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1 [The R.M.C. 803 session was called to order at 1347, 25
2 October 2015.]

3 MJ [COL POHL]: The commission is called to order. Trial
4 counsel.

5 STC [MR. CAMPOAMOR-SANCHEZ]: Yes, Your Honor, before we
6 proceed, and I've told Mr. Connell this, I have an objection
7 to the argument he wants to present, and I will tell the
8 commission why.

9 MJ [COL POHL]: Okay.

10 STC [MR. CAMPOAMOR-SANCHEZ]: Your Honor, at the break
11 Mr. Connell handed us a 17-page PowerPoint presentation of
12 what he intends to argue now to the commission ----

13 MJ [COL POHL]: Excuse me. Okay.

14 LDC [MR. RUIZ]: I am having a little trouble hearing,
15 Judge.

16 MJ [COL POHL]: Can you stand a little closer to the mic?

17 STC [MR. CAMPOAMOR-SANCHEZ]: Absolutely. I was saying,
18 at the break Mr. Connell handed us a 17-page PowerPoint
19 presentation of what he intends to argue right now. And as
20 the court will see, even from the argument, this is an
21 argument tailored to 292VV, which is their motion to compel
22 that he joined filed by Mr. Nevin originally.

23 And, again, I don't have an objection at some point

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1 during these proceedings if the court wants to address VV, but
2 our request and our understanding of what we were doing this
3 morning is arguing on whether Mr. Binalshibh's team has a
4 conflict of interest, and issues about discovery, at least
5 from our perspective, have nothing to do with that.

6 And that's, frankly, part of the reason that we
7 suggested as a path forward today that the court hear, the
8 commission hear from independent counsel, from Mr. Harrington,
9 and then hopefully from us in response to those arguments so
10 that the commission then has a complete record and can decide
11 that issue, which is, frankly, the most important issue we
12 believe that the commission should decide and decide first.

13 MJ [COL POHL]: Let me ask you this, that you have
14 received a number of discovery requests on this issue, I'm
15 assuming from various teams?

16 STC [MR. CAMPOAMOR-SANCHEZ]: We received discovery
17 requests from Mr. Nevin, from Mr. Connell, and more recently
18 from Mr. al Hawsawi, I believe.

19 MJ [COL POHL]: Have you responded to those requests yet,
20 or are you waiting for this determination to respond?

21 STC [MR. CAMPOAMOR-SANCHEZ]: Well, I have responded to
22 those requests, and I think that's probably the argument that
23 Mr. Connell intended to make today. We have, and as I

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1 outlined in the general sort of preamble we did this morning,
2 outlined for the court how we generally intend to proceed.
3 Now, we have opposed the motion to compel as it currently
4 stands. But, for example, with Mr. Nevin, I believe we have
5 reached agreement, now that he signed the MOU, as to his team.

6 And I want to also point out that as to the conflict
7 issue, we have met numerous times with independent counsel,
8 had discussed the issues and have shown her both classified
9 and unclassified filings, so that she was in the best position
10 to make whatever argument she deemed necessary for the
11 commission.

12 And so to now have Mr. Connell attempt to argue
13 discovery motions when again -- and maybe the commission has a
14 different idea, but what I understood us to be trying to
15 resolve this morning is the conflict as to Mr. Harrington's
16 team. We're mixing things. And frankly ----

17 MJ [COL POHL]: Have you responded to 292VV?

18 STC [MR. CAMPOAMOR-SANCHEZ]: Yes, sir, we did. We did
19 back in 2014. And it also creates problems for us as we had,
20 for example, attempted to, you know, my co-counsel and myself,
21 trial counsel, Mr. Driscoll, how we were going to address
22 this, was intending to respond to the arguments made by
23 Ms. Pitvorec and Mr. Harrington today, and I am happy to

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1 respond to VV if the court wants to hear argument on that.

2 But at this stage I suggest what we should be arguing
3 about is whether the Special Review Team has a conflict, not
4 about discovery issues. That's our suggestion on how to
5 proceed.

6 MJ [COL POHL]: Don't leave yet.

7 STC [MR. CAMPOAMOR-SANCHEZ]: Oh, I'm sorry.

8 MJ [COL POHL]: That's okay. Assuming we resolve the
9 conflict issue today ----

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

11 MJ [COL POHL]: ---- it strikes to me there is a lot of
12 outstanding discovery to be given to various teams.

13 STC [MR. CAMPOAMOR-SANCHEZ]: Yes. Well, at least
14 according to our position, first to Mr. Nevin and then to
15 Mr. Harrington, right.

16 MJ [COL POHL]: And would some of that information be
17 responsive to Mr. Connell's request, but you would not give it
18 to him without Mr. Harrington's approval?

19 STC [MR. CAMPOAMOR-SANCHEZ]: Yes. And that's been part
20 of the issue that we have been having, is that as I have
21 indicated to Mr. Connell in the past, before I provide him
22 anything, I intend to first have Mr. Nevin and Mr. Harrington,
23 assuming that the court rules there is no conflict, review

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1 that first and make a determination whether those documents
2 can go to the other teams.

3 MJ [COL POHL]: Okay. I understand. Thank you.

4 Mr. Connell.

5 LDC [MR. CONNELL]: Procedurally we are doing one of two
6 things today. The military commission is either acting on
7 292RR and 292SS or the commission is acting -- maybe and/or
8 the commission is acting on 292VV.

9 This morning the military commission did not tie its
10 comments -- excuse me, let me take this off -- its comments to
11 any particular motion, but the first question that arose was
12 how are we going to organize this discovery question. The
13 Special Review Team gave its position on discovery,
14 Mr. Harrington gave its position on discovery, and I would
15 simply like to give my position on discovery too.

16 The procedural framework for that, the way we call
17 that in the military commission is 292VV, because that's where
18 it has been briefed by all the parties. But that is the
19 vehicle that I have to make the argument that I want to make
20 to the military commission, that the military commission,
21 according to the drift of the argument so far, is putting the
22 cart before the horse; that the military commission thinks it
23 can decide the question of conflict, that is, the question of

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1 whether to reconsider QQ, which is -- that motion to
2 reconsider is SS from the defense and RR from the Special
3 Review Team, without having -- the parties having access to
4 the discovery, so that's the position that I want to present
5 to the military commission today. The vehicle for that is
6 292VV.

7 MJ [COL POHL]: Okay. So your position is -- and I may
8 have them wrong, that your request for reconsideration, which
9 I believe Mr. Nevin asked me not to decide today ----

10 LDC [MR. CONNELL]: I'm not asking you to decide it today.
11 I'm ----

12 MJ [COL POHL]: I know you are not bound by him, but you
13 want your discovery on that.

14 LDC [MR. CONNELL]: That's right.

15 MJ [COL POHL]: And there is a chicken-and-egg component
16 to this, is do you get discovery and find there is a conflict,
17 or do you find there is no conflict that permits the discovery
18 to go to the conflict counsel, and that's primarily
19 Mr. Harrington's team, not that he has a conflict, but -- now,
20 your litigation posture on VV is, for want of a better term,
21 somewhat premature because they have not been in a position to
22 totally respond to it until the conflict issue was resolved,
23 and since there is going to be all sorts of other discovery in

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1 this case, are we going to be relitigating this later anyway?

2 LDC [MR. CONNELL]: I don't think so, sir. And if I can
3 get into my argument, I will explain it, but I want to break
4 the chicken-and-egg cycle, which I think is illusory. I think
5 it is somewhat ironic to refer to a discovery request from
6 2014 as premature, but be that as it may. The ----

7 MJ [COL POHL]: I am not speaking chronologically. I am
8 speaking in terms of this case.

9 LDC [MR. CONNELL]: Yes, sir. But, in fact, the very
10 first slide that I want to address is what order do I think
11 that we should be taking it in, what is the order of the
12 analysis; and to allow the Special Review Team to argue its
13 order of analysis without allowing me to respond to that is
14 simply unfair.

15 MJ [COL POHL]: I'll tell you what I will let you do,
16 Mr. Connell. You can do your first slide, and then we will
17 talk after that.

18 LDC [MR. CONNELL]: Okay. With my dear love to the
19 interpreters and the stenographers, as I am sometimes -- I
20 don't know why, but sometimes accused of going a little fast,
21 may I ask that my box here be turned on where they are allowed
22 to tell me to slow down? Thank you very much.

23 And I have previously provided the slide deck, an

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1 electronic version of the slide deck to the commission
2 security officer. I have provided him this morning a paper
3 version for comparison to the electronic version, I have
4 provided a copy of the slides to the Special Review Team, and
5 I have provided a copy of the slides to other counsel and to
6 the clerk of court.

7 May I ask that the slides be marked as the next
8 appellate exhibit in the 292 series.

9 MJ [COL POHL]: 292IIIII.

10 LDC [MR. CONNELL]: Five I's, quintuple India. And may I
11 ask -- I have the feed from Table 4 and that I be permitted to
12 publish the slides to the military commission?

13 MJ [COL POHL]: Slide.

14 LDC [MR. CONNELL]: There is a cover slide but ----

15 MJ [COL POHL]: Yeah, okay. Okay. Your issue before me
16 was you want to be heard on the order of March, you said
17 that's the first slide, so let's talk about it.

18 LDC [MR. CONNELL]: Truthfully, I want to be heard on
19 order of discovery, make no mistake, but you asked me to speak
20 on the order of March.

21 May I also speak to the issues other counsel have
22 raised, because my goal here today is to take the discussion
23 we have had this morning and tie it to the record, because

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1 there is a lot of briefing on these issues, there is a lot of
2 references to things which -- without appellate exhibit
3 references. And I want to clean up the record here, and then
4 I want to talk about slide 1.

5 MJ [COL POHL]: Okay.

6 LDC [MR. CONNELL]: First, Your Honor, I wanted to make
7 sure of the military commission's ruling on the Special Review
8 Team's motion to unseal. I want to make sure that its motion
9 to unseal 292TTTT has been granted; is that correct?

10 MJ [COL POHL]: I think so.

11 LDC [MR. CONNELL]: They weren't sure.

12 STC [MR. CAMPOAMOR-SANCHEZ]: We asked for that this
13 morning, Your Honor. I don't know that the commission
14 actually ruled.

15 MJ [COL POHL]: Let me make it clear. The request for
16 seal came from you.

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

18 MJ [COL POHL]: If the moving party wants something,
19 absent extraordinary circumstances, be unsealed, the general
20 answer will be yes, and the specific answer for this one is
21 yes.

22 STC [MR. CAMPOAMOR-SANCHEZ]: I just wanted to clarify for
23 Mr. Connell, we requested to unseal the redacted version that

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1 we provided to the commission and all defense counsel last
2 Monday.

3 MJ [COL POHL]: Thank you.

4 LDC [MR. CONNELL]: To be specific, the Special Review
5 Team provided it to the defense counsel on 22 September 2015
6 after the issuance of AE 292WWW, which was the approval order
7 from the military commission.

8 The second housekeeping matter is -- I'm slowing
9 down -- that based on that ruling by the military commission,
10 I would ask the military commission to unseal AE 292VV (AAA
11 2nd Sup) which was sealed only because it referred to material
12 which was contained in 292TTTT. It's my motion. I ask to
13 unseal it now that it's derivative of TTTT.

14 MJ [COL POHL]: Any objection?

15 STC [MR. CAMPOAMOR-SANCHEZ]: Can Mr. Connell repeat which
16 was the attachment he intends to unseal?

17 LDC [MR. CONNELL]: Yes. It's the entire pleading of
18 292VV (AAA 2nd Sup).

19 MJ [COL POHL]: You want that to be unsealed because the
20 references was to documents that were sealed in their motion?

21 LDC [MR. CONNELL]: I didn't want it to be sealed,
22 Your Honor.

23 MJ [COL POHL]: That is what you ----

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1 LDC [MR. CONNELL]: To unseal, yes.

2 STC [MR. CAMPOAMOR-SANCHEZ]: No objection to the request,
3 and by that, to be clear, is your discovery request.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: Okay. Then your motion to unseal that
6 part of 292VV is granted. Go ahead.

7 LDC [MR. CONNELL]: The third housekeeping matter is the
8 military commission inquired of the Special Review Team
9 whether it had responded to the three discovery requests,
10 which are labeled DR-180 B, C and D -AAA, and we have had
11 pending since 15 October AE 292-30, which is our request to
12 file a third supplement to 292VV, and that is where we intend
13 to provide for the record a copy of the Special Review Team's
14 response.

15 Out of an abundance of caution, we attached the
16 Special Review Team's response to AE 292CCCC, and so I just
17 wanted to answer that question and let the military commission
18 know that we are waiting for motion for leave to file in
19 292-30.

