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1 [The R.M.C. 803 session was called to order at 0901,  
2 4 December 2017.]

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

4 Trial Counsel, who is here on behalf of the United  
5 States?

6 CP [BG MARTINS]: Good morning, Your Honor. Present for  
7 the United States: Brigadier General Mark Martins, Mr. Robert  
8 Swann, Mr. Edward Ryan, Mr. Clay Trivett, Mr. Jeffery  
9 Groharing, Ms. Nicole Tate, Major Christopher Dykstra. Also  
10 present at counsel table: Mr. Dale Cox, Mr. Rudolph Gibbs,  
11 Ms. Heather Fulmines, and also present in the courtroom are  
12 Patrick O'Malley, Kim Waltz, Brianna Hearn and Mary Needham of  
13 the Federal Bureau of Investigation.

14 I should also mention, Your Honor, the special trial  
15 counsel is present depending on how you handle the first  
16 motion. And these proceedings are being transmitted by closed  
17 circuit signal to locations in the continental United States  
18 pursuant to the commission's order.

19 MJ [COL POHL]: Thank you.

20 Mr. Nevin?

21 LDC [MR. NEVIN]: David Nevin, Lieutenant Colonel Poteet,  
22 Ms. Leboeuf, Mr. Sowards, and Mr. Mohammad is present.

23 MJ [COL POHL]: Thank you.

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1 Ms. Bormann.

2 LDC [MS. BORMANN]: Judge, on behalf of Mr. Bin'Attash,  
3 Edwin Perry, myself, Captain Brian Brady, and Major Matthew  
4 Seeger.

5 MJ [COL POHL]: Thank you.

6 Mr. Harrington.

7 LDC [MR. HARRINGTON]: Judge, in addition to me,  
8 Ms. Alaina Wichner, Major Christopher Lanks, and Major Jarrod  
9 Stuard.

10 MJ [COL POHL]: Mr. Harrington, I understood that you had  
11 some issues with your legs. If you need to remain seated when  
12 you talk, you may.

13 Mr. Connell.

14 LDC [MR. CONNELL]: Good morning, Your Honor.

15 MJ [COL POHL]: Good morning.

16 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi, are  
17 myself, James Connell; Lieutenant Colonel Sterling Thomas of  
18 the United States Air Force; Alka Pradhan; and Major Jason  
19 Wareham of the United States Marine Corps.

20 MJ [COL POHL]: And Mr. Ruiz.

21 LDC [MR. RUIZ]: Judge, I'm here on behalf of  
22 Mr. al Hawsawi, Ms. Susan Lachelier, Lieutenant Commander  
23 Jennifer Williams, and Mr. Sean Gleason.

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1 MJ [COL POHL]: Thank you.

2 As we start out each session this week, I'm going to  
3 go over with the accused your right to be present and your  
4 right to waive your presence. So this is directed to all of  
5 the accused.

6 You have the right to be present during all sessions  
7 of the commission. If you request to absent yourself from any  
8 session, such absence must be voluntarily and of your own free  
9 will. Your voluntary absence from any session of the  
10 commission is an unequivocal waiver of the right to be present  
11 during that session.

12 Your absence from any session may negatively affect  
13 the presentation of the defense in your case. Your failure to  
14 meet with and cooperate with your defense counsel may also  
15 negatively affect the presentation of your case.

16 Under certain circumstances your attendance at a  
17 session can be compelled regardless of your personal desire  
18 not to be present.

19 Regardless of your voluntary waiver to attend a  
20 particular session of the commission, you have the right at  
21 any time to decide to attend any subsequent session. If you  
22 decide not to attend the morning session but wish to attend  
23 the afternoon session, you must notify the guard force of your

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1 desires. Assuming there's enough time to arrange  
2 transportation, you will then be allowed to attend the  
3 afternoon session.

4           You will be informed of the time and date of each  
5 commission session prior to the session to afford you the  
6 opportunity to decide whether you wish to attend that session.

