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1 [The R.M.C. 803 session was called to order at  
2 1001, 18 February 2020.]

3 MJ [Co] COHEN]: The military commission is called to  
4 order. The parties are present. All right.

5 Good morning, everyone. It's good to see everyone.  
6 We had a slight delay this morning. It was important for me  
7 to make sure that Mr. Binalshibh had the opportunity to meet  
8 with his counsel this morning as the only issue on the docket  
9 is to make sure that -- is to determine whether or not to  
10 release his learned counsel, Mr. Harrington, and so we'll take  
11 that motion up there earlier.

12 Let me start with the government. General Martins,  
13 good morning. Would you like to account for members of your  
14 team here this week, sir?

15 CP [BG MARTINS]: Good morning, Your Honor. All members  
16 representing the United States remain the same.

17 MJ [Co] COHEN]: Thank you, sir. Appreciate it.

18 I think Colonel Poteet was not here last week, but  
19 otherwise, it looks like everyone is the same.

20 LDC [MR. SOWARDS]: That is correct, Your Honor. Good  
21 morning.

22 MJ [Co] COHEN]: Good morning.

23 LDC [MR. SOWARDS]: And Mr. Mohammad is present.

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1 MJ [Col COHEN]: All right. Thank you very much.

2 Ms. Bormann, good morning. It looks like you have  
3 additions to your team this week -- oh, I'm sorry.

4 LDC [MR. SOWARDS]: I'm sorry, Your Honor. Also the  
5 additional firepower is Ms. LeBoeuf.

6 MJ [Col COHEN]: That's right. She's here as well. Good  
7 to see you again, ma'am.

8 Ms. Bormann, it looks like your team also has some  
9 additions this week. And I see that Mr. Bin'Attash is here.

10 LDC [MS. BORMANN]: Mr. Bin'Attash is here. We don't have  
11 any additional counsel. It's still the same four.

12 MJ [Col COHEN]: Okay. All right. Just some additional  
13 staff. Got it.

14 Mr. Harrington, if you'd please -- I see that  
15 Mr. Binalshibh is here -- and would you please account for  
16 your team.

17 LDC [MR. HARRINGTON]: Yes, Judge. On behalf of  
18 Mr. Binalshibh, James Harrington, Wyatt Feeler, and Major  
19 Virginia Bare. Lieutenant Commander Reddick and Donna Cline  
20 are not here this week.

21 MJ [Col COHEN]: All right. Thank you, sir.

22 Mr. Connell, good morning.

23 LDC [MR. CONNELL]: Good morning, sir. On behalf of Mr.

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1 al Baluchi ----

2 MJ [Col COHEN]: I see that Mr. Ali -- or Mr. al Baluchi,  
3 is here. And if you'd account for the rest your team, please.

4 LDC [MR. CONNELL]: Yes, sir. On behalf of  
5 Mr. al Baluchi, myself, James Connell, and Major Ann Marie  
6 Bush of the United States Air Force.

7 MJ [Col COHEN]: All right. Thank you, sir.

8 All right. Mr. Ruiz, I see that Mr. al Hawsawi is  
9 here. If you'd please account for the rest of your team  
10 that's here, please.

11 LDC [MR. RUIZ]: Good morning, Judge.

12 MJ [Col COHEN]: Good morning.

13 LDC [MR. RUIZ]: We're the same.

14 MJ [Col COHEN]: All right. Thank you.

15 LDC [MR. RUIZ]: Thank you.

16 LDC [MS. BORMANN]: Judge, before we get ----

17 MJ [Col COHEN]: Ms. Bormann.

18 LDC [MS. BORMANN]: ---- to the arguments on  
19 Mr. Harrington's motion to withdraw, there are some logistics  
20 issues that Mr. Binalshibh's team, I think Mr. Connell's team,  
21 and my team need to bring to your attention.

22 MJ [Col COHEN]: Okay.

23 LDC [MS. BORMANN]: If we may have just a moment.

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1 DC [MR. FEELER]: Judge, can I approach and address the  
2 issue?

3 MJ [Co] COHEN]: You may. While you're doing that, while  
4 you're coming forward, I'll have him grab something.

5 Good morning.

6 DC [MR. FEELER]: Good morning, Judge. I just briefly  
7 want to put this on the record. As you're well aware, of  
8 course, we're getting a late start this morning. As I  
9 e-mailed, I believe in my e-mail I said due to transportation  
10 issues Mr. Binalshibh would be arriving late this morning. He  
11 did. It was, I think, a little after 9:00 when he arrived.

12 Slowing down.

13 The issue this morning, Judge, is there is currently  
14 one van available to transport the accused to court that  
15 enables them to sit upright in that van, and so that van made  
16 multiple trips back and forth to bring Mr. Binalshibh.  
17 Mr. Binalshibh did not ride in a smaller van. And this has  
18 been a recurring issue, recently especially.

19 The smaller van, I mean fundamentally, the accused are  
20 not able to sit up in it. They're scrunched down.  
21 Mr. Binalshibh tells us it's hot, it's dark in there. When  
22 they hit bumps, they hit their heads. And this is not a new  
23 issue.

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1           Just for your awareness, our team has complained about  
2 this in 2016, we complained about it in 2017, and we are  
3 preparing -- yesterday we worked up a special request that  
4 Mr. Binalshibh not be forced to ride in this van that forces  
5 him to kind of hunch over and bump his head.

6           He has needed pain medication for his shoulder in the  
7 past. Back in 2017 that was part of our complaint, that he  
8 needed pain medication when he was riding in the van. And  
9 he's had back spasms. And -- and so we are trying to work  
10 this out through other channels, but I want Your Honor to be  
11 aware.

12          MJ [Co] COHEN]: Okay.

13          DC [MR. FEELER]: It's also not just a court issue. It's  
14 not just an issue of getting him to court. It's been an issue  
15 in other respects as well. And Mr. Binalshibh has -- has  
16 missed other things because they tried to force him to ride in  
17 this van. He was, for example, late to an ICRC call.

18          So this is not just about some issue with the court.  
19 He -- it's affected his life in other ways, and it affected  
20 our meetings this week. On Sunday I was out meeting with him  
21 and the -- he had to stay an hour later after I left at  
22 Echo II because, once again, they had to take two trips with  
23 the van because the only other available van was the smaller

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1 van.

2           And JTF personnel told me at that point it was a flat  
3 tire. In fact, they showed it to me in the yard, because  
4 there are two, there are actually two vans. That's why this  
5 is not normally an issue. There are two vans that are tall  
6 enough, and they said one of them had a flat tire. The JTF  
7 guard was very nice, showed it to me. And so they took two  
8 trips. But he had to stay there an extra hour post-meetings,  
9 got back to the camp late.

10           So it's a recurring issue. And I think it raises,  
11 among other issues, logistical concerns for -- for these  
12 hearings and this trial, the fact that there is one van or  
13 there can be one van, kind of a one point of failure, that's  
14 able to adequately move the accused to court.

15           And the problem now is, you know, is the -- the  
16 possibility that the prosecution has informed me of that, you  
17 know, if Mr. Binalshibh again says I want to be transported to  
18 court in a van that he can comfortably ride in, sit up in,  
19 that there could be the possibility of a forced cell  
20 extraction if he's unwilling to either waive his appearance in  
21 court or, you know, or if he wants to ride in a van that he  
22 can sit in.

23           And I think that is -- you know, like I said, we are

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1 working on this issue with JTF, LSS, trying to work it that  
2 way, but that is an issue that certainly involves Your Honor  
3 and certainly involves the court. And I think no one wants  
4 that, but I also think beyond that, Mr. Binalshibh should not  
5 be in the position where he has to decide between, you know,  
6 an incredibly uncomfortable ride to court or a forced cell  
7 extraction, and that's essentially the position that -- that  
8 we're talking about.

9 MJ [Co] COHEN: Okay.

10 DC [MR. FEELER]: So I'm glad there was -- you know, that  
11 he was able to come later this morning. But to the extent  
12 this is a recurring issue, you know, the -- this too-small a  
13 van is not an option.

14 MJ [Co] COHEN: Okay.

15 DC [MR. FEELER]: Thank you.

16 MJ [Co] COHEN: Thank you, sir.

17 LDC [MS. BORMANN]: Judge, not to beat a dead horse, but  
18 we have a slightly different situation. So Mr. Bin'Attash is  
19 currently on painkillers because of an area of his side that  
20 was damaged -- I'm not going to talk about how, but it was.  
21 And so when he has to scrunch over, it's like being in a small  
22 confined area, and it causes excruciating pain.

23 So this morning, the other detainees were given rides

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1 in the taller van that allows them -- I mean, we're not  
2 talking like a lap of luxury. We're still talking about being  
3 shackled, still talking about all that, but a van that allows  
4 them to sit without scrunching over. And for the record, I'm  
5 bent over with my shoulders hunched in approximately, oh, I  
6 don't know, a 45-degree angle -- and where every time you go  
7 over a bump -- and, of course, you know by now that there are  
8 lots of bumps here -- you smack your head on the top of the  
9 roof because you have no control because you're shackled.

10 So we sought some solution to this issue by sending a  
11 letter, a request to JTF, about a month ago asking -- it went  
12 through the SJA's office, asking them to please rectify the  
13 situation. We understand there are enough tall vans that  
14 would allow this to happen, but nobody seems to want to either  
15 repair them or fix a flat tire, and that's a bit of a problem.

16 Then to make matters worse, this morning Mr. Swann  
17 informed me that today's situation, which would be to allow my  
18 client to come to court while sitting up and not having to  
19 smack his head over and over was a one-time deal, and if he  
20 refused to come tomorrow because he would have to get to court  
21 that way, he would -- and didn't sign what Mr. Swann referred  
22 to as a clean waiver, that he would be subject to a forced  
23 cell extraction.

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1           Let me put on the record now, Mr. Bin'Attash wants to  
2 come to court. He doesn't want to have his head smashed and  
3 be in a confined position, though, in order to get here. And  
4 so we're asking Your Honor to do something about this.

5           I asked Mr. Swann to intervene with JTF. He informed  
6 me that he was unaware of the letter and if I wanted anything  
7 to happen, I needed to let him know instead of just sending a  
8 letter to the SJA. I said to him, "Well, will you intervene  
9 with JTF?" He said he'd think about it, but I should file a  
10 motion.

11           I don't think that's the proper way to get this  
12 resolved. I don't want to have to file a motion, but I will  
13 if I have to.

14           MJ [Co] COHEN]: Okay. Thank you, ma'am.

15           Mr. Connell.

16           LDC [MR. CONNELL]: Sir, I just want to take this  
17 opportunity to connect this issue up with a few things that  
18 are already in the record.

19           MJ [Co] COHEN]: Okay.

20           LDC [MR. CONNELL]: The -- because I concur that there is  
21 a medical -- a serious medical aspect to this -- to this  
22 issue. Mr. al Baluchi this morning was transported in the  
23 larger van. On multiple occasions recently, he's been

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1 transported in the smaller van.

2 I don't have an insight into what vans are available  
3 at what time, but I do note that in AE 279C, the military  
4 commission issued an order for us to have access to what was  
5 the van at that time to take photographs of. We produced  
6 those photographs to the government on 3 September 2019, gave  
7 notice of discovery in AE 628Q.

8 What we will be doing is we can put -- that was like  
9 100 and 200, so we didn't want to produce all of those to the  
10 military commission. We can produce some photographs to the  
11 military commission, since this issue just came up, to give  
12 you a sense of what we're talking about here.

13 MJ [Col COHEN]: I think I'll just -- I think I can save  
14 you the effort on that. I think I can just -- if the smaller  
15 van is here, I'll just take a look at it when we're done here  
16 today.

17 LDC [MR. CONNELL]: Oh. That works perfectly fine, sir.  
18 Well, then let me just mention the medical issues.

19 The issue with Mr. al Baluchi's back is already a  
20 matter of record in this military commission. It's -- there  
21 have been some accommodations made. He has to travel with  
22 pillows, for example. And the pilonidal cyst was an issue  
23 that I believe on your first hearing that you came -- is an

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1 issue that we had to address that pilonidal cyst.