20 Finally, Your Honor, Ms. Bormann raised the question
21 of the interaction between 292 and 350. In AE 294-24, the
22 military commission directed Mr. Bin'Attash's team to file its
23 intended supplement to 292SS as a supplement to 350C. They

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1 filed 350L, which was an objection to that proceeding. We
2 filed our position in 350M.

3 And I am in a position today to confirm to the
4 military commission that the only reason that we did not
5 provide a copy of 350C to the counsel for Mr. Bin'Attash was
6 because of the MOU issue, and if the military commission
7 directs, I'll be pleased to provide a copy of 350C to not only
8 Mr. Bin'Attash's counsel, but all other defense counsel as
9 well.

10 MJ [COL POHL]: Well, I think the issue about the MOU now
11 is OBE, and, therefore, if that's the only prohibition for
12 doing it -- I don't know whether you filed that under seal or
13 not.

14 LDC [MR. CONNELL]: Classified filings are automatically
15 under seal.

16 MJ [COL POHL]: But obviously if that's the prohibition,
17 if that was the impediment for sharing with fellow defense
18 counsel, then the impediment no longer exists.

19 LDC [MR. CONNELL]: That's generally been my view. That
20 particular one was the subject of litigation, so I wanted to
21 hear from the military commission before we acted
22 unilaterally.

23 MJ [COL POHL]: But as I recall at the time the MOU issue

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1 was still out there.

2 LDC [MR. CONNELL]: Yes, sir.

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

4 LDC [MR. CONNELL]: So turning to slide 1. Okay. Here is
5 the pending 292 issues. There is one minor issue that has
6 come up this week after I submitted the slides, but these --
7 this slide captures what is still live motions in the 292
8 series.

9 So the first of those slides -- issues is the 292VV
10 discovery question. That is the question of whether the
11 Special Review Team will provide information to
12 Mr. al Baluchi's team and other teams on a series of topics,
13 which I will be delighted to show you slides on shortly. But
14 fundamentally the questions boil down to, number one, why did
15 they -- why are they investigating?

16 Number two, what did they do in the investigation,
17 especially with regard to person A?

18 And number three, what steps have been taken along
19 with -- during that investigation.

20 There are two other pending motions, really three,
21 but two that are on the slide, that deal with the question of
22 what steps were taken. One of those is 292YY, which is the
23 request to the military commission to reveal the undisclosed

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1 information that it received. We now know that that is the
2 attachment to AE 292XX that started the third FBI
3 investigation.

4 Separately pending is 292YYYY, which is our request
5 to unseal the long series of classified and unclassified, but
6 all under-seal pleadings by the SRT which were updating the
7 military commission on the progress of the third
8 investigation.

9 Connected to that, a sort of footnote to 292YYYY, is
10 that the Special Review Team has filed 292DDDDD, which was
11 although styled as a notice, is really a motion to approve
12 redactions without, in our opinion, complying with the
13 requirements of M.C.R.E. 506. That could be seen as an
14 unauthorized supplement to 292YYYY, or it can be seen as its
15 own issue.

16 Those are the issues that need to be resolved before
17 the military commission can move on to the question of
18 resolving 292RR, the government's motion to reconsider, and
19 292SS, the defense motion to reconsider.

20 Now, 292SS, the defense motion to reconsider,
21 contains within it essentially two components. One of those
22 is the ruling in 292QQ regarding AE 292L, which was
23 Mr. al Baluchi's motion for independent counsel to advise him

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1 on the existence or nonexistence of a conflict. And second,
2 it contains within it a motion to reconsider the military
3 commission's ruling in AE 292QQ regarding 292D, the original
4 motion to compel discovery, although in my opinion that
5 question has been overtaken by events by 292VV.

6 Now, the real question that the military commission,
7 you know, is trying to resolve today, and I think prematurely
8 today, is whether counsel for Mr. Binalshibh or counsel for
9 somebody else, for Mr. Mohammad's team or Mr. al Baluchi's
10 team, as we claim in 292SS, are laboring under a potential
11 conflict, or have for the 18 -- past 18 months labored under a
12 potential conflict.

13 The analysis that the court originally made in 292QQ
14 at page 30 is directly instructive on this question -- which I
15 think has gotten a little tangled this morning -- this
16 question of whether we are only looking at the moment, or are
17 we looking at the last 18 months as well.

18 And so if I may switch from the feed from Table 4 and
19 have the document camera, I would like to show one segment of
20 AE 292QQ at page 30.

21 MJ [COL POHL]: Go ahead.

22 LDC [MR. CONNELL]: So on page 30, the military commission
23 in AE 292QQ made its analysis of the conflict issue with

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1 respect to Mr. al Baluchi and found that there was no actual
2 or potential conflict between counsel and their clients based
3 on information available to the commission. Nothing indicates
4 either defense team was implicated in either FBI
5 investigation. Defense counsel were not aware of either
6 investigation until 12 May 2014. Any chilling that may have
7 occurred is de minimis given the length of time since
8 arraignment and the relatively short period of time that has
9 lapsed since the investigation surfaced.

10 Now, buried in that is the analysis that the time
11 under which counsel is under investigation or reasonably
12 suspects that they are under investigation does play a role in
13 the conflict analysis. It is not simply a question of the
14 present moment. And I'm done with this, and I'll take it
15 down.

16 In June of 2014, I argued to the military commission
17 that the claim by the SRT that there, quote, "is no
18 investigation" was highly dependent upon tense. Little did I
19 know how prescient that comment would turn out to be, because
20 less than two months later, based on information apparently
21 provided by the military commission in AE 292XX, the Special
22 Review Team, and through a long chain of an alphabet soup of
23 agencies, was involved in a third FBI investigation, this time

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1 of not just counsel of record, not just Mr. Harrington, but
2 according to 292TTTT, members of the Ramzi Binalshibh defense
3 team writ large.

4 Now, this investigation over time reached back to the
5 second FBI investigation, that of Mr. Binalshibh's linguist,
6 and gathered the information that had been brought up in the
7 investigation which had run from at least November 2013 to May
8 of 2014. So I argued at the time that essentially under a
9 pure momentary conflict analysis, that the Special Review Team
10 could stop an investigation just before the hearing and start
11 an investigation again before the next hearing, and nobody
12 would ever have a conflict. Little did I know that would be
13 what actually happened.

14 MJ [COL POHL]: If the Special Review Team or anybody
15 represented at the hearing that there is no investigation, all
16 investigations are complete and there is no further
17 investigation going, would that suffice?

18 LDC [MR. CONNELL]: Well, in June of 2014 that is what
19 they represented, and clearly it did not suffice, because not
20 only was an investigation started later, but that later
21 investigation drew on the second investigation, that is the
22 investigation into the linguist for Mr. Binalshibh.

23 And if I could have the military commission's

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1 permission to go to the second slide in 292, I have a slide
2 that illustrates the answer to that question.

3 STC [MR. CAMPOAMOR-SANCHEZ]: Your Honor, we object.

4 MJ [COL POHL]: Yeah, the issue -- you have already made
5 your objection.

6 The issue before me is: Is this a discovery issue or
7 is this a conflict issue?

8 LDC [MR. CONNELL]: Those two -- there is no distinction
9 between those two, Your Honor. The fundamental question is
10 what information does defense counsel need to represent their
11 position to this military commission about whether they have a
12 conflict.

13 Now, I believe that the discovery that Mr. Campoamor
14 hopefully will turn over at some point will include
15 information about person A, who I believe to be Elbert Cruz,
16 the person who went on a -- conducted joint OCONUS
17 investigation with Mr. Binalshibh's team, conducted joint
18 CONUS investigation into the seizure of the computers and had
19 access to our information. I believe that that discovery will
20 be forthcoming.

21 Now, if the military commission makes its final
22 decision with respect to Mr. Binalshibh's team in 292RR or
23 with respect to Mr. al Baluchi in 292SS without access to the

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1 core information about -- then it is acting prematurely,
2 because I cannot -- I have given you every bit of information
3 that my investigation has shown with respect to the
4 involvement of person A, who I believe to be Elbert Cruz. If
5 the discovery confirms that it is in fact Elbert Cruz who met
6 with the FBI in November of 2013, then our explanation, my
7 suspicion that we have been laboring under a potential
8 conflict is much, much stronger.

9 On the other hand -- I mean, I'm putting all my cards
10 on the table. On the other hand, if it turns out I am wrong
11 and person A is someone who is completely separate, who has
12 nothing to do with Mr. al Baluchi's team, then I am in a
13 very -- much, much weaker situation, and all of my fears, all
14 of the different things that I have done, all of the changes
15 that I have made to our representation, all the precautions
16 that we have taken have all been in vain. It was obviously
17 simply overly suspicious.

18 But the reason why this is important is that it
19 informs the order in which the military commission does
20 things. If you act without full information, if you act with
21 only one-half of the room knowing what has actually gone on,
22 then you severely risk acting prematurely, because you will
23 not have an adversarial determination of whether a conflict of

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1 interest exists or not.

2 There is only one person on the defense side of the
3 room who has had access to that, at least some of that
4 information, and that's Lieutenant Colonel Pitvorec, and she
5 told you this morning that she believes there is a potential
6 conflict of interest requiring a waiver colloquy.

7 The military commission asked this morning what is my
8 path forward, and that's what I am here to answer under the
9 limited restrictions.

10 MJ [COL POHL]: Let me ask you this, because I think there
11 are two issues that are being conflated a little bit. There
12 is a conflict of interest issue, and there may be, for our
13 generic term, alleged misconduct issue by members of defense
14 team. Let me focus on the first part of that, okay?

15 Colonel Pitvorec asked me that there is at least an
16 appearance of a conflict of interest, okay? If you -- and my
17 question really is: What would that be unless there is a
18 potential or an ongoing investigation? What's the
19 appearance -- what's the potential conflict of interest
20 that -- what kind of dialogue would I have with an accused to
21 see whether he wants to waive it without specifying what the
22 conflict is?

23 LDC [MR. CONNELL]: Without specifying? Well, let's

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1 bracket "without specifying what the conflict is," because I
2 think the cases are completely clear that you have to specify
3 what the conflict is.

4 MJ [COL POHL]: And I would tend to agree with you. So
5 back to you, since you are standing there. What would be the
6 conflict of interest or the potential or the appearance,
7 whichever qualifying term you want to do, would be, that would
8 entail in that discussion?

9 LDC [MR. CONNELL]: Sure. Here is what it would look
10 like. You would say the facts have revealed that -- and there
11 might have to be an unclassified summary, I understand, right,
12 but let's skip over that part -- but an unclassified summary
13 of the investigation that has taken place, the allegations
14 that were made, and if you have any information, the different
15 course of action that his defense counsel took as a result of
16 the investigation.

17 I know that I have detailed and Mr. Mohammad has --
18 counsel for Mr. Mohammad has detailed different things that we
19 have done, changes we have made in our representation as a
20 result of the belief that there was an ongoing investigation.

21 Now, I am only talking about between ----

22 MJ [COL POHL]: But I don't know that.

23 LDC [MR. CONNELL]: Well, I told you, sir.

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1 MJ [COL POHL]: No. No. What I am saying is, is you took
2 certain actions with your professional judgment under an
3 assumption that there may be some type of an investigation on
4 you, and you said Mr. Nevin did also, okay? But I don't know
5 what you did. I don't know why you did it.

6 LDC [MR. CONNELL]: Well, with all due respect, sir, I
7 laid it out in extraordinary detail in the June 2014 hearing.

8 MJ [COL POHL]: Okay.

9 LDC [MR. CONNELL]: It was an emotional moment for me, but
10 apparently it wasn't for the military commission. It is in
11 the transcript.

12 MJ [COL POHL]: No, I am not saying it's not in the
13 transcript. I am going back to then I take what you say and I
14 go through everything you said you did or did not do and
15 that's part of the waiver colloquy.

16 LDC [MR. CONNELL]: So there are three things in the
17 waiver colloquy, and the things that need to be in the waiver
18 colloquy are, factually, really just boiled down to what
19 happened here, all right? One of the things, one of the
20 elements of a knowing and voluntary waiver of conflict is what
21 happened. And I laid out for you what I thought what happened
22 looks like.

23 MJ [COL POHL]: No, it's coming back to me.

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1 LDC [MR. CONNELL]: Yes.