7           Mr. Mohammad, do you understand what I just explained  
8 to you?

9           ACC [MR. MOHAMMAD]: Yes.

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

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

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

15          ACC [MR. BINALSHIBH]: Yes.

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

18          ACC [MR. AZIZ ALI]: Yes.

19          MJ [COL POHL]: Mr. Hawsawi, do you understand what I just  
20 explained to you?

21          ACC [MR. AL HAWSAWI]: Yes, and I would like to leave.

22          MJ [COL POHL]: Okay. Mr. Ruiz, is there any issue as to  
23 whether Mr. Hawsawi's voluntarily leaving now, if he's ----

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1 LDC [MR. RUIZ]: No, Judge.

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

3 LDC [MR. RUIZ]: No, Judge.

4 MJ [COL POHL]: Okay. We're going to begin with 532,  
5 which is the motion where the government's represented by the  
6 special trial counsel, and we're going to start out with just  
7 the special trial counsel here and not the rest of the  
8 government or the other part of the government.

9 Just as a housecleaning thing: There's an issue  
10 about the computers that were seized, and this deals with 530,  
11 which is the next issue we'll get. There was a motion that  
12 they be put under the control of the trial judiciary, and that  
13 has been accomplished.

14 There's a safe that's been put in my court  
15 information security officer's office, and that's where the  
16 computers currently reside.

17 Okay. That being said, we'll take a ten-minute  
18 recess. Mr. Hawsawi may be returned to the camp, assuming the  
19 transportation can be made for him to leave.

20 LDC [MR. RUIZ]: Thank you, Judge.

21 MJ [COL POHL]: And I make a specific finding that he's  
22 voluntarily returning to the camp on his own and waiving his  
23 presence. Commission is in recess for ten minutes.

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1 MTC [MR. TRIVETT]: Sir, briefly before the regular  
2 prosecution team leaves.

3 MJ [COL POHL]: Yes.

4 MTC [MR. TRIVETT]: We're going to have an issue with one  
5 of our witnesses who we're calling to make an in-court  
6 identification of Mr. Hawsawi. It is not going to be today,  
7 but it is going to be on -- within the next couple of days.

8 MJ [COL POHL]: Okay. We'll address that issue at the  
9 time. Because as I -- Mr. Ruiz, if you explain to Mr. Hawsawi  
10 that even though he may not want to be here, there may be  
11 times he will be compelled to be here, as I just told him.

12 LDC [MR. RUIZ]: Judge, could we have a little bit more  
13 than ten minutes? I need to explain that to him and make sure  
14 he understands it.

15 MJ [COL POHL]: Okay. It's -- we'll take a 15-minute  
16 break.

17 LDC [MR. RUIZ]: Okay. Thank you.

18 MJ [COL POHL]: Commission is in recess.

19 [The R.M.C. 803 session recessed at 0907, 4 December 2017.]

20 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 0925,  
2 4 December 2017.]

3 MJ [COL POHL]: Commission is called to order.  
4 Mr. Hawsawi is absent. The rest of the defense team are  
5 present. And Major Lebowitz is here representing the special  
6 trial counsel. The other members of the government team are  
7 absent.

8 That brings us to 532. And there is some procedural  
9 issues I want to address in 532. Mr. Ruiz?

10 LDC [MR. RUIZ]: Do you want to hear from -- it seemed  
11 from the 802, you wanted to hear from us first? Is that ----

12 MJ [COL POHL]: Yeah. Well, yeah, I'm not -- actually,  
13 I'm going to want to hear from the other side first, and then  
14 I'm going to let you hear.

15 532 deals with an issue which there's multiple  
16 procedural components to it, and the first one deals with the  
17 fact that only three of the five defense counsel were notified  
18 of what the issue is in 532; and the other two, Mr. Connell  
19 and Mr. Ruiz, asked to be informed of what it was about. And  
20 this was objected to by Ms. Bormann.

