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1 [The R.M.C. 803 session was called to order at 0907,
2 9 February 2015.]

3 MJ [COL POHL]: The commission is called to order.
4 Government, who is here representing the United
5 States this morning?

6 STC [MR. DRISCOLL]: Good morning, Your Honor. Kevin
7 Driscoll and Fernando Campoamor of the Special Review Team for
8 the United States.

9 MJ [COL POHL]: Thank you.

10 Mr. Nevin?

11 LDC [MR. NEVIN]: Major Poteet and Mr. Sowards.

12 MJ [COL POHL]: Ms. Bormann?

13 LDC [MS. BORMANN]: Major Swensen, Captain Schwartz and
14 later on today, if we get further on, there will be an
15 additional lawyer who will just be assisting me.

16 MJ [COL POHL]: Okay. And I'm going to skip you,
17 Mr. Harrington, because we have some changes. I will come
18 back to you.

19 Mr. Connell?

20 LDC [MR. CONNELL]: Lieutenant Colonel Thomas and I are
21 here, Your Honor.

22 MJ [COL POHL]: Mr. Ruiz?

23 LDC [MR. RUIZ]: Lieutenant Colonel Gleason, Colonel

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1 Williams and myself, Walter Ruiz.

2 MJ [COL POHL]: Mr. Harrington, who is here for
3 Mr. Binalshibh?

4 LDC [MR. HARRINGTON]: Judge, in addition to me is
5 Lieutenant Commander Bogucki, Major Alaina Wichner and Major
6 Mark Balfantz. Sorry, Judge, and Commander Tri Nhan.

7 MJ [COL POHL]: Commander Bogucki, my understanding you
8 have a request before the commission to withdraw; is that
9 correct?

10 DDC [LCDR BOGUCKI]: Yes, Your Honor. Pursuant to
11 Appellate Exhibit 346(RBS) I respectfully request to be
12 excused from further participation in the commission.

13 MJ [COL POHL]: It is the commission's understanding you
14 are retiring from active duty; is that correct?

15 DDC [LCDR BOGUCKI]: That's correct, sir.

16 MJ [COL POHL]: Mr. Binalshibh, do you consent to
17 Lieutenant Commander Bogucki withdrawing as one of your
18 counsel in this case?

19 ACC [MR. BINALSHIBH]: Yes, I did. I have some problem to
20 get the translations, complete translations, so I have my
21 interpreter, [REDACTED]. But the problem is I cannot
22 trust him because he was working at the black site with the
23 CIA and we know him from there.

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1 MJ [COL POHL]: Mr. Binalshibh, we will get to that in
2 just a second. I will go over your attorney rights, and then
3 we will come back to that in a minute.

4 Major Wichner, is that the right pronunciation?

5 ADDC [MAJ WICHNER]: Wichner.

6 MJ [COL POHL]: Wichner.

7 Please put your detailing qualifications on the
8 record.

9 ADDC [MAJ WICHNER]: Yes, Your Honor. Major Alaina
10 Wichner. I have been detailed to this military commission by
11 the Chief Defense Counsel. I am qualified and certified under
12 Article 27(b) Uniform Code of Military Justice and Rules for
13 Military Commission 502 and 503. I have previously been sworn
14 under Uniform Code of Military Justice under Article 42(a). I
15 have not acted in any way that might tend to disqualify me in
16 this proceeding. My detail letter is marked
17 Appellate Exhibit 004H.

18 MJ [COL POHL]: Thank you. Mr. Binalshibh, do you also
19 consent to Major Wichner as being one of your defense counsel
20 in this case?

21 ACC [MR. BINALSHIBH]: Yes.

22 MJ [COL POHL]: Thank you. Now, as far as the issue with
23 the interpreter, Mr. Harrington, is there something you want

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 me to address with that or do you wish to address it inside
2 the defense team and then come back to me later?

3 LDC [MR. HARRINGTON]: Judge, this is a new development
4 and we would ask the court if we could have five minutes among
5 the defense counsel if we could.

6 LDC [MS. BORMANN]: Judge, we have exactly the same issue.
7 My client relayed to me this morning that there is somebody in
8 this courtroom who was participating in his illegal torture.