2 MJ [COL POHL]: I remember this discussion, not with
3 granularity, but I've got that.

4 LDC [MR. CONNELL]: Sure.

5 MJ [COL POHL]: But the threshold start is, Mr. Accused,
6 there is an appearance ----

7 LDC [MR. CONNELL]: Yes, I am ----

8 MJ [COL POHL]: ---- there is a potential conflict of
9 interest in X.

10 LDC [MR. CONNELL]: Right.

11 MJ [COL POHL]: What is X here?

12 LDC [MR. CONNELL]: X here is that between April and June
13 of 2014, and between August and at least -- at least
14 August 2014 to at least September of 2015, Mr. Binalshibh,
15 your counsel was under investigation. The steps that were
16 taken in this investigation are X. The allegations were Y.
17 The steps, if any, that we know that your client -- that your
18 attorney has done the same or differently were Z.

19 Knowing all that, and knowing that this is not a
20 situation of a de minimis one-month investigation, but almost
21 18 months of investigation, do you -- are you willing to waive
22 the potential conflict of interest that your client has --
23 that your attorney has?

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1 MJ [COL POHL]: I'm back -- you have gone to either step 2
2 or 3, I don't know which one, but you are not on step 1.

3 What I am saying is this, and help me here.

4 LDC [MR. CONNELL]: I am trying to.

5 MJ [COL POHL]: Okay. Is that -- and, again, I know there
6 are disagreements on this, and I've got it, you have got your
7 objections, I don't need -- I do read most of your pleadings.
8 Actually I read all your pleadings; whether I remember them
9 all, I can't guarantee you that.

10 But bottom line is, in QQ I said that there is no
11 ongoing investigation with four teams, therefore, there is no
12 conflict.

13 LDC [MR. CONNELL]: Yes, sir.

14 MJ [COL POHL]: Okay. You may disagree with that state of
15 the law, I've got it. You have it preserved.

16 Now, if I find that today, 25 October, whatever today
17 is, there is no investigation going forward on anybody, on
18 anybody, where is the conflict?

19 LDC [MR. CONNELL]: Sir, if I could have the ----

20 MJ [COL POHL]: No. What you did in the past -- and,
21 again, I am trying to focus here, Mr. Connell, is when I said
22 there's kind of two issues of alleged misconduct, that -- I
23 mean, there is nothing informing the accused within the

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1 classification issues of what happened. I'm not saying
2 anything about that, whether you chose to do that. I am
3 assuming you probably do, whether they want to possibly go
4 forward. If you want to tell your clients this is what I did
5 and this is why I did it, and if there is a representational
6 issue, I have got it there.

7 But what I am trying to focus here on is the fact
8 that if there is no -- if all investigations have been
9 completed, and I am going to talk again to the SRT about is
10 there a possibility for reach-back, if the answer to that is
11 no, that everything is done, no reach-backs possible, then
12 currently there is no actual conflict -- this is a question
13 mark at the end. There is no actual conflict, and under this
14 context, since there is no actual conflict, what's the
15 appearance of a conflict?

16 LDC [MR. CONNELL]: Okay. I want to change the
17 vocabulary, and I'm answering your question specifically,
18 because I know -- I know where I think other counsel got it
19 wrong, and I know where I think the military commission is
20 getting it wrong.

21 The -- the appearance is a useful framework,
22 especially in ethical situations. I understand why we use the
23 appearance framework, but the legal framework, the

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1 Holloway v. Arkansas framework, the Supreme Court's framework
2 is not actual and apparent conflict.

3 The Supreme Court's situation is actual conflict,
4 that is conflict which cannot be waived, that is, the
5 counsel -- the decedent is the counsel's spouse, the counsel
6 is representing both the cooperating witness and the
7 defendant, unwaivable actual conflict. That's what is
8 addressed in Mickens. That is what's addressed in all those
9 cases.

10 I don't believe there is an actual conflict here. I
11 believe there is a potential conflict here, and that's when
12 Holloway talks about when the possibility of, of conflict is
13 brought to the judge's attention, there has to be a diligent
14 investigation, et cetera.

15 What the military commission needs to advise
16 Mr. Binalshibh, and in my position Mr. al Baluchi of, is the
17 potential conflict. Now, your next question is well, if
18 everything is closed, if there is a letter from the President
19 promising no one will ever be prosecuted for anything or
20 investigated or even bothered ever again, then what is the
21 conflict?

22 The conflict is that for almost 18 months counsel for
23 Mr. Binalshibh and Mr. al Baluchi have changed their tactics,

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1 have changed the exercise of their professional judgment
2 because of a -- not some imaginary suspicion of an
3 investigation, but because of an actual investigation.

4 And I will draw the military commission's attention
5 to the fact that from August 2014 forward, we knew there was
6 some kind of investigation going on that might give rise to a
7 conflict of interest, but we didn't know who its targets were.
8 We honestly still don't know who its targets were, other than
9 members of the Binalshibh team. And once we get the actual
10 discovery and the actual documents, it may turn out to be
11 broader than that.

12 The conflict analysis is not frozen in time at the
13 instant of the questioning. The conflict analysis has to look
14 at what has happened in the recent past, at least. And that
15 is why, when the military commission wrote in 292QQ about the
16 chilling effect with respect to the investigation that
17 Mr. al Baluchi's team knew about between April 2014 and
18 May 2014, that chilling effect the military commission decided
19 wasn't nonexistent, but was de minimis because it only lasted
20 for a month, and there was only a month that we knew that
21 people that we worked with, that we collaborated with, and in
22 the case of Mr. Mohammad's team were actually on his team, had
23 been investigated.

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1 That situation is different now. That is why the
2 facts underlying reconsideration in 292SS are different now
3 than they used to be, because there is no possibility that
4 this is a de minimis situation. This is a situation in which
5 actual defense team members were actually investigated by
6 Washington Headquarters Service, the U.S. Under Secretary of
7 Defense for Intelligence, the FBI, the Department of Justice
8 and the Northern District of Illinois's U.S. Attorney's
9 Office. This is not an imaginary situation, this is an actual
10 conflict of interest that at least Mr. Binalshibh's team and I
11 suggest the rest of us as well were laboring under for almost
12 18 months. What the ----

13 MJ [COL POHL]: Okay. Let's assume that that's true.
14 Okay. Let me -- I am just trying to figure this out, the way
15 ahead.

16 LDC [MR. CONNELL]: Yes, and that's what I want to get to,
17 is the way ahead.

18 MJ [COL POHL]: Mr. Nevin in earlier sessions on this
19 issue talked about the fear of going forward, and I understand
20 that. Okay.

21 Everybody was aware as of, I believe, April of '14,
22 which is when I think this issue first came up.

23 LDC [MR. CONNELL]: Yes sir.

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1 MJ [COL POHL]: And, again, my dates may be wrong.

2 LDC [MR. CONNELL]: No, you have it, sir.

3 MJ [COL POHL]: There was an issue of an investigation of
4 an alleged misconduct out of the defense team.

5 LDC [MR. CONNELL]: Yes, sir.

6 MJ [COL POHL]: In late May of '14, and unlike you I am
7 not quite as well versed with all the exhibit numbers.

8 LDC [MR. CONNELL]: Yes, sir, that's fine.

9 MJ [COL POHL]: It was all closed and there was some
10 mealy-mouth language on that.

11 LDC [MR. CONNELL]: Yes, sir.

12 MJ [COL POHL]: In June or July I issued 292QQ which
13 satisfied neither side, so ----

14 LDC [MR. CONNELL]: Which means ----

15 MJ [COL POHL]: It could mean a lot of things, but
16 basically it was because I said based on that language I'm not
17 now satisfied about that this is actually in Mr. Harrington's
18 team, but the other four I was.

19 LDC [MR. CONNELL]: That any chilling effect was
20 de minimis.

21 MJ [COL POHL]: Subsequently, I believe in the September
22 timeframe, there was some information that went directly to
23 me.

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1 LDC [MR. CONNELL]: August 20.

2 MJ [COL POHL]: I will tell you this, when you see the
3 discovery, that's not the only thing that came straight to me,
4 so I am just letting you know.

5 LDC [MR. NEVIN]: Could I ask you to repeat that,
6 Your Honor? I didn't hear it.

7 MJ [COL POHL]: What I am saying is I got that straight
8 with me. It was delivered straight to me August 28, to my
9 office actually, and there may be one or two other items in
10 that way which will be fully disclosed through the process.

11 So I just wanted to let you know some of it came
12 unsolicited, ex parte to me. It was immediately turned over
13 to the government. There will be papers to the effect as it
14 goes through. As a result, you have the September whatever
15 order. Go look again. And now we have spent the last year on
16 that follow-up thing, okay? That's kind of where we are at.

17 LDC [MS. BORMANN]: Judge, speaking of chilling effects, I
18 am sorry to interrupt, but it is so cold in this courtroom
19 that ----

20 MJ [COL POHL]: I don't know where the thermostat is. Is
21 there a thermostat over your head?

22 LDC [MS. BORMANN]: If somebody can turn it up a little
23 bit.

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1 MJ [COL POHL]: Outside? By the clock. I see, it's on
2 the wall over here. A Marine can figure that one out.

3 And, again, don't quote me on all the -- I am doing
4 this off the top of my head. I'm trying to give the general
5 flavor.

6 So from September forward we have been in hiatus
7 while this thing has been resolved and you have the nine
8 updates or ten updates, whatever, where they sent it to me,
9 and you will get that.

10 LDC [MR. CONNELL]: I want it to be clear. I don't have
11 the nine or ten updates, I only have 292TTTT.

12 MJ [COL POHL]: Those updates, everything given to me in
13 this entire issue will be given to you and everybody else that
14 I got. I am just telling you, absent some classification
15 issue or some -- if there is some exception. But my view is
16 when this is all done, that's what I want the discovery to be.
17 Okay.

18 So now we are up to October of 2015. Okay. There is
19 always the potential for anybody involved in this process to
20 be investigated if there is an allegation of misconduct.

21 LDC [MR. CONNELL]: Yes.

22 MJ [COL POHL]: Okay. So the fact there could be
23 something else, if something comes up to me, is irrelevant for

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1 our current inquiry.

2 LDC [MR. CONNELL]: Understood, sir.

3 MJ [COL POHL]: Okay. Now, if you had done actions in the
4 past because you knew about an investigation going forward,
5 okay, and your remedy, therefore, is -- is to, that means you
6 have a conflict, let's say, for example ----

7 LDC [MR. CONNELL]: Potential conflict, yes, sir.

8 MJ [COL POHL]: Let's say, for example, your suspicion
9 is -- let's go the other way, that Mr. Cruz was there.

10 LDC [MR. CONNELL]: Yes, sir.

11 MJ [COL POHL]: You took certain actions, you wanted to
12 inform your client what you did. Mr. Harrington's team will
13 tell his client what they found out about their activities,
14 okay?

15 LDC [MR. CONNELL]: Sure. I am with you.

16 MJ [COL POHL]: Is that a conflict analysis or simply a
17 disclosure to your client analysis to determine whether he
18 wants to continue with you as his attorney? Because that's my
19 problem here, is I'm not saying that the 292 discovery means
20 that everything is hunky-dory and you can go forward as it is.
21 I am just going back -- is the ending of any investigation,
22 remove any current conflict, and in there was a conflict in
23 the past, is that the remedy? What's the remedy?

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1 LDC [MR. CONNELL]: Right. I want to take all of those --
2 all those as given for parameters, because there are a few
3 footnotes that could be put on there, but let me go with those
4 as the parameters.

5 In that situation the bifurcation that the military
6 commission has articulated between disclosure to the client
7 and the remedy, which the remedy -- don't get me wrong, the
8 remedy is a waiver colloquy, right? That's the remedy.

9 MJ [COL POHL]: If I find a conflict.

10 LDC [MR. CONNELL]: If you find that there is a potential
11 conflict, the remedy is a waiver colloquy.

12 MJ [COL POHL]: On this issue, yes. Not always, but on
13 this issue.

14 LDC [MR. CONNELL]: I am trying to narrow us here. I am
15 trying to follow you.

16 MJ [COL POHL]: Narrow down.

17 LDC [MR. CONNELL]: That dichotomy is the dichotomy
18 between the ethical duty of counsel, because we are not really
19 talking of Rule 1.7 here, Model Rule 1.7, about the ethical
20 duty of counsel to keep the client informed and to advise them
21 of potential conflicts. We are really talking about the Sixth
22 Amendment inquiry, which is the only part that the court gets
23 involved in.