21 Just so I'm clear of the lay of land, Mr. Nevin, do  
22 you also object to informing the other two of what 532 is  
23 about?

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1 LDC [MR. NEVIN]: Your Honor, I don't know what to tell  
2 you about that. I have a feeling about this, the discussion  
3 of this whole matter, as it pertains to me.

4 MJ [COL POHL]: Uh-huh.

5 LDC [MR. NEVIN]: And I have another feeling, I think,  
6 about how it pertains to Mr. Mohammad.

7 MJ [COL POHL]: Okay.

8 LDC [MR. NEVIN]: And I can't sort it out.

9 MJ [COL POHL]: Okay.

10 LDC [MR. NEVIN]: I don't -- I really don't have anything  
11 to say about it.

12 MJ [COL POHL]: Okay.

13 Mr. Harrington?

14 LDC [MR. HARRINGTON]: Judge, we have no objection to  
15 sharing it with Mr. Hawsawi or Mr. al Baluchi's team.

16 MJ [COL POHL]: Okay.

17 Ms. Bormann?

18 LDC [MS. BORMANN]: To be clear, Judge, the details  
19 outlined in the government's notice to you under 292QQ don't  
20 affect Mr. al Baluchi or Mr. Hawsawi. But I advised both  
21 counsels through other conversations that, you know, I'm happy  
22 to share what I can with them.

23 The problem that we have, of course, is that sharing

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1 with trial counsel and the rest of the public crystallizes the  
2 conflict. So that doesn't apply to Mr. al Baluchi and  
3 Mr. Hawsawi. It does, however, apply to the world writ large.

4 MJ [COL POHL]: So you're withdrawing your objection for  
5 them to be informed of what this is about?

6 LDC [MS. BORMANN]: What I am withdrawing is -- and what I  
7 have told Mr. -- counsel for Mr. al Baluchi, and I believe it  
8 was also related to counsel for Mr. al Hawsawi -- I'm told it  
9 wasn't -- is that I am happy to inform them informally, but  
10 they have no dog in this fight. So with respect to taking  
11 positions, we don't think that's proper.

12 MJ [COL POHL]: Well, regardless of whether or not they  
13 have a dog in the fight, the question I -- and correct me if  
14 I'm wrong here. Mr. Connell and Mr. Ruiz, what exactly do you  
15 want? Because I'm not sure. I just want to clarify what the  
16 dispute is over.

17 LDC [MR. RUIZ]: Yes, Your Honor. The essence of the  
18 dispute for us, and I'm speaking on behalf of Mr. al Hawsawi,  
19 is the procedure itself; the fact that the prosecution has  
20 filed a pleading in a joint prosecution where Mr. al Hawsawi's  
21 facing the death penalty.

22 Back in 2012, the government made a decision to try  
23 this case as a joint trial and to take it to its fruition.

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1 And as the record amply demonstrates, for quite a while  
2 Mr. al Hawsawi's defense team has sought to sever this case.  
3 The prosecution has steadfastly opposed that a number of  
4 times. The critical violation for us is that in a joint trial  
5 you can't have it both ways.

6 So we see it as two separate issues here. One issue  
7 is the filings from the prosecution; the second issue is  
8 filings from the defense where they, I think, have more than  
9 enough opportunity to protect their confidentiality.

10 So when you look at the litigation in this case,  
11 there have been three filings by the special prosecuting team  
12 that are provided to three of the co-accused but not to the  
13 two of us.

14 Our fundamental objection is to any filing that comes  
15 from the prosecuting team, in this particular case, the  
16 special prosecutor, that is not also provided to the  
17 co-accused in a capital case. We believe that violates due  
18 process and it puts us in a position where I'm having to  
19 react, make decisions on behalf of Mr. al Hawsawi without  
20 having all of the facts.