9 MJ [COL POHL]: Okay. And you first became aware of this
10 when we convened today?

11 LDC [MS. BORMANN]: Just three minutes ago.

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

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

14 MJ [COL POHL]: Mr. Connell, I got three yeses, I don't
15 really need to have any more. Okay. The commission will be
16 in recess for 15 minutes. We will reconvene at 0920. The
17 commission is in recess.

18 [The R.M.C. 803 session recessed at 0911, 9 February 2015.]

19 [The R.M.C. 803 session was called to order at 0933,

20 9 February 2015.]

21 MJ [COL POHL]: The commission is called to order. All
22 parties are again present that were present when the
23 commission recessed.

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1 Commander Bogucki, are you going to want to continue
2 to represent him, Mr. Binalshibh, for this week of sessions?

3 DDC [LCDR BOGUCKI]: Not present in the court, Your Honor.

4 MJ [COL POHL]: Okay. You are free to leave if you wish
5 to.

6 DDC [LCDR BOGUCKI]: Thank you.

7 MJ [COL POHL]: With regards to that issue that
8 necessitated the recess, do we need to discuss it further?
9 Mr. Connell?

10 LDC [MR. CONNELL]: Sir, I believe that the regular
11 prosecution should be here ----

12 MJ [COL POHL]: I got that piece. No, that's not my
13 question.

14 LDC [MR. CONNELL]: I believe it requires further
15 discussion and the government may have a position as to
16 whether that occurs in closed or open court.

17 MJ [COL POHL]: Okay. Let's do this. I agree, it has to
18 be the regular prosecution team. I'm going to excuse the
19 Special Review Team. However the connection is made, I would
20 like the regular prosecutors to come here. From what you
21 said, Mr. Connell, you think it would be helpful if you
22 discussed it with them before we went on the record?

23 LDC [MR. CONNELL]: I don't know if they are watching, I

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1 don't know what they know.

2 MJ [COL POHL]: Neither do I. I don't know what they
3 know. Let's do this. I don't know where they are. It is now
4 0925. We will reconvene at 1030. The commission is in
5 recess.

6 The commission is not in recess.

7 STC [MR. CAMPOAMOR-SANCHEZ]: Just one quick point,
8 Your Honor, minor, but I wanted the record to reflect that
9 independent counsel for Mr. Binalshibh has been here all
10 morning, Lieutenant Colonel Pitvorec. I don't believe that
11 was placed on the record.

12 MJ [COL POHL]: I don't think it was either, but I
13 appreciate that.

14 The commission will be in recess.

15 [The R.M.C. 803 session recessed at 0933, 9 February 2015.]

16 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1040,
2 9 February 2015.]

3 MJ [COL POHL]: The commission is called to order. All
4 parties present when the commission recessed are present with
5 the exception we have switched out the prosecutors. Who is
6 here to represent the government on this issue, please?

7 CP [BG MARTINS]: Your Honor, representing the government
8 are myself, Brigadier General Mark Martins, Mr. Robert Swann,
9 Mr. Ed Ryan, Mr. Clay Trivett, Ms. Danielle Tarin, Ms. Nicole
10 Tate, and also present at counsel table is Detective Patrick
11 Lantry, if he is at counsel table -- no, he is in the
12 courtroom.

13 I should also state these proceedings are being
14 transmitted to closed circuit sites pursuant to the judge's
15 order.

16 The special trial counsel detailed for the 292
17 litigation are absent.

18 MJ [COL POHL]: Okay. General Martins, are you familiar
19 with what the issue is that came up earlier?

20 CP [BG MARTINS]: Your Honor, may I move to the lectern?

21 MJ [COL POHL]: Sure.

22 CP [BG MARTINS]: Your Honor, we are aware -- we have
23 become aware of more than one accused recognizing somebody in

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1 the courtroom at the last session. We have met with defense
2 counsel, conferenced this issue in an attempt to determine
3 what the recognition was, who was it, and have obtained some
4 information from them.