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1 And the Sixth Amendment inquiry in that situation is
2 yes, under the facts that you described, that means that for a
3 substantial period of time, over one-third the pendency of the
4 case, close to half the pendency of the case, at least
5 Mr. Binalshibh's defense team has been laboring under a
6 conflict of interest while they were actually being
7 investigated by an alphabet soup of government agencies. And
8 your role there is to inquire of Mr. Binalshibh whether that
9 investigation, the general conduct generated by that
10 investigation, means whether he is willing to waive that
11 potential conflict or not. That is the court's role.

12 Defense counsel has their own role of disclosure of
13 consultation of full communication of competence, et cetera,
14 all the things that the military commission was referring to,
15 but the court's role in that is to -- is neither more nor less
16 in this situation than a colloquy with the defendant on
17 whether he is willing to waive the potential conflict of
18 interest under which his counsel labored for a year and a
19 half.

20 MJ [COL POHL]: So as I understand your position ----

21 LDC [MR. CONNELL]: Always dangerous words, sir.

22 MJ [COL POHL]: I know. I know. And I'm sure I don't
23 understand it properly, as you will tell me, but that's okay.

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1 Is if defense counsel are under -- operating under a
2 potential conflict of interest because they know they are
3 currently being investigated by the same U.S. Government
4 that's prosecuting their client, okay, and subsequently the
5 investigation is completed with no further action done, we are
6 now done, okay? Okay. I'm now asking the accused to waive
7 the potential conflict of interests that occurred in the past,
8 even though there is no current potential conflict of
9 interest. Is that your analysis?

10 LDC [MR. CONNELL]: Almost all potential conflict -- not
11 almost all, a great deal of potential conflicts of interest
12 arise from past events. The facts in ----

13 MJ [COL POHL]: Mr. Connell, I know it is sometimes
14 difficult. Simple question.

15 LDC [MR. CONNELL]: Yes, sir.

16 MJ [COL POHL]: Counsel is under a potential conflict of
17 interest.

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: The potential conflict of interest for
20 whatever reason goes away. It goes away, okay? But for a
21 period of time there was.

22 LDC [MR. CONNELL]: Yes, this is it.

23 MJ [COL POHL]: Now the potential conflict of interest

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1 goes away. Does the judge now have to go back to the client
2 and say that during this period of time there was a potential
3 conflict of interest that may have impacted your attorney's
4 performance, do you wish to waive that, even though there is
5 no current potential conflict of interest?

6 LDC [MR. CONNELL]: Simple question, simple answer. Yes.

7 MJ [COL POHL]: Okay.

8 LDC [MR. CONNELL]: Alternative to that is to leave a
9 person with a criminal defendant in a death penalty case with
10 the constitutional equivalent of not having had an opportunity
11 of representing their interests in a conflict-free manner for
12 a year and a half, right?

13 You seem to be focusing on sort of anomaly or the
14 anomalous result required by the law that one must at the
15 current time -- because we are always at the current time,
16 right, one must at the current time address past events.

17 The alternative to that, the alternative analysis is
18 far more outrageous. The alternative analysis is we can let
19 conflicts go by, no matter how long, 18 months, three years,
20 ten years, and as long as at some point it becomes over, we
21 never even have to advise the defendant of the existence of
22 the conflict in any formal manner or inquire whether he wants
23 to waive it? That can't possibly be the constitutional

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1 analysis.

2 MJ [COL POHL]: So back to a previous question I had. So
3 in this particular case, it would be Mr. Binalshibh for a
4 period of time, your counsel was being investigated by the
5 United States Government, okay?

6 LDC [MR. CONNELL]: By the United States Government.

7 MJ [COL POHL]: And your counsel was aware of that
8 investigation since April of 2014.

9 LDC [MR. CONNELL]: Right.

10 MJ [COL POHL]: On this date the investigation is closed
11 or any intent to do anything about that, okay? During that
12 time your counsel may have made decisions based on that, okay?
13 Okay. Discuss with your independent counsel and tell me
14 whether you wish to waive it.

15 LDC [MR. CONNELL]: Yes. That's right.

16 MJ [COL POHL]: So my original question about the conflict
17 of interest, you are talking about altering the defense --
18 that's what you are talking about, waiving a past conflict of
19 interest even though there is no existing one?

20 LDC [MR. CONNELL]: It is -- so you are equivocate --
21 making an equivocation that I don't fully agree with, but it
22 doesn't really matter. You are equivocating, making closure
23 with conflict of interest. I don't think those are a

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1 one-for-one match, but let's assume for these purposes that
2 they are a one-by-one match. Let's assume there is no reach
3 back. The fact that the third FBI investigation dredged up
4 the information from the second FBI investigation after the
5 SRT stood here and told us absolutely from no possible way is
6 there any further investigation, let's assume all that factual
7 predicate were not even true.

8 In that situation, you have two choices, the sort of
9 idea that has been floated this morning that the military
10 commission could just say, you know, constitutionally I am
11 very sorry for the fact that, you know, you had a conflicted
12 counsel for 18 months, but there is nothing really that I can
13 do about it and just move on is one, is option A.

14 Option B is to say -- is to advise the defendant of
15 the conflict of interest and to obtain a waiver, if they want
16 a waiver.

17 Because make no mistake -- let's say that he doesn't
18 want to waive. Make no mistake, in that situation a defendant
19 has a right to be advised of the fact that their client
20 actively -- their attorney actively, during the case, has been
21 laboring under a conflict of interest, and if they wish to
22 fire that counsel, they have every constitutional right to do
23 so because that person ----

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1 MJ [COL POHL]: Would it make any difference -- we
2 discussed earlier about me not reading your pleading of all
3 the things you changed, but would it make any difference
4 whether they changed what they did or not, as long as they
5 were under -- they were aware of the investigation?

6 LDC [MR. CONNELL]: For -- in some parts of the analysis
7 it does. If we -- so it's whether it brings us into the
8 standard of United States v. Cronic or not. So the Cronic
9 standard is a different ineffective assistance of counsel
10 analysis under the Sixth Amendment.

11 So ineffective assistance of counsel has basically
12 two different analyses that can be made.
13 Strickland v. Washington, which is about 95 percent of all IAC
14 claims, requires a showing of deficient performance and
15 prejudice. Cronic, which is about 5 percent of the claims,
16 requires a showing of conflict of interest which had an actual
17 effect on the representation. If under Cronic there is a
18 showing of a conflict of interest that has an actual effect on
19 the representation, there is no further inquiry, there is no
20 prejudice analysis, and the inquiry is over.

21 The question that the military commission just asked
22 about, does there have to be an inquiry into whether there was
23 an actual effect on the representation, from a constitutional

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1 perspective I don't think has ever been raised, because no one
2 here has claimed that there is a Cronic, no one has made a
3 Cronic style claim in this. However, constitutionally I
4 absolutely agree with the suggestion that it is relevant.

5 But with the Holloway analysis that we are doing
6 here, which is really procedural in nature: When one has
7 information about a potential conflict of interest, what does
8 the judge do? What do the defense counsel do? And the rule
9 is that the defense counsel have to bring it to the attention
10 of the court and that the court has to -- once it has gathered
11 all the facts, the court has to address the defendant on that.

12 And there are, you know, case after case on that.
13 The most substantial -- I mean, the sort of case that brought
14 all this analysis into modern times is Curcio,
15 United States v. Curcio at 680 the F.2d 881, a 1982 case, and
16 it lays out in clear terms, which have been adopted by
17 military and civilian courts alike, what the military
18 commission has to do in that situation.

19 It has to advise the defendant of his right to
20 conflict-free representation, instruct the defendant as to
21 problems inherent in being represented by an attorney with
22 divided loyalties, allow the defendant to confer with his
23 chosen counsel, encourage the defendant to seek advice from

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1 independent counsel, and allow a reasonable time for the
2 defendant to make his decision.

3 When the military commission asked me what is the
4 path forward, the path forward is to acknowledge that for
5 18 months Mr. Binalshibh's counsel, and I suggest other
6 counsel, have been under at least a potential conflict of
7 interest, and to follow the Curcio analysis, to advise the
8 defendant, allow him to consult, and then find out whether he
9 wants to waive that conflict.

10 Now, what I would really like to address now is the
11 rest of the discovery questions, because all other counsel
12 have had their opportunity to speak about discovery. But if
13 you don't want me to talk about discovery, that's all I have
14 to say about the conflict.

15 MJ [COL POHL]: Okay. I may or may not give you an
16 opportunity later on, but I want to hear the government's
17 response to what you just said.

18 LDC [MR. CONNELL]: Thank you very much.

19 MJ [COL POHL]: Thank you.

20 STC [MR. CAMPOAMOR-SANCHEZ]: So, Your Honor, this was
21 perhaps not for the commission, but for us, a feeling of
22 deja vu. We stood in front of this commission in June of 2014
23 and all defense counsel, including Mr. Connell, made exactly

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1 the same arguments.

2 When we were before the commission in June of 2014,
3 there was a motion to compel pending. Mr. Nevin, Mr. Connell,
4 everybody stood up and argued to this commission that they
5 needed all of this discovery in order to be able to resolve
6 the conflict issue.

7 We argued about that, and the court ultimately ruled
8 in QQ that four out of the five defense teams did not have a
9 conflict. And as to the last remaining team, yes, we did file
10 a motion to reconsider, but it was on what we understood at
11 the time to be, frankly, not a legal disagreement between the
12 commission and the legal position from the government, the
13 SRT, but what we understood to be factual differences as to,
14 for example, what conversations had taken place between the
15 chief of special security at OSS and Mr. Harrington and other
16 counsel of record. And we were trying at the time to address
17 those issues.

18 As to SS and the same arguments that Mr. Connell is
19 making here today, and Mr. Nevin briefly touched upon, we
20 argued SS in August of 2014. Mr. Driscoll stood here, and
21 again all defense counsel that filed that motion and joined
22 that motion had a chance to argue it. And in fact when we
23 were back before the commission in December of 2014, the

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1 parties agreed that SS had been argued and was ripe for
2 decision by this commission. In fact, the commission issued
3 QQ, the amended order, which at the time the SRT understood
4 was a ruling by the commission overruling the objections that
5 were raised by the defense in SS. So we essentially heard
6 again the arguments that Mr. Connell -- and which we disagree
7 with -- has been making since June.

8 Also, I think it's important to address that there
9 has been an assumption that Mr. Harrington has been operating
10 under conflict for 18 months. That has been repeated numerous
11 times. We believe that is not accurate and that has not been
12 the position of the government in this case. And as I told
13 this commission when I stood at this podium back in June, the
14 United States has an interest in making sure that all defense
15 counsel in this case are conflict free. So if indeed we
16 believed that there was a potential for a conflict, we would
17 be agreeing with the commission that the accused should be
18 advised.

19 Respectfully, we believe that it is Mr. Harrington,
20 according to QQ, that the commission ruled that there was at
21 least a potential conflict. Because of that ruling, the
22 commission decided to appoint Lieutenant Colonel Pitvorec, or
23 ordered that an independent counsel be appointed and has been

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1 appointed.

2 In addition, essentially the proceedings have been
3 grinded to a halt precisely so that Mr. Harrington or his
4 team, if they were indeed operating under a conflict, were not
5 actually making arguments and decisions in this case while
6 they were under at least the cloud of a conflict.

7 Now, it is certainly true that when we stood here
8 back in both June and August of 2014, our understanding was,
9 and it was correct, that there was no other investigation
10 going on. And as the commission knows, because of information
11 that the commission received and was forwarded to the SRT for
12 us to forward to other individuals, that ultimately an
13 investigation was begun, and obviously we assume precisely
14 because of that is why these proceedings have not gone
15 forward, because the commission was allowing the time to go by
16 so that this issue could be, in fact, brought to a conclusion
17 either way.

18 So in terms of the path forward, again, it is our
19 position -- and, again, we are ready to argue the legal
20 issues, but we have argued those, and the commission knows it,
21 and in QQ the commission laid out the legal framework for this
22 analysis.

23 MJ [COL POHL]: Let me ask you this. With regard to

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1 Mr. Harrington's team, should there be any colloquy with the
2 accused to make sure he was aware of the investigation?

3 STC [MR. CAMPOAMOR-SANCHEZ]: We do not believe that at
4 this time a colloquy is necessary, because we do not believe
5 that a conflict exists, and the commission was in fact
6 pointing to this issue.

7 So let me make another example. If indeed we had
8 come here in October and the investigation had been disclosed
9 and it wasn't open -- and it was open still, and the
10 commission wanted to see if indeed the accused wanted to
11 proceed, then a colloquy absolutely at that point, with the
12 open investigation and Mr. Harrington knew about it and
13 therefore his interests could diverge and he could pull his
14 punches, the accused should have been advised.