2 MJ [Col COHEN]: Yes, sir.

3 LDC [MR. CONNELL]: We have an ongoing dialogue with JTF  
4 about one of the issues aggravating the back pain, which is  
5 that JTF provided a CPAP machine for Mr. al Baluchi but put it  
6 in a heavy metal box and so he -- that has aggravated his back  
7 issues, and so these issues are combined. We have submitted a  
8 memorandum to JTF last Tuesday. They're trying to address  
9 this van issue.

10 We are trying to work this through ordinary channels,  
11 but since it came up today, I wanted you to make sure that you  
12 knew that this is not simply a comfort issue. It is a medical  
13 issue.

14 MJ [Col COHEN]: Okay. Thank you, sir.

15 LDC [MR. CONNELL]: Thank you.

16 MJ [Col COHEN]: Mr. Ruiz.

17 Mr. Sowards, you were too slow.

18 LDC [MR. SOWARDS]: I hear that a lot, Your Honor.

19 LDC [MR. RUIZ]: May I have a moment, Judge?

20 MJ [Col COHEN]: You may.

21 [Pause.]

22 MJ [Col COHEN]: Good morning.

23 LDC [MR. RUIZ]: Good morning, Judge.

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1           The only thing I want to say about this particular  
2 issue is that just to alert the commission, Mr. al Hawsawi  
3 actually has an order that's been entered in this case for him  
4 to be transported. We litigated this issue a while back. And  
5 the order was, in fact, entered.

6           We're working with the prosecution to get a copy of  
7 that order in its unclassified format so that Mr. al Hawsawi  
8 can have it with him, because a lot of times there's a  
9 disconnect with the camp in terms of communications and since  
10 there is turnover rather frequently, one set of -- one set of  
11 transportation group may not be completely aware of the issue.

12           So our piece in this is that we're working to get a  
13 copy of that order for Mr. al Hawsawi ----

14           MJ [Co] COHEN]: Okay.

15           LDC [MR. RUIZ]: ---- so that if there is that  
16 miscommunication in the future, he has an order that he can  
17 provide.

18           MJ [Co] COHEN]: Perfect.

19           LDC [MR. RUIZ]: We haven't been able to do that because  
20 he simply can't have it right now because it's classified, but  
21 I wanted just to make that clear on the record.

22           MJ [Co] COHEN]: Thank you. I appreciate that proactive  
23 effort to ----

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1 LDC [MR. RUIZ]: And it is something that has been ordered  
2 for him, and so I think it is within the commission's  
3 authority to do so as it deemed it necessary in other cases.

4 MJ [Co] COHEN]: Yeah. Like I said, to the extent that  
5 the parties can make that happen, that makes -- that makes  
6 sense, if -- especially if it's going to resolve any future  
7 issues.

8 LDC [MR. RUIZ]: Great.

9 MJ [Co] COHEN]: All right. Thank you.

10 Mr. Sowards.

11 LDC [MR. SOWARDS]: Thank you. Your Honor, just so you  
12 have a fuller background of this and particularly in light of  
13 what Ms. Bormann mentioned with regard to Mr. Swann's  
14 comments, I wanted you to know that Mr. Mohammad came today in  
15 the smaller, less favored van, which was not his wish.

16 He has been subjected, as you know, to various  
17 techniques and personal violations, some of which were extreme  
18 that we talked about before, and they have also left him with  
19 sequelae in the form of physical as well as emotional trauma.  
20 And so for various reasons, it is simply just as -- without  
21 the psychological aspect of it, it is physically very  
22 uncomfortable to be in that particular mode of transport.

23 But the option that he was confronted with today was

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1 either get in that van or you're not going to court. And I  
2 don't know whether there was a similar admonishment that he  
3 could not modify the waiver form to inform the judge of what  
4 was going on, if he chose not to attend, but in -- actually,  
5 in the interest of making another van available for his  
6 brother defendants, he agreed to go in the smaller van.

7 But my concern is going forward, if he were informed  
8 that one of the defendants has chosen not to attend today,  
9 rather than have the camp -- which they only respond to the  
10 instructions that they receive from the prosecution, so they  
11 don't know what the lay of the land is; I'm not at all  
12 suggesting they would do anything untoward -- but that it  
13 would be helpful that they be alerted that this isn't a matter  
14 of forced cell extractions, nor is it a matter of giving  
15 someone an ultimatum that either they go in a means that is  
16 stressful and exacerbating of their exist -- the defendants'  
17 existing medical condition, but that they permit -- be  
18 permitted to explain to Your Honor by way of the -- a waiver  
19 form or through the SJA witness why it is that they're not  
20 attending the sessions.

21 MJ [Col COHEN]: Okay. Thank you, sir.

22 LDC [MR. SOWARDS]: Thank you, sir.

23 MJ [Col COHEN]: Mr. Swann.

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1 TC [MR. SWANN]: Good morning, sir.

2 MJ [Co] COHEN]: Good morning, sir.

3 TC [MR. SWANN]: In the morning, I'm challenged with  
4 issues like this. And I know what the judge's order was. The  
5 judge issued an order that said that a clean waiver, meaning  
6 they have waived their right to attend these proceedings, and  
7 nothing else on that waiver is to be expected from me. That  
8 is my communication to the camp.

9 Now, this morning, playing musical chairs, one  
10 detainee decided he wanted to go in one van and told the  
11 guards that he had a medical condition. It's not documented  
12 anywhere that I'm aware of and there's no order from this  
13 court. There's one order from this court, and that was the  
14 order that was issued in Hawsawi's case, and we have  
15 accommodated that throughout.

16 Now, for this issue to rise its head this morning,  
17 after seven years of traveling in that van -- and I can't  
18 believe that there is an American company that built a vehicle  
19 that wouldn't accommodate somebody with headroom sitting in a  
20 vehicle. But for seven years this has been happening and  
21 there have been no complaints.

22 Now, because they see one going in one van, one wanted  
23 to travel in that van. And then when we try to accommodate

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1 that issue, another one -- in this case, Binalshibh -- says,  
2 "I'm not coming unless I get to travel in that van."

3 And I know it was important this morning that  
4 Mr. Binalshibh be here and I know what you said yesterday  
5 about not wanting to forcibly extract him. I took that to  
6 heart.

7 MJ [Col COHEN]: I appreciate that.

8 TC [MR. SWANN]: That said -- that said, we did this  
9 turn -- and what I'll call is a turn-and-burn. They brought a  
10 few people, they went back and got two more, and they came  
11 here.

12 There are -- there's a van that's down, maybe another  
13 one that's down, too. That said, this van has accommodated  
14 these folks for seven years, and yet it can't now be the issue  
15 about I have to decide or the camp has to decide or the SJA  
16 has to decide every morning that, is it a true waiver or not?  
17 There are only two choices: Waive, nothing on the document.  
18 That's what Judge Pohl's order was; that's an understandable  
19 order. Or, one, the second one is the forcible extraction.

20 No one wants to do the forcible extraction. No one  
21 wants to hurt these gentlemen. No one wants their guards  
22 being hurt. And that's what all that order was about. It's a  
23 clear choice in the morning. But you don't get to choose

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1 whether you want to come in this van or not. What's next? I  
2 don't want to come in the Camaro but I'll come in the Mustang.

3 I mean, this is turning into, quite frankly, every  
4 morning what they want. They get a trial, they get a fair  
5 trial, but they don't get to choose in the morning what they  
6 want.

7 I ask that you go ahead and take a look at this van.  
8 I think you'll come to the same conclusion, that that van is  
9 capable of bringing these individuals to court.

10 MJ [Col COHEN]: All right.

11 TC [MR. SWANN]: Now, with respect, I'd like to say  
12 another thing. I don't agree with what Ms. Bormann said this  
13 morning with respect to what the camp allows to have happen or  
14 not to have happen. There is nothing to suggest that any of  
15 these detainees' heads are being hit or -- and that the guards  
16 had anything to do with that. That's just not happening in  
17 this instance.

18 We agree that, in light of the attempts that the  
19 defense teams have made to invade the province of the JTF  
20 commander in this instance, they have to file a motion. We  
21 have to see what it says. We have to then try to take a look  
22 to see how we can accommodate it or not accommodate it, and  
23 then you make a decision one way or the other.

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1           My attempt this morning was simply one very easy way  
2 of dealing with this. Knowing that it occurred this morning,  
3 we're going to have other hearings this week, I didn't want  
4 this to have -- to delay us any further in the weeks or cause  
5 something to have to happen that didn't have to happen.

6           I asked them to come over and talk to me so they can  
7 explain to their client what the issues were. The client is  
8 fully aware of the issue about waiving or not waiving. That's  
9 the only thing I have to deal with this morning. It is so  
10 easy, that if you don't want to court -- come to court, sign  
11 the waiver. If it's because you don't want to come to the  
12 court because you don't like the mode of transportation, you  
13 don't go to work that day. They can waive it.

14           But we can't be in the business of finding out in the  
15 morning, no, I don't want to travel here, but I will travel  
16 here, or this one hour. There were no transportation issues  
17 this morning. I saw what was said. There were no  
18 transportation issues, only accused issues in this situation.

19           MJ [Co] COHEN]: All right. Thank you, sir.

20           TC [MR. SWANN]: Thank you, sir.

21           MJ [Co] COHEN]: I appreciate it. Will it be possible to  
22 see both, I guess, compare the two vans? Is that going to be  
23 an option, sir, at some point before they travel back today?

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1 TC [MR. SWANN]: I'm told they're both here.

2 MJ [Co] COHEN]: Perfect. I'll take a look at both of  
3 them. All right. Thank you for bringing that to my  
4 attention. Like I said, I will personally go observe both  
5 vans.

6 Mr. Sowards.

7 LDC [MR. SOWARDS]: I'm sorry. Just a last point.  
8 Speaking on behalf of someone who endured the smaller van, my  
9 point was earlier -- and I didn't hear Mr. Swann contradict  
10 Ms. Bormann -- that going forward the choice is either come to  
11 court or sign a waiver that doesn't inform the commission of  
12 why you're not coming to court, or face a cell extraction.

13 That's not the purpose of -- I understand, given the  
14 people they represent, they may think that's how people treat  
15 people in custody. But when we have an orderly judicial  
16 process, obviously what Your Honor wants to know is are they  
17 appearing in court? If they're not, is their appearance  
18 wholly voluntary and are they informed of their options?

19 If someone wants to inform you that he is not coming  
20 to court because they feel they cannot physically or even  
21 psychologically endure transport in a particular vehicle, you  
22 may find that completely unreasonable, and then you have  
23 certain remedies at your disposal.

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1           But that's not Mr. Swann's decision, and it's not fair  
2 for him to impose that on the fine professionals that we rely  
3 on to assist us -- who, by the way, have been immensely  
4 helpful, the guard force here in the courtroom -- who have  
5 been immensely helpful in assisting us in having our clients  
6 transported here and working out the business we need to work  
7 out.

8           I'm sorry that this gives problems for Mr. Swann or  
9 tries his patience, but there is an orderly process to be  
10 engaged in. And the only thing I was trying to clarify is  
11 that if Mr. Mohammad, unlike today, finds that it is, in fact,  
12 intolerable for him to be transported by a particular means,  
13 he has the option of informing the commission that he's not  
14 attending today and that is the reason.

15           And if Your Honor finds that that's not a valid reason  
16 or it's still a voluntary choice -- because Judge Pohl was  
17 faced with that on a number of occasions where he said, "I  
18 understand why you're not coming, that's your choice, that's a  
19 voluntary waiver." Perhaps you'll decide differently. But  
20 that's for you to decide, not Mr. Swann and some forced cell  
21 extraction team.

22           What Mr. Swann is also acknowledging is that there are  
23 at least two other vans that even the -- the guard force or

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1 JTF recognizes are preferable to the one that was being used  
2 today and how they have somehow gone out of service -- and let  
3 me tell you, as I go out to the camp to visit my client, I've  
4 often -- often -- noticed all of these broken-down Mules on  
5 the -- that have been abandoned on the side of the road. So I  
6 understand that, you know, maintaining vehicles and things  
7 down here is also a challenge. But again, that's not the  
8 clients' doing, and it's not some part of some conspiracy to  
9 make Mr. Swann's life difficult.