21 MJ [COL POHL]: Okay. So just so I'm clear, so what you  
22 want is the government pleadings in this case? The defense  
23 responses, replies?

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1 LDC [MR. RUIZ]: Right. So the defense ----

2 MJ [COL POHL]: You don't want those?

3 LDC [MR. RUIZ]: No, we don't.

4 MJ [COL POHL]: Okay.

5 LDC [MR. RUIZ]: Because we see that as a distinguishing  
6 feature. Obviously, we are in a co-accused case, but all of  
7 us, including ourselves, have filed pleadings where we have  
8 submitted ex parte matters because we feel that they protect  
9 our confidentiality and attorney-client privileged  
10 information. To me, that's separate and distinct from what  
11 the prosecution is doing here, which is choosing -- picking  
12 and choosing who they serve this information on.

13 MJ [COL POHL]: Okay.

14 LDC [MR. RUIZ]: We have seen some of the filings from  
15 other defense teams that give us some insight into what the  
16 issue is, but we shouldn't have to guess, and we shouldn't  
17 have to fill in the gaps. So I see those two as distinct and  
18 separate issues.

19 And so that's the essence. Do you have any  
20 questions, Judge?

21 MJ [COL POHL]: No, I don't.

22 LDC [MR. RUIZ]: Thank you.

23 DDC [Maj WAREHAM]: Good morning, Your Honor. Major

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1 Wareham for Mr. al Baluchi.

2 MJ [COL POHL]: Good morning.

3 DDC [Maj WAREHAM]: Our team's position is that we want  
4 all of the proceedings, and that that is appropriate procedure  
5 in this kind of situation. Whether or not we have a dog in  
6 the fight should be a question or an answer that we come up  
7 with after review.

8 And furthermore, the law supports that, in that any  
9 sort of ex parte filing that excludes us in this kind of style  
10 is effectively a closure of the proceedings as to us, and  
11 would have to, at the minimum, be supported by findings  
12 consistent with Press Enterprise v. Superior Court of  
13 California, 464 U.S. 511.

14 Keeping with the multiprong test there, essentially  
15 requiring findings of compelling need and an overriding  
16 interest likely to be prejudiced; further requiring that said  
17 closure not be any broader than absolutely necessary to  
18 provide -- to protect this compelling interest.

19 So far what I have heard from the government and that  
20 we agree that we should -- the government and our team is in  
21 agreement, we should receive the pleadings at this point.  
22 There doesn't seem to be a compelling interest. What has been  
23 told by other defense teams doesn't seem to rise to the level

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1 of compelling interest.

2           And at the end of the day, we're seeking one hour --  
3 or service of the pleadings and one hour to evaluate them to  
4 fully understand the scope of the issue, and especially when  
5 it pertains to what I understand is now a sought abatement in  
6 this case. Those all impact the rights and privileges of our  
7 team. We should be able to evaluate those.

8           MJ [COL POHL]: Thank you.

9           DDC [Maj WAREHAM]: Thank you, Your Honor.

10          MJ [COL POHL]: Ms. Bormann.

11          LDC [MS. BORMANN]: I, like Mr. Nevin and Mr. Harrington,  
12 have mixed feelings about all of this because, of course, what  
13 you know and what I know and what Major Lebowitz knows is very  
14 different from what the rest of the world knows.

15               Earlier this month, Major Lebowitz, acting as special  
16 trial counsel, filed a notice with you copying defense counsel  
17 for Mr. Mohammad, Mr. Bin'Attash, and Mr. Binalshibh. That  
18 notice, I can't go into the details of, but let's suffice it  
19 to say that it raised a very real potential conflict. And the  
20 situation still exists.

21               It was filed pursuant to your order in 292QQ, which  
22 to remind you was when the Binalshibh team was being  
23 investigated for allegations of impropriety both with respect

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1 to their clearances and then later resulting in an FBI  
2 investigation.