5 We, having done due diligence as a government under
6 the 292 litigation, can assure that there is no attempt to
7 have someone be put into the defense teams in any sort of
8 untoward way, but we do want to collect the facts and
9 understand what the situation is -- would propose that we make
10 filings on this matter with regard to it and to do that
11 through a filing process with an accelerated timeline to do
12 so.

13 MJ [COL POHL]: So the government -- the way ahead today
14 is what, then?

15 CP [BG MARTINS]: My understanding is this individual is
16 no longer in the courtroom and that we at this point, through
17 written filings, determine how we can sort out the situation.
18 There may be a need for the commission to rule under 806 that
19 a portion of this be in a closed session to discuss, and that
20 in order to sort that out, the best way to do it, in light of
21 the sensitivity, is to actually do it in writing.

22 MJ [COL POHL]: Thank you.

23 Defense? Now, understand that we are in an open

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1 session here.

2 LDC [MR. NEVIN]: I understand that.

3 MJ [COL POHL]: Okay. I'm assuming everyone has the
4 classification guidance. So with that being said, Mr. Nevin.

5 LDC [MR. NEVIN]: Your Honor, two requests: One is that
6 we stop until we can sort this out, figure out what exactly is
7 going on here and how extensive the problem is. That's one
8 request. And the second is that the military commission order
9 that this person remain on the island and be made available to
10 us for an interview.

11 We have due diligence we need to do here in order --
12 for many reasons that I think are probably obvious and don't
13 need to be stated, but we have an obligation to come to
14 understand this as best we can, and I think the military
15 commission can assist us in doing that in that way. But I
16 don't know how we go forward at this point until we get this
17 understood, and that's our request.

18 MJ [COL POHL]: General Martins?

19 CP [BG MARTINS]: Your Honor, I recommend we do this in
20 filings, and if there is a request for witnesses, for other
21 access, for that to be in written filings. I would state that
22 at this point this is something that we understand affects
23 more than one accused and thus that we should not be dealing

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1 with the 292 right now and turn to this.

2 MJ [COL POHL]: Well, what I hear Mr. Nevin says is they
3 want some time to interview this person and then to determine
4 kind of the way ahead. In normal written filings, I mean, the
5 normal filing schedule is, you know, three weeks. I'm not
6 sure we are talking -- I hope we are not talking here three
7 weeks.

8 CP [BG MARTINS]: We would seek to file something today.
9 We are all here. We are all on the job, and we would seek to
10 have an accelerated schedule.

11 MJ [COL POHL]: Is this individual available to be
12 interviewed?

13 CP [BG MARTINS]: We were just collecting information
14 here. We believe we will have something we can provide the
15 commission and counsel soon and that we ought to determine
16 from that what the next steps are. I fully understand
17 counsel's desire to sort this out.

18 MJ [COL POHL]: Well, it would seem to me -- again, I
19 don't anticipate spending three weeks on this, but I don't
20 anticipate spending a lot of time on issues I spend a lot of
21 time on. But that's okay.

22 It strikes to me that both sides need to develop some
23 of the facts in this thing for this issue, so it strikes to me

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1 is that if we give you today to file, tomorrow for both sides,
2 today and tomorrow to look into it, and then we meet again
3 Wednesday morning and hopefully we can resolve it or at least
4 see where we are at, would seem to be a reasonable schedule
5 that will at least get this started and perhaps completed. If
6 not, again, that's the way it goes.

7 But I do -- there may be a myriad of reasons of why
8 this individual may or may not wish to be interviewed by the
9 defense. I am not going to speculate on what that is, but he
10 should be made available to be interviewed. If he has a
11 reason why he should not be, then that should be an additional
12 filing from the government, because I am assuming that this is
13 a -- the infirmity here comes back to potential service with
14 the government.

15 Does that make sense, General Martins?

16 CP [BG MARTINS]: May I confer before we conclude?

17 MJ [COL POHL]: Sure.

18 CP [BG MARTINS]: Your Honor, we will file something by
19 today, and that sounds like an appropriate way to proceed.

20 MJ [COL POHL]: Okay. Mr. Nevin?

21 LDC [MR. NEVIN]: Yes, thank you, Your Honor, that's ----

22 MJ [COL POHL]: And, again, we will reconvene at 0900 on
23 Wednesday just to see where we are at, and then if we need to

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1 do more -- and of course I'm not going anywhere, so if we need
2 to meet tomorrow, we certainly can, if that's possible, at
3 least as an 802, if necessary.