15 But as the commission was intimating, we are now
16 beyond that. When the investigation has, in fact, been
17 closed, and even though on this legal point where we disagree
18 with the commission that that's a security access issue
19 pending, that would create a conflict, even if we had gotten
20 the assurances from the DoD there is no security action
21 pending. So in that instance, as the commission indicated,
22 what is the accused going to be advised of? There is no
23 conflict.

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1 MJ [COL POHL]: Just so I am clear, your position is that
2 the investigation is complete and no further action will be
3 taken on the investigation by any entity of the United States
4 Government?

5 STC [MR. CAMPOAMOR-SANCHEZ]: Correct, and that's not just
6 Fernando Campoamor sitting here or Kevin Driscoll sitting
7 here, as we included in TTTT, yes, TTTT, and we provided to
8 all defense counsel, there is a letter from a Deputy Assistant
9 Attorney General of the United States Department of Justice
10 the who has made those representations, one, that the FBI
11 investigation is closed, and two, that the U.S. Attorney for
12 the Northern District of Illinois declined prosecution after
13 investigating this matter. I mean, that's the most that can
14 be said about this.

15 If this commission takes the approach that is
16 apparently being suggested by Mr. Connell or Mr. Nevin,
17 because in the future if there is a violation of a security
18 protocol or there is an allegation that a violation of
19 criminal law has taken place, that that exists, then that
20 could create a conflict -- that is in the future. We don't
21 know what's going to happen.

22 The question, as the commission has properly said, is
23 now, what is happening now, is there a conflict now, and we

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1 respectfully submit the answer is no. And that's why we would
2 like to focus this argument on Mr. Binalshibh and his team,
3 what's happened there, and we would like to respond ultimately
4 to the arguments that were made by Lieutenant Colonel Pitvorec
5 and Mr. Harrington.

6 But the issues that are raised by Mr. Connell,
7 respectfully, are a sideshow, or at the very least rearguing
8 what has already been decided by the commission and was argued
9 fully in June and August of 2014.

10 MJ [COL POHL]: What about Mr. Connell's issue that a
11 member of his team may have been conflicted with his ----

12 STC [MR. CAMPOAMOR-SANCHEZ]: Yes. That's very
13 interesting, because I have not seen a case that would stand
14 for the proposition that Mr. Connell is using this fact for.
15 So assuming that his argument is correct, that somehow someone
16 that provided information to the FBI went into some other
17 country with Mr. Connell and was present when some defense
18 activity was conducted, that is not a conflict. There is no
19 investigation of Mr. Connell or his team.

20 If he wants to later allege that somehow that
21 individual, if that indeed took place, you know, got all this
22 great defense information that was provided to the government,
23 okay, we can argue about that.

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1 But that has nothing to do with the conflict, and
2 that's the problem with many of these arguments. And the way
3 that defense counsel is arguing, is they are conflating
4 issues. Whether that happened and Mr. Connell thinks it
5 happened, okay, we will take a look at that if that happened,
6 but that's not a conflict. That's an issue of whether the
7 government obtained information from the defense improperly.
8 That is not a conflict claim, that is not a conflict issue,
9 and we respectfully submit that is not what the commission
10 needs to be deciding at this point.

11 MJ [COL POHL]: Okay.

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

13 MJ [COL POHL]: Anything further?

14 Mr. Ruiz? Colonel Pitvorec, I will give you an
15 opportunity.

16 LDC [MR. RUIZ]: Thank you, Your Honor. I just want to
17 make Mr. al Hawsawi's position perfectly clear, because I know
18 there has been a great deal of argument and some general
19 statements about what the rest of us have been laboring under,
20 or generalized statements, which I understand, in the course
21 of argument. We sometimes do that, especially in a
22 codefendant case.

23 But Mr. Hawsawi's case remains the same as it did

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1 when Your Honor ruled on 292QQ, which is that based on the
2 information that was provided to me, I was of the opinion that
3 there was no conflict of interest. As, of course, the court
4 is well aware, I asked the court to sever Mr. al Hawsawi's
5 case so that we could proceed with the motions and the
6 business of his case.

7 As of right now I can tell the court that during that
8 period of time I did not feel as we were laboring under any
9 particular constraints, and I didn't take any actions based on
10 those issues, other than to continue to petition the
11 commission to sever Mr. al Hawsawi's case, once again so we
12 could proceed.

13 At this juncture we are of the same -- in the same
14 posture, and that is based on the -- at least the information
15 that has been provided to us, I believe that Mr. al Hawsawi's
16 defense team is conflict free. We are prepared to proceed.

17 Of course, I would ask the commission that if he
18 ordered discovery be provided concerning the investigation,
19 that that also be provided to our team. In a capital case we
20 don't have the luxury of ignoring discovery on these kinds of
21 issues so that at least we can review it.

22 MJ [COL POHL]: You understand some of the discovery is
23 going to be specific to certain teams.

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1 LDC [MR. RUIZ]: Sure.

2 MJ [COL POHL]: And of course it's either privileged or
3 attorney work product, and so consequently they will hold the
4 keys, at least initial keys, of whether it is disclosed to
5 other defense teams. Given the fact that everybody signed the
6 MOU, that's no longer an impediment. But say, for example,
7 Mr. Harrington gets some discovery and he chooses to share it
8 with the other defense teams, that's up to him. If he refuses
9 to do it and you want to make a motion to compel, we will
10 address it as the time goes on.

11 LDC [MR. RUIZ]: I was more referring to if there was
12 discovery that doesn't impact attorney-client privileged
13 information, if the court is going to make that ruling, I
14 would ask if the court make that ruling ----

15 MJ [COL POHL]: No, this whole process has had a number
16 of -- and I understand it. The nature of this process is
17 while an investigation is going on it is always going to be
18 somewhat opaque to the defense. I have got that.

19 When it is completed, as I said before, my intent is
20 unless there is a good reason not to, that the opaqueness will
21 be lifted and you will see what was going on with the
22 understanding that, on the one hand the government may have
23 some classification issues that they don't want to disclose or

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1 whatever, and some things may be protected by privilege that
2 do not want to be shared.

3 But my perspective is whatever came to me in any way,
4 shape or form, or went out from me in any way, shape or form,
5 the default is to give it to the defense.

6 LDC [MR. RUIZ]: I understand that, and I certainly
7 understand the privilege issues.

8 MJ [COL POHL]: Okay.

9 LDC [MR. RUIZ]: And of course the court understands it is
10 never good policy to have counsel making determinations about
11 their ethical obligations, advising the persons they represent
12 with imperfect information or information that hasn't been
13 provided to us. In our instance we have made the decisions
14 we've made based on the information that has been provided to
15 us, and always with that caveat.

16 MJ [COL POHL]: And I understand that and, quite frankly,
17 how I rule today or tomorrow, whenever I get to rule on this,
18 I understand that once you get discovery, you may have a
19 different take on some things, which will not be either
20 surprising or unusual. And so if, once you get it -- and,
21 again, I am not ruling on anything right now. Right now I am
22 not issuing any ruling about our way ahead. But if we go
23 ahead and you get information, then obviously you can raise

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1 whatever issues you want.

2 LDC [MR. RUIZ]: That's fine. I mean, our position right
3 now is the same as it has been, and I want to make that
4 perfectly clear, because I know both sides made some
5 generalized argument about all counsel doing X, Y or Z, filing
6 similar motions. And that, of course, is not the case with
7 respect to Mr. al Hawsawi's case. We have been very clear
8 about our position in terms of 292 and where we stand on that.

9 MJ [COL POHL]: Thank you, Mr. Ruiz.

10 Colonel Pitvorec.

11 IDC [Lt Col PITVOREC]: Thank you, Your Honor. I just
12 wanted to point out a couple of cases that I think are
13 important to consider when we are talking about this conflict
14 issue. And the first one is United States v. Merlino, 349
15 F.3d 144. And headnote 5 says, "An attorney who faces
16 criminal or disciplinary charges for his or her actions in a
17 case will not be able to pursue the client's interests free
18 from concern for his or her own well -- or concern for" --
19 yes.

20 And why that's important is twofold. It was
21 abundantly clear to the RBS team that something and some sort
22 of investigation was ongoing. Sorry.

23 MJ [COL POHL]: You need to slow down a little bit, but go

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1 ahead.

2 IDC [Lt Col PITVOREC]: I apologize. It applied to them
3 given the nature of 292. And there was a number of filings,
4 as we already know, that were done on a monthly basis under
5 292 filed ex parte under seal that were provided just to the
6 commission, but not to anyone else, but it was indicative that
7 there was still something ongoing on 292.

8 So for this period of time, at least from the date of
9 the filing of 292RR on the 4th of August of 2014, where there
10 was indicated at that point that there was no ongoing
11 investigation, to sometime later in August that the commission
12 was made aware of some additional allegations that gave rise
13 to an investigation, these monthly updates, if you will, have
14 given notice to Mr. Harrington and his team, as well as
15 everyone else on the part of the defense side, that there was
16 still something ongoing. And I think a proper assumption
17 could have been that there was some sort of an investigation.

18 And this is not de minimis. As you mentioned in QQ,
19 this is an 18-month -- or from August, at least a 14-month
20 period of time that they have been laboring under this issue.

21 MJ [COL POHL]: But is this -- and I want to ask you the
22 same question I asked Mr. Connell earlier. Is this a conflict
23 issue now or just an adequacy of representation issue going

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1 backwards?

2 IDC [Lt Col PITVOREC]: Your Honor, if I may, the Zepp
3 case, and I will get you the citation, 748 F.2d 125, it's a
4 1984 case, actually states -- he is talking about the
5 government's position, which I think it's very -- it's similar
6 to this one. "It is the government's position that there was
7 no actual conflict of interest because Zepp's trial attorney
8 was never subject to any criminal charges as a result of his
9 conduct on December 18, 1982 and thus had no potential
10 liability."

11 They concluded that an actual conflict of interest is
12 present on this record even though it is something that had
13 happened two years earlier and that it was -- he was not
14 subject to criminal charges. So that's not -- and the reason
15 I point that out is that it was not dispositive.

16 MJ [COL POHL]: Was he aware of the investigation?

17 IDC [Lt Col PITVOREC]: It actually doesn't discuss that.
18 I can probably go back regardless of whether ----

19 MJ [COL POHL]: I mean, we have discussed this issue a
20 number of times. Most of these are appellate court issues
21 that go back, that the counsel was being investigated while
22 representing somebody, and whether he knew it or not becomes a
23 significant issue. If he knows about it and doesn't disclose

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1 it to his client, you've got a problem. I got that, okay?

2 IDC [Lt Col PITVOREC]: Right.

3 MJ [COL POHL]: So I am back to kind of what I asked
4 Mr. Connell, is: It's one thing to inform the accused of
5 what -- what actions were taken while it was being
6 investigated. Your -- given the last time we met was in
7 February, and each month, or whenever I issued a docket order
8 it would come out, and everybody would wait about two weeks or
9 so, and then you would get the new docket order saying it's
10 canceled. So again, everybody knew an investigation was going
11 on.

12 IDC [Lt Col PITVOREC]: Yes, sir.

13 MJ [COL POHL]: What I am saying is if I do what
14 Mr. Connell suggested, is go to the accused and say oh, by the
15 way, this was going on for this period of time, your counsel
16 has known about it, he may have changed actions on it, he may
17 not have, I don't know. Have you discussed it with your
18 independent counsel and do you wish to go forward? That would
19 imply -- again, you would say then there is some type of
20 waiver of ineffective assistance or waiver of a conflict?

21 IDC [Lt Col PITVOREC]: I think it's a waiver of a
22 conflict, Your Honor, and I think it's important though, in
23 order to get that, to get that out there, because a couple of

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1 things have to happen; that Mr. Harrington needs to explain to
2 Mr. Binalshibh exactly what he feels like has happened and
3 what he has done and whether or not he feels like he can
4 continue on as counsel with this, with all of this
5 information, and then also -- and then I have to sit down with
6 Mr. Binalshibh and explain what I think his options are and
7 how I think he should go forward. And he has to take all of
8 that in collectively and then go through a colloquy with you
9 to make sure that it's a knowing and intelligent waiver.

10 MJ [COL POHL]: Okay. And so you are agreeing with
11 Mr. Connell that the past actions ----

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

13 MJ [COL POHL]: ---- that created the conflict because of
14 the chilling effect on counsel to do its things, even if that
15 chill has been lifted ----

16 IDC [Lt Col PITVOREC]: But I think ----

17 MJ [COL POHL]: ---- as the temperature in this courtroom
18 rose, even if that chill is currently lifted, we still have to
19 go back and get a waiver for the chilling period of time?

