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1 [The R.M.C. 803 session was called to order at 0941,
2 26 February 2016.]

3 MJ [COL POHL]: The commission is called to order. All
4 accused are present except for Mr. Bin'Attash.

5 Trial Counsel, any changes in the defense -- or the
6 prosecution team since we last recessed on Wednesday?

7 CP [BG MARTINS]: Good morning, Your Honor. No.

8 MJ [COL POHL]: Mr. Nevin?

9 LDC [MR. NEVIN]: No changes, Your Honor.

10 MJ [COL POHL]: Ms. Bormann? Ms. Bormann?

11 LDC [MS. BORMANN]: We are all present and accounted for.

12 MJ [COL POHL]: Thank you.

13 LDC [MR. HARRINGTON]: No changes, Judge.

14 DDC [Lt Col THOMAS]: No changes for Mr. al Baluchi.

15 MJ [COL POHL]: And Mr. Ruiz?

16 LDC [MR. RUIZ]: No changes.

17 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
18 was sworn, and testified as follows:

19 **DIRECT EXAMINATION**

20 Questions by the Trial Counsel [MR. SWANN]:

21 Q. Major, are you the same individual that has testified
22 previously in these proceedings?

23 A. I am.

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1 Q. All right. Again, I remind you you are under oath.
2 I have in front of me what's been marked as Appellate Exhibit
3 408H. It indicates a waiver by Mr. Bin'Attash. What time did
4 you advise Mr. Bin'Attash of his right to attend?

5 A. The interpreter started reading at 0557. Prior to
6 that, I greeted Mr. Bin'Attash, advised him that he had a
7 commissions hearing this morning at 0900 and asked if he would
8 come. He advised that he would not. I then read the entire
9 version in English and then the entire version was read to
10 Mr. Bin'Attash in Arabic, and that started at 0557.

11 Q. Did you deviate in any way from having done it
12 before?

13 A. I have not.

14 Q. And did Mr. Bin'Attash execute the waiver of 408H?

15 A. He did. He included his name and then he signed and
16 dated it, and then he wrote the language there about
17 three-quarters of the way down.

18 Q. All right. You had an interpreter interpret that
19 language?

20 A. I did.

21 Q. And what does it say?

22 A. Similar to the other waiver, he indicated that he was
23 not going to come to the commission today because his defense

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1 team is still the same. I advised him that -- or reminded him
2 that according to the judge that would still be a voluntary
3 waiver.

4 TC [MR. SWANN]: All right. Thank you very much. I have
5 no further questions, Your Honor.

6 MJ [COL POHL]: Ms. Bormann, any questions?

7 LDC [MS. BORMANN]: No.

8 MJ [COL POHL]: Thank you, Major.

9 [The witness withdrew from the courtroom.]

10 MJ [COL POHL]: Just to clean up a little business on my
11 side and then I will give Mr. Harrington a bit to talk. An
12 issue came up about what could be discussed on the AE 400 in
13 open and closed court. That issue has not been briefed so,
14 trial counsel, I would like to have your legal position in
15 writing within two weeks.

16 Defense, you will have an opportunity to respond and
17 then we will do a normal briefing schedule and then we will
18 put it on the docket for April.

19 Mr. Harrington.

20 LDC [MR. HARRINGTON]: Judge, obviously, as you know, we
21 are starting late this morning and it involves an incident
22 concerning my client and whether he would voluntarily come to
23 court today or not.

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1 When you last saw him it was on Wednesday when he
2 testified in court for several hours where he was calm and
3 cooperative and intelligent in what he presented. Both he and
4 I were concerned about potential retaliation when he returned
5 to the camp given the testimony that he had given. We were
6 scheduled to meet with him yesterday -- not me, because we
7 were in court, but some of my team members, and we had a long
8 agenda of items we had worked out with him to discuss and he
9 did not come to that meeting yesterday.

