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1 [The R.M.C. 803 session was called to order at 0904, 26
2 October 2015.]

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

4 Mr. Campoamor, are the same members of the SRT here today as
5 when we met earlier?

6 STC [MR. CAMPOAMOR-SANCHEZ]: As yesterday, yes.

7 MJ [COL POHL]: I noticed Mr. Swann has joined us. That's
8 for the sole purpose to account for the sole absent detainee?

9 TC [MR. SWANN]: Yes, Your Honor.

10 MJ [COL POHL]: Mr. Nevin, any changes to counsel?

11 LDC [MR. NEVIN]: No changes, Judge.

12 MJ [COL POHL]: Ms. Bormann?

13 LDC [MS. BORMANN]: No changes.

14 MJ [COL POHL]: Mr. Harrington?

15 LDC [MR. HARRINGTON]: No changes to counsel, but one of
16 our support staff, Damon Farkas, is no longer here in a
17 support role, and Mr. Amit Patel is here.

18 MJ [COL POHL]: Colonel Thomas?

19 DDC [Lt Col THOMAS]: Sir, no changes for counsel. I did
20 want to clarify one matter for the record yesterday, if I may
21 just have one moment. Court's indulgence.

22 MJ [COL POHL]: Let me go through the parties.

23 Mr. Ruiz?

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1 LDC [MR. RUIZ]: No changes.

2 MJ [COL POHL]: I note all detainees are here today except
3 for Mr. al Hawsawi. Colonel Thomas, let Mr. Swann do his
4 thing and then you will be next up.

5 DDC [Lt Col THOMAS]: Yes, sir.

6 MJ [COL POHL]: Mr. Swann.

7 CAPTAIN, U.S. Army, was called as a witness for the
8 prosecution, was previously sworn, and testified as follows:

9 DIRECT EXAMINATION

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

11 Q. Are you the same captain, Assistant Staff Judge
12 Advocate that testified yesterday in these proceedings?

13 A. I am.

14 Q. I remind you that you are still under oath.

15 This morning did you have occasion to advise
16 Mr. al Hawsawi of his rights to attendance this morning?

17 A. I did.

18 Q. All right. Did you use the same form that you used
19 yesterday and the same form that I have in front of me,
20 Appellate Exhibit 382, consisting of three pages?

21 A. Yes.

22 Q. Did you advise Mr. al Hawsawi of his rights in
23 English and in Arabic?

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1 A. I did.

2 Q. Did you do the Arabic translation?

3 A. I did not. There was an interpreter present.

4 Q. So what time did that occur this morning?

5 A. It began at 0528.

6 Q. When did you complete that?

7 A. 0533.

8 Q. All right. Do you believe that he understood his

9 right to attendance this morning?

10 A. I do.

11 TC [MR. SWANN]: I have no further questions, Your Honor.

12 MJ [COL POHL]: Mr. Ruiz, do you have any questions of

13 this witness?

14 LDC [MR. RUIZ]: No, thank you.

15 MJ [COL POHL]: Thank you, Captain. You are excused.

16 **[The witness was excused and withdrew from the courtroom.]**

17 MJ [COL POHL]: Mr. Swann, you are also excused

18 pending ----

19 TC [MR. SWANN]: Thank you.

20 STC [MR. CAMPOAMOR-SANCHEZ]: Your Honor, after Lieutenant

21 Colonel Thomas, I would also like to -- there are a couple of

22 housekeeping matters I would also like to address.

23 MJ [COL POHL]: Sure. I am waiting for Mr. Swann to leave

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1 because I want to make sure there is no spillover from the
2 regular prosecution team.

3 [Mr. Swann withdrew from the courtroom.]

4 MJ [COL POHL]: Colonel Thomas.

5 DDC [Lt Col THOMAS]: Your Honor, just a brief matter.
6 Yesterday I read three statements from Mr. al Baluchi related
7 to his issues regarding his ability to see counsel over the
8 weekend. The third one was yesterday [sic], the 24th, JTF
9 canceled my legal visit with my defense team. I want to
10 clarify for the record that the Saturday the 24th of October
11 visit was canceled by his legal team, not by JTF.

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

13 Mr. Campoamor.

14 STC [MR. CAMPOAMOR-SANCHEZ]: Thank you, Your Honor. Two
15 matters, Your Honor. The first one is just a housekeeping
16 one. Yesterday Mr. Connell, during his remarks, he had moved
17 to unseal AE 292VV (2nd Sup), a supplement that he had filed
18 on October 7 of this year, 2015, and we were asked on the
19 record if we did not oppose, and we did not.

20 However, because I did not have it in front of me, I
21 did not realize at the time that that supplement contains the
22 names of a number of individuals, names that we have sought to
23 redact, for example, from TTTT. I would like to make the

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1 request, and again we do not oppose it being unsealed, but we
2 would like those specific names to be redacted. I tried to
3 reach Mr. Connell last night by e-mail but you may not have
4 received my e-mail, so I wanted to make sure I placed it on
5 the record.

6 MJ [COL POHL]: Okay. Let me make it clear what we are
7 talking about here. The 292VV is Mr. Connell's discovery
8 motion, one of his.

9 STC [MR. CAMPOAMOR-SANCHEZ]: It is actually filed by
10 Mr. Nevin, Mr. Connell joined, and then Mr. Connell has been
11 supplementing with more recent discovery requests.

12 MJ [COL POHL]: Okay. And embedded in one of those was a
13 document that referred back to one of your pleadings that was
14 sealed.

15 STC [MR. CAMPOAMOR-SANCHEZ]: Correct. And, again, we do
16 not oppose, as he requested, that it be unsealed now. We just
17 would like any particular names to be redacted from that
18 public unsealing.

19 MJ [COL POHL]: Okay. Do you have a redacted copy?

20 STC [MR. CAMPOAMOR-SANCHEZ]: I do not. And I tried to,
21 again, reach Mr. Connell last night. I am happy to address
22 that with him. Yesterday we were left as we did not oppose.
23 I just wanted to make it clear.