20 IDC [Lt Col PITVOREC]: Yes, Your Honor. There is an
21 18-month or so period of time under which Mr. Harrington did
22 not know whether or not he could effectively move forward and
23 represent his client based on all of this information.

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1 And because of that, because of him operating under
2 basically the umbrella of this conflict, knowing that there is
3 an investigation, knowing that it likely concerns him, that I
4 think at a minimum Mr. Binalshibh needs to be consulted, he
5 needs to be informed of his rights and needs to have the
6 opportunity to waive.

7 MJ [COL POHL]: Waive -- again ----

8 IDC [Lt Col PITVOREC]: To waive ----

9 MJ [COL POHL]: Waive the potential conflict that -- even
10 though it may no longer exist? Here is the same question I
11 asked to you before, to Mr. Connell: Potential conflict of
12 interest while the investigation is going on and counsel is
13 aware of it, I got that. That's why we have not met very
14 often. I got that. I have got why that's a problem. Okay.

15 The potential conflict has resolved and now it's
16 done, just don't get into the wording of what -- now it's
17 done. Now I have to go back and say, oh, by the way, he had
18 this conflict of interest in the past, it no longer exists,
19 and I want you to waive the old conflict of interest, the
20 potential, even though it no longer exists.

21 IDC [Lt Col PITVOREC]: Yes. And this is why, because
22 Mr. Binalshibh could have likely been negatively affected over
23 the course of the last 18 months based upon his counsel's

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1 inability to move forward on his case. I'm not saying that
2 it's an actual conflict, that they have not been able to move
3 forward, but I think there is a strong possibility that they
4 have been operating under the -- with the information that
5 there is a potential conflict in their case, and because ----

6 MJ [COL POHL]: Doesn't this go to -- again, I am trying
7 to focus here on -- is Mr. Harrington, and I'm not saying what
8 happened, okay? Understand that I am not assuming there was
9 misconduct or anything like that.

10 But Mr. Harrington tells Mr. Binalshibh, and you tell
11 Mr. Binalshibh what happened and why -- or what happened. The
12 why may not be known, but what happened.

13 IDC [Lt Col PITVOREC]: And we have done that, Your Honor.

14 MJ [COL POHL]: We have done this, and I have known this,
15 and I have known this, and I have known this. Mr. Binalshibh
16 may say that based on that I either want you as my lawyer or I
17 don't want you as my lawyer. Okay. That's why I say it's a
18 representational issue.

19 But if it's fully disclosed and there is no current
20 conflict, is that a waiver of conflict? That's what I keep
21 coming back to. I see he needs to know what happened. I got
22 that.

23 IDC [Lt Col PITVOREC]: Right.

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1 MJ [COL POHL]: But it strikes to me it slides more into
2 the representational capacity as opposed to waiving a conflict
3 that no longer exists.

4 IDC [Lt Col PITVOREC]: But I think he needs to ----

5 MJ [COL POHL]: It may end up in the same place, quite
6 frankly.

7 IDC [Lt Col PITVOREC]: Correct. However, I really think
8 that, to be clear on the record, I think this is something
9 that needs to happen in this court so that the court is also
10 comfortable with the fact that he is -- that he understands
11 everything that happened in his ----

12 MJ [COL POHL]: But would not it be -- and, again, I am
13 very conscious of privilege here.

14 IDC [Lt Col PITVOREC]: I understand.

15 MJ [COL POHL]: And I know Mr. Connell was telling me a
16 laundry list -- or, excuse me, referenced a laundry list that
17 apparently I forgot, of all things he changed, okay? But my
18 real concern is, is I don't know, unless I absolutely have to
19 either really know or want to know what you guys did.

20 And it strikes to me that's one of the reasons you
21 are on this case. So for informing the accused, this is what
22 happened, this is what I did, okay. Okay. And you gave him
23 your advice, he takes Mr. Harrington's advice, then the next

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1 step would be did you discuss with the lawyers. And I don't
2 want to get into the details of it unless I absolutely have
3 to, because it is going to be privileged stuff.

4 IDC [Lt Col PITVOREC]: Correct.

5 MJ [COL POHL]: And then if you fully informed the client
6 and the client says yes, I have got all this, whether it's
7 called a waiver of a conflict or an agreement that given what
8 they did and why they did it, I still want them as my lawyers,
9 do we end up in the same place?

10 IDC [Lt Col PITVOREC]: Well, we might, but we also may
11 end up at a place where he says I can't possibly move forward.

12 MJ [COL POHL]: No, I am not saying what the answer is.
13 The answer is a different issue. What I am simply saying is
14 it seems to me what you are saying is the factual predicate is
15 Mr. Binalshibh must be informed of what happened, both in
16 terms of what the government was doing and what Mr. Harrington
17 may or may not have been doing, and then you -- okay. That's
18 the factual predicate, okay? I, quite frankly, don't have any
19 problem with that, okay?

20 But it's the next step that I am having a tough time
21 wrapping my mind around from a legal perspective, is you
22 contend then there has to be a waiver of a conflict that
23 occurred back then and I -- that no longer exists, as opposed

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1 to an informed decision to continue forward with my current
2 lawyers or not. I mean, I'm not saying what the answer is,
3 but what I am having difficulty with is saying this is a
4 conflict issue when it no longer exists. Are you with me on
5 this? I mean, not with me in the sense ----

6 IDC [Lt Col PITVOREC]: I understand what you are saying.
7 I respectfully disagree. I don't think that the conflict -- I
8 disagree with the court's position and the Special Review
9 Team's position that because there is no longer a current
10 ongoing investigation, that there is no conflict. I disagree
11 with that, that position.

12 I think there is ample case law that indicates that
13 they can -- that we can look retrospectively and say that
14 there was an investigation or that there was a conflict and,
15 therefore, that the client has now been, you know ----

16 MJ [COL POHL]: Do you have any case law that would stand
17 for the proposition -- okay. Let me back up.

18 Most of these cases are appellate cases.

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

20 MJ [COL POHL]: And most of them have to do with an
21 investigation that happened during the course of a trial.

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

23 MJ [COL POHL]: With unclear ending of the investigation,

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1 okay? Do you have any case law that stands for the
2 proposition that if the investigation is closed, no further
3 action -- and the defenses counsel knows the investigation has
4 been closed and no further investigation, do you still have a
5 conflict? Or do you say that there is no current conflict
6 even here, there is just the potential conflict from the past?

7 IDC [Lt Col PITVOREC]: Your Honor, the cases, because we
8 are looking at an appellate record, the cases are not
9 necessarily clear about when in fact the investigation was
10 ongoing into their background. Some of them talk about cases
11 that were three years old and somehow affected the
12 representation. It's not necessarily clear.

13 However, in looking at -- and I go back to Merlino,
14 because I think this is an important aspect, and I don't know
15 how you can cut off, as of October 25th there is no longer a
16 conflict, when in fact Mr. Harrington has continued
17 representing Mr. Binalshibh since April -- since this first
18 came to light in April of 2014, but, "An attorney who faces
19 criminal or disciplinary charges for his or her actions in a
20 case will not be able to pursue the client's interests free
21 from concern of his or her own."

22 And I go back to that not because it's, oh, it's a
23 done deal today, but how can we discount the last 18 months

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1 and what has happened over the course of the last 18 months
2 without bringing forward the issue of a conflict?

3 MJ [COL POHL]: I understand what you are saying, but let
4 me ask you this. And understand, this is just -- this is a
5 question. It's not meant to mean anything more than what it
6 is.

7 If a defense counsel in an ongoing case becomes aware
8 of an investigation into his or her activity and chooses to
9 continue to represent that accused, what is the court supposed
10 to do?

11 IDC [Lt Col PITVOREC]: Isn't Mr. Harrington and his
12 team -- I mean, assuming arguendo that that's what we are
13 talking about, what was he supposed to do, face ineffective
14 assistance of counsel charges because he failed to do
15 anything, or continue representing, to the best of his
16 ability ----

17 MJ [COL POHL]: But what you are saying though -- and,
18 again, I'm not -- I don't want anybody to take any of this
19 personally or anything like that, what you are saying is that
20 a defense counsel -- I am not going to personalize it --
21 continues to represent the accused while under a conflict of
22 interest situation, and then later on has to get a waiver from
23 the accused, as opposed to simply saying I'm aware of this

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1 investigation, I'm going to do nothing until it's concluded.

2 IDC [Lt Col PITVOREC]: But didn't the counsel in this
3 case actually file motions with this court in order to flush
4 all of this out on the record? Wasn't that the whole purpose
5 of an independent counsel? It is not ----

6 MJ [COL POHL]: See, I asked you a question, so you can't
7 ask me one. No, I'm just trying to figure -- what you are
8 saying is I should do some type of remedial action for what
9 counsel did while they knew they were being investigated,
10 because it's a conflict of interest. So what you are telling
11 me is that -- and you are telling me this, that people
12 performed as defense counsel while under a conflict of
13 interest. Didn't they have the option to do nothing until it
14 was resolved?

15 IDC [Lt Col PITVOREC]: I think that would have been a
16 very dangerous option, Your Honor.

17 MJ [COL POHL]: So the option that was chosen was the
18 professional option, so now I've got to waive -- get a waiver
19 from the accused that the defense counsel did what they should
20 have done?

21 IDC [Lt Col PITVOREC]: I'm not sure that the defense
22 counsel was in any position to fail to represent -- I mean, I
23 think it's just -- I think it's an unwieldy option. I don't

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1 think it's fair either way.

2 I think in one sense it's ineffective if you fail to
3 do nothing, and in another sense then you are operating under
4 a conflict if you fail to operate, you know, at all. So I
5 think it's a -- you know, I think it's a false choice. I don't
6 think it was a fair choice for counsel in this situation at
7 all.

8 MJ [COL POHL]: So let me back up. You are saying the
9 government essentially gave them two bad choices. And so let
10 me ask you this: If the government is aware -- and I am not
11 saying -- again, I am caveating this and I am saying it in a
12 theoretical sense.

13 The government is aware of alleged misconduct, the
14 government -- and the defense becomes aware of it, what's the
15 government supposed to do, not investigate it?

16 IDC [Lt Col PITVOREC]: I'm not saying that -- I'm not
17 saying that the government is not supposed to investigate it.

18 MJ [COL POHL]: Well, you are saying the defense counsel
19 has an unfair choice of either proceeding with the cloud or
20 doing nothing.

21 IDC [Lt Col PITVOREC]: But I think it is unfair for the
22 government to stand up and say there is no conflict. I think
23 that's where the issue comes in.

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1 MJ [COL POHL]: You are saying that under the professional
2 rules, that they should continue to perform under a conflict
3 and later on get a waiver?

4 IDC [Lt Col PITVOREC]: No, Your Honor. What I am saying
5 in this case was that the government knew that there was an
6 ongoing investigation. I'm not saying that they had a duty to
7 disclose that ongoing investigation.

8 However, at this time I think it's very clear, and I
9 think over the course of time that they were making updates to
10 the commission, that people who were defense counsel had an
11 understanding that there was an ongoing investigation that
12 involved some or all of them. At a minimum, some. And I
13 think because it was 292, it is very clear that
14 Mr. Harrington's team was implicated.

15 Now, because of that, and because we kicked the can
16 down the road, I don't think it's necessarily fair to say ----

17 MJ [COL POHL]: Well, keep in mind, when you say kick the
18 can down the road, that when this all started, we started
19 doing the Holloway analysis, everybody on that side of the
20 room, correctly, said when this becomes aware, you must do a
21 full investigation. So when you say kick the can down the
22 road like we were delaying it, the last I wanted was for this
23 thing to last a year.

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1 IDC [Lt Col PITVOREC]: No, I understand.

2 MJ [COL POHL]: But I think the law requires a full
3 investigation, and that's what took so long. It took time,
4 but that's what ----

5 IDC [Lt Col PITVOREC]: But did it take a full
6 investigation by the FBI, or did it take a full investigation
7 by independent counsel to figure out what was going on? I
8 guess that's the question that I have.

9 MJ [COL POHL]: Well, you weren't in a position to
10 investigate this. Really?

11 IDC [Lt Col PITVOREC]: Well, I am not in a position to
12 investigate the underlying misconduct or the FBI
13 investigation.

14 MJ [COL POHL]: I know.

15 IDC [Lt Col PITVOREC]: But to figure out what was going
16 on? I mean, for the last five months I have been able to tell
17 my client that I have ----

18 MJ [COL POHL]: No, there is a different issue about when
19 you know it. But this is not an issue for you to go
20 investigate. The appropriate agencies chose -- I am saying
21 appropriate because they are the ones who did it. I am not
22 making any value judgment whether they were the right ones.
23 But there was an allegation made, another allegation made, it

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1 was turned over to whomever investigates for them, the FBI,
2 DoJ, I don't know. They are done, and now they said here it
3 is, and you guys will get it as it is done.