4 LDC [MR. NEVIN]: Right. And I was just going to ask
5 whether the commission would order as it has previously that
6 we have the opportunity to meet in the courtroom with
7 Mr. Mohammad for the rest of the day.

8 MJ [COL POHL]: The rest of the day being until when?

9 LDC [MR. NEVIN]: 17. And I raise ----

10 MJ [COL POHL]: What time is the afternoon prayer? 16.

11 LDC [MS. BORMANN]: 1530.

12 MJ [COL POHL]: 1530? Okay. Through the afternoon
13 prayer, and then they are going to release them, okay?
14 Because you will have all day tomorrow if you need to talk to
15 them. I know there is an issue of whether -- but let's see
16 where we are at.

17 LDC [MR. NEVIN]: And this is one that Mr. Mohammad is
18 uniquely involved in ----

19 MJ [COL POHL]: Understand.

20 LDC [MR. NEVIN]: ---- the litigation, so to go out to the
21 camps and back and run ----

22 MJ [COL POHL]: I gotcha, but let's -- okay. But given
23 the nature of this issue, I can see why involvement of the

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1 client is perhaps more important than other issues, so you can
2 have him until 1600 ----

3 LDC [MR. NEVIN]: All right. Thank you.

4 MJ [COL POHL]: ---- and then they will do their prayers.

5 Mr. Connell -- or General Martins?

6 CP [BG MARTINS]: Your Honor, we would request that before
7 adjourning, that the accused be advised of their right to be
8 present for ----

9 MJ [COL POHL]: Okay. I will.

10 LDC [MR. CONNELL]: Sir, I want to make sure that I
11 understand what the path forward is. First, the individual
12 concerned will be made available to the defense for interview.
13 He may or may not consent to that interview, that's his
14 business. And then the filing that the government intends to
15 file, that will not be an ex parte proceeding, that will be
16 adversarial pleading? There have been an awful lot of
17 ex parte pleadings on these sorts of topics.

18 MJ [COL POHL]: General Martins?

19 CP [BG MARTINS]: Your Honor, on the first point, we would
20 request that sort itself out as we file with regard to access
21 to witnesses, we should approach it the way we approach access
22 to evidence and witnesses generally.

23 MJ [COL POHL]: Your intent is to have a filing available

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1 to both sides?

2 CP [BG MARTINS]: We intend to have a filing ----

3 MJ [COL POHL]: You are not going to file ex parte?

4 CP [BG MARTINS]: Correct. Well, we were going to sort
5 out based on the facts that we have obtained partly with
6 conference of the defense. We do intend to submit a filing
7 that is not ex parte.

8 MJ [COL POHL]: If that changes, obviously you will give
9 them notice, and we will go from there.

10 CP [BG MARTINS]: Correct.

11 MJ [COL POHL]: One second.

12 Ms. Bormann?

13 LDC [MS. BORMANN]: Thank you. With respect to
14 Mr. Bin'Attash, I just want to bring to the commission's
15 attention that it may be that General Martins and his team is
16 not the correct team to be doing their due diligence and
17 investigation, because if, in fact -- if this, in fact, is the
18 biggest coincidence ever and it has nothing to do with the
19 ongoing infiltration of defense teams, then maybe they would
20 be the right people. But if this is part of the pattern of
21 infiltration by government agencies into the defense teams,
22 then the right people to be addressing this issue are not in
23 the courtroom, and that would be the SRT.

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1 So, I mean, you know, right now you have an SRT that
2 is looking into allegations of government infiltration into
3 defense teams. They are there for a purpose. If the
4 allegations that were made earlier -- this is so difficult to
5 do in an open session without crossing the line -- are
6 accurate, and I have reason to believe that they are, just
7 based on what my client says to me, then it seems to me that
8 the SRT should be the people looking into and determining to
9 what extent that placement of an individual who has worked for
10 the government in the past is part of an ongoing scenario.