10 I did receive a letter from him yesterday and a
11 letter from him early this morning in which he indicates that
12 when he got back to the camp on Wednesday, that he -- sometime
13 after 6:00 he said one of the types of noises that disturbs
14 him started in the Charlie rec outside and he contacted the
15 supervisors and he spoke with the watch commander and he told
16 the watch commander to please have them stop it because of
17 your order. And he said the watch commander raised his middle
18 finger to him and said that he likes things upside down and he
19 is going to keep it that way, and he doesn't care what the
20 commission or his testimony was.

21 And that continued throughout the evening, which --
22 in the early morning hours, which exhausted Mr. Binalshibh and
23 obviously prevented him from going to our meeting yesterday.

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1 After continued problems last night and early this
2 morning, he was contacted early this morning by the SJA about
3 coming to court and he has now -- he has now gone through
4 extended periods of sleep deprivation and is very upset and
5 very frustrated and indicated that he was not going to come
6 and not going to sign the waiver, and it was because of what
7 was going on in the way that he was being treated.

8 At some point in time several hours after that he
9 obviously changed his mind and agreed to come to court. And
10 as he testified the other day, and as we have repeatedly said
11 to you, this is an extension of what he has experienced before
12 and his reaction to this treatment is not just something
13 that's based upon what's going on now, but is something that
14 has gone on for years and years and years and creates this
15 kind of turmoil and upset within him, and it's a reaction that
16 is directly attributable to the torture in which he believes
17 is a continuing thing to this day.

18 We are now in the middle of a contempt hearing and we
19 have ----

20 MJ [COL POHL]: I'm sorry, in the middle of what?

21 LDC [MR. HARRINGTON]: A contempt hearing. That's what we
22 have styled it and I know we have an issue that we have to
23 resolve with you about what the authority ----

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1 MJ [COL POHL]: You are talking about the 152?

2 LDC [MR. HARRINGTON]: Yes. I don't mean today, I meant
3 in the hearings, the continuation of the 152.

4 MJ [COL POHL]: I understand.

5 LDC [MR. HARRINGTON]: And obviously the impracticality of
6 doing things at one time because of the structure of our
7 system here is very difficult. But, Judge, we are asking you
8 to again -- not to just reaffirm the order, but this issue is
9 becoming so difficult for Mr. Binalshibh and our team that I
10 think that one of the remedies you mentioned the other day
11 that you have with these continuing problems, not just in this
12 situation, but is to abate the proceedings until things are
13 stopped.

14 And we will be requesting to the court shortly the
15 independent inspection of these facilities, and that's a
16 complicated issue to get done, we understand that. And it's
17 dependent upon who the experts could be, but we have to get to
18 the bottom of this and we have to have something independent
19 other than just the guard force and the other people who are
20 involved in operating this facility and behind the scenes in
21 this facility to determine what it is exactly that their
22 capabilities are and what exactly is going on here.

23 As you know, when I talk about abatement, this

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1 proceeding was abated for 18 months while the FBI investigated
2 me and other people on my team, and the government kept coming
3 to you and saying "We don't care, we don't want a severance in
4 this case, we want to continue all of these men together," and
5 that is a powerful threat to try -- to them, to try and get
6 some remedy for this. They do not want this case severed.

7 This also leads, Judge, to a difficult position for
8 me and the other members of my team in that Mr. Binalshibh is
9 certainly lacking in confidence that we can get anything done
10 for him because we cannot remedy this most significant problem
11 in his life. And we couple that with the fact that this FBI
12 investigation on -- where a member of our team who was an FBI
13 snitch provided all sorts of attorney-client privileged and
14 confidential information to the government, it puts us in a
15 position of having a very fragile and a very iffy relationship
16 with our client.

17 And we are urging the court to at least make some
18 statements on the record as to what -- what you believe your
19 powers are and what it is that can happen here if this is
20 not -- if this is not addressed. And I think that only that,
21 Judge, is what will get a message to the camp that they have
22 to do something to stop this.