10 All we're asking for is an opportunity to reasonably  
11 discuss what the options are when these issues arise.

12 MJ [Col COHEN]: All right. Thank you, sir.

13 LDC [MR. SOWARDS]: Thank you.

14 MJ [Col COHEN]: Mr. Connell.

15 LDC [MR. CONNELL]: Two brief points, Your Honor. The  
16 first is that in 2015, I saw the vans which were in use at  
17 that time. There was a discussion of how long they'd been in  
18 use. And at the time the representation was, from the  
19 government, that those were the same type of vans that were  
20 used in 2006 when the men were transferred from CIA custody to  
21 here, which is, in fact, why I wanted to see them at the time.

22 I have never seen the second van. And if the military  
23 commission is going to do a site view, I wonder if it would be

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1 possible for one representative for each team to also do the  
2 site view.

3 MJ [Col COHEN]: Sure. Like I said, there won't be any  
4 discussion. I'm just going ----

5 LDC [MR. CONNELL]: Right. No discussion, just go out and  
6 look.

7 MJ [Col COHEN]: That's fine.

8 LDC [MR. CONNELL]: And the second thing is: I was a  
9 little surprised to hear the government's argument that by  
10 making a request to JTF, that we were invading the province of  
11 the commander. I've acknowledged on many occasions in this  
12 military commission that in military situations, the will of  
13 the commander, unless it interferes with the process of the  
14 military commission, is essentially law. And so on many  
15 occasions have been informed that the proper format is to --  
16 when you have a request, to fill out the Special Request Form,  
17 which is provided by the Joint Task Force, send it in on SIPR  
18 through the SJA, and they route it through the proper  
19 channels, and they give us an answer.

20 So it seems to me that that was the proceeding --  
21 that's what we followed. And by no means did I intend to  
22 invade anyone's province, but that's the -- you know, we --  
23 not every issue -- we work out so many issues. I know you

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1 hear about ones, and they seem -- some of them seem minor and  
2 some of them seem big. But we work out so many issues with  
3 JTF directly through their request process. It seems that the  
4 interests of judicial economy is not to have to file a motion  
5 about everything, but rather to follow the channels which JTF  
6 has established.

7 MJ [Col COHEN]: Following the site visit, if I feel that  
8 I need to hear from the parties, I'll specify the issue.

9 LDC [MR. CONNELL]: Thank you, sir.

10 MJ [Col COHEN]: Okay. Moving on. In the last three days  
11 my staff, at my direction, circulated two e-mails to the  
12 parties and the administrative personnel involved in this  
13 commission as part of an 802 informal discussion. The first  
14 date of 15 February 2020 notified the parties of my proposed  
15 schedule for this week, and the second, dated 17  
16 February 2020, notified them of my desire to conduct an  
17 ex parte session with Mr. Binalshibh preferably today if he  
18 was here but if he chose not to come here today to speak with  
19 you, tomorrow, sir.

20 My staff also reviewed and responded via e-mail to two  
21 scheduling queries, the recipients of all of these e-mails  
22 included all parties to the litigation.

23 Do counsel have any additions or corrections to the

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1 commission's summary of these e-mail communications? Trial  
2 counsel?

3 CP [BG MARTINS]: Not for the government, Your Honor.

4 MJ [Co] COHEN]: All right. Any defense counsel?

5 Negative response from all defense counsel.

6 Noted in my staff's e-mail communications, the purpose  
7 of today's open session is to hear oral argument on AE 761  
8 (RBS), Mr. Binalshibh's request for excusal of learned  
9 counsel, and Mr. Harrington's personal request to -- to  
10 withdraw from the case.

11 I appreciate the notices that have received about  
12 potential severance issues as no decisions have been made on  
13 that. I agree with the parties that if there is argument to  
14 be held on severance, that will be at a later date and not at  
15 this point in time. I have not issued a final ruling yet;  
16 therefore, and based on the filings that were provided, those  
17 were things that I don't think all the parties wanted to know  
18 about and have an idea on timing and those kinds of things,  
19 which makes sense, but I do appreciate the parties at least  
20 providing me a notice.

21 All right. Before we begin with oral argument, I do  
22 want to let the parties know that I appreciate their prompt  
23 filings. I appreciate the quick turnaround that

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1 Mr. Harrington gave. I appreciate the -- the very quick  
2 turnaround that the government gave, and I also appreciate the  
3 quick response via reply. That was the -- the fastest  
4 expedited process we've had on probably most motions recently.  
5 I realize that the -- and I appreciate that. It allowed us to  
6 continue on this morning.

7 Before I proceed with argument, I do want to bring up  
8 a couple of other issues here on the record, and then we  
9 can -- to the extent that the parties then need an 802  
10 conference following my -- following this, we can do so.

11 Based upon my review of the issues pending and the  
12 limited amount of time we have available this week, I intend  
13 to hear oral argument on Wednesday and Thursday for most of  
14 the day, depending on how we kind of end based on the motions  
15 that are to be argued.

16 We will have the 802 logistical brief at 0900 hours on  
17 Friday. General Martins, are you ready to proceed with that?

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

19 MJ [Co] COHEN]: Okay. And we'll proceed for a couple of  
20 hours depending on kind of where we're at. I'm not sure we'll  
21 resolve every issue, but at least we'll start a dialogue among  
22 the parties. I want to make sure we get that done. And then  
23 following that, we will be in recess. Well, actually, we're

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1 already in recess. There will be nothing. I won't take up  
2 any additional matters that afternoon.

3 With respect to oral argument on the -- I'd like to  
4 hear oral argument on the following AEs, and I'll also include  
5 a couple of AEs that have not been fully briefed, but if the  
6 parties are willing to, in lieu of perhaps filing a reply  
7 and/or filing a response, to go ahead and argue what they  
8 would like to present to me, I'm more than willing to do so.

9 I'd like to hear argument on AE 632E (MAH),  
10 AE 656 (MAH), AE 672 (MAH), AE 701 (WBA), AE 667A (KSM).

11 In addition, these are ones that have not gone through  
12 the full briefing cycle but which we could potentially take  
13 argument on, depending on the preference of the parties:

14 AE 744, I believe that's (KSM). It's titled  
15 Mr. Mohammad's Motion to Dismiss Based on the Ex Post Facto  
16 Removal of the Right to a Speedy Trial. Not sure if we can  
17 get to that one or not, but I -- if we could hear argument on  
18 it, that would be great. If we can't, I understand.

19 AE 730, which is I believe (MAH). Defense Motion for  
20 Partial Dismissal Based on Multiplicity and Unreasonable  
21 Multiplication of Charges. Once again, not fully briefed  
22 through the entire cycle, but if we could argue, I'm more than  
23 willing to hear it.

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1           Also, if the government is willing to address it, the  
2 AE 551M (AAA), it doesn't seem like a real substantive legal  
3 argument so much as just a potential interpretation of, I  
4 believe, Chapter 17 of the Regulations for Military  
5 Commission. I believe it's a subparagraph c. I can't  
6 remember the actual paragraph number, but it talks  
7 specifically about the military judge's ability to step in  
8 with respect to the release of information, filings,  
9 et cetera, on behalf of any party as well as any third party  
10 to include attorney representation of the press, et cetera. I  
11 believe that's in Chapter 17. If I'm a little off, I  
12 apologize.

13           Oh, I can look it up real quick and tell you guys.  
14 This is that crack staff that Ms. Bormann told me about  
15 earlier.

16           LDC [MR. CONNELL]: Sir?

17           MJ [Col COHEN]: Yes.

18           LDC [MR. CONNELL]: If you wind up taking argument on 730  
19 (MAH) on multiplicity and unreasonable multiplication of  
20 charges ----

21           MJ [Col COHEN]: Yes.

22           LDC [MR. CONNELL]: ---- we have a separate unreasonable  
23 multiplication of charges motion, which is 687, and it would

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1 make sense to take that up at the same time.

2 MJ [Co] COHEN]: Okay. And would you be prepared to do so  
3 if the government is ready to do so?

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

5 MJ [Co] COHEN]: Okay. Government, if you'll think about  
6 that one and let me know. That's Chapter 19, not 17, and it's  
7 paragraph -- Section 19-3, paragraph -- subparagraph c. which  
8 says that, "The military judge may resolve any dispute raised  
9 by the parties or by members of the public including news  
10 media representatives or their counsel regarding whether  
11 material presented at trial, at a hearing, or in a filing,  
12 ruling, order, or transcript may be released to the public or  
13 is not appropriately designated as protected."

14 So that seems to be the -- like I said, I will -- I'll  
15 defer to the parties. I'll give you some time to think about  
16 it. You don't have to make a decision right now.

17 But like I said, I know -- I am aware that AEs 744,  
18 730, 551M, and possibly even 687 may not have gone through the  
19 entire briefing cycle.

20 LDC [MR. CONNELL]: It has, sir.

21 MJ [Co] COHEN]: Okay. Great. Then I will -- if it's  
22 gone through the briefing cycle, then let's definitely take it  
23 up. It makes sense to take them both up at the same time.

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1 Don't have to argue it the same way, but if we could take them  
2 both up.

3 Mr. Trivett.

4 MTC [MR. TRIVETT]: Sir, just to clarify, I know that  
5 Admiral Reismeier was available for testimony every day except  
6 Friday this week. Our only concern with that is there's a 1  
7 June deadline that the commission has set for an amended  
8 convening order. That's going to be impacted by the decision  
9 as to whether or not he's disqualified or not.

10 MJ [Col COHEN]: I agree. And so what I'm thinking about  
11 doing, depending on how I rule on this motion, is I picked  
12 June out of just to give a -- a large amount of time before  
13 that, but the reality is once they're selected, they're  
14 still -- even if I was to push it, like, for example, 60 days  
15 to the right, where he didn't actually have to make a  
16 selection, it shouldn't have a significant impact on our  
17 ability to get to trial or at least given the fact that there  
18 are still four or five months before we would sit down -- at  
19 least four and a half months at that point.

20 So what I'm probably inclined to do is if I grant this  
21 motion is to -- and we don't take his testimony this week, I  
22 would want to take his testimony in June. It is also  
23 possible -- I've heard rumors, although it's not a finding of

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1 fact, that he may testify next week in another trial. If that  
2 is the case, there may be additional testimony which may be  
3 able to limit the scope of what's actually necessary for any  
4 here, and so if that could be made available, it may also  
5 reduce the amount of time that he would need to be on the  
6 stand, if he -- if that actually happens.

7 Like I said, I heard an informal rumor among the  
8 judiciary that may be the case, but we don't actually sit down  
9 and talk about our cases or their schedules, so I don't know  
10 if that's actually a fact. You guys probably have more  
11 situational awareness on that than I do, but that is also  
12 something to consider.

13 But, yeah, what I would do is I would move that to the  
14 right because that is impacted, obviously. If he was  
15 disqualified, I would not want him selecting the members, and  
16 so I will -- depending on how I rule, I would move that to the  
17 right.

18 All right. Like I said, if there's additional -- if  
19 you guys take the time while we're arguing this morning, take  
20 some additional time -- if we need to have an 802 to discuss  
21 anything else, or if you just want to put it on the record,  
22 I'm fine. I'm happy to do that as well.

23 LDC [MR. RUIZ]: Judge, we would like to have an 802, but

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1 we'd also have to have an opportunity to discuss amongst  
2 ourselves ----

3 MJ [Co] COHEN]: Absolutely.

4 LDC [MR. RUIZ]: ---- the issues. I would appreciate  
5 that.

6 MJ [Co] COHEN]: All right. We'll have an 802 for sure,  
7 then.

8 LDC [MR. RUIZ]: Thank you.

9 MJ [Co] COHEN]: Mr. Sowards.

10 LDC [MR. SOWARDS]: Thank you, Your Honor. Also, I don't  
11 know if it's best for an 802, but at some point after the main  
12 docket item today, I would like to be heard on the effect of  
13 Mr. Connell's attempt to file AE 735 which, as I understand  
14 it, has not ----

15 MJ [Co] COHEN]: Yeah, I think that's going to be  
16 premature for you all. I anticipate that I'm going to be  
17 releasing some information to you and the public that is  
18 pertinent to that matter, and I think you're going to want to  
19 have that before you finalize your briefs.

20 LDC [MR. SOWARDS]: And I appreciate that, Your Honor.  
21 And my -- my concern is that, from what I know on behalf of  
22 Mr. Mohammad as to the allegations and information in 735  
23 itself, but then also with the subsequent events of 735A and

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1 B, it would be our position that we -- we are not prepared to  
2 go forward until we actually resolve what's underlying the  
3 apparent appearance of events with respect to the government's  
4 outside communications. It raises a lot of issues with  
5 respect to the former litigation of 133, and I believe it's  
6 also 425.