3           During the pendency of that particular issue, at no  
4 point was Mr. Bin'Attash, Mr. Mohammad, Mr. al Hawsawi, or  
5 Mr. al Baluchi entitled to materials related to the  
6 investigation of the Binalshibh case. At no point was trial  
7 counsel privy to the investigation regarding the Binalshibh  
8 case.

9           This instance is no different. There is absolutely  
10 no reason why there would need to be other -- particularly  
11 trial counsel in this case because there's a concern about the  
12 crystallizing a potential conflict into an actual conflict  
13 when trial counsel's involved. But there is no compelling  
14 reason that you would differentiate the 292 procedure from  
15 this procedure given what you know.

16           As I explained to Mr. Connell and as I've now  
17 discussed with Mr. Ruiz, they don't pose the problem with the  
18 conflict. The conflict occurs when the trial counsel, people  
19 from the U.S. Attorneys's office and others, become involved  
20 in the litigation of this issue, just like in 292.

21           But I would say to you that I think the better method  
22 is to do what you did in 292, and that is to have regular  
23 ex parte updates regarding that potential conflict and keep

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1 trial counsel out of the litigation so as not to provide  
2 impetus for actual conflict, and ----

3 MJ [COL POHL]: But the issue -- we're not to that point  
4 about switching the trial counsel out or bringing the regular  
5 team in.

6 A simple question is is that Mr. Connell and Mr. Ruiz  
7 want to have access to the pleadings in this case. These are  
8 pleadings that you share with the special trial counsel, but  
9 you don't want to share with your -- the other co-accused.

10 LDC [MS. BORMANN]: That's not exactly what I said.

11 MJ [COL POHL]: No, but is that what you're saying now?

12 LDC [MS. BORMANN]: Right. What I said was I am happy, on  
13 an informal basis, to share with trial -- with counsel for the  
14 defendants, any of the defendants, anything they ask me,  
15 but ----

16 MJ [COL POHL]: Well, they've asked for all of the  
17 pleadings. I just heard Major Wareham say I want all of the  
18 pleadings.

19 LDC [MS. BORMANN]: Well ----

20 MJ [COL POHL]: Are you happy to share all of those  
21 with ----

22 LDC [MS. BORMANN]: I'm happy to do so on an informal  
23 basis, yes.

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1 MJ [COL POHL]: I don't know what that means. You say on  
2 an informal basis.

3 LDC [MS. BORMANN]: Well, under your protective orders we  
4 are at permitted to share a variety of matters with other  
5 defense counsel, and I'm happy to do that. That would not be  
6 violative of your order.

7 MJ [COL POHL]: Okay. So ----

8 LDC [MS. BORMANN]: You know, this is a difficult  
9 situation, Judge, because the -- the real concern, obviously,  
10 is trial counsel, right?

11 MJ [COL POHL]: Yeah, we are going to -- we're going to  
12 get to that.

13 LDC [MS. BORMANN]: And they're watching this. You know,  
14 they have access to the ----

15 MJ [COL POHL]: I've got it. And that's why we're being  
16 very opaque, and I've got it. I'm only talking -- that's why  
17 I kind of broke this up into bite-size bits.

18 The simple question before me is that two of the  
19 defense teams want access -- one wants access to all the  
20 pleadings in this issue so they know what it's about, and the  
21 other just wants the government's pleadings. And you say you  
22 have no objection to that ----

23 LDC [MS. BORMANN]: Judge ----

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1 MJ [COL POHL]: ---- is that what you're telling me?

2 LDC [MS. BORMANN]: Judge, Mr. Nevin said it best, which  
3 is -- and this really crystalizes the conflict in a way, I  
4 guess, that needs to be crystallized.

5 As Cheryl Bormann, I held one opinion. As  
6 Mr. Bin'Attash's counsel, I hold another opinion. And so  
7 while I'd like to answer you with certainty, the conflict is  
8 that, and while I can't go into anything more concrete ----

9 MJ [COL POHL]: Uh-huh.

10 LDC [MS. BORMANN]: ---- on a record involving an ongoing  
11 potential conflict, that is where we sit, so -- and that's the  
12 best I can do for you.