4 IDC [Lt Col PITVOREC]: And, Your Honor, to be clear, I
5 didn't -- I wasn't suggesting that the criminal investigation
6 that was conducted by the FBI would have been conducted by me.
7 What I was suggesting is that this conflict analysis, in
8 looking at Mr. Harrington's team and interviewing all of the
9 members of Mr. Harrington's team and talking to them, was
10 very -- that I started last October, I think has carried
11 forward.

12 We have been in a position to argue whether or not
13 there was a conflict, you know, thereafter, but we weren't
14 given that opportunity because the court held the court in
15 abeyance actually since February, so ----

16 MJ [COL POHL]: Got it.

17 IDC [Lt Col PITVOREC]: One final thing, and I just wanted
18 to mention this. The one point about the term "at this time,"
19 and I will just end with that.

20 I think it was very clear to everyone that if there
21 is future misconduct, that that will be fully investigated. I
22 don't think that's the question. I think the issue with the
23 term "at this time" is that it gives the impression that the

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1 current closed criminal investigation can be reopened with no
2 additional facts, and I think that's the issue with the term
3 "at this time."

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

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

6 MJ [COL POHL]: Mr. Nevin.

7 LDC [MR. NEVIN]: Your Honor, just so we are clear, and
8 I'll do this quickly. I will.

9 MJ [COL POHL]: Okay.

10 LDC [MR. NEVIN]: We have been asking you to tell us what
11 was under investigation with specificity for quite some time,
12 and you asked counsel just now what's Mr. Harrington supposed
13 to have done. He went forward. We all went forward over the
14 last 18 months. We filed motions. We took overseas travel.
15 We did investigation. We continued to work.

16 Was he supposed to have stood aside? Whose call was
17 this to make? Was it the court's call? Was it -- whose call?
18 And we argued to you very early on that three people have to
19 make a call here. One is the court or the military
20 commission, one is counsel, and one is the client. And
21 everybody has, not only the right, but an obligation to take a
22 position on the question of whether there is a conflict.

23 We have been asking you throughout to provide us with

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1 the information that would make it, that would make it
2 possible for us to make that call, and we really are still in
3 the same position.

4 We and the military commission have asked about this
5 question of the investigation being over, and just two things
6 about that. I mean, first, when we did litigate the question
7 with respect to my team back in April of 2014, we had just
8 learned about the events that had occurred a year before, and
9 the military commission made the point in the language that
10 Mr. Connell put on the presenter for you that at that time you
11 said we just learned about that. It was taken care of
12 promptly, and so there was no reason to suppose that there had
13 been prejudice.

14 But now we have an 18-month lapse, and, you know, we
15 speak of Mr. Harrington possibly having a conflict or of him
16 being under investigation. This was the point of me putting
17 the Reuters article on the presenter for you. That's what we
18 know about what happened, which is to say we don't know
19 anything. And that investigation could well have been about
20 us as well, and we don't operate under -- we make no
21 assumption that it was simply with respect to the Ramzi
22 Binalshibh team.

23 The fact -- the tantalizing, I suppose you would say,

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1 fact that comes out of that article is that what appears to be
2 under investigation is not some unlawful behavior that you
3 might imagine anyone engaging in -- and of course if you
4 engage in unlawful behavior, you have to anticipate you are
5 going to be investigated. We are talking here about actions
6 that defense counsel in a capital case are obligated to take,
7 that actions we were obligated to take brought someone under
8 investigation. If that's true, then we clearly will be
9 operating under a conflict of interest as we go forward.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: Because ----

12 MJ [COL POHL]: Got it. I understand.

13 LDC [MR. NEVIN]: Well, Your Honor, I guess my point is I
14 have got the ABA and you inferentially telling me go forward
15 and provide an effective defense, and I have got the
16 government on the other side saying if you do that, there is
17 going to be an 18-month investigation. That is an ongoing
18 conflict of interest.

19 But let me just ask you to look -- go ahead.

20 MJ [COL POHL]: No, I'm ----

21 LDC [MR. NEVIN]: Let me just ask you about the issue of
22 it being past. We are in the context of a conflict of
23 interest. But suppose I came in here and told you I had a

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1 head injury 18 months ago and I haven't really been myself for
2 the last 18 months, and I've been forgetting things and
3 haven't been doing the work I should do and I have been really
4 out of whack for the last 18 months, but here is my doctor and
5 he says David is good to go now. Would you say I don't have
6 to tell Mr. Mohammad anything about that?

7 MJ [COL POHL]: I got it.

8 LDC [MR. NEVIN]: Clearly I would have an obligation, and
9 you would as well, to preserve the record, to raise that with
10 Mr. Mohammad. And the situation is the same here.

11 Just the last thing, Your Honor.

12 MJ [COL POHL]: Uh-huh.

13 LDC [MR. NEVIN]: Mr. Campoamor said these are the same
14 matters that we argued back in 2014, and they aren't. You
15 asked Ms. Pitvorec -- Colonel Pitvorec.

16 MJ [COL POHL]: Colonel Pitvorec, yeah.

17 LDC [MR. NEVIN]: You asked Colonel Pitvorec if there was
18 any case that said fear of being investigated would lead to a
19 conflict of interest, and I pointed out to you back on that
20 day that the Lafuente case says exactly that.

21 MJ [COL POHL]: We have discussed Lafuente.

22 LDC [MR. NEVIN]: Say it again.

23 MJ [COL POHL]: We discussed that last time.

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1 LDC [MR. NEVIN]: Yes, we did discuss that last time. So
2 this is a separate issue that wasn't resolved by the earlier
3 pleadings, couldn't have been, isn't really presented until --
4 fully until today.

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

6 Trial Counsel, I want to explore one more issue with
7 you, and then we are going to -- we may recess for the day.
8 And perhaps it's a distinction I am making but nobody else is
9 agreeing with me, so I am probably not correct but I'm going
10 to do it any way.

11 Does Mr. Harrington's team have a responsibility
12 within -- again, within the normal limitations, to fully
13 inform Mr. Binalshibh what happened, why it happened, if they
14 can clean that, so he can determine whether or not he still
15 wants them as his attorneys?

16 STC [MR. CAMPOAMOR-SANCHEZ]: We certainly believe
17 Mr. Binalshibh needs to be informed of the fact and the last
18 investigation. We have been describing that allegations were
19 made against defense team members, including counsel of
20 record, that those allegations were referred for a criminal
21 investigation, that a criminal investigation was in fact
22 conducted and closed.

23 MJ [COL POHL]: Does he need to be given the details of

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1 what happened and why?

2 STC [MR. CAMPOAMOR-SANCHEZ]: Not for the conflict.

3 MJ [COL POHL]: No, I understand that, and I'm trying
4 to -- understand, let's not -- I have got everybody's view on
5 the conflict. Got it.

6 STC [MR. CAMPOAMOR-SANCHEZ]: Okay.

7 MJ [COL POHL]: What I am saying is this.

8 Hypothetically ----

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

10 MJ [COL POHL]: ---- defense counsel commits some type of
11 misconduct.

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

13 MJ [COL POHL]: The investigation closes and there is no
14 conflict issue, but the counsel was investigated by the
15 U.S. Government, and here is what the facts were they looked
16 in. Does the defendant have a right to know that, what the
17 counsel did, why he did it, to determine whether or not he
18 wants to continue with him as his lawyer? It's a
19 representational issue, not a conflict issue.

20 STC [MR. CAMPOAMOR-SANCHEZ]: I would have to agree with
21 the commission that it is really more of a representation
22 issue versus a conflict issue. But I want to make sure that I
23 don't misspeak in that I am -- I don't believe that, at least

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1 from a -- and I know you have the conflict part, but I'm not
2 sure to what extent he is entitled to know the details of an
3 investigation for him to be able to decide whether he intends
4 to continue having Mr. Harrington or his team ----

5 MJ [COL POHL]: I'm not saying, as I explained to Colonel
6 Pitvorec earlier -- I think it was her -- I'm not saying what
7 the answer is. What I am saying is I'm not saying that if
8 this is fully disclosed to an accused and the accused says I
9 want my counsel fired and get this case off the rails, again,
10 I don't know what his answer will be, but also he does not
11 know what my answer will be.

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

13 MJ [COL POHL]: And the mere fact that he says I want to
14 do this does not necessarily mean that he is going to do that.

15 STC [MR. CAMPOAMOR-SANCHEZ]: Correct, that he is going to
16 get that way.

17 MJ [COL POHL]: So as a threshold inquiry is, do you
18 believe he should at least know what the allegations were with
19 as much specificity as can be given under the circumstances?

20 STC [MR. CAMPOAMOR-SANCHEZ]: Well, he definitely needs to
21 know the basis of the allegation, and, respectfully, we
22 believe we have done that.

23 So for the initial part we had the declarations of

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1 two FBI agents that talked about what the investigation was
2 about, what the concern was. If the commission may recall, it
3 related specifically previously as to the transmission of
4 information potentially to third parties.

5 And if I may, in TTTT we specifically informed the
6 defense that the defense team members -- that prior defense
7 team members had alleged, so prior RBS team members had
8 alleged that the current RBS defense team members, including
9 counsel of record, "had willfully circumvented security
10 practices by allowing protected information, including
11 classified information, to be passed from the defense team
12 directly to the defendant and other unauthorized third parties
13 in violation of the commission's protective orders and the DoD
14 nondisclosure agreements they had signed."

15 So I don't want the commission to have the idea that
16 there is no, that this is an amorphous issue out there. There
17 is specifically an allegation that we have in fact made part
18 of the record and that has been provided to defense counsel,
19 and we assume has been, in fact, shared with Mr. Binalshibh.

20 MJ [COL POHL]: Okay.

21 STC [MR. CAMPOAMOR-SANCHEZ]: Your Honor, if I may, one
22 thing, and this -- Mr. Nevin just addressed this, and I think
23 it's not correct. He and Ms. Bormann keep talking about that

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1 they are being investigated for the work that they do. That
2 is a false premise. That is a strawman argument. Nobody is
3 being investigated for working as defense counsel.

4 The only people that may be investigated is when
5 there is allegations that they may have committed criminal
6 violations.

7 MJ [COL POHL]: Well, Mr. Nevin brought up the Reuters
8 article twice, and the Reuters article says that somebody from
9 the team took a message from the detainee and called a
10 relative in Yemen and conveyed said message.

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

12 MJ [COL POHL]: Is it the government's view that that was
13 improper?

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

15 MJ [COL POHL]: Regardless of how innocuous the message
16 may be, are they permitted to do those communications or not?

17 STC [MR. CAMPOAMOR-SANCHEZ]: They are permitted to follow
18 the security protocols and clear to the letter what it is that
19 they can do and not do. And I am not -- I am far from an
20 expert of what the security protocols are.

21 MJ [COL POHL]: Okay. We don't need to go there, but --
22 okay.

23 STC [MR. CAMPOAMOR-SANCHEZ]: To me that is an important

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1 distinction to keep in mind. The idea that people are being
2 investigated for doing their job as defense lawyers is simply
3 not accurate.

4 MJ [COL POHL]: Okay.

5 STC [MR. CAMPOAMOR-SANCHEZ]: That is not what we are
6 talking about.

7 MJ [COL POHL]: Now, let's go back to what you -- for
8 Mr. Harrington, you gave him discovery about what exactly
9 happened. What have you given him?

10 STC [MR. CAMPOAMOR-SANCHEZ]: So as to Mr. -- that's
11 interesting. First of all, as to Lieutenant Colonel Pitvorec,
12 we have shared both the unclass and classified filings, both
13 of them, because she had in fact signed the MOU.

14 As to Mr. Harrington, if the court may recall,
15 Mr. Connell had filed a motion to modify the sealing order in
16 this case, and we responded to the motion, and we opposed
17 on -- primarily because, one, it didn't pertain to his team;
18 two, there was still the MOU issue out there, which is not out
19 there anymore.

20 But we said, look, we oppose your motion, but here is
21 a compromise. I have -- how about we at least start with the
22 unclassified filings. We redacted names out of that. In
23 fact, we were ready, as we showed up here last Monday, to make

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1 that available first to Mr. Harrington so he could review it
2 and have it, but then Mr. Connell has now posted, which I
3 don't understand. So he now claims that I somehow violated
4 the rules of the commission with an improper filing when I'm
5 trying to get him part of what he asked for.