7 So -- and it may be something that would be easier to  
8 discuss in an 802 and then put on the record, but however the  
9 court wishes to proceed. And I apologize, I have not filed  
10 any written pleading only because of the unsettled nature of  
11 735 itself.

12 MJ [Co] COHEN]: All right. I appreciate it.

13 Mr. Connell.

14 LDC [MR. SOWARDS]: Thank you, sir.

15 LDC [MR. CONNELL]: If we're talking about 735, I just  
16 wanted to bring to the military commission's attention that  
17 735 has not been accepted for filing. One of the reasons why  
18 I was so surprised about the government's ex parte meeting and  
19 that series of events was that -- is that even as of when we  
20 left the office this morning, 735 has not been accepted for  
21 filing.

22 MJ [Co] COHEN]: I think that's my fault. I think I'm  
23 ahead of -- I'm ahead of the game. I didn't realize it was

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1 still unaccepted either, so -- all right. I'll remedy that.  
2 I -- it must be a classification review or something. I ----  
3 LDC [MR. CONNELL]: Sir, we were informed yesterday that  
4 it had been sent for classification review, so I think your  
5 expectation is consistent, at least with the information that  
6 we've received.

7 MJ [Co] COHEN]: All right. I'll treat it currently as an  
8 accepted classified filing, and then the moment it's indicated  
9 that there is no classified information in it, it -- I will  
10 make it immediately an unclassified filing available to the  
11 public.

12 LDC [MR. CONNELL]: Thank you, sir.

13 MJ [Co] COHEN]: All right.

14 LDC [MR. SOWARDS]: And, Your Honor, one of the -- just so  
15 you have a context, one of the aspects about that that was  
16 troubling for us, given the substance of the motion itself is  
17 that, as I understand Mr. Connell's allegations, that the  
18 facts giving rise to it were things that were observed by  
19 individuals in the gallery as well as in the open courtroom.  
20 And so that has now been diverted from the regular filing  
21 process for a classification review.

22 So I think it raises one of the very issues that will  
23 be discussed with respect to our ability or inability to

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1 comply with classification guidance that is, in a sense, ad  
2 hoc.

3 MJ [Co] COHEN]: Okay.

4 LDC [MR. SOWARDS]: Thank you.

5 MJ [Co] COHEN]: I likely can rule on KSM's motions  
6 without oral argument, so -- all right. There will be --  
7 there will be information that I am -- that I am ordering  
8 released that you guys will want to see before you -- before  
9 you argue the motion.

10 LDC [MR. CONNELL]: Understood, sir. Thank you.

11 MJ [Co] COHEN]: All right. Thank you.

12 Okay. Let's go ahead.

13 Mr. Harrington, are you ready to be heard? Sir, you  
14 may have as much time as you need this morning. I'll waive  
15 the typical ten-minute rule. If you need more than that,  
16 you're welcome to argue. I'm taking up your argument, then  
17 I'll hear from the government, and then I'll hear any final  
18 response that you have.

19 LDC [MR. HARRINGTON]: Judge, I don't intend to be all  
20 that long.

21 But, as you know, this is not a motion that I prefer  
22 to be making, but I am. And it -- I'm going to touch on just  
23 -- just in this part of it on the first basis, which is the

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1 health concerns. The other part I believe has to be taken up  
2 in our ex parte meeting with Mr. Binalshibh, because it  
3 relates to attorney-client matters.

4 And I want you to know, Judge, I'm not about to drop  
5 dead in front of you right now, and I don't say that -- but  
6 you recall back in -- I think it was November when the court  
7 wanted to proceed with testimony at 7:00 at night, and I got  
8 up and made some statements that -- about my own personal  
9 circumstances.

10 And the amazing thing about that for me was that that  
11 had an impact on me, what I said, because I couldn't believe  
12 that I actually got up and said it. And after I did and I sat  
13 down, and you said, "Are you ready to go ahead," my -- every  
14 instinct in me was to say I can still go ahead, because that's  
15 the way that I've always lived my life. And I came to the  
16 realization right then that maybe that wasn't the wiser  
17 course.

18 And then from that, as you know, from the papers that  
19 were filed, I -- I saw my cardiologist in January, and he gave  
20 me some advice. And he said to me, you know, it's -- "but  
21 it's up to you." And even at that point, I said no.

22 But after the last hearings with -- that we've had in  
23 this case, with the testimony and all that, I have reached the

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1 realization that I really shouldn't continue in this case.  
2 And the first question is: Can I still work? I can still  
3 work. I'll go back to Buffalo. I essentially don't have any  
4 practice left; because of this case, I've given everything up.  
5 But I'll get cases. My partner has cases. That's not a  
6 problem. Will somebody come to me and ask me to do a trial?  
7 Maybe. Will I do a trial? I don't know.

8 I mean, there's certainly not going to be any case  
9 like this. Can I try a case that lasts a week? Probably.  
10 But I don't think I'm going to try another case. I just -- I  
11 don't think I am. I don't think it's -- it's intellectually  
12 honest to come and tell you that I'm in this circumstance and  
13 then go back and say I'm just going to take up my normal  
14 practice and continue to try cases. My intention now is,  
15 unless there's some unusual circumstances, I won't do that.

16 And we have three associates in our office, including  
17 my son, and I can help them with cases and help them prepare  
18 and maybe second chair a case or something like that, but  
19 my -- but my trial days are -- are over.

20 And, Judge, one of the things that the government  
21 brought up was that they believe that someone on our team,  
22 Vivian Hernandez, was qualified to step in. And I think that  
23 the information from General Baker pretty well, you know, said

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1 that that's not true. It doesn't mean that at some point in  
2 time in the future, given especially what she's accomplished  
3 in her very short number of years in practice, that she won't  
4 be, but she's not there. She does not meet the criteria of  
5 the American Bar Association to be learned counsel in this,  
6 nor of the rules and regulations of the commissions to do  
7 that.

8           And, Judge, part of the reason that General Baker and  
9 I submitted the information about attempts to replace me  
10 earlier -- and there were significant attempts. General Baker  
11 represented to you a number of people that he had talked to.  
12 And I had talked to many, many other learned counsel and had  
13 serious discussions with them. And it was anticipating that  
14 if this case was going on the track that it was -- and that  
15 was even before you had set a trial date on this case -- that  
16 something like this was going to happen.

17           And applications were made to the convening authority,  
18 which they rejected, to give a second learned counsel to  
19 everybody first, and then to give one to just, you know,  
20 Mr. Binalshibh, to avoid this thing. So essentially we were  
21 trying to address what potentially was going to be an issue,  
22 which is -- which has reached this point now.

23           And so we submitted that to you so that you could see

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1 that this is not just something -- you know, a whim or  
2 something else, or some strategy to game the system, which the  
3 government seems to -- seems to imply. That's not what this  
4 is.

5 Judge, I'm going to say a few things about part of  
6 their response which I don't think have anything to do with  
7 your decision, and perhaps you would agree with me. But they  
8 made an allegation in there about how much money I had been  
9 paid over an eight-year period, or how much money they believe  
10 that I had been paid. And for the life of me, I don't  
11 understand why that's in there. And I -- I consider it to be  
12 petty, and I consider it to be vindictive by them. And I  
13 don't say those words very often.

14 My practice has always been don't trash the other  
15 side. You don't get anything out of it, and judges don't like  
16 it, so I usually -- I usually don't. But, Judge, part of the  
17 reason that it was so offensive is they brought a man in here  
18 who testified for two weeks who had been paid \$81,000,000 by  
19 our government who got up on the witness stand and said, "I  
20 didn't make very much money from that because I had a lot of  
21 expenses," right?

22 Now they come in and say that I made a certain amount  
23 of money. Well, why am I here asking to get out of this case

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1 if I was making so much money? Isn't that -- isn't that  
2 counterintuitive, that I would want to stay on because I was  
3 making money?

4 But I want to just say a couple words, Judge, about  
5 the business of practicing law. I submit to you there's  
6 probably not a person at that table who has ever run a law  
7 firm or operated a business law firm. And why do I say that?

8 When I go to work in Buffalo, I open the door to my  
9 office. And what happens? Money starts flowing out of me and  
10 out of my partner. We pay rent. We have 11 people working  
11 for us. We pay their salaries. We pay their health  
12 insurance. We pay their Social Security, the employer's part  
13 of it. We pay for insurances for them, unemployment, workers'  
14 comp, all sorts of other insurances for them. We have a  
15 retirement plan, we pay for a 401(k).

16 We have -- we turn on our computers. You come in in  
17 the morning and turn on your computer, you don't even think  
18 about it. We pay for all the computers. We pay to have an IT  
19 service on hand for us to take care of the computers. We have  
20 to update the computers just like -- just like every other  
21 business does. The same thing with the copy machine. The  
22 same thing with telephones.

23 When you go on LexisNexis or Bloomberg, whatever

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1 service you have, you don't even think about it. We pay for  
2 that. And we pay for it for all of the -- all of the lawyers  
3 and the law clerks that work in our office. We pay for  
4 supplies.

5 We pay for bar dues for the lawyers that work for us.  
6 We're constantly solicited for judicial political campaigns.  
7 That's no big deal, but we -- we give money to people that we  
8 support. We don't give it to everybody. We're not like a lot  
9 of law firms, but we give money to the people that we support.

10 We -- when all that's paid, then there's a certain  
11 amount of money that my partner and I say, well, that's your  
12 income. Well, guess what happens to the income. I pay  
13 federal tax. I pay state tax. And not only that, and even  
14 though I'm getting Social Security, I still pay part of my  
15 salary is Social Security, and I pay the employer's part of  
16 the Social Security.

17 And so when you cut all that away and you get down to  
18 the end, that pie isn't really -- isn't really very big. And  
19 the rate that is authorized for this case is less than half  
20 what we charge our private clients. If I was in New York  
21 City, I'd be charging three or four times that. The rates in  
22 Buffalo are nowhere near what they are for a big city.

23 And I only point these things out, Judge -- I'm not

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1 complaining. I'm not complaining about what money I've been  
2 paid in this case or what net money I've got out of it.  
3 That's not me. I am privileged to be standing here, and I  
4 recognize that. And my partner isn't complaining, even though  
5 he's carrying me right now. He's not complaining. I've  
6 carried him before on other occasions. Neither of us are  
7 complaining about that.

8           But I just want you to understand how offensive that  
9 was, to have the government say that, and how -- I rarely get  
10 upset about people impugning my integrity, but I really,  
11 really took offense at that.

12           Now, Judge, there was a subjective part of this issue  
13 that you have to decide. You have to decide whether I am  
14 really telling the truth. Is this really this or not? I  
15 agree with the government. You don't have a great deal of  
16 medical records on this, but they don't dispute anything  
17 that's in the medical records.

18           And in 2018, I went through hell with my knee and had  
19 three surgeries, and I did not disrupt these commissions. I  
20 went for over a year. I never took pain medication. I limped  
21 in here, I limped to the trial that I had in Buffalo and all  
22 that stuff, and I didn't complain about it. I'm -- that's not  
23 me. I fight through things.

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1           But, Judge, in terms of me representing to you right  
2 now that I should not go ahead, right, I'm going to read a  
3 couple of names to you and to the prosecution, and I invite  
4 you or they to call any one of these people. And when I  
5 finish their names, I'll tell you why: James P. Kennedy,  
6 William Hochul, Denise O'Donnell, Patrick Numoyer, Dennis  
7 Vocco, Roger Williams, Salvatore Martoche, and Richard Arcara.  
8 There's eight names there. Four of them are Democrats and  
9 four of them are Republicans. It's 50 years of United States  
10 Attorneys for the Western District of New York. You can call  
11 them, you can call Robert Moscati who used to be -- worked for  
12 them, was a deputy to -- to General Martins who came from  
13 Buffalo. You can ask them. You can call them up and ask them  
14 and say tell me something about Jim Harrington, and I can give  
15 you the adjectives that they'll give to you.