11 And I hate to be so obscure, but ----

12 MJ [COL POHL]: No, I understand.

13 LDC [MS. BORMANN]: ---- I don't want to step over that
14 line. It strikes me that there is a huge issue here.

15 MJ [COL POHL]: Yes. But ultimately who decides that?

16 LDC [MS. BORMANN]: Well, I think you do.

17 MJ [COL POHL]: No, what I am saying is both this
18 prosecution team and the SRT are aware of this issue, correct?
19 The government set up the SRT in order to avoid perhaps
20 disqualifying them from the way forward or not.

21 And so it strikes to me is that how they choose to
22 proceed is up to them, and if they choose poorly, there will
23 be a remedy later on. I just don't see why -- I think the

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1 decision was made by them originally to begin with.

2 LDC [MS. BORMANN]: This is a scenario that concerns my
3 client gravely. He was visibly shaken today. I want to get
4 to the bottom of it.

5 MJ [COL POHL]: I understand, Ms. Bormann. I understand.

6 LDC [MS. BORMANN]: Okay.

7 MJ [COL POHL]: Trial Counsel, do you have anything to say
8 on this issue?

9 CP [BG MARTINS]: Your Honor, we are aware of our
10 obligations, and we will proceed as the path forward that you
11 described.

12 MJ [COL POHL]: Okay. The commission will be in recess
13 for ten minutes, and then we will do the advice of the absent
14 accused. The commission will be in recess.

15 [The R.M.C. 803 session recessed at 1054, 9 February 2015.]

16 [The R.M.C. 803 session was called to order at 1055,
17 9 February 2015.]

18 MJ [COL POHL]: The commission will come to order. All
19 parties who were present when the commission recessed are
20 again present.

21 I would like now to discuss with each of the accused
22 their rights to be present. As all of you know, this is what
23 I do normally on the first session that we have during the

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1 hearings, and I want to go over this again with you to make
2 sure you understand it.

3 Each of you have the right to be present during all
4 sessions of the commission. If you request to absent yourself
5 from any session, such absence must be voluntarily and of your
6 own free will. Your voluntary absence from any session of the
7 commission is an equivocal waiver of the right to be present
8 during that session.

9 Your absence from any session may negatively affect
10 the presentation of the defense in your case. Your failure to
11 meet with and cooperate with your defense counsel may also
12 negatively affect the presentation of your case. Under
13 certain circumstances, your attendance at a session can be
14 compelled regardless of your personal desire not to be
15 present.

16 Regardless of your voluntary waiver to attend a
17 particular session of the commission, you have the right at
18 any time to decide to attend any subsequent session. If you
19 decide not to attend the morning session but wish to attend
20 the afternoon session, you must notify the guard force of your
21 desires. Assuming there is enough time to arrange
22 transportation, you will then be allowed to attend the
23 afternoon session.

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1 You will be informed of the time and date of each
2 commission session prior to the session to afford you the
3 opportunity to decide whether you wish to attend the session.

4 Mr. Mohammad, do you understand what I just explained
5 to you?

6 ACC [MR. MOHAMMAD]: Yes.

7 MJ [COL POHL]: Mr. Bin'Attash, do you understand what I
8 just explained to you?

9 ACC [MR. BIN'ATTASH]: Yes.

10 MJ [COL POHL]: Mr. Binalshibh, do you understand what I
11 just explained to you?

12 ACC [MR. BINALSHIBH]: Yes, I understood.

13 MJ [COL POHL]: Mr. Ali, do you understand what I just
14 explained to you?

15 ACC [MR. AZIZ ALI]: Yes.

16 MJ [COL POHL]: And, Mr. Hawsawi, do you understand what I
17 just explained to you?

18 ACC [MR. AL HAWSAWI]: Yes.

19 MJ [COL POHL]: Thank you. The commission is in recess
20 until 0900 on Wednesday.

21 [The R.M.C. 803 session recessed at 1057, 9 February 2015.]

22 [END OF PAGE]

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