23 MJ [COL POHL]: Okay. Trial Counsel, who is the senior

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1 member of the guard force here today?

2 CP [BG MARTINS]: One moment, Your Honor, please.

3 Your Honor, we have identified the individual, but I am
4 interested in seeing where this goes.

5 MJ [COL POHL]: I'm sorry?

6 CP [BG MARTINS]: We have identified the officer, but I
7 prefer not to state her name in open court. What do you seek
8 with the officer?

9 MJ [COL POHL]: I just want to confirm that they have my
10 order there and they understand what it means. That's all.
11 We can either have that person or somebody senior to her here
12 today. It won't take long, but I just want to look somebody
13 in the eye and make sure that they understand it.

14 TC [MR. SWANN]: Your Honor, we have the Staff Judge
15 Advocate that services the camp. He is here in the room. He
16 is the man that testifies every morning. He goes to the camp
17 quite often. He could testify as to that.

18 MJ [COL POHL]: I don't want the SJA. I want somebody
19 who -- a senior person from the guard force. The SJA is not
20 down there at the camp day in and day out. The complaint is,
21 from Mr. Harrington -- it's a simple -- it's not a
22 complicated -- I am not blaming anybody -- I am not pointing
23 fingers, I'm not taking sides. I simply want some face that I

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1 can ask, "Is the order there, do you understand it, do you
2 believe your guards are going to follow it" and reiterate to
3 them that they are to follow it. That's all I want.

4 CP [BG MARTINS]: Your Honor, we would need to then bring
5 an appropriate commander here.

6 MJ [COL POHL]: Okay. Okay. And we will do this today.
7 So you pick whoever is in charge. And, again, I understand
8 there is forced protection issues about personal
9 identification. I am not asking that. What I am simply
10 saying is I want to see a name -- excuse me, I want to see a
11 face and make sure that the message is being conveyed. It
12 shouldn't take too long. Okay?

13 CP [BG MARTINS]: Yes. Yes, Your Honor.

14 MJ [COL POHL]: Okay. Ms. Bormann and Mr. Ruiz, you
15 indicated you want to put something on the record before we
16 get started with the 254 argument. Do you still wish to do
17 that?

18 LDC [MR. NEVIN]: Your Honor, I need to do that as well.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: Okay. So yesterday, when we were in
21 closed session, it became apparent that the government wanted
22 to go into material that required a certain read -on, which I
23 will colloquially refer to as ACCM. Despite numerous requests

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1 by counsel for Mr. Bin'Attash to have our only detailed
2 military counsel, that being Major Seeger, being read into the
3 applicable ACCM, we were told that he was number 46 out of 46
4 in a list of defense team members that had requested it and
5 that there was nothing that could be done about it.

6 We approached General Baker, the Chief Defense
7 Counsel, on this issue, who indicated that he had placed
8 several phone calls to individuals, a Mr. [REDACTED]
9 regarding getting this done, and his phone calls and e-mails
10 had been ignored.

11 Yesterday, when it became apparent that because of
12 the government's failure to read Major Seeger onto the
13 applicable ACCM, the court would have to stop because of the
14 statutory requirement that Mr. Bin'Attash be represented by at
15 least one detailed military counsel, General Martins indicated
16 he would do whatever he could do to solve the situation.

17 We broke for that solution at 9:32 a.m. At
18 approximately 9:42 a.m. a Mr. Bumpus, the security officer
19 here on Guantanamo Bay, came to our office here in the
20 Expeditionary Legal Complex, and asked for Major Seeger. I
21 asked, "Why?" He indicated to me, that meaning Mr. Bumpus
22 indicated to me, that he had received a phone call from a
23 Mr. [REDACTED] indicating that General Martins had reached out to

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1 him and asked specifically that Major Seeger be read on to the
2 ACCM and that Mr. [REDACTED] was able to do it immediately.

3 Major Seeger was then taken to an office where he was
4 read on to the applicable ACCM and all of that was
5 accomplished before 9:59 a.m.