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1 MJ [COL POHL]: When we said "unsealed," did you mean
2 unsealed to the public or unsealed to other members of the
3 defense?

4 STC [MR. CAMPOAMOR-SANCHEZ]: It's been provided to other
5 members of the defense already. I meant it could be unsealed
6 for the public.

7 MJ [COL POHL]: Okay. Let's do this: Since it was your
8 original motion, I will take under advisement the request for
9 it to be unsealed. You provide the redacted copy with them,
10 and then, Defense, you come back to me if you have got an
11 objection to the redactions, okay?

12 STC [MR. CAMPOAMOR-SANCHEZ]: Okay. Thank you,
13 Your Honor. I appreciate that.

14 DDC [Lt Col THOMAS]: I will just add, and
15 Mr. Campoamor-Sanchez might not be aware of this, but normally
16 those redactions are handled by the DoD
17 Classification/Declassification Review Team and they would
18 happen in the ordinary course of business anyway.

19 MJ [COL POHL]: Okay. Okay. Well, are these classified
20 redactions or PII?

21 STC [MR. CAMPOAMOR-SANCHEZ]: Yes, it is PII, personal
22 information redaction.

23 MJ [COL POHL]: However it is done.

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1 STC [MR. CAMPOAMOR-SANCHEZ]: That was issue number one.

2 Issue number two is -- I would ask for the court's
3 indulgence; the court asked me a question yesterday at the end
4 of the day and, frankly, it has been bothering me all evening
5 because I did not answer it appropriately, and I would like
6 the opportunity to do that now.

7 MJ [COL POHL]: Okay.

8 STC [MR. CAMPOAMOR-SANCHEZ]: And if the court may recall
9 towards the end of the day, the commission asked the SRT and
10 myself whether -- what was the problem with sort of providing
11 the discovery to defense counsel while we were still
12 litigating the conflict issue, specifically to
13 Mr. Harrington's team, and I believe the commission, in fact,
14 raised the question, perhaps half jokingly, that the
15 commission understood that once discovery was provided,
16 perhaps a new motion for a conflict of interest would be filed
17 in the future, so perhaps it would be more efficient. I took
18 the commission to mean, to essentially provide discovery and
19 then litigate the conflict of interest issue all at once.

20 And so the reason I'm particularly concerned is that
21 it appeared as if the commission was considering delaying a
22 decision on the conflict issue until after discovery was
23 provided, and I frankly did a very poor job of answering that

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1 question to the commission because I believe there are some
2 serious implications of delaying the commission's ruling on
3 that issue.

4 First, the commission yesterday, from -- a number of
5 defense counsel argued to the commission that they had been
6 placed in the untenable position of this cloud of a potential
7 conflict now for 18 months, and yet -- and, again, of course
8 we disagree with that, we have our factual arguments and legal
9 arguments to make about that. But they are saying that they
10 are in an untenable position, and yet they are asking the
11 commission to delay its decision on the conflicts issue, thus
12 prolonging, making this so-called untenable position even
13 longer.

14 LDC [MR. CONNELL]: Your Honor, I object. This is the
15 third time that the Special Review Team has been allowed to
16 argue the discovery matter, and we haven't been allowed to
17 address it yet.

18 MJ [COL POHL]: Here is what we are going to do, just for
19 the way ahead. We are going to finish with the conflict
20 issue, okay? As it is conflated with the discovery issue, I
21 will let you touch base on that. Then what we will do -- and
22 you will like this, Mr. Connell -- then we can go to your
23 slide show on discovery. Once we have discussed the conflict

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1 issue and the discovery issue, we will see where we are at,
2 okay?

3 So I understand what you are saying, but what I
4 believe is being focused on is let's address the conflict
5 issue first, and then we get to discovery.

6 LDC [MR. CONNELL]: That's what I want to address too, but
7 it sounds like the commission is going to give me the
8 opportunity to do that.

9 MJ [COL POHL]: I will give you that opportunity,
10 Mr. Connell.

11 STC [MR. CAMPOAMOR-SANCHEZ]: If I may focus the
12 commission on this, essentially they are conflating the issues
13 on this, the discovery and the conflict issue, and yet you
14 heard yesterday about this untenable position, and they are
15 asking the commission not to rule on the conflict issue until
16 the discovery has been provided, which actually would prolong
17 the issue.

18 In fact, you heard from Mr. Nevin, for example, that
19 you should not rule on 292SS, his and others' motions to
20 reconsider QQ. You heard from -- Mr. Harrington make that
21 argument to the commission that the commission should allow
22 him to get the discovery so that he can actually make a full
23 argument on the discovery issue. That is, we think, an

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1 untenable position to take; that is, they are complaining
2 about being in this cloud and yet they want to prolong this
3 cloud. That's one issue.

4 Issue number two is, of course, not ruling on the
5 conflict issue is going to have a negative effect on the rest
6 of these proceedings. As the court, as the commission knows,
7 of course, because of these issues that we have been
8 litigating, the rest of the arguments, the prosecution team
9 and defense have not been able to work with the commission on
10 moving this matter forward and getting other issues resolved.

11 MJ [COL POHL]: But on that -- on that point, if there is
12 a need to do additional time to litigate properly 292, the
13 fact that it delays other things to me is somewhat irrelevant.
14 I understand what you are saying, but just because it's -- if
15 the process takes time, it takes time.

16 STC [MR. CAMPOAMOR-SANCHEZ]: And I do not disagree at all
17 with the commission on that point. But what we are trying to
18 focus, though, is saying we are at that position, we are at
19 that time, the commission can in fact rule. That's all we are
20 saying, but we agree with that.