6 So he asked to modify the sealing order. I said I
7 disagree but, hey, here is a compromise, how about if I give
8 you this redacted, and now he believes that that's improper.
9 So that hasn't happened yet. I am happy to do that now, to
10 give it to Mr. Harrington, or at least start there.

11 But Lieutenant Colonel Pitvorec has had access to
12 those filings, both the unclass and the classified filings.
13 And in fact as we disclose in TTTT, as soon as she signed the
14 MOU back in January of 2015, we informed her of the fact that
15 there was an ongoing investigation and that the investigation
16 involved counsel of record for ----

17 MJ [COL POHL]: Okay. So let's go the way ahead.

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

19 MJ [COL POHL]: Again, I want to put whether it was a
20 representation or a conflict issue on this. Mr. Harrington's
21 team, Colonel Pitvorec, have had the unclassified, which was
22 the redacted ----

23 STC [MR. CAMPOAMOR-SANCHEZ]: So I have prepared, in fact,

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1 a redacted version of the unclassified filings, which I
2 intended to provide to Mr. Harrington so he could give me the
3 okay. And if he gave me the okay, then I was happy to provide
4 it to everybody else.

5 MJ [COL POHL]: I am only talking about Mr. Harrington's
6 team right now. We will deal with the rest when -- in the
7 fullness of time when we get to them.

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

9 MJ [COL POHL]: Okay? But my concern is I don't want to
10 come back two months from now and the issue has changed from a
11 conflict issue to a representational issue.

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

13 MJ [COL POHL]: And it seems to me that whether you frame
14 it in either way, and, again -- again, whichever way you frame
15 it, at the end of the day the accused must be told about what
16 happened to them and what they did or didn't do. I mean, they
17 make this idea -- now, again, I'm not sure it makes too much
18 difference -- let me rephrase that.

19 You know, the label about they changed their -- what
20 they did because they are under investigation, whether you
21 call that as a conflict issue or, quite frankly, an
22 ineffective assistance issue, at the end of the day the client
23 must know what they did or didn't do. So I don't want to come

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1 back in two months and -- say we are talking about discovery
2 still and come back two months later and two months later.

3 If it takes time, it takes time. As everybody knows,
4 this has taken time.

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

6 MJ [COL POHL]: So my question is: How much discovery --
7 you have given Colonel Pitvorec all discovery as relates to
8 this issue?

9 STC [MR. CAMPOAMOR-SANCHEZ]: So to Lieutenant Colonel
10 Pitvorec we have shared all unclassified and classified
11 filings in response to 292XX. In addition to that, as we have
12 noted previously, so she had the context, we also provided --
13 and I don't remember the letter, but it was the ex parte
14 classified filings that we made with the commission initially
15 that related to the FBI preliminary investigation.

16 MJ [COL POHL]: Including any evidence that generated some
17 of the investigation?

18 STC [MR. CAMPOAMOR-SANCHEZ]: So it contains summaries of
19 interviews about the investigation.

20 MJ [COL POHL]: You are talking about the FBI summaries?

21 STC [MR. CAMPOAMOR-SANCHEZ]: Yes. Right.

22 MJ [COL POHL]: But let me go back ----

23 STC [MR. CAMPOAMOR-SANCHEZ]: And that was a specific

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1 filing ----

2 MJ [COL POHL]: There were some other things that came
3 within ----

4 STC [MR. CAMPOAMOR-SANCHEZ]: Yes. That has not been
5 provided to Lieutenant Colonel Pitvorec and that certainly has
6 not been provided to Mr. Harrington.

7 MJ [COL POHL]: When I said earlier about everything that
8 has been provided as a default they should be allowed to see,
9 you're telling me that's not the state of the record?

10 STC [MR. CAMPOAMOR-SANCHEZ]: As to Lieutenant Colonel
11 Pitvorec, it is that she was able to see what was filed with
12 the commission not just to 292XX, but also the prior ex parte
13 filing that we have made with the commission.

14 MJ [COL POHL]: And the only thing that Mr. Harrington has
15 not seen ----

16 STC [MR. CAMPOAMOR-SANCHEZ]: He hasn't seen either one.

17 MJ [COL POHL]: Either one.

18 STC [MR. CAMPOAMOR-SANCHEZ]: I have not seen either one.
19 I have not yet shared with Mr. Harrington -- aside from TTTT,
20 I have not shared anything else yet with Mr. Harrington. And
21 I am ready to do so, but I would ask and urge the commission
22 to first make that finding that there is, as we have argued,
23 that there is no conflict.

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1 MJ [COL POHL]: Well, what if I make a ruling that you
2 have got to give them the discovery then I will decide the
3 conflict?

4 STC [MR. CAMPOAMOR-SANCHEZ]: That is certainly the
5 commission's prerogative, and obviously we would comply our
6 best with what the commission has ordered.

7 MJ [COL POHL]: But, again, you have one issue. I have
8 two issues. And my concern is that if, simply based on what
9 you have represented -- and I'm not saying -- again, everybody
10 is good faith here, so when I said that it came out wrong.

11 You know, you have represented X, they have
12 represented Y, they are going to get the discovery. The issue
13 is still going to be out there on whether or not he wants his
14 attorney still to represent him. Again, not that the answer
15 is going to be yes, so I would like to do it all at one time.
16 So my point being is give Mr. Harrington all the discovery, he
17 can inform his client, and then we can make a more informed
18 way ahead.

19 STC [MR. CAMPOAMOR-SANCHEZ]: Well, I think that it is a
20 greater concern certainly to the FBI and other government
21 agencies if we have -- there has not been a determination that
22 Mr. Harrington and his team are conflict free, and yet we are
23 going to be providing complete discovery about that

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1 investigation.

2 But I hear the commission, and I was ready today --
3 not today, when we first came down, to even share with him the
4 unclassified filings that were redacted. And obviously if the
5 commission orders that -- it orders that, and we will comply,
6 but ----

7 MJ [COL POHL]: But my point is this, is that what you
8 want me to do ----

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

10 MJ [COL POHL]: ---- is to make a conflict-free
11 determination.

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

13 MJ [COL POHL]: Then give him the discovery.

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

15 MJ [COL POHL]: Then we deal with what I call the
16 representational issue, but I would suspect it will also turn
17 back into the conflict issue. Do you understand what I am
18 saying, that ----

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

20 MJ [COL POHL]: I don't have their input on this.

21 STC [MR. CAMPOAMOR-SANCHEZ]: Well, I ----

22 MJ [COL POHL]: Not that I necessarily -- let me rephrase
23 that. I don't have their influence, their input on it. I

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1 will leave it at that.

2 STC [MR. CAMPOAMOR-SANCHEZ]: You don't, although again
3 you do have the input of Lieutenant Colonel Pitvorec about
4 this issue, and we understood that that was part of the
5 reason.

6 MJ [COL POHL]: She says there is a conflict.

7 STC [MR. CAMPOAMOR-SANCHEZ]: I know, and we disagree with
8 her.

9 MJ [COL POHL]: So I get the input and then just -- okay.
10 I am with you.

11 STC [MR. CAMPOAMOR-SANCHEZ]: And I hear what the court is
12 saying, but what I guess I'm resisting, for lack of a better
13 term, and I would like the commission to understand our
14 position, is to us how they are trying to mix the discovery
15 with the conflict issue is improper and they don't have a
16 legal basis to do that.

17 So as the court ordered in QQ -- or as the court
18 ruled and as our cases that we cited show, if there is no
19 longer an investigation, then there is not a possibility of a
20 conflict. And the commission has the obligation to make that
21 inquiry and reach that determination, and we believe --
22 really, truly, we have argued -- this I guess this is the
23 third time we have argued this, and I'm sure the commission

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1 doesn't want it argued any more.

2 MJ [COL POHL]: Welcome to my world.

3 STC [MR. CAMPOAMOR-SANCHEZ]: But the commission has
4 everything it needs to rule there is no conflict. If the
5 defendant, if Mr. Harrington or any other counsel wants to
6 later have the court -- has a representational issue based
7 upon the documents that we provide, fine. But I can certainly
8 tell the commission that from the documents that we are going
9 to provide, they are not going find that there is an
10 investigation ongoing. They are historical documents about an
11 investigation that has already been completed and conducted.

12 So providing the discovery is not going to change the
13 legal analysis to be undertaken by the commission. And
14 frankly, it allows a better record so that the commission can
15 go on the rest of this week, including Mr. Harrington, with
16 all the other arguments and motions that are going to be held
17 with a conflict-free counsel.

18 And the last point I will leave with the commission
19 is although certainly the defendant has to be informed if
20 there is a conflict and it has to be informed of what has been
21 going on, it is only the commission that gets to make that
22 determination. It is not the SRT, it is not Mr. Harrington,
23 it is not Lieutenant Colonel Pitvorec. It is the commission

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1 that has to make the inquiry.

2 The commission has done that inquiry. We have
3 provided the factual background why there is no conflict and
4 we respectfully urge you to make that finding that there is no
5 conflict and we will provide the discovery.

6 MJ [COL POHL]: Okay.

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

8 LDC [MR. HARRINGTON]: Judge, could I just ----

9 MJ [COL POHL]: Sure. Just to let you know the way ahead,
10 is that as soon as Mr. Harrington is done, or whoever wants to
11 speak, we are going to recess for the rest of the day, and we
12 will pick this issue up tomorrow morning.

13 LDC [MR. HARRINGTON]: Judge, just a couple of things ----

14 MJ [COL POHL]: Because we kind of drifted a lot broader
15 than anticipated.

16 LDC [MR. HARRINGTON]: You brought into the mix here the
17 question of it's not a conflict, maybe it's a representation
18 issue, and you want to try to deal with both of them.

19 Just so the court is aware, it is my position, my
20 ethical position and my belief, that I have an obligation to
21 tell Mr. Binalshibh as much about this, of the details of
22 this, as I can without violating some disclosure rules. That
23 is my position, and that is what I intend to do at some point

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1 in time.

2 I just -- I am troubled by this argument that you
3 have to make a finding of no conflict before we can get
4 discovery. If they are serious that there is no
5 investigation, that there is no conflict and there is nothing
6 going on in it, what is the problem with giving us the
7 discovery information now, right?

8 Maybe we look at the discovery information and I
9 say -- I look at it and I come back to the court and I say,
10 Judge, this supports my idea that there is a potential
11 conflict and I can say to you and here is why, whether that's
12 in a closed proceeding or open proceeding, whatever it is.

13 But then you get the conflict issue and your inquiry
14 obligation resolved once and for all without having it come
15 back, and here is a motion to reconsider the conflict issue.
16 That's not what you want, and it's certainly not ----

17 MJ [COL POHL]: You are not going to file a motion for
18 reconsideration?

19 LDC [MR. HARRINGTON]: Pardon me?

20 MJ [COL POHL]: You are saying you are not going to file a
21 motion for reconsideration on my ruling?

22 LDC [MR. HARRINGTON]: No, I said you don't want one.

23 MJ [COL POHL]: Well, that's a different issue. Okay. I

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1 got you. I understand, Mr. Harrington. I understand your
2 position is -- let me ask you this.

3 On what I am calling the representational issue, do
4 you see that as an issue or ----

5 LDC [MR. HARRINGTON]: It could be, Judge. It could be.

6 MJ [COL POHL]: I mean, do you feel a need to disclose
7 this to your client?

8 LDC [MR. HARRINGTON]: I do, Judge, yes.

9 MJ [COL POHL]: Including whatever decisions you made -- I
10 mean, Colonel Pitvorec stood up and said if you made different
11 decisions, and Mr. Connell said the same thing. I don't need
12 to go into the detail, but do you feel that's part of an
13 informed decision to keep you as his lawyer?

14 LDC [MR. HARRINGTON]: I do.

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

16 Mr. Connell?

17 LDC [MR. CONNELL]: Judge, I am not trying to prolong
18 proceedings, but I do want to point out that the military
19 commission just allowed Mr. Campoamor-Sanchez to argue 292VV
20 and 292YYYY and 292DDDDD, which the military commission did
21 not allow me to do. I have authority and ----

22 MJ [COL POHL]: I got it. Mr. Connell, as I alluded to
23 earlier, this issue has kind of evolved, for want of a better

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1 term, and I'm not going to decide it tonight to begin with.
2 We are going to recess until tomorrow at 0900, and we will
3 pick it up at that time.

4 LDC [MR. CONNELL]: Understood, sir.

5 MJ [COL POHL]: The commission is in recess.

6 [The R.M.C. 803 session recessed at 1541, 25 October 2015.]

7 [END OF PAGE]

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