6 So what the Chief Defense Counsel couldn't do in
7 several weeks, General Martins was able to get done in less
8 than a half an hour. We will be filing applicable motions and
9 pleadings asking for some relief from the government control
10 of our resources going forward

11 MJ [COL POHL]: Thank you.

12 Mr. Ruiz?

13 LDC [MR. RUIZ]: Yes, Your Honor. As Ms. Bormann has
14 indicated, yesterday was a perfect example of how the Chief
15 Prosecutor's position in this case is one that allows him to
16 pick and choose which members of the defense are worthy of
17 being present at hearings, of having access to information
18 within the defense teams, and that policy, as you know, was
19 articulated in court a number of hearings back.

20 I appreciate you hearing me on this issue. It is one
21 that I think is -- there are many that are troubling and have
22 been troubling in Guantanamo, but this policy -- this position
23 has a tremendously negative effect on our defense team.

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1 As it stands right now, on my team we have over ten
2 people who have not received this additional compensatory
3 measure, who cannot access information within our defense
4 team. They can't do it because General Martins has decided
5 that not all members on the defense team have a need to know
6 classified information despite the fact that they are properly
7 assigned to this case, to this court for the specific purpose
8 of assisting in the defense of Mr. al Hawsawi.

9 This represents an unprecedented excursion into the
10 attorney-client realm, into the learned counsel's
11 responsibilities to lead, to be the supervisor of the team and
12 to determine who, within our team, needs to have access to
13 this information in order to carry out our duties as learned
14 counsel. It goes to the heart and to the core of our matter,
15 which is about representation, our ethical responsibilities to
16 direct our defense team in the manner that we see based on our
17 training, on our experience, which is why we are presumably
18 here, to carry out the best defense for Mr. al Hawsawi.

19 What this has done is it puts us in a position where
20 we have half of our team -- half of my team right now cannot
21 access this information, including a number of experts,
22 including people that in my professional judgment need to have
23 access to this information, and, Your Honor, it has been made

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1 very clear by the Chief Prosecutor that he will use the
2 national security privilege as a shield and as a sword, and as
3 he has told you many times, there's information you are not
4 allowed to see and you are not allowed to get into the realm
5 of classified information.

6 Judge, you do, however, have the authority and the
7 responsibility to ensure the fundamental fairness of these
8 proceedings. While yesterday was not a member of my team, I
9 wanted to know and I wanted the record to be clear that there
10 is a direct and ongoing impact on the conduct of our defense
11 on behalf of Mr. al Hawsawi. I am sure Mr. Harrington will
12 speak as to the effects on his case, but yesterday was about
13 as clear as an example as you can see as to why the prosecutor
14 having a direct line to the classification authorities or
15 whomever the nameless or faceless bureaucrat is, who
16 ultimately approves these hearings is so damaging. One member
17 of the defense team was able to get their read-on because it
18 suited their purpose to move this proceeding forward. Another
19 member of the team was not able to get that read-on because in
20 their view he was not an essential member, despite the fact
21 that that is a member who is the resident expert on classified
22 matters in a classified session.

23 That is a clear illustration of the encroachment on

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1 the attorney-client function. It is the latest in a number of
2 attempts to reign in the defense function, to incur into
3 our -- into our responsibility. And, Judge, obviously I am
4 putting this on the record now, we have a motion that's
5 pending before this court which asks you to determine that the
6 manner in which these proceedings is, in total, have continued
7 with the repeated incursions into the attorney-client
8 privilege cannot be reconciled with national security concerns
9 as articulated by the Chief Prosecutor.

10 It appears that the defense functions will not be
11 respected and those very valued principles of fundamental
12 fairness in these proceedings will not stand, at least will
13 not stand in equal light when it comes to national security
14 concerns as articulated and as wielded by General Martins.
15 And as such, in that motion, we are going to ask you what you
16 can do, which is to ensure fundamental fairness, which is to
17 ensure that the defense functions can proceed or not proceed
18 and dismiss these charges, dismiss these charges, because
19 under this onslaught of governmental interferences, we simply
20 cannot do our job and carry out our responsibility.