21 And the last point I would make, Your Honor, is on
22 this issue of why -- this position that discovery must come
23 first does not make sense because, as the commission heard

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1 from defense counsel when this first arose back in April 2014,
2 the commission had a duty to investigate, the commission had a
3 duty to make a determination as to whether a conflict existed.
4 And as it stands now, that is where we are. In fact, the
5 commission, we believe, does have the obligation to make that
6 determination.

7 And so the issue of discovery as a prerequisite for
8 the commission to be able to reach this determination is,
9 frankly, a red herring, and let me explain why. As the
10 commission knows -- again, the commission issued 292QQ, the
11 order. In that order, the commission correctly stated that if
12 there is no investigation, there is no conflict, and the
13 reason for that, as the commission may recall, is because it's
14 only when an investigation exists that the interest of the
15 counsel and the accused could potentially diverge, okay?
16 That's what potentially creates a conflict. If we have indeed
17 established, as we believe we have, that there is no
18 investigation and not even a security access issue, there
19 cannot be a conflict.

20 And so when counsel are telling the commission, well,
21 we need the details of the investigation, fine. There is a
22 relevant legal argument to be made as to why they might be
23 entitled to some of that information, but those details of

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1 that investigation do not go to proving or disproving the fact
2 that the investigation took place. In fact, we have said it
3 did take place. It did or did not focus on counsel of record.
4 It is now over.

5 So we have provided those facts to allow the
6 commission to make that determination. So the details about
7 what happened during the investigation, what facts may or may
8 not have been provided, cannot possibly change the fact that
9 the investigation did take place and is now closed. So to say
10 that discovery is going to answer that question is simply
11 incorrect. It's false logic.

12 And so, again, in QQ, the commission again ordered,
13 well, if there is no investigation, there is no conflict.
14 What's left is what? Perhaps a fear of a future
15 investigation. And again the commission asked -- answered
16 that question with QQ. It said that is speculative. Mere
17 fear is not enough. And those two basic legal rulings that
18 the commission issued in QQ are based on a longstanding line
19 of cases that establish just that. In other words, the
20 commission got the legal framework right for resolving the
21 conflict of interest issue.

22 And that's why, frankly, I'm a little baffled and
23 concerned that there is so much focus being placed on

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1 discovery when we haven't resolved the conflicts issue, and I
2 get it. The commission has told us loud and clear the
3 commission wants discovery to be provided, and we will provide
4 it. In fact, as I mentioned yesterday, Mr. Nevin and I are
5 essentially in agreement as to at least the first stage of
6 that discovery, and now that he has finally signed the MOU, we
7 are in a position to do that.

8 So we get it. We are not trying to stand in the way
9 of not providing discovery, but what we want to make sure the
10 commission understands is that it can and should rule on the
11 conflict. And not ruling on the conflict now is extending
12 this cloud that we believe can be dispelled and is also,
13 frankly, then forcing the court, if the commission orders,
14 forcing us to provide discovery to a counsel that is still
15 allegedly under this cloud of conflict.

16 And so we clearly -- to us, this is clearly two
17 separate issues. And look, if the commission disagreed with
18 us and says, look, counsel, I am not convinced that there is
19 no conflict, then frankly we would say, Your Honor, okay.
20 Then let's, then the commission should advise RBS. We
21 shouldn't delay the conflict issue any longer. If the
22 commission is not satisfied, then RBS should be advised,
23 Mr. Binalshibh should be advised.

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1 But the commission, as it went through the argument
2 with defense counsel yesterday, realized it's almost hard to
3 figure out what the commission would advise because there is
4 no investigation. We have a Deputy Assistant Attorney General
5 saying that. We have a declaration from a DoD official saying
6 there is no security access consequences. There is nothing
7 else we can do to establish for the commission or the
8 defendants that there is nothing else going on. Maybe they
9 don't believe us. Fine. But the court should rule. If the
10 court doesn't rule now on conflict, we are going to be
11 extending this issue beyond what it needs to be.

12 So the case law is in support. The commission has
13 the facts. We believe that this untenable position that they
14 claim they are in should proceed no longer and that the court
15 should rule. And if the court disagrees, then Mr. RBS should
16 be advised, but there is no reason to postpone this conflict
17 issue any longer.

18 Thank you.

19 MJ [COL POHL]: Thank you.

20 Mr. Harrington?

21 LDC [MR. HARRINGTON]: Judge, I'm not going to belabor the
22 arguments that I made yesterday, but what Mr. Campoamor just
23 stated to you, he still hasn't said to you what the reason is

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1 why we shouldn't have these things before this issue is
2 resolved. I don't understand what he means by the conflict is
3 over and now you get the discovery. That doesn't seem to make
4 any sense.

5 If you determine there is a potential conflict and
6 you have to advise Mr. Binalshibh of his rights, you are going
7 to ask him the question: Do you know what this is about? And
8 he is most likely going to say to you no.

9 Mr. Campoamor can talk about 292TTTT all he wants.
10 There is very little information in that. Lieutenant Colonel
11 Pitvorec is under restraint not to share the information, the
12 factual information, with Mr. Binalshibh.

13 And, Judge, the long string of cases that
14 Mr. Campoamor wants to refer to do not talk about the
15 potential conflict coming from the very case that's being
16 litigated in front of the court. It's always a collateral
17 issue that the defense lawyer finds himself or herself in a
18 problem because of something else not related to the actual
19 case, and that's what -- that's what the difficulty is.

20 Judge, this is kind of like a wounded dog. It's one
21 thing if you step on a dog's toe and the dog yelps and runs
22 away. It's another thing if the dog gets run over by a car,
23 and this is run over by a car. And it comes right from the

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1 very case that we are talking about, and the discovery is
2 essential right now. Thank you.

3 MJ [COL POHL]: Thank you. Mr. Nevin, do you want to be
4 heard? I mean, if you have got something new -- I understand
5 you disagree with his position, so I ----

6 LDC [MR. NEVIN]: I thought it was the same argument that
7 was made yesterday.

8 MJ [COL POHL]: It ended up being the same argument. It
9 started out talking about the discovery thing, and I think at
10 the end of the day it amounts to the same argument.