16           The first one they'll say is he's a curmudgeon, right?  
17 The next one they'll say is he's an iconoclast. You know,  
18 there's no gods for him. There's no -- there's no -- he  
19 doesn't seem to recognize black robes. He doesn't seem to  
20 recognize authority figures as being anything different than  
21 an ordinary man or woman. They'll say he's irreverent.  
22 They'll say he's prepared. They'll say he's a skilled trial  
23 lawyer. They'll say he has an incredible dry wit and a very

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1 twisted sense of humor. And they'll say he gets away with  
2 murder in the courtroom because of those qualities.

3 But most importantly, which is the only quality that  
4 they'll say, is you can completely trust him. Judges,  
5 prosecutors, other lawyers, and most importantly, they'll tell  
6 you jurors believe him. If he gives his word, he means it.

7 Many years ago, a friend of mine was an assistant  
8 district attorney in a supervisory position, and he invited me  
9 a number of times to come and talk to young district attorneys  
10 who were starting and to tell them just about some -- how to  
11 deal with lawyers and all the rest of that stuff. When he  
12 introduced me, Judge, he paid me the highest compliment you  
13 can pay any lawyer.

14 He said, "You don't have to get anything in writing  
15 from Jim Harrington. If he tells you something, he means it.  
16 If you tell him something, he won't twist it. Whatever you  
17 told him, he'll do it. You can trust him." He said to them,  
18 "There are a lot of lawyers that you can't, but this is not  
19 one of those guys."

20 Now, I only say these things to you, I'm not trying to  
21 brag about myself or anything like that. This is based upon  
22 my own analysis of myself. What I'm trying to show you,  
23 Judge, that when I come to you and say these things to you and

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1 look you in the eye, I am telling you that I am being  
2 100-percent forthright and honest with you.

3           When I was a puppy lawyer, Judge, I asked a  
4 tremendous, tremendous lawyer who was probably my age now, you  
5 know, what was the secret of being a good trial lawyer? And  
6 he said to me, he said, "There's only one secret," and he  
7 said, "That secret is don't try to be like me or anyone else.  
8 Just be yourself. And what yourself is is what you need to  
9 project." And he said, "Jurors will see through it if you're  
10 not yourself."

11           I followed that advice, Judge, and by following it  
12 I've had a wonderful career. I've had a great life. And I  
13 have the honor of standing in front of you even at this  
14 unpleasant moment in this case.

15           So in the end, Judge, I'm sad. I'm disappointed in  
16 myself, but that shouldn't matter to anybody but me. I don't  
17 want anybody else to feel sympathy or empathy or any other  
18 pathies for me. That's not what I want, and I'm not here  
19 asking for that for you.

20           What I'm telling you, Judge, is the right thing for  
21 Mr. Binalshibh, which is the real -- real question here. It's  
22 the right thing for the commission. It's the right thing for  
23 the prosecution, even though they don't agree with it right

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1 now, and for the other accused in this case that I be  
2 permitted to -- to withdraw.

3 If you have any questions, Judge, I'd be glad to  
4 answer them.

5 MJ [Co] COHEN]: No, sir. Thank you very much.

6 Mr. Ryan.

7 TC [MR. RYAN]: Good morning, Your Honor.

8 MJ [Co] COHEN]: Good morning.

9 TC [MR. RYAN]: Edward Ryan on behalf of the  
10 United States, sir.

11 Judge, one week ago we were all gathered in this very  
12 courtroom for one major purpose; that was to take the  
13 testimony of the defense-requested witness, James Fitzsimmons,  
14 a retired FBI agent.

15 Since age seems to be a topic of discussion this week,  
16 I will note that Mr. Fitzsimmons is now 74 years of age. He  
17 still works in a very demanding career in which he deploys  
18 internationally many times per year. He has his own health  
19 issues, which include the need for two doctors to come  
20 together this week in the same appointment -- we can probably  
21 all agree that's next to impossible -- for the purpose of  
22 consulting as to his own personal health condition. That's  
23 why he couldn't stay.

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1           Notwithstanding all of these things, Mr. Fitzsimmons  
2 voluntarily agreed to testify and to testify in this  
3 courtroom. Beyond that, he also voluntarily agreed to meet  
4 with the Ali defense team ahead of his testimony to help guide  
5 them in their questionings. There is nobody to my left in  
6 this courtroom who will say about this man that he does  
7 anything except operate in good faith.

8           Once down here, the Binalshibh team objected to taking  
9 his testimony while 761 is pending and, actually, even before  
10 it had even been filed, despite the fact that he was sitting  
11 here on this island, had been requested by the defense many  
12 weeks before.

13           Inconsistently, they continued filing motions and  
14 requests with the convening authority and informed us that,  
15 quote, they were generally operating as normal, apparently as  
16 to everything except taking the testimony of a defense  
17 witness.

18           So last week we accomplished about eight minutes or so  
19 on the record, and for no good reason that I can see, we lost  
20 a week when we don't have weeks to lose.

21           I note that in 761B, counsel for Mr. Baluchi, Mr. Ali,  
22 says, "Mr. Baluchi does not believe that the military  
23 commission will complete the testimony of the remaining

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1 witnesses in time for a January 2021 trial date." So that  
2 drumbeat has just begun. Mr. Fitzsimmons will have to be  
3 rescheduled.

4 Now, in light of that significant event in the course  
5 of this case, I was thinking that 761, once I had a chance to  
6 read it and once it had been filed, would have some  
7 groundbreaking effect in the course of this case. Well, I  
8 never felt the ground break, and I'm not sure what story I can  
9 possibly tell Mr. Fitzsimmons as to why he didn't get to  
10 testify when he agreed to come down here.

11 So as to 761, Your Honor, there are two analyses to be  
12 considered by this commission. I submit, sir, that they are  
13 separate and distinct. They are not stackable. They are not  
14 cumulative. Neither one alone gets the -- gets greater  
15 benefit by being joined with the other.

16 I'd also suggest that one of those analyses should be  
17 considered immediately, or at least be considered as part of  
18 the commission's ongoing business, and the other one does not.

19 The first analysis is Mr. Binalshibh's dissatisfaction  
20 with his counsel and whether it constitutes good cause for the  
21 severance of that relationship. Mr. Binalshibh bears the  
22 burden of proof as to this.

23 As to this critical question, the Binalshibh team, in

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1 its filing in 761, essentially tells us, at least the parties  
2 and the prosecution, no facts upon which it can rely and plan  
3 its response. Rather, it says simply see Attachment F, an  
4 ex parte document that I have not and cannot see. I  
5 understand this is the normal course when there is  
6 communication to the commission regarding inner workings of a  
7 defense team, which may, of course, involve privileged  
8 communications.

9           So I can't talk to you about facts today, Judge, about  
10 this, but I can talk to you about certain principles that are  
11 at stake and certain things that we do know from the record as  
12 it exists. And I will note, Judge, that this is not our first  
13 rodeo when it comes to dismissal of counsel in this case.  
14 We've been through it once before in great detail in AE 380,  
15 as I quoted -- or as I cited to you the other day.

16           So the first principle I'd like to raise for Your  
17 Honor's attention is this: Number one, and this is a quote,  
18 "An indigent criminal defendant who seeks court-appointed  
19 counsel does not have" -- "does not have a Constitutional  
20 right to choose his attorney. He only has the right to  
21 effective representation." That is a quote from the Bostick  
22 case, and it is a quote from the commission's order in 380VV.

23           Continuing from 380VV and citing U.S. v. Francois, a

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1 First Circuit case from 2013, "In some circumstances a trial  
2 court may compel a defendant to go to trial with an unwanted  
3 attorney or to proceed pro se. In such a circumstance, a  
4 defendant does not show good cause simply because the  
5 defendant did not like the advice given by counsel."

6 Final point from 380VV, Your Honor. Judge Pohl, in  
7 denying the accused at that time, the accused Mr. Bin'Attash's  
8 request regarding his dismissal of counsel, said the  
9 following: "The commission has also concluded that  
10 Mr. Schwartz" -- who was at that time one detailed counsel to  
11 the Bin'Attash team -- "and the rest of the defense team  
12 actively and vigorously defend Mr. Bin'Attash's interests.  
13 Although Mr. Bin'Attash may not like his counsel or the advice  
14 counsel are giving him, there is no evidence indicating that  
15 Mr. Bin'Attash has not received effective assistance of  
16 counsel."

17 So this is the state of the law in this case and on  
18 this very issue.

19 Your Honor, I'd suggest also that, although you were  
20 not here, 380 is instructive to us not only for the ruling  
21 itself and the law that is cited, but also for what happened  
22 next.

23 In 380, or in the events leading up to 380,

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1 Mr. Bin'Attash over there complained long and loud about his  
2 defense team, even requiring to sit -- for them to sit in the  
3 back of the courtroom for well over a year. It looked as  
4 irretrievably broken a relationship as you could possibly  
5 imagine. But Judge Pohl, after a great deal of argument and  
6 consideration, followed the law. Peace eventually broke out,  
7 counsel returned to the table, and there have been no further  
8 complaints since that time. I say this because I think it was  
9 instructive to us to not act simply because one of these  
10 particular accused suddenly decided that they were going to  
11 run their own defense team.

12           Second principle as to this, the issue of  
13 Mr. Bin'Attash -- Mr. Binalshibh's dissatisfaction: It is  
14 doubtful -- although I don't know and although I have not seen  
15 what you have seen, and I have not heard what you have heard,  
16 it would seem to me it is very doubtful that Mr. Binalshibh's  
17 dissatisfaction with Mr. Harrington, eight years down the  
18 road, is rooted in any real core defense function, such as  
19 guilt or non-guilt, which would certainly, I suggest, raise  
20 your -- raise the consideration and raise the importance of  
21 your analysis because it would go directly -- far more  
22 directly to the concept of effective representation by  
23 counsel.

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1 I say this with a great deal of confidence about not  
2 going to guilt or non-guilt because Mr. Binalshibh has never,  
3 to my knowledge, not celebrated his guilt to anyone who would  
4 listen, to include journalists, FBI agents, military  
5 commissions, and fellow detainees.

6 It is far more likely -- as we have seen and as it  
7 exists in the record to a great extent, it is far more likely  
8 that the dissatisfaction concerns his continued complaints  
9 about conditions of confinement. As I said, it's been  
10 litigated extensively through the years, even to the extent,  
11 sir, that Mr. Binalshibh took the witness stand and told the  
12 military judge at that time all of his complaints.

13 If this goes -- if I am correct that much of the  
14 dissatisfaction with counsel goes to him, counsel, not being  
15 able to satisfy Mr. Binalshibh, I suggest to you, sir, that  
16 you should reject this as constituting good cause because --  
17 for two basic reasons: There is no validity as to his  
18 complaints, and dismissal of Mr. Harrington for this  
19 particular basis will not, sir, I suggest and I submit to you,  
20 solve anything.

21 No lawyer will ultimately satisfy Binalshibh in this  
22 regard because, as we've learned through the years, no guard  
23 force, no camp commander, no military judge has ever been able

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1 to satisfy Mr. Binalshibh about his greatest complaints and  
2 concerns for the simple reason that they don't exist.

3 At one point, Your Honor, it got so bad that on  
4 page 13405 of the record, Judge Pohl had Mr. Binalshibh  
5 forcibly removed from this courtroom over his complaints and  
6 his unwillingness to abide by the commission's orders and to  
7 even sit there quietly.

8 When it comes to these things, I would suggest he is  
9 the most difficult of the clients, and he is not reasonable  
10 with anyone.

11 Third point as to Mr. Binalshibh's dissatisfaction  
12 with Mr. Harrington: I agree with what Mr. Harrington said in  
13 great deal. He has provided effective assistance of counsel  
14 to a very difficult client, notably without significant  
15 complaint for an entire period of eight years, when  
16 Mr. Binalshibh has found reason to complain about everything.

17 In recent months, with great skill that I absolutely  
18 concede, Mr. Harrington has effectively represented his client  
19 as to issues before this commission that go to the heart of  
20 this case, specifically the defense's requests that Your Honor  
21 suppress any statements made by these five detainees, these  
22 five accused, to FBI agents in early 2007 in which they,  
23 again, admit their guilt. In the course of that

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1 representation, Mr. Harrington effectively cross-examined  
2 Dr. Mitchell and Special Agent Butsch, two witnesses most  
3 critical to the issue of suppression of those statements.