21 As I said, the learned counsel assignment is not just
22 one in form, but in functions. We simply are not providing
23 effective assistance.

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1 Thank you.

2 LDC [MS. BORMANN]: I obviously didn't want what Mr. Ruiz
3 said, but I do want to clarify one thing I said. When I said
4 General Baker reached out to Mr. [REDACTED] and a variety of people
5 to try to solve these issues, I meant General Baker at large.
6 His deputy is Captain Filbert, and so that staff worked it out
7 and although again General Baker was involved himself as well,
8 so I wanted to make that clarification.

9 MJ [COL POHL]: Thank you.

10 Mr. Nevin.

11 LDC [MR. NEVIN]: Thanks, Your Honor. I just wanted the
12 unclassified record to reflect that yesterday in a closed
13 session I renewed our motion in AE 406 to abate these
14 proceedings until our translator is read on. I had argued
15 this to you at the beginning of this session and what happened
16 yesterday with this instantaneous read-on is another
17 illustration of the points I made to you at that time.

18 We are here for yet a third session without -- I
19 should say probably a fifth session without the services of
20 our interpreter. And I know perfectly well, and you saw an
21 illustration of it yesterday, that if the military commission
22 said we are stopping until you read this man on or tell him
23 why you are not reading him on, that he would be sitting here

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1 at the table interpreting for Mr. Mohammad right now. And I
2 think that is probably still true today.

3 My guess is that it would probably take about
4 29 minutes, which is about how long it took yesterday. And I
5 adopt the arguments that the other counsel had made -- have
6 made. I am not going to repeat them, but you do see in this
7 the proposition that the prosecution ends up essentially with
8 a veto power over who gets to sit at our table, and that's
9 fundamentally wrong.

10 That fundamentally inverts the way the Sixth
11 Amendment is supposed to work. It turns it on its head and it
12 goes to the question of general fairness, to whether this is a
13 regularly constituted court, and whether we are
14 providing effective -- able to provide effective assistance of
15 counsel, whether there is a level playing field.

16 Once again, I ask you to stand down until our
17 interpreter is read on. Thank you for hearing me.

18 MJ [COL POHL]: Your motion to abate the proceedings today
19 is denied. I adhere to my original motion and timeline --
20 ruling and timeline on 406 as I issued earlier.

21 Mr. Harrington.

22 LDC [MR. HARRINGTON]: Judge, I just wanted to put on the
23 record what happened yesterday because -- and again I have to

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1 go back to the FBI investigation. What triggered that was the
2 loss of our DISO who came forward and said that the FBI had
3 contacted him, and he then had to leave our team given what
4 had occurred. And so that happened in April of 2014. Other
5 than a short two-month period where we had a temporary DISO,
6 we have been without one until the past three or four months,
7 and that DISO has finally been TS/SCI SAP cleared, but we
8 can't get the ACCM cleared for him. He had to leave the court
9 yesterday at a time when he would be of great assistance to
10 us.

11 And, Judge, the ACCM is important to us. It involves
12 all sorts of issues, including the one that I was complaining
13 about to you this morning because of the nature of the
14 information for it. So we are particularly hurt by this -- by
15 this process.

16 MJ [COL POHL]: Thank you.

17 How many defense teams' DISO are not ACCM cleared?
18 Mr. Harrington, Mr. Ruiz?

19 LDC [MR. RUIZ]: Our DISO is cleared.

20 MJ [COL POHL]: For ACCM?

21 LDC [MR. RUIZ]: Yes.

22 MJ [COL POHL]: So the only one who is not ACCM cleared is
23 Mr. Harrington's DISO? That's what I am hearing.

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1 LDC [MS. BORMANN]: Our DISO is not ACCM cleared for the
2 other ACCM program that Mr. Connell's team is read on for.
3 None of us are for that.