11 LDC [MR. NEVIN]: Yes, sir, and I made the points I wanted
12 to make yesterday, so ----

13 MJ [COL POHL]: Ms. Bormann, do you have anything to add
14 at this point?

15 LDC [MS. BORMANN]: No, Judge.

16 MJ [COL POHL]: Okay. Mr. Connell?

17 ACC [MR. BIN'ATTASH]: I don't have an interpreter in
18 court. I need my interpreter. He told them that he couldn't
19 come to court and I don't know the reason.

20 MJ [COL POHL]: Okay. Ms. Bormann?

21 LDC [MS. BORMANN]: Judge, this is a security
22 investigation ongoing and a determination was made by people,
23 not me, much like the translator in Mr. Mohammad's case, that

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1 our team translator should, subject to investigation, remain
2 out of classified information zones. I was informed of this
3 about 8:55, 8:50, something like that, and so that's where we
4 are.

5 MJ [COL POHL]: Why is your client raising it now and you
6 didn't raise it to me at the start? Is there an issue, we
7 can't go forward without an interpreter?

8 LDC [MS. BORMANN]: Well, he has translation services
9 through the court and we have been discussing matters with him
10 in English. I have not had contact with him this morning
11 about this issue, so I don't know why.

12 [Pause.]

13 LDC [MS. BORMANN]: Mr. Bin'Attash indicates he
14 interrupted court because he is having difficulty
15 understanding what's happening in court, and he wishes to have
16 a translator sitting at the table to assist him. So given
17 that set of circumstances, we are asking for the assistance of
18 a translator.

19 MJ [COL POHL]: Doesn't he have earphones? Can he listen
20 to the translation that way?

21 LDC [MS. BORMANN]: Yes, he has earphones, but he tells me
22 that he has questions about particular issues involving
23 translation, and I frankly don't know what they are because I

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1 don't speak Arabic, and I don't listen to the translation
2 that's coming through the earphones. So having me have a
3 conversation with Mr. Bin'Attash about what he is not
4 understanding isn't going to be helpful since I don't know
5 what the words are that are being spoken to him. He indicates
6 that he could use the assistance of a translator this morning.

7 MJ [COL POHL]: Here is what we are going to do,
8 Ms. Bormann, is I am going to finish 292 and he is going use
9 the translation through his earphones. Then we will recess to
10 see if there is a way to resolve this.

11 LDC [MS. BORMANN]: Thank you.

12 Translation coming through the earphones are fine.
13 The problem is that Major Schwartz is giving him -- advising
14 him of legal information that is important to him, and he is
15 having a difficult time understanding that.

16 MJ [COL POHL]: Okay. I understand that.

17 LDC [MS. BORMANN]: Major Schwartz just advised my that my
18 client wants to revisit 380 now.

19 MJ [COL POHL]: Okay. As I told you yesterday, here is
20 what we are going to do. As I said before, we are going to
21 finish 292. We will recess to see if we can solve the
22 interpreter issue, okay? To me it's a short-term thing. If
23 there are things that Major Schwartz needs to explain to him,

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1 legal matters, there will be ample time to do that.

2 Then when we have the recess, make sure

3 Mr. Bin'Attash understands the ruling I told on Sunday about
4 the status of 380 and where we are at with it, and then if he
5 wants to discuss it with the regular trial counsel team, we
6 will do it at that time, okay?

7 LDC [MS. BORMANN]: I will advise Mr. Bin'Attash of your
8 ruling.

9 MJ [COL POHL]: Thank you.

10 Mr. Connell.

11 LDC [MR. CONNELL]: I sometimes get the impression that
12 the military commission thinks that I am too dependent on the
13 slides, so I am not going to use the slides. I am just going
14 to make my argument about discovery.

15 If my best friend came to me and said that he had
16 been having an affair with my wife, that that affair had been
17 closed on September 16, 2015, and gave me a letter, a redacted
18 letter saying that the affair was closed at this time and that
19 I should just forget about it and move on, I would have some
20 questions for both my best friend and my wife.

21 The first of those questions would be: What were you
22 thinking? The second of those questions would be: What
23 actually happened? And the third of those questions would be:

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1 How can I ever trust either of you ever again?

2 MJ [COL POHL]: And the fourth question would be: Do I
3 still want to stay married?

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

5 MJ [COL POHL]: Which makes it a representational issue.

6 LDC [MR. CONNELL]: And before I answered that fourth
7 question, do I want to stay married, I would want to know the
8 answers to the first three. That, in a nutshell, is why I
9 think that we should handle things in the order that I am
10 suggesting.

11 MJ [COL POHL]: Okay.

12 LDC [MR. CONNELL]: Find out what they were thinking, what
13 actually happened, how we can trust their representations now,
14 and then Mr. Binalshibh is going to have to make a decision.
15 That's the order that makes sense.

16 The Special Review Team said yesterday that they
17 intended to provide all the discovery to Mr. Binalshibh's
18 attorney for his consideration and, I assume, production of a
19 privilege log or assertion of a privilege. The phrase "all
20 the discovery" covers a lot of sins, and the real discussion
21 that I want to have is what "all the discovery" contemplates.

22 I understood from the military commission yesterday
23 that it had it in serious contemplation that the motions in

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1 the 292 series that had been sealed would be unsealed with
2 respect to counsel, what the military commission has seen,
3 what counsel would see, which essentially addresses the issues
4 which are found both in 292YY, the motion to reveal
5 undisclosed information, and 292YYYY, the motion to partially
6 unseal the pleadings. So I would like to focus today on
7 292VV, which is the motion for discovery.

8 The first major issue that I want to deal with is the
9 oft-repeated argument from the Special Review Team that it is
10 impossible for us to participate in the discovery process
11 because of the potential conflict of interest, or as he would
12 say it, of the claimed potential conflict of interest.