4           Now, I note, Your Honor, from the e-mail and from  
5 other statements, that you intend to inquire of Mr. Binalshibh  
6 as to his complaints as to counsel, and clearly under the case  
7 law that is entirely proper and appropriate that you do so.  
8 We understand that that part of any discussion would occur in  
9 camera and ex parte; however, I simply note, sir, that if at  
10 some point Your Honor intends to conduct a colloquy with the  
11 accused as to his preferences to counsel and even possibly his  
12 wish to represent himself, that any such colloquy as that  
13 should, in fact, occur in open court.

14           So that ends my discussion as to the first analysis  
15 that is before Your Honor in 761.

16           The second analysis put upon the commission by 761  
17 concerns Mr. Harrington's health and his desire to be  
18 discharged from the case, which has taken up -- which took up  
19 the entirety of his oral argument a few moments before. I  
20 submit, Your Honor, that this issue is separate and apart from  
21 the issue of the Binalshibh discussion -- Binalshibh  
22 dissatisfaction.

23           As to this issue, Judge, I'm generally going to rely

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1 on our pleading in 761A in which we tried to go into a great  
2 deal of detail -- and I understand it's resented in some  
3 circles, but a great deal of detail to provide you with a full  
4 gamut of information as to subjects and issues surrounding  
5 this issue that I think Your Honor needs to know. We stand by  
6 our pleading.

7 As to 761A and the issue of Mr. Harrington's health,  
8 I, again, make some following points in general:

9 There is nothing in any defense submission, and I  
10 think I heard it from him here today, to indicate that this is  
11 an emergency medical situation. Mr. Harrington himself agrees  
12 or has offered in his pleading to continue representing  
13 Mr. Binalshibh in a transitional phase, so I would submit,  
14 sir, that there is no pressing need to excuse learned at this  
15 exact moment because on the other hand, sir, and which you are  
16 required to take into account, it would have significant and  
17 lasting impact upon this case which Your Honor noted a few  
18 days ago by -- by saying that it could even bring about the  
19 drastic -- as the law says, the drastic remedy of severance of  
20 the case.

21 From their own pleadings and attachments, it appears  
22 that Mr. Harrington -- and again, I believe I just heard it as  
23 well -- will continue working, once excused, on other matters

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1 and other cases and other projects back in his law office, but  
2 just not on this case.

3           So with respect, I simply say, sir, that there is not  
4 a need at this moment for this commission to act in such a way  
5 that will hurt this case, hurt the United States' interests,  
6 but at the same time, allow for some possibilities in the  
7 future, and I'm coming to that in a moment, sir.

8           Number two, according to Mr. Harrington and the Chief  
9 Defense Counsel, the search for a learned counsel to either  
10 supplement or replace Mr. Harrington began sometime in 2018.  
11 Since that time, by my reckoning, most, if not all -- and I  
12 think it's all -- of the seven additional lawyers assigned to  
13 the Binalshibh team joined the team, both civilian and  
14 military. There are two here today; there's five others on  
15 the record.

16           There is no adequate explanation in the pleadings or  
17 General Baker's declaration or memorandum as to why none of  
18 those positions was used for a learned counsel during these  
19 two years that have been going on when apparently it was  
20 determined that it was necessary. That was exactly the method  
21 by which at least two of the learned counsel in this courtroom  
22 today came to be on this very case.

23           There is also no reference to any attempts at training

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1 those persons who have been brought on the case in the last  
2 few years that would have brought them to a degree of  
3 expertise and proficiency that they will have been qualified  
4 as learned counsel as well; although, I note and I stand by  
5 that it is the prosecution's position that there is one  
6 person, Ms. Hernandez, that under the guidelines the defense  
7 has cited is qualified to act as learned counsel right now.

8           But all that being said, Your Honor, the prosecution  
9 will agree to counsel's request to leave the case and his  
10 client so long as -- and this is where we speak for our  
11 interests, so long as our legitimate and powerful interests in  
12 a joint trial proceeding on schedule are met. In short, we  
13 don't care who is sitting there if the accused wants someone  
14 acting as learned counsel and if consistent with 10 U.S.C.  
15 949a, it is to the greatest extent practicable.

16           So here is our recommendation, sir:

17           First, you, Your Honor, should not give away your  
18 leverage because you will never get it back. I suggest, sir,  
19 that you hold 761 in abeyance, that is, at least to the  
20 portion regarding Mr. Harrington's request to be dismissed for  
21 health reasons -- hold that in abeyance pending new learned  
22 counsel being identified and becoming available, ready to try  
23 the case in January.

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1           If that had happened over two years ago and had  
2 been proposed over the last two years and had been proposed to  
3 the prosecution, I submit there would not have been a 761. We  
4 are not being unreasonable in this area, Judge.

5           Recently, when Mr. Sowards and Mr. Nevin asked to  
6 change places, it had no effect on our ultimate interests, so  
7 we played no significant part in that decision. Certainly, we  
8 did not object.

9           I submit, sir, that it is certainly not too much to  
10 ask for Your Honor to put this requirement upon counsel.  
11 After eight years of a relationship with a difficult client,  
12 it is not too much to ask that counsel remain in this  
13 situation, allowing for a transition, to at least make sure  
14 that the client is well represented, the transition has been  
15 seamless; and, in fact, this is something that is suggested,  
16 recommended, if not required by the ABA Guidelines.

17           Your Honor, I suggest, should direct counsel and the  
18 Chief Defense Counsel to identify the replacement learned  
19 counsel with all deliberate speed. There is plenty in the  
20 pleadings and in the record now to indicate that this process  
21 was going on well -- for a period of about the last two years  
22 behind the scenes, which we did not see, which you did not  
23 see, but which from the pleadings seems to indicate that a

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1 good number of people have been talked to. If so, then it  
2 should not be out of realm of reason for such a person to be  
3 identified, especially now that there is a certain degree of  
4 certainty involved. I can represent that it is our  
5 understanding that the convening authority has agreed to fund  
6 both a replacement learned counsel and Mr. Harrington during a  
7 transition phase.

8 I ask, sir, that you retain oversight because, as we  
9 set forth on page 19 through 20 of 761A, the role of learned  
10 counsel in proceedings in military commissions has,  
11 unfortunately, become weaponized. I refer you to those pages  
12 which contain Judge Spath's comments in the Nashiri case, the  
13 CMC's opinion, and the more recent ruling of Judge Acosta in  
14 the Nashiri case in 490E at page 10, which go to this very  
15 point of the learned counsel being used for the purpose of  
16 delay. I also note that, notwithstanding the Chief Defense  
17 Counsel's protestations, the D.C. Circuit did not reject these  
18 factual findings, but overturned the case on other grounds.

19 If replacement counsel becomes available without  
20 disruption, we will not object and Mr. Harrington will be free  
21 to walk away from the case without any further need once the  
22 transition has occurred.

23 If, on the other hand, sir, during this transition

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1 phase that I'm talking about in which Your Honor, as I  
2 strongly advocate, retains your leverage and your oversight,  
3 if the Chief Defense Counsel does not provide replacement,  
4 Your Honor can take evidence, can hear from him as to the  
5 efforts and the reasonableness of those efforts.

6 For example, as we -- as I noted with a -- when  
7 reading it with a -- a good deal of alarm, it appears that at  
8 least on one occasion, a qualified candidate was being spoken  
9 to but was rejected because Mr. Binalshibh, I believe sight  
10 unseen, had decided to reject him. Mr. Binalshibh has such --  
11 has no such right to reject learned counsel that would be  
12 provided to him by the people of the United States without  
13 cost. He does not have that right under the law, which is  
14 made clear in the many cases we cite.

15 But if Your Honor was to take evidence and hear the  
16 things, such as that which I just cited, you can then, as part  
17 of the -- of this analysis, make certain findings and come to  
18 certain decisions, which I don't pretend to -- I don't intend  
19 to foreshadow, but which would include, among other  
20 possibilities, that Mr. Harrington is allowed to leave the  
21 case, even if not -- even if learned counsel is not otherwise  
22 already in place, if Your Honor finds -- and it's a big if,  
23 but if Your Honor finds that at that time, to the greatest

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1 extent practicable, learned counsel has been provided, has  
2 been in place for eight years, has advocated effectively, has  
3 provided effective representation and counsel, and then for  
4 all of the reasons as to why -- that might be cited to you in  
5 the future as to why it can't happen, why new learned counsel  
6 can't be provided, that the accused will be proceeding to  
7 trial with the other seven lawyers he has been assigned,  
8 including Ms. Hernandez, who, again, we believe is qualified  
9 as it is right now.

10 In closing, Your Honor, let me note an overriding  
11 interest of the prosecution in far more concrete terms than I  
12 have. We, the prosecution, right up until oral argument this  
13 morning, have taken pointed criticism from the defense because  
14 we dared to question Mr. Harrington and his decision to leave.  
15 I guess that's on us and I guess we'll stand by that. In  
16 fact, I know we will.

17 But what gets lost, sir, is that we, the prosecution,  
18 and I submit, sir, under the law, you as the military  
19 commission have an obligation to consider the years that are  
20 going by for persons besides just Mr. Harrington. For this, I  
21 refer you to pages 19, 21, 29 through 31 of our response, and  
22 also the series of -- the series of litigation in AE 422.

23 Your Honor, I wish you had, but you did not have the

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1 benefit of providing [sic] three years ago this month when Lee  
2 Hanson took the witness stand and testified in a closed  
3 deposition to preserve his testimony pursuant to AE 422.  
4 Mr. Hanson at the time was in his mid-eighties and had  
5 suffered through very significant health issues up and to that  
6 point, justifying that his testimony be preserved. It ended  
7 up becoming the first evidence presented as to both guilt and  
8 as to penalty in the 9/11 case.

9           He sat about six feet from where you sit right now,  
10 sir, and was the picture of grace and dignity as he talked  
11 about the murder that he watched on television of his son, his  
12 daughter-in-law, and his granddaughter, Christine, the  
13 youngest victim of them all. Within a year of his appearance  
14 on this island, we lost him.

15           We have many, many Lee Hansons in our midst. You  
16 don't see them, sir. You do see Mr. Harrington when he comes  
17 up here, and that is with all due respect I say that, but we  
18 hear from all the Lee Hansons of the world on a daily basis.

19           We know what we are obligated to represent in this  
20 commission. And I tell you now, sir, that at all costs, we  
21 are advocating that these men must be tried; they must be  
22 tried together; they must be tried once; and they should be  
23 tried on schedule.

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1 Subject to your questions, sir.

2 MJ [Co] COHEN]: I never shirk from my responsibilities,  
3 but my question for the government is: If I find there is  
4 good cause to allow Mr. Harrington to withdraw, and the only  
5 way we can get this case to trial in a timely fashion is to  
6 sever, is the government going to remain adamant, contrary to  
7 the desires of the victims, et cetera, to go forward, that he  
8 not be severed from this case even though you could take four  
9 out of the five?

10 TC [MR. RYAN]: My answer, sir, is I do not wish to make  
11 that decision. I do not wish to give this commission an  
12 answer on that unless it becomes absolutely imperative.

13 That being said, we will have to consider all equities  
14 at that point ----

15 MJ [Co] COHEN]: All right.

16 TC [MR. RYAN]: ---- including length of expected delay,  
17 other options, et cetera. If the commission will accept that  
18 answer.

19 MJ [Co] COHEN]: It is an answer.

20 TC [MR. RYAN]: Yes, sir.

21 MJ [Co] COHEN]: And ----

22 TC [MR. RYAN]: Judge, and ----

23 MJ [Co] COHEN]: I only ask because you ----

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1 TC [MR. RYAN]: ---- severance ----

2 MJ [Co] COHEN]: ---- you -- you had no problem putting  
3 the burden on me to take into consideration all of those  
4 things. And my -- my question is -- I didn't make the  
5 decision to try them jointly. I didn't make the decision not  
6 to move for severance in the event that I do this. That's the  
7 prosecution's decision.

8 My decision today is whether or not there's good cause  
9 to withdraw.

10 TC [MR. RYAN]: Yes, sir. But within the good cause  
11 analysis, as Your Honor raised sua sponte and completely  
12 appropriately, there is this question of what that would mean  
13 for the case going forward.

14 MJ [Co] COHEN]: Absolutely.

15 TC [MR. RYAN]: And for that reason we -- we put in our  
16 pleading those issues which we believe the commission should  
17 at least take into account.