4 LDC [MR. NEVIN]: I hadn't understood the commission's
5 question. We are in the same position.

6 MJ [COL POHL]: I am only aware of one ACCM program that
7 required a clearance.

8 LDC [MS. BORMANN]: There are two.

9 LDC [MR. NEVIN]: There are two.

10 LDC [MS. BORMANN]: Mr. Connell has mentioned it by name.
11 I'm not sure what the classification level is, so I am not
12 going to mention it, but there are two.

13 MJ [COL POHL]: Trial Counsel, I know you don't control
14 all this stuff and I am not going to give you 29 minutes to
15 resolve the issue, but it just seems to me on -- the DISO was
16 provided to the defense to assist them in making security
17 determinations, to make sure that they properly handle
18 classified information. And I know you have some concerns
19 about too many people getting the ACCMs. But it strikes to me
20 that given the function of the DISO, that would be one that
21 should be in the group that should get the ACCM.

22 CP [BG MARTINS]: If I may?

23 MJ [COL POHL]: Sure.

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1 CP [BG MARTINS]: I guess I'm not going to win a
2 popularity contest on the other side of the room today.

3 Your Honor, the additional compensatory control
4 measure is something that is part of the Department of
5 Defense's structure of protecting information. It's not a
6 program as we explained in our notice to the court at its
7 request. It is based on a need-to-know principle, and it is
8 based on a limitation of numbers.

9 As I understand it, the way in which they were
10 applying that with regard to defense teams was to have ten of
11 each defense team, absent a particularized showing that they
12 need more. So any ten they wanted, and I don't know exactly
13 how that was getting implemented. Yesterday when the
14 commission noted that a detailed military counsel who recently
15 received the underlying clearances and access program tickets
16 needed to have the ACCM, we conveyed that information to the
17 appropriate point of contact that apparently the defense has
18 also contacted, something we don't do day in and day for lots
19 of reason. And they agreed that the detailed military counsel
20 could be read on expeditiously, and as we spoke, it was
21 limited to him.

22 Everybody in this process is individual. They have
23 different backgrounds, they have different things that need to

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1 be looked at by the government in personnel security. So the
2 fact that there are different outcomes for different people is
3 what right looks like. So I'm unapologetically stating that.

4 I am aware that the department is looking at that
5 compensatory control measure trying to determine how to
6 protect the underlying information and seeing if there is
7 another way within the policy to do it. If the commission
8 would allow, we will update our notice within a week to try to
9 provide you what we can of that, with regard to that, but
10 there is an understanding that there is dissatisfaction with
11 regard to the defense teams on this matter.

12 Yesterday happened the way it should have happened.
13 When the commission confronted something of that magnitude,
14 the government took notice and tried to figure out how to get
15 it going forward with somebody who had been cleared and who
16 was -- who had a clear need to know.

17 Subject to your questions.

18 MJ [COL POHL]: Okay. I don't want to get into an
19 unbriefed issue like this. No, you can have a seat.

20 What I am hearing the government say is defense, you
21 have -- and, again, I am not going to get into -- we are not
22 litigating this now. Okay? What I hear the government saying
23 is that ten people in every defense team are authorized an

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1 ACCM. What I hear the government saying is you want somebody.
2 In addition to ten you have to justify for what it is. That's
3 what I hear them saying.

4 If your DISO is not included in that ten, then it
5 tells me that there must be a justification for it. If you
6 have not gotten the ACCMs, then your DISO can be included in
7 the ten. That's what I hear them saying. I am not litigating
8 this now, I am not going through it, I am simply saying that's
9 the state of the record as it is right now. And if the
10 government is going to provide additional notice and they want
11 to come back -- and they want to come back and revisit it, I
12 will.

13 As I stated before, it would strike to me that -- and
14 I'm not trying cases for the defense here -- but the purpose
15 of the DISO is to assist you in classified matters, so he
16 needs to, or she would need to have the appropriate clearances
17 so all classified matters can be reviewed by him. Again, I am
18 not litigating that now, but you are going to stand up anyway
19 Mr. Ruiz.