13 Luckily -- although there is very little case
14 law that matches up with our situation, luckily there
15 is a case that matches up with this situation pretty well,
16 and it's in fact from a largely authoritative source,
17 the D.C. Circuit. And I refer to the case of
18 United States v. Lopesierra-Gutierrez, found at 708 F.3d 193,
19 a D.C. Circuit case from 2013.

20 Lopesierra is interesting in that it does involve an
21 investigation related to the representations and because on
22 the eve of trial in that case the government disclosed that
23 the attorney had been paid allegedly laundered funds for the

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1 representation.

2 The court clearly recognized that there was a
3 potential conflict of interest. In that case it was the
4 government who moved to disqualify the attorney, not the
5 attorney who raised it him or herself -- himself.

6 But what is very interesting in that case and what
7 gives us the information that we need to resolve this issue
8 against the Special Review Team, it was that it was
9 Lopesierra's attorney who litigated the conflict. He also had
10 independent counsel, and it is clear that both the independent
11 counsel and the original attorney participated in the
12 litigation over the existence of the conflict.

13 The defendant waived the conflict after a colloquy,
14 and the question on appeal raised by the defense was, was that
15 conflict per se unwaivable, that is, was it an actual conflict
16 that falls under Cuyler v. Sullivan and
17 United States v. Cronin, which I talked about yesterday, and
18 the D.C. Circuit said no.

19 But there are three lessons that can be taken from
20 Lopesierra. One, and the most important one for our purposes
21 right now, is that an attorney with a potential conflict --
22 that is, a waivable conflict -- can participate in the
23 question of the litigation of the conflict. In fact, the vast

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1 majority of the cases where -- at least the District Court
2 cases, and many of the Circuit Court cases that are on these
3 investigation conflict matters, are situations where the
4 government has moved to disqualify the defense counsel because
5 the defense counsel represented a cooperator previously or
6 there is some question about the funding, something like that.
7 It is a hundred percent clear that the attorney, with a
8 potential conflict, can participate in the litigation of that
9 conflict.

10 There are two other things which I think come out of
11 that authoritative case. One of them is the importance of
12 independent counsel, which Mr. Binalshibh has, but the
13 military commission has denied for Mr. al Baluchi, but remains
14 pending in 292SS; and third [sic], the importance of a knowing
15 and voluntary waiver of a conflict, because the only reason
16 why that case was not reversed on appeal is because all of the
17 facts had been disclosed to the defendant, and the defendant
18 had made a knowing and voluntary waiver of the possible
19 conflict.

20 Now, standing against this case is no case whatsoever
21 that the government has ever cited, saying that an attorney
22 who is investigating the possibility of a conflict cannot
23 participate in that litigation. In fact, Holloway itself, the

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1 seminal case on this question, says that it is counsel's
2 responsibility to bring it to the attention of the court. And
3 given that responsibility, it seems impossible that the lawyer
4 would not participate in telling the court what little -- or
5 whatever it is, it may be a lot that he or she knows.

6 But I also checked this issue -- I'm slowing down --
7 under the ethical rules, and in fact the ethical rules under
8 the comments to 1.7, Model Rule 1.7 and State Rule 1.7, I do
9 have something to say about this.

10 My own home bar, which is Virginia, has Comment 8 to
11 Virginia Rule of Professional Conduct 1.7, which is based on
12 ABA Model Rule 1.7, which explicitly says a possible conflict
13 does not itself preclude the representation. The critical
14 questions are the likelihood that the conflict will eventuate,
15 and if it does, whether it will materially interfere with the
16 lawyer's independent professional judgment in considering
17 alternatives or foreclose courses of action that should
18 reasonably be pursued on behalf of the client.

19 That commentary to the rule makes it clear that the
20 lawyer, as the person who has the primary ethical
21 responsibility for determining whether they themselves have a
22 conflict from an ethical, not a Sixth Amendment, point of
23 view, made clear that the attorney can participate.

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1 The ABA Model Rule commentary is to the same. The
2 Comment 2 to Model Rule 1.7 says that, "Resolution of a
3 conflict of interest problem under this rule requires the
4 lawyer" -- that is the participating lawyer, the person who
5 has the potential conflict -- "to, one, clearly identify the
6 client or clients; two, determine whether a conflict of
7 interest exists; three, decide whether the representation may
8 be undertaken despite the existence of a conflict, i.e.,
9 whether the conflict is consentable" -- that is, waivable --
10 "and four, if so, consult with the clients affected under this
11 paragraph and obtain their informed consent confirmed in
12 writing."

13 Both the Sixth Amendment analysis out of the
14 D.C. Circuit and the ethical rules make it clear that a lawyer
15 can participate in the determination of a potential conflict
16 and the SRT's position to the contrary, which is the basis of
17 its entire claim that the court needs to decide the conflict
18 before it orders discovery, simply is not viable.

19 Now, on many occasions the Special Review Team has
20 promised to provide discovery to conflict-free counsel. I
21 will reference just, as one example, AE 292BB, in which the
22 Special Review Trial Team recognizes that the defense may be
23 entitled to discovery and is prepared to respond to discovery

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1 requests made by conflict-free defense counsel, including
2 providing the defense with appropriate counsel.

3 Now, why is discovery important? We actually have a
4 case, not from the D.C. Circuit but from the D.C. District,
5 that discusses that question as well. That case is United
6 States v. Bikundi found at 80 F.Supp. 3rd 9, a D.C. District
7 case from 2015 after most of the briefing in this case was
8 concluded.

9 And Bikundi was a successive representations case in
10 which the defense counsel had previously represented another
11 witness in the case and so although it bears a
12 representation -- I mean, it bears a resemblance to the
13 problem we face of a completed investigation, it was a
14 previously completed representation. And like many of the
15 cases, the government in that case moved to disqualify the
16 attorney and the District Court -- but because it was the
17 government who was moving to disqualify, the defense said,
18 well, it's a waivable conflict and proffered a waiver, a
19 knowing and voluntary waiver from the defendant.