18 MJ [Co] COHEN]: Did you all look at Chapter 9 of the  
19 Regulations for Military Commission with respect to the  
20 detailed learned defense counsel and who has authority to  
21 actually make those decisions?

22 TC [MR. RYAN]: Are we speaking as to learned counsel,  
23 sir?

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1 MJ [Co] COHEN]: Yes.

2 TC [MR. RYAN]: Yes, sir.

3 MJ [Co] COHEN]: All right. So then you would agree,  
4 then, that there are already timelines built in, that assuming  
5 our -- assuming by analogy, this is essentially the same thing  
6 as if they were -- as if the Chief Defense Counsel was  
7 notified that there's a referral of a capital case, that he  
8 would have 14 business days to look within MCDO and to  
9 determine whether or not someone's available; that then he  
10 would have a 30-day period -- 30-business-day period to do  
11 something else; then ultimately he has up to 45 business days  
12 to make a nomination. If he doesn't make a nomination within  
13 45 business days and the convening authority does not grant an  
14 extension, or if he does grant an extension and then the  
15 extension tolls -- runs, the convening authority in and of  
16 himself has the authority to appoint a learned counsel in this  
17 case.

18 TC [MR. RYAN]: Yes, sir.

19 MJ [Co] COHEN]: Those are all the timelines that  
20 currently exist. So the -- the reality is, is that I'm not  
21 sure I'd ever need to take testimony. I think I just need for  
22 the people to do their jobs in accordance with the regulations  
23 that already exist.

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1 TC [MR. RYAN]: Your Honor, I -- I do not disagree. I'll  
2 only -- I'll make this notation, sir. I brought up the issue  
3 of your involvement in this area because you do have a dog in  
4 this fight, because you are the presiding judge in a case that  
5 has gone on for this many years ----

6 MJ [Co] COHEN: I agree.

7 TC [MR. RYAN]: ---- again, not -- through no fault of  
8 this commission.

9 You have the ability to leverage certain actions, or  
10 at least certain efforts and movements on the part of other  
11 equity players within. And ultimately, Judge, it would be  
12 your decision to ultimately come to the conclusion of whether,  
13 to the greatest extent practicable, learned counsel has been  
14 provided. And I would submit, within that decision, Your  
15 Honor would be well armed if you were in a position of having  
16 persons report to you as well.

17 MJ [Co] COHEN: So assuming that I agree with you, that  
18 just -- just a blanket withdrawal as of, for example,  
19 tomorrow -- saying, yep, you're done -- is not in the interest  
20 of the case, that there should be some kind of transition or  
21 at least some kind of -- I'll use your word because I can't  
22 think of a better one right now -- of leverage over, to make  
23 sure that things are still getting done and they're getting

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1 done in a timely fashion, et cetera.

2 For how long? You know, in other words -- and I'm  
3 sure you've had this as a prosecutor within -- within the  
4 Department of Justice in the past where -- or maybe you have,  
5 maybe you haven't. But anytime you come in as lead counsel on  
6 a case and you take over, there may have been things done in  
7 the case that you didn't like to have done ----

8 TC [MR. RYAN]: No, sir.

9 MJ [Co] COHEN: ---- that you would like to change. I  
10 know from personal experience, I was thrilled one day when a  
11 civilian defense counsel got fired and I got to take over the  
12 case because I got to try it the way that I wanted it, and it  
13 worked out a lot better than I thought it was going to work  
14 out had that civilian defense counsel stayed on the case. So  
15 that client's decision was the best decision that client ever  
16 could have made.

17 What if I find myself in that situation? What if I  
18 find the idea that another learned counsel is appointed, that  
19 we do have this transition period, but at the end of the day,  
20 either because the learned counsel can't get caught up to  
21 speed fast enough because of the sheer volume -- I think -- I  
22 think in your declaration, it was about 1.5 million documents  
23 or pages of information that were -- that were provided maybe

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1 like -- you know, something like that -- that it just takes  
2 time to read that. It takes time to get spun up.

3           What if -- you know, so the -- the other -- so the  
4 question I've got is if I find there's good cause but I don't  
5 release him immediately, how long do I keep him on the hook?  
6 At what point are we so close to trial that I'm like, well,  
7 forget the fact that you had good cause and forget the fact  
8 that you could, you know, potentially endanger this case on  
9 the eve of trial or in the middle of trial, I'm just going to  
10 have to assume that risk because I've waited too long to make  
11 a decision?

12           TC [MR. RYAN]: Yes, sir. As to the point of the  
13 learned -- a transition occurring for effective new  
14 representation to take place, I'll note that in the pleading  
15 the Chief Defense Counsel speaks about discussions he had with  
16 the convening authority in which it was agreed between them  
17 that a likely transition period would have to -- to take place  
18 over several months. I don't think this is out of the realm  
19 of reason, especially in a case of this complexity.

20           Also, Mr. Harrington himself in his pleading or in his  
21 own declaration has agreed that he would stay on for  
22 purposes -- or is willing to stay on for purposes of  
23 transition. You heard him here speak today, Judge, that he

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1 intends to continue the practice of law, although as, in his  
2 words, apparently his trial days are over.

3 To your question, sir, I would submit, first of all,  
4 that this is a question that you don't have to reach at this  
5 particular moment. Here's where the schedule is going  
6 forward:

7 After this week, we will have a -- I think, two or  
8 three weeks off, and then we come back for three weeks in  
9 March. Following that, we're off for eight weeks. I would  
10 submit that in the course of that period of time, a lot can  
11 happen in regard to this particular subject matter.

12 So my recommendation, sir, is certainly not that  
13 Mr. Harrington be excused immediately, that is, before the  
14 March session because that will automatically require all  
15 sorts of actions on behalf of -- on the part of the  
16 prosecution, probably the Chief Defense Counsel, and the  
17 commission as well, certainly as to the March hearings, and  
18 the ripple effects going forward would be significant.

19 MJ [Col COHEN]: So if I was to do this -- just to make  
20 sure I understand kind of like the -- that you guys have  
21 adopted the bottom-line-up-front analogy. You've been in the  
22 military commissions long enough, so let's just go with the  
23 BLUF.

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1           At the end of the day, if I find there's good cause  
2 and I'm inclined to let him withdraw, your main concern is  
3 that I take actions that would allow in the -- provide the  
4 greatest chance for this -- this case to proceed in a timely  
5 fashion with the hopes of maintaining as close as we can to  
6 the January 2021 trial date.

7           TC [MR. RYAN]: And all five together, yes, sir.

8           MJ [Co] COHEN]: Okay. All right. I'm an outside-the-box  
9 thinker. So if I -- now that I understand your bottom line up  
10 front, I will take those matters into consideration as well.

11          TC [MR. RYAN]: May I have one moment, sir?

12          MJ [Co] COHEN]: You may.

13 **[Counsel conferred.]**

14          TC [MR. RYAN]: Sir, last comments I want to make. And  
15 there is a distinction here that might be fine, but it's  
16 significant.

17           Your Honor asked the questions about if you were to  
18 find good cause. There are basically two points of -- as to  
19 what good cause might exist in this case before you right now.  
20 As to Mr. Binalshibh's dissatisfaction, which I think I've  
21 covered extensively and which I don't wish to touch upon  
22 again, and secondly as to Mr. Harrington's health issue.

23           Mr. Harrington's health issue -- I don't think there

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1 is disagreement among the parties -- does not require  
2 immediate dismissal of him from this case. Your Honor's  
3 forward thinking, or outside the box, as you put it, for  
4 what's happening, what could be going on several months from  
5 now, and even as the Binalshibh points out -- team points out,  
6 it's in no one's interest that something happen on the eve of  
7 trial. We certainly agree with that and respect that.

8           However, we wish to draw the distinction that if Your  
9 Honor is to -- for purposes of being proactive, seek to -- to  
10 start allowing Mr. Harrington to remove -- remove himself from  
11 the case, that it be clear it's being done by the commission  
12 not because it constitutes the legal definition of good cause  
13 at this particular moment but rather that it is the  
14 commission's attempt to allow for counsel, because of the  
15 possibility of health issues to come in the future, possibly,  
16 and we hope not being worse, that Your Honor's trying to deal  
17 with that now.

18           But if so, then it is not based on good cause, which  
19 puts in place a requirement for counsel to replace, but rather  
20 on the part of the commission. If so, then the commission  
21 should have a colloquy with Mr. Binalshibh in which he is made  
22 to understand that he does not have a right to learned counsel  
23 to step in and be fully up to speed, whatever time that person

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1 might determine, before he takes over for purposes of trial  
2 because I would submit that puts us right back in the same  
3 problem that we're trying to avoid.

4 That's all I have, sir.

5 MJ [Co] COHEN]: No, I understand, sir. I -- I can  
6 promise the parties that whatever I do, based on the  
7 information available to me and the concerns that I have for  
8 judicial economy and moving the case forward and also taking  
9 into interest the five other parties that are represented  
10 here, that I will look at all options and that whatever  
11 decision I make, it will be made with an eye toward mitigating  
12 the -- any significant impacts to the remaining parties in the  
13 case.

14 TC [MR. RYAN]: Understood, sir. May I be excused?

15 MJ [Co] COHEN]: You may.

16 TC [MR. RYAN]: Thank you.

17 MJ [Co] COHEN]: Mr. Harrington, would you like to be  
18 heard with some final comments?

19 LDC [MR. RUIZ]: Judge?

20 MJ [Co] COHEN]: Mr. Ruiz.

21 LDC [MR. RUIZ]: I'm sorry to interject. We could use a  
22 ten-minute break if ----

23 MJ [Co] COHEN]: Okay.

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1 LDC [MR. RUIZ]: Thank you.

2 MJ [Co] COHEN: All right, we'll take a -- ten minutes  
3 here is tough. Let's go ahead and take 15, and then we'll be  
4 in recess for 15 minutes.

5 [The R.M.C. 803 session recessed at 1137, 18 February 2020.]

6 [The R.M.C. 803 session was called to order at 1152,  
7 18 February 2020.]

8 MJ [Co] COHEN: The military commission is called to  
9 order. The parties are present. Mr. Binalshibh is not  
10 currently here. Do we have permission to proceed?

11 [Counsel conferred.]

12 MJ [Co] COHEN: Mr. Harrington, I can take a recess in  
13 place if that's what we need to do.

14 LDC [MR. HARRINGTON]: I think just for a minute, Judge,  
15 if we could check.

16 MJ [Co] COHEN: All right. We'll take a quick recess in  
17 place.

18 LDC [MR. HARRINGTON]: Okay.

19 [Pause.]

20 LDC [MR. HARRINGTON]: Judge, he's on his way in. He  
21 should be here.

22 MJ [Co] COHEN: Okay. No problem.

23 [Pause.]

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1 MJ [Col COHEN]: While we wait, I'll just have a brief  
2 802. I don't care if the public hears this.

3 I think the best way for us to handle the site visit  
4 is -- so immediately following this argument we'll recess.  
5 Then if anyone who -- one per team, but any team that wants to  
6 come may meet me out -- out back where the vans are. Around  
7 that time, maybe prayer time, shortly thereafter anyway, so  
8 the accused will just remain here in the courtroom during that  
9 time period. We'll go out and take a look.

10 We will then come back in, have the 802 that Mr. Ruiz  
11 wanted to have. We can talk about any additional motions,  
12 those kinds of things for -- for practical purposes. And then  
13 following that, I will release everyone except for the RBS  
14 team so that I can have the ex parte with Mr. Binalshibh.  
15 **[The accused, Mr. Binalshibh, returned to the courtroom.]**

16 MJ [Col COHEN]: The military commission is called to  
17 order. Parties are present to include all five accused.

18 Mr. Harrington, you may have final comments.

19 LDC [MR. HARRINGTON]: Thank you, Judge.

20 Judge, just a few comments. One is Mr. Ryan made  
21 reference to the decision -- decision in the Nashiri case.  
22 And the government cited in their brief, and he repeated again  
23 that it was -- with respect to Brigadier General Baker, it was

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1 reversed on other reasons. That's really not an appropriate  
2 cite. It's quoted in General Baker's attachment to our reply.