20 LDC [MR. RUIZ]: Judge, in terms of the justification, I
21 just want the record to be clear. The Chief Defense Counsel,
22 who has the statutory and regulatory duty to authorize and
23 also to supervise counsel within the military commission's

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1 defense office, reached out to individual teams inquiring
2 about the personnel within those teams and their need to know
3 information in order to carry out the defense function.

4 The Chief Defense Counsel then compiled a
5 justification letter that went to the proper authorities that
6 indicated why members of the defense teams needed to have this
7 information in order to effectively represent the men that we
8 represent. So I want to make that very clear. It's not as
9 though this has happened.

10 In terms of the ten-person requirement, I think the
11 record needs to be very clear that when this issue was first
12 discussed in court and a number of defense personnel were read
13 on, there was no such limitation, there was no such numerical
14 limitation. The first time we heard of such a numerical
15 limitation, or at least the suggestion that that would be an
16 appropriate way to proceed, was from the Chief Prosecutor who
17 first proposed it before this military commission.

18 It strains credibility to say that there must be a
19 need to know this information and at the same time assign some
20 arbitrary number in terms of the number of people who can be
21 read on into the program.

22 Second, I understand, Judge, why you asked the
23 question concerning the DISO, but I would also object to that

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1 type of analysis moving forward because that is a very -- the
2 very analysis we are trying to prevent, which is when we take
3 an individual member of the defense team and have to justify
4 our reasons, that's an easy one I think. But there are other
5 members of the defense teams who need access to this
6 information, who need to look at it, who need to analyze it,
7 who need to handle it. And when we get into an individualized
8 justification for why our defense team members need to have
9 that information, we are at that point getting into the
10 province of our ability to manage our team, our ability to
11 move this case forward.

12 And so I would ask that we at least be mindful
13 that it is very difficult, and we shouldn't get into a
14 person-by-person analysis, and what they do on the defense
15 team, because that's an internal matter for the defense teams.

16 And also, it's not as though we are asking the
17 members of some unknown public be read into this program. I
18 will again reiterate that these are all properly cleared
19 members, or in stages of the clearance process, of defense
20 teams that are put together for the specific purpose of trying
21 these cases, and that is a discrete universe of people,
22 carefully vetted by the U.S. Government. What this amounts to
23 is an additional layer of encroachment on the defense

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1 function. And that is what ultimately we cannot allow to
2 happen.

3 Thank you, Your Honor.

4 MJ [COL POHL]: You're welcome.

5 LDC [MR. NEVIN]: May I?

6 MJ [COL POHL]: Sure.

7 LDC [MR. NEVIN]: Just to respond to what General Martins
8 said, setting aside the necessity to protect this information,
9 it's not my purpose as I stand up now to quarrel with that,
10 but just to make two points.

11 One, it is -- that this is another illustration of
12 the way in which the problem of protecting national security
13 as the government sees it conflicts with having a fair trial
14 and having a fair and speedy trial and moving forward
15 expeditiously. And I haven't -- my team hasn't moved to
16 dismiss the case at this point, but I think that -- and from
17 time to time I called this to the military commission's
18 attention that this is yet another example of the way in which
19 the need for national security is inconsistent with the
20 requirement for having a fair and speedy trial. And this is
21 another one.

22 But I didn't ask you to dismiss the case, I just
23 asked you to put a full stop to it until our guy gets read on.

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1 MJ [COL POHL]: So on one hand you are objecting to a lack
2 of a speedy trial and in the next hand you are asking me to
3 stop it?