20 And what the District Court said in Bikundi, which
21 was upheld in an unpublished decision from the D.C. Circuit,
22 that the waiver was involuntary because of the things that the
23 defendant did not know about the completed prior

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1 representation. The analogy to this case is strong in that
2 there was a completed prior investigation here and the
3 defendant himself knows very little about what actually
4 happened.

5 There was a comment yesterday that the Special Review
6 Team assumed that we had fully -- that we had provided the
7 contents of AE 292TTTT to the defendants when, in fact, we had
8 not, because 292TTTT was unsealed only an hour before that
9 commentary by the Special Review Team was made.

10 And the District Court in Bikundi was clear, and I
11 just want to give just a couple of quotes from that case.
12 "Serious questions arise, however, about how fully informed
13 the defendant can be regarding the circumstances of the
14 defense lawyers' prior representation because given the prior
15 client's refusal to waive his secrets and confidences." A
16 closed source of information is very analogous to what we have
17 here.

18 And the reason why the conflict continued to affect
19 the current representation, even though the prior
20 representation was complete, was, "When the current defendant
21 discovers all that the lawyer has kept secret from him in the
22 course of discovery and in preparation for trial, his trust
23 and confidence in her may be adversely affected."

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1 In the analogy that I began this argument with,
2 that's the question: What don't I know? That was the second
3 question: What actually happened here? What don't I know?
4 And the District Court for D.C. has relied very much on that
5 same reasoning.

6 If the military commission is struggling -- as I
7 thought I perceived yesterday, though I don't always know --
8 with the question of how does a completed investigation become
9 a continuing conflict, this Bikundi case explains it. Because
10 there are still unknowns that may crop up later when those
11 become known, the defendant will obviously feel betrayed, feel
12 that he didn't have all the information and that he might have
13 made -- chosen a different course of action.

14 Now, what are the actual discovery requests which are
15 pending in this case? The first discovery request was made on
16 10 July of 2014. And when I say "first discovery request," I
17 mean the ordinary course -- discovery course. When this issue
18 first came up in April of 2014, we filed AE 294 -- 292D which
19 sort of short-circuited the process, and that is what was
20 denied in AE 292QQ.

21 But post, after that situation, the first discovery
22 course -- request in the ordinary course of business was
23 DR-180-AAA on 10 July 2014. It requested five -- made five

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1 discovery requests and breaks them down into, you know,
2 extraordinary detail, which I won't go into here. But the
3 five broad requests are: Number one, what was the inception
4 of this investigation? Number two, what was the authorization
5 for this investigation? These two questions fall into the
6 what were you thinking category.

7 The second -- excuse me, the third request in DR-180,
8 which is found as Attachment B to 292VV (AAA Sup) was what
9 were the results of those investigations? What were the 302s
10 which came out of the FBI? What happened in that
11 investigation, which comes up to the second question I asked
12 in this analogy, which is what actually happened here.

13 The fourth and the fifth discovery requests went to
14 what communications have occurred with the prosecution team
15 and what communications occurred regarding what I thought at
16 the time and still suspect might have played a role was the
17 inception of the investigation, which is our classification
18 review request CR-108-AAA. Those go to the third question I
19 used in my analogy, which is: How can I trust you ever again?

20 The Special Review Team and the regular prosecution
21 responds to those. Those responses are found in the record at
22 292VV (AAA Sup) Attachments C and D. The Special Review Team
23 denied our request, refused to respond to our requests 1

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1 through 4. The regular prosecution refused to respond to our
2 request 5.

3 After this the military commission may recall the
4 trial counsel, General Martins, amended the scope of
5 responsibility of the Special Review Team to give them
6 responsibility for all things 292-related, so that sort of
7 split response would not happen again.

8 They asked -- the Special Review Team asked in AE
9 292VV (AAA Sup) Attachment C, so we must assume at this point
10 that, "Because you are insisting on discovery, that you no
11 longer assert that you were operating under a conflict of
12 interest. If that is not the case, please let us know."
13 Well, we let them know.

14 On 7 August 2014 we provided an explanation to the
15 Special Review Team in DR-108A-AAA, that the bases for the
16 discovery requests were both the historical violation of the
17 right to counsel and the question of the current conflict of
18 interest.

19 Now, what we learned after that on 23 September 2015,
20 when the -- after the issuance of 292WWW in the unsealed
21 AE 292TTTT, was that at least three former Ramzi Binalshibh
22 defense team members had allegedly information -- passed
23 information to unauthorized third parties.

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1 Now, we suspect that one of those former Ramzi
2 Binalshibh defense members was Mr. Cruz, also described as
3 person A -- although that's simply our argument. Mr. Cruz has
4 never been confirmed to be person A -- who participated in two
5 separate investigations with the al Baluchi defense team.

6 In TTTT, the Special Review Team asked the military
7 commission, as its path forward, to discuss with independent
8 counsel for Binalshibh as well as all other defense counsel
9 for other defendants what discovery, if any, needs to be
10 provided to litigate the conflict of interest issues.

11 So we took them at their word on that, and on that
12 same day, 23 September 2015, provided three follow-up
13 requests. The first of those was DR-180B-AAA, which were
14 documents that we could tell from 292TTTT that existed; the
15 second of those was DR-180C-AAA, which were witnesses which
16 were apparent from 292TTTT; and the third was DR-180D-AAA, the
17 firewall information apparent from 292TTTT.

18 The first of those requests go to what actually
19 happened here, the last of them goes to the question of how
20 can we ever trust you again. Both of those, all of those
21 documents are attachments to 292VV (AAA 2nd Sup), and I
22 informed to the court yesterday that the response from the
23 Special Review Team refusing to provide the documents is

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1 attached to AE 292CCCCC (AAA) Attachment B.