3 But the D.C. Circuit was really pretty -- it's pretty  
4 direct language for a court to write this: "Although a  
5 principle so basic to our system of law should go without  
6 saying, we nonetheless feel compelled to restate it plainly  
7 here. Criminal justice is a shared responsibility. Yet in  
8 this case, save for al Nashiri's defense counsel, all elements  
9 of the military commission system, from the prosecution team  
10 to the Justice Department to the CMCR to the judge himself  
11 failed to live up to that responsibility."

12 And they vacate what Judge Spath had done. I think  
13 that it's -- it's wrong to rely on those decisions where the  
14 court took this drastic remedy.

15 And secondly, Judge, the issue about my going forward,  
16 if you grant my motion to withdraw, I am fully ready to be a  
17 resource counsel for somebody else. And I'm indicating to the  
18 court right now that I'm not ready to come back in three weeks  
19 and cross-examine witnesses or examine witnesses or do the  
20 rest of it. I'm asking the court to make the determination  
21 about now, and that -- because you and I know that what  
22 happens with these situations is they don't end. We predict  
23 it's going to be three months, we predict it's going to be

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1 four months, we predict it's going to be this, but it's just  
2 not.

3 Judge, you read the regulation about who should pick  
4 the learned counsel. And Mr. Ryan went into some scenarios  
5 where he said why aren't these things happening. That's  
6 really not his business, first of all. And the fact that we  
7 hire somebody as a GS employee and -- and you could say, well,  
8 in a matter of a year or two years or something, that person  
9 who comes in with no capital experience could be capitally  
10 qualified to be learned counsel in this is just, is just  
11 preposterous, and it makes a mockery of having learned counsel  
12 at all.

13 One thing I do agree with Mr. Ryan on, Judge, and that  
14 is that had the efforts before by General Baker and me been  
15 successful, we might be standing here right now and there  
16 might be somebody else, a man or a woman standing next to me  
17 saying, "I'm coming in for Mr. Harrington," and you say,  
18 "Mr. Harrington can leave." So those efforts were all made in  
19 good faith.

20 And not only that, Judge, he made a comment, because  
21 General Baker made a reference to it of three people and one  
22 that Mr. Binalshibh rejected. That's not exact -- that's not  
23 really what happened, Judge. The circumstances of that

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1 particular person were inappropriate for this case, and  
2 Mr. Binalshibh agreed with that. But I went to him with  
3 résumés, with descriptions of people, and all the rest of that  
4 because he couldn't meet with people. He couldn't meet  
5 with -- with potential candidates.

6 And, yes, the convening authority, yes, Brigadier  
7 General Baker have the authority and the power to hire  
8 somebody else, and I know that especially General Baker will  
9 do everything that he can to comply with -- with what's  
10 needed.

11 And it may be, Judge, that if I'm out of this and the  
12 learned counsel community knows that and knows that this is a  
13 definite job and it's definitely going to happen and it's  
14 going to go ahead, that that process hopefully will be much  
15 easier -- much easier to accomplish.

16 That's all I have, Judge. Thanks.

17 MJ [Col COHEN]: Sir, I have a couple questions.

18 LDC [MR. HARRINGTON]: Sure.

19 MJ [Col COHEN]: As a resource counsel, that wouldn't  
20 require travel. In much the same way you described your  
21 potential law practice following this, is more of not going  
22 into the courtroom and getting involved with litigation, but  
23 just providing information, resources, those kinds of things.

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1           Is there a limit to what you can do as far as time  
2 limit on -- as being a resource counsel, as long as you're  
3 being paid? Obviously, I wouldn't ask you to do it pro bono.

4           LDC [MR. HARRINGTON]: No, I understand that. And that is  
5 a good question.

6           The answer to the question is, Judge: I think there's  
7 a good bit that I can do. I know that I can't do what I do  
8 now, but that doesn't -- I mean, if I'm resource counsel,  
9 Judge, it's still going to require travel from Buffalo to  
10 Rosslyn, which is not -- that's not that big a deal. It's an  
11 hour plane ride each way; that's not that big a deal. But  
12 that clearly is going to happen because that's where our  
13 offices are and that's where the information is and that's  
14 where the meetings have to take place, certainly with new  
15 counsel and our team, that would happen.

16           If you're asking me whether I can come down here on  
17 the hearing schedule for all of the hearings, my answer is I  
18 don't think so, but -- but I don't know.

19           MJ [Col COHEN]: I guess that's the ultimate one, right?  
20 We only know until you -- until you -- until something happens  
21 that ----

22           LDC [MR. HARRINGTON]: Right.

23           MJ [Col COHEN]: Yeah. All right. The other question I

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1 had, sir, is: Do you agree with the previous findings of the  
2 court in the 380VV, that at the end of the day Mr. Binalshibh  
3 gets a learned counsel, not necessarily a learned counsel of  
4 choice?

5 LDC [MR. HARRINGTON]: If that's what the law says, Judge.

6 MJ [Co] COHEN]: Okay.

7 LDC [MR. HARRINGTON]: I don't think there's any -- I  
8 mean, the ideal situation, obviously, is to have somebody --  
9 and that's why we -- General Baker and I went through the  
10 efforts that we did, because we were trying to avoid having  
11 somebody come in and replace me and then being back two  
12 months, six months, a year later in the same situation for the  
13 same reasons or different reasons. So that we were trying to  
14 front-load the idea with -- with trying to get everybody on --  
15 everybody on the same page.

16 But the answer to the question is that the person who  
17 gets to -- to, you know, nominate the person -- Judge, I was  
18 appointed to the case before I met Mr. Binalshibh.

19 MJ [Co] COHEN]: Okay.

20 LDC [MR. HARRINGTON]: That's how it went.

21 MJ [Co] COHEN]: That's good to know. I did not know  
22 that. Thank you.

23 I've heard the government's ideal scenario. What's

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1 your ideal scenario?

2 LDC [MR. HARRINGTON]: To call my wife tomorrow and tell  
3 her that I'm coming home and I'm not part of this. That's  
4 my -- that's a facetious answer, which I shouldn't have made.

5 The answer is, Judge, that for Mr. Binalshibh, I want  
6 him to get a different learned counsel and somebody who --  
7 whom he can trust and relate with. And I'm not saying that he  
8 and I have not had, you know, our times when things were fine  
9 and our times when things were bad. Every defense counsel and  
10 client over an eight-year period is going to go through that,  
11 right? But I'm hoping that we can have a change of situation  
12 that makes it better for him.

13 I just -- I don't see how it is possible, though, with  
14 what the government proposed, that you can keep the trial date  
15 that you have, bring somebody in, even in a -- quickly, even  
16 if you got somebody within a month. How much time is it going  
17 to take that person to come in? You know what's going to  
18 happen. That lawyer is going to come in front of you and say,  
19 "Judge, I need more time. I just need more time." And it's  
20 going to be pretty hard to say not.

21 So I -- my ideal scenario is, I think that Mr. --  
22 Mr. Binalshibh needs to be severed from the -- from the others  
23 and that his counsel situation has to be addressed, and then

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1 his trial situation will be addressed in due course, if he's  
2 going to get adequate representation.

3 MJ [Co] COHEN]: Would you agree that -- well, maybe you  
4 don't have to agree. That's a bad question. I don't do a lot  
5 during voir dire, so I'm not going to ask that question of  
6 you.

7 Of the two bases for potential, which do you believe  
8 is your stronger bases as you stand in front of me?

9 LDC [MR. HARRINGTON]: Well, first, I disagree ----

10 MJ [Co] COHEN]: Stronger basis.

11 LDC [MR. HARRINGTON]: ---- I disagree with Mr. Ryan that  
12 they're not connected. They are connected, Judge.

13 MJ [Co] COHEN]: Okay.

14 LDC [MR. HARRINGTON]: They're connected because the  
15 difficult relationship with him affects the health issue.  
16 There's no question about that. The amount of energy,  
17 resource, and all the rest of that that goes into dealing with  
18 stressful situations with your clients is very, very telling  
19 on -- on anybody. So they are connected to -- to one thing.

20 But if you -- if you ask me, I would say -- I'd say  
21 the health issue probably is a little bit more severe, but --  
22 but the attorney-client relationship is something that is --  
23 that is really, really a difficult situation. I think you're

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1 going to hear that in the -- in the ex parte.

2 MJ [Co] COHEN]: Okay.

3 LDC [MR. HARRINGTON]: And, Judge -- well, I won't say any  
4 more.

5 MJ [Co] COHEN]: As I say, you don't get your best case  
6 scenario for you, personally, and that I don't tell you  
7 tomorrow, like, okay, you're entirely approved for withdrawal,  
8 but I put some kind of conditions on that.

9 LDC [MR. HARRINGTON]: Right.

10 MJ [Co] COHEN]: It does not appear to me that, although  
11 the health issues are there, that there is an ethical issue  
12 that would preclude you from at least overseeing the  
13 continuing filing of motions that are coming up and those  
14 kinds of things while we look for learned counsel. Do you  
15 agree? And if so, if I gave you an order that you must do it  
16 anyway, that should protect you under your bar rules, correct?

17 LDC [MR. HARRINGTON]: The answer to that question is --  
18 is yes.

19 MJ [Co] COHEN]: Okay.

20 LDC [MR. HARRINGTON]: I -- I mean, I'm learned counsel  
21 until you tell me I'm not.

22 MJ [Co] COHEN]: Right.

23 LDC [MR. HARRINGTON]: No matter what -- anything else is

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1 going on, I'm learned counsel. There's no question about  
2 that.

3 MJ [Co] COHEN]: Okay.

4 LDC [MR. HARRINGTON]: When we do the ex parte, you're  
5 going to hear some more about that situation and how that can  
6 aggravate things. But the answer to your question is ----

7 MJ [Co] COHEN]: Okay. It doesn't mean you necessarily  
8 have to draft them, but just that the case maintains learned  
9 counsel until there's another learned counsel available.

10 LDC [MR. HARRINGTON]: But just -- and just so, you know,  
11 that potentially is opening up a real later question of  
12 ineffective assistance of counsel.

13 MJ [Co] COHEN]: Okay. Well, that's always a risk and, in  
14 fact, the reason death penalties get overturned, under most  
15 circumstances, is ineffective assistance of counsel. So even  
16 if you guys do everything perfect, some Monday morning  
17 quarterback is likely to say you should have done this  
18 differently. So I get it. I understand that.

19 All right. That's all the questions I've got, sir.  
20 Thank you very much.

21 All right. We're going to go into a -- we're going to  
22 go into a recess. We'll reconvene tomorrow morning at 0900  
23 hours on the record. I will have an interim ruling. I

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1 suspect what I'll do is I'll give you some guidance of how  
2 we're going to move forward, one way or another, and I'll  
3 follow it up with a written ruling at a later time. But we'll  
4 do that.

5 All right. I'm going to step out. I'll meet no more  
6 than six people back there in the -- in the back, if you'd  
7 like to look at the vans.

8 LDC [MR. SOWARDS]: Sir, I may have misunderstood.

9 MJ [Co] COHEN: Mr. Sowards.

10 LDC [MR. SOWARDS]: I thought after the viewing you would  
11 be coming back in for the ----

12 MJ [Co] COHEN: Yes, but I won't -- but public won't be  
13 here. So we'll be in recess. It's an 802.

14 LDC [MR. SOWARDS]: Very good. Thank you, sir.

15 MJ [Co] COHEN: And then I'll have the ex parte with  
16 Mr. Binalshibh following that.

17 TC [MR. SWANN]: Sir, they're not going to be ready until  
18 1330.

19 MJ [Co] COHEN: Okay. That takes care of that then.

20 TC [MR. SWANN]: What they have, they actually have, they  
21 actually have two of the bigger vans online. They got the  
22 tire fixed on this morning on one of them.

23 MJ [Co] COHEN: Okay.

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1 TC [MR. SWANN]: So I'm going to have them have one big  
2 van ready for you and we'll let you see the smaller van at the  
3 same time.

4 MJ [Co] COHEN]: Perfect.

5 TC [MR. SWANN]: So 1330, everybody is on.

6 MJ [Co] COHEN]: Okay. All right. So we'll do a site  
7 visit at 1330 today. All right. Perfect.

8 All right. I'll go ahead and take a break, let the  
9 public exit, we'll do a quick 802, and then court reporters  
10 should remain for my ex parte with Mr. Binalshibh afterwards.

11 All right. We're in recess.

12 [The R.M.C. 803 session recessed at 1210, 18 February 2020.]

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