4 LDC [MR. NEVIN]: Yes. Absolutely.

5 MJ [COL POHL]: You don't need to be consistent. I just
6 want to understand your position.

7 LDC [MR. NEVIN]: Speedy doesn't go by itself any more
8 than throwing somebody in chains as a way to get them to
9 court. Speedy goes along with fair and it's got to be fair.
10 I understand about the absence of a requirement for a speedy
11 trial in the Military Commissions Act and in the rules. And
12 my purpose is not to argue a motion to dismiss on grounds of
13 speedy trial, it's only to call to your attention that this is
14 another way in which national security is stepping on the
15 ability to have a fair trial, number one.

16 Number two, our situation about the ACCM may come up
17 in our argument on 254 today, and if it does, I'll call that
18 to your attention. But underlying that and in support of that
19 is the fact that only -- only two of our six paralegals have
20 been read on to the ACCM, and reviewing materials related to
21 the ACCM may be necessary to fully respond to arguments that
22 the prosecution may make on 254.

23 And if -- I will -- I won't say more about that and I

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1 won't do it in open session, of course, in a way that would
2 reveal information, but that is something that may come up
3 later today. Thank you.

4 MJ [COL POHL]: Okay. I'm sure glad we are not litigating
5 this.

6 LDC [MS. BORMANN]: Not to beat a dead horse, but I do
7 want to put on the record that General Martins was informed
8 yesterday in this commission, along with you and everybody who
9 was present, that on the Bin'Attash team there had only been
10 five members read on to the ACCM. We are told by your court
11 security officer that Major Seeger is number six.

12 So we were well under the ten limit, and despite
13 being well under the ten limit, attempts to get Major Seeger
14 read on went unheeded when they came from the defense side.
15 But when they came from the prosecution side, we went from
16 zero to a hundred in, well, 29 minutes.

17 MJ [COL POHL]: Trial Counsel, you have provided notice on
18 this in AE 389A. You indicated you want to do it in seven
19 days. You're going to provide an updated notice?

20 CP [BG MARTINS]: Yes, Your Honor, that's the request.

21 MJ [COL POHL]: Defense, once you get a copy of that, I
22 know I say this all the time, but I am going to say it again,
23 if you -- it seems to me if we have to litigate this, it has

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1 to be in a normal litigation posture. The notice would
2 trigger your response in terms of what you want in relief of
3 this and then we will litigate it in the April sessions after
4 it is fully briefed.

5 That being said, I intend to go straight through to
6 lunch, so let's begin the 254 argument.

7 LDC [MS. BORMANN]: Judge, are we starting with WW?
8 Because our position is we need to -- that's the unlawful
9 influence issue.

10 MJ [COL POHL]: Just -- okay. There are two issues and
11 the second issue has two parts. Okay. There is the 254Y
12 basic motion and then there is the two UI issues. It strikes
13 to me is we should start with the 254Y issues, the underlying
14 issues, because the other two talk about remedies. But I will
15 leave it to the discretion of each defense counsel, okay, how
16 you want to do it. But when you -- when you argue, and as I
17 said yesterday in the 802, I will give you leeway to break the
18 argument on the issues between counsel members. If you want
19 to -- when it is your time to argue, you want to start with
20 the UI issue, one or the other, that's up to you. If you want
21 to start with the 254Y issue, that's up to you. But when you
22 are up for your initial argument, it's going to be all of
23 those. Is that clear?

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1 LDC [MS. BORMANN]: So what you would like us to do is
2 argue two distinct motions, sort of combined, we can divide
3 them by ----

4 MJ [COL POHL]: I'm not -- what I am simply saying is you
5 have got to argue all aspects of 254, the substantive motion
6 and the UI motion. Whether you want to break them up into
7 three separate arguments or you want to do one intertwined
8 argument, that's up to you.

9 LDC [MR. RUIZ]: Judge, can we just confer for a moment
10 amongst the counsel? I think it will make it more efficient.

11 MJ [COL POHL]: I'm good on efficiency.

12 I'll tell you what we will do, we will take a
13 ten-minute recess and we will restart at 10:30. The
14 commission will be in recess.

15 [The R.M.C. 806 session recessed at 1021, 26 February 2016.]

16 [END OF PAGE]

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