2 Now, what is the materiality of this matter? There
3 are two separate bases for materiality. One of those is
4 conflict, and one of those is historical violation of the
5 defense camp. There are at least three and probably four
6 investigations that these discovery requests address.

7 MJ [COL POHL]: Mr. Mohammad, I don't mind you discussing
8 with your co-accused, but please keep your voice down.

9 Thank you.

10 Go ahead, Mr. Connell.

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

12 The first is the full investigation into the linguist
13 for Mr. Mohammad's team; the second is the preliminary
14 investigation into Mr. Binalshibh's linguist; and the third is
15 described in TTTT as a preliminary, but I am not sure if it
16 stopped there or not, investigation to review allegations into
17 the full Binalshibh defense team including counsel of record.

18 We know that that third investigation involved
19 reach-back. It involved access at first to limited and
20 finally to the full file, including the privileged information
21 from the second investigation, the investigation into
22 Binalshibh team as a whole reached back to the closed
23 investigation into the Binalshibh linguist.

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1 We know that it involved at least four agencies:
2 Washington Headquarters Service, the Under Secretary of
3 Defense for Intelligence -- five, the Department of Justice,
4 the FBI and the U.S. Attorney's Office for the Northern
5 District of Illinois.

6 The discovery request that we had made regarding the
7 inceptions of the investigation, the communications and the
8 apparent documents and witnesses clearly go, not just to the
9 historical violation of invasion of the defense camp, but to
10 the conflict itself.

11 With respect to the larger -- the other discovery
12 question, which is the one the Special Review Team keeps
13 focusing on, the Weatherford v. Bursey question, as
14 interpreted by the D.C. Circuit in United States v. Kelly, 790
15 F.2d 130, D.C. Circuit 1986, the information that the Special
16 Review Team needs to turn over addresses all of the so-called
17 Kelly factors. The four factors which are contained within
18 Weatherford v. Bursey, it goes to the intentionality of the
19 invasion of the defense team. It goes to the actual affect on
20 the defense team.

21 And with respect to actual effect, it not be lost on
22 the military commission that on the record this week are the
23 fact that at least three various defense team members are --

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1 one for Mr. Mohammad's team, one for Mr. Bin'Attash's team and
2 one counsel of record for Mr. Binalshibh's team, are missing
3 from the courtroom as a result of some kind of security
4 clearance problems.

5 And finally, the fourth Kelly factor, that of a
6 firewall between the investigating authority and the regular
7 prosecution team, at least three of our discovery requests go
8 to that question.

9 The fundamental question that somebody is eventually
10 going to have to answer, whether you describe it as
11 representational or conflict, is: Can this relationship
12 between Mr. Binalshibh and his attorney continue? And in
13 order for Mr. Binalshibh and, for that matter, his defense
14 team to make an informed decision about that, they have to
15 have the discovery. So the order has to be information, then
16 decision; not decision, then information.

17 Thank you.

18 MJ [COL POHL]: Thank you.

19 Any other counsel want to be heard on the discovery
20 component? Defense? Okay.

21 LDC [MR. NEVIN]: Your Honor, I don't want to argue it,
22 but I do want to point out to the military commission that
23 there are some documents marked as ex parte and sealed, which

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1 were provided apparently -- according to the filings
2 inventory, were provided to the military commission in secret
3 that have not been provided to us, which are not referred to
4 in Mr. Campoamor's 292TTTT laying everything out, and they are
5 also not referred to in 292YYYY, the AAA team's motion to see
6 everything that was provided in secret.

7 And I want the military commission to be aware of
8 that. I can provide that at an appropriate time so that we
9 have a comprehensive list.

10 MJ [COL POHL]: Okay.

11 STC [MR. CAMPOAMOR-SANCHEZ]: Thank you, Your Honor. I'll
12 be very brief.

13 So I first want to start by responding to Mr. Connell
14 regarding the Lopesierra v. Gutierrez case. Mr. Connell has
15 cited this case to you as very analogous to this one and as
16 providing support for his claim that discovery must come
17 first.

18 Well, as it happens, a member of the Special Review
19 Team, Mr. Vijay Shanker, Special Trial Counsel, is the person
20 who actually argued Lopesierra in the D.C. Circuit Court of
21 Appeals. And there is not a single line in this case,
22 Mr. Connell, that would stand for the proposition that
23 discovery must be provided on the underlying details of an

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1 investigation before a decision can be made on the conflict.

2 There is none.

3 In fact, to the contrary. And what's being lost in
4 all this is the argument that Mr. Connell is trying to make to
5 this court is that an attorney with a waivable conflict can
6 participate in the argument. Well, yeah, that's true, because
7 of course in the majority of those cases, unlike this one, the
8 attorneys are claiming that they do not have a conflict of
9 interest. They are actually taking the opposite position.
10 Here we actually have defense attorneys who are saying, "I'm
11 sorry, Your Honor, I may have a conflict," and we keep trying
12 to tell them, "No, you do not, the investigation is closed.
13 You have the information that you need." And that is a very
14 important distinction.

15 In fact, in the whole list of cases cited by the
16 defense or the Special Review Team previously, there is not a
17 single one that discusses discovery as an issue in resolving
18 any of those cases. In fact, to the contrary. As we had
19 cited in our cases, in the Lafuente case that Mr. Nevin and I
20 love to go back and forth about, as the court may recall, the
21 court said as to other decisions, the government could obviate
22 the need for an evidentiary hearing by simply confirming, you
23 know, through declaration, the existence or nonexistence of an

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1 investigation. We have done that. We in fact have done more
2 than that.

3 And so this whole argument that I can argue I have a
4 conflict but I want you to tell me all the details is not
5 supported by any case law on the record, and it doesn't make
6 sense because the issue to be decided is if there is a
7 conflict, it's because there is an investigation. The details
8 of that investigation are not going to matter.

