Then I have no problem, and I can read  
15 it, and I can supplement it with the facts I believe pertain  
16 to 292SS, stop sign, stop sign.

17 MJ [COL POHL]: Got it. It's actually Sierra, Sierra, but  
18 you can do it.

19 LDC [MS. BORMANN]: So I have a bit of a difficult maze to  
20 run through here in trying to get the issue to you that I need  
21 to get to you in the 292 series.

22 MJ [COL POHL]: Okay.

23 LDC [MS. BORMANN]: So I would ask you to release AE 350C

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1 to us, allowing us to do that so that we can supplement it and  
2 then refer to it in the 292 series.

3 MJ [COL POHL]: Got it.

4 LDC [MS. BORMANN]: Short of that, I have just a couple of  
5 other comments, and that is I'm going to assume that the  
6 commission has never been under investigation by a confluence  
7 of United States government law enforcement agencies. I  
8 haven't either. But I have represented literally thousands of  
9 people who have. And I'm here to tell you that the amount of  
10 stress it causes to an individual who is undergoing  
11 investigation, whether they are ultimately charged or not, is  
12 intense. It destroys relationships, it ruins marriages, it  
13 creates unclear thinking, it affects judgment, it does a lot  
14 of harm.

15 And when the person or people under investigation by  
16 the United States are actually under investigation for the  
17 very work they are required to do, and those people are under  
18 investigation for the work they are required to do in a  
19 capital case that is subject to scrutiny throughout the world,  
20 and there is no promise by the government -- which there can  
21 be, by the way -- that under the current facts the  
22 investigation won't be reopened, then it's impossible for  
23 anybody to say there is not a potential conflict. If the

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1 government wanted to make an argument that there was no more  
2 conflict, then they could simply say there will be no  
3 prosecution. They do that regularly.

4           So to say that the term, "as it stands right now" or  
5 "at this time" doesn't have a particular meaning is to ignore  
6 the opposite, because they are capable of saying that, under  
7 the facts known at the current time, if there is no other  
8 information separate -- about separate incidents, under what  
9 we know now, there will be no prosecution, that would change.

10           MJ [COL POHL]: Let me ask you this, because it seems to  
11 me part of this is just the language issue. By that I mean  
12 the term "at this time" has been interpreted one way. You are  
13 saying if -- on another way. I mean, at the end of the day if  
14 the government stands up and says there will be no charges,  
15 nothing will happen on this, and then a month from now, a year  
16 from now they come back and say oops, never mind -- I mean,  
17 what I am saying is if I take them at their word, if that's  
18 their word, whatever language they use, but I take it to mean  
19 investigation is complete, there is no further action going to  
20 be taken, no disciplinary action, it is now done and nothing  
21 will be done on this investigation, which is basically what  
22 they have told me. And then you say they may reopen it later  
23 on, isn't that the time that I address whether there should be

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1 a remedy at that time?

2 LDC [MS. BORMANN]: Well, no, because right now the  
3 potential conflict exists.

4 MJ [COL POHL]: What do I do? When does the potential  
5 conflict end?

6 LDC [MS. BORMANN]: Let me get to that. So I'll give you  
7 an example. I represent a fellow who has been subpoenaed to  
8 appear in front of a grand jury. The U.S. Attorney's Office  
9 has given me a letter saying he is a target. That means that  
10 he has special rules that apply to him. Eventually the U.S.  
11 Attorney's Office gives me a memo saying they have declined  
12 prosecution at this time.

13 The advice that I am required to give my client is  
14 that it can be reopened at any time; that if an FBI agent  
15 comes to anyone he knows or to him regarding this, anything  
16 they say can still be used against him; that until the statute  
17 of limitations is -- actually lapses, he is still subject to  
18 prosecution because the declination letter only applies  
19 retroactively, not prospectively; and it doesn't mean that  
20 they are still not investigating. That's why those words "at  
21 this time" matter.

22 Now, I have received letters saying we will proceed  
23 no further. And so there is a difference, and that's -- and

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