9 And I obviously maybe overstayed my welcome with the
10 court. I am happy to argue this issue or answer any questions
11 the court may have. And ultimately the court may disagree.
12 But there is not a single case to support this novel
13 proposition that they are trying to have the court adopt. We
14 have always been willing to address discovery. The reason we
15 haven't was, on the one hand, the MOU issue; on the second
16 hand, the conflict issue.

17 Again, we respectfully suggest that the commission
18 can resolve the conflict issue and then the discovery issues
19 will be resolved. Thank you.

20 MJ [COL POHL]: Thank you.

21 Last but not least, Colonel Pitvorec, do you want to
22 be heard on this issue? You don't? Okay.

23 I have considered everything that people have

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1 submitted in writing. I have considered all the arguments,
2 and on this issue the court rules as follows:

3 The commission finds that the SRT representation is
4 that the investigation is complete and closed and no further
5 action will be taken on the investigation by any entity of the
6 United States Government. Based on that representation, the
7 commission finds that there is no actual conflict of interest
8 or potential conflict of interest with regard to
9 Mr. Harrington and his team.

10 The commission adheres to its previous ruling on
11 AE 292QQ for the other defense teams and accordingly denies
12 both AE 292RR and 292SS, the two motions for reconsideration.

13 However, the commission does direct the SRT to serve
14 discovery related to AE 292 on any team that the discovery is
15 relevant to, including but not necessarily limited to
16 Mr. Harrington and his team.

17 After reviewing the discovery, if the defense
18 believes there is need for the commission to be involved in
19 any representational issue, they are to file an appropriate
20 motion. In the absence of said motion, the commission will
21 assume defense counsel, including independent defense counsel,
22 will comply with all professional requirements. A written
23 order will be issued in due course.

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1 That being said, we will recess for 20 minutes with
2 the understanding that if counsel needs a little more time for
3 the various issues that have come up, let me know before the
4 20 minutes are up. And, Ms. Bormann, make sure you alert the
5 prosecution team of the interpreter issue. Okay.

6 The commission is in recess.

7 [The R.M.C. 803 session recessed at 0958, 26 October 2015.]

8 [The R.M.C. 803 session was called to order at 1050,
9 26 October 2015.]

10 MJ [COL POHL]: The commission is called to order. All
11 defense counsel are again present that were present when the
12 commission recessed.

13 Stand by, Mr. Harrington, for a second -- I'm sorry,
14 accounting for the parties?

15 LDC [MR. HARRINGTON]: Sir, Major Wichner is not here.
16 She will be here in just a second.

17 MJ [COL POHL]: Trial Counsel, is the same trial team here
18 as the last time we met with the regular counsel?

19 CP [BG MARTINS]: Your Honor, Ms. Tarin is absent. Other
20 than that, everyone else is the same.

21 MJ [COL POHL]: Okay. Major Wichner has just joined us.

22 During the recess I received an ex parte under-seal
23 motion that changes some circumstances with regards to 380.

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1 Ms. Bormann, do you wish to be heard?

2 LDC [MS. BORMANN]: Mr. Bin'Attash advises me that he is
3 ready to proceed to a colloquy with Your Honor about his pro
4 se rights. I advised him that in my professional opinion that
5 would be premature because I have learned of matters that
6 directly relate to what those pro se rights are and have
7 affected my ability to advise him properly and your ability to
8 advise him properly. Those matters need to be investigated,
9 and Mr. Bin'Attash needs to be advised of them.

10 He does not know of everything because I don't know
11 of everything, and so his decision is ill-informed at this
12 point. And so I am asking for time to be able to properly
13 inform him, over his objection.

14 MJ [COL POHL]: Okay. How much time do you want?

15 LDC [MS. BORMANN]: I at least need -- well, I don't know
16 how long the investigation is going to take. We have some
17 difficulties there, but I at least need to speak with him and
18 do some preliminary investigation over the next couple of
19 days.

20 MJ [COL POHL]: Let me make -- let's back up on this, just
21 so it is clear. I understand there are certain matters that
22 you want to keep confidential.

23 LDC [MS. BORMANN]: They are related to team work product,

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1 frankly.

2 MJ [COL POHL]: I understand that. But just as a
3 sequencing thing, this additional information that you need to
4 come up to -- or need to investigate, basically came up over
5 the weekend?

6 LDC [MS. BORMANN]: Yes. Friday they came to a head.

7 MJ [COL POHL]: And it impacts on the internal team?

8 LDC [MS. BORMANN]: Absolutely.

9 MJ [COL POHL]: Okay. Okay.

10 LDC [MS. BORMANN]: And may eventually result in my
11 withdrawal, but at this point there is, you know ----

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

13 ACC [MR. BIN'ATTASH]: [Speaking in Arabic, no audible
14 translation.]

15 MJ [COL POHL]: Am I getting a translation?

16 ACC [MR. BIN'ATTASH]: I am ready for -- I am ready to
17 discuss Motion 380. I don't need any additional advice from
18 my attorney. All I request is a closed session with ex parte
19 because I have information related to that defense strategy
20 and it's considered privileged information. And I have no
21 problems with attending any hearings -- **[Speaking in English]**
22 for the other teams. **[Interpretation resumed]** I have no
23 problem with other teams attending the rest of the hearings.

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1 MJ [COL POHL]: Mr. Bin'Attash, that's one of the reasons
2 why it's a bad idea to represent yourself, is because you have
3 conflated about three different legal principles in such a way
4 that it would make no sense to any lawyer. That being said,
5 I'm not going to go to the issue now.

6 The request of Ms. Bormann for a day-and-a-half
7 recess is granted. We will reconvene at 0900 on Wednesday.

8 Commission is in recess.

9 [The R.M.C. 803 session recessed at 1056, 26 October 2015.]

10 [END OF PAGE]

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