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

14 Any other defense counsel wish to be heard?

15 Apparently not.

16 Major Lebowitz, do you wish to be heard on this slice  
17 of this issue?

18 STC [MAJ LEBOWITZ]: Good morning, Your Honor.

19 MJ [COL POHL]: Good morning.

20 STC [MAJ LEBOWITZ]: Just to Ms. Bormann, there's a lot to  
21 unpack, but I'm going to speak very carefully and I'm not  
22 going to get into the merits.

23 MJ [COL POHL]: Yeah, just get to the narrow issue

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1 about ----

2 STC [MAJ LEBOWITZ]: Yes, sir.

3 MJ [COL POHL]: ---- not sharing it with the -- two of the  
4 five defense counsel.

5 STC [MAJ LEBOWITZ]: Yes, Your Honor.

6 MJ [COL POHL]: That's the only issue I got right now in  
7 front of me. And the government position is what?

8 STC [MAJ LEBOWITZ]: The government's position is that  
9 there is -- at this point, based on the specific facts where  
10 we stand right now, the government has no issues with  
11 providing the notice or the pleadings as well to the other two  
12 defense counsel, the other two defense teams. But I just want  
13 to say that that's just for this specific issue based on these  
14 specific facts where it stands.

15 And if I can speak very generally about the reason  
16 why the government's position is -- is that right now is the  
17 underlying matter occurred in court and impacted all of the  
18 parties. And the notice -- the reason I'm looking down is to  
19 make sure I don't reveal anything more than we need to.

20 There's only one -- in the notice, there's only one  
21 fact that really is not known. At least I don't -- I can't  
22 tell what the defense has heard from other defense teams, but  
23 is not known, the prosecution doesn't know; it didn't occur to

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1 them, wasn't impacting them -- and it's on the notice -- it's  
2 in paragraph B on page 2 of the notice. There's a certain  
3 category that's referenced toward end of that section. That's  
4 the only part of that notice in 532 (Gov STC) that the other  
5 defense teams aren't privy to to my knowledge.

6 But then again, the prosecution filed 532D and 532L  
7 which discussed to all parties the general fact about the  
8 matter. And if we move further on this, the government does  
9 not intend on discussing, beyond generalities, the details of  
10 the underlying facts contained in the notice. And as I  
11 elaborated in 532N and Q, and will do so again if we need to,  
12 the defense does not need to discuss a lot of those -- some of  
13 those underlying facts as well.

14 But the parties again are aware that defense counsel  
15 filed several motions. I think they used the term, they know  
16 they're requesting abatement, they know there's a conflict.

17 So the bottom line, though, Your Honor, is that the  
18 parties for these facts under these circumstances should be  
19 privy to efforts to abate the proceedings. That includes the  
20 prosecution. I think that ----

21 LDC [MS. BORMANN]: Judge, are we arguing the issue  
22 regarding trial counsel at this point? Because if not, I have  
23 an objection.

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1           STC [MAJ LEBOWITZ]: Is wasn't my intent. Actually the  
2 question for you, Your Honor, is, was your intent to have the  
3 prosecution argue 532L or would you prefer ----

4           MJ [COL POHL]: Just bite-sized bits. We're just doing  
5 this little part now. We're not -- I'll get to whether or not  
6 the -- other prosecution team argues or not. I'm only talking  
7 about right now is Mr. Ruiz and Mr. Connell's access to the  
8 pleadings.

9           STC [MAJ LEBOWITZ]: Right.

10          MJ [COL POHL]: That's it.

11          STC [MAJ LEBOWITZ]: So I keep -- Your Honor, I think the  
12 proposal is this: By keeping the actual notice under seal,  
13 but still providing it to the other two defense counsel  
14 knowing that they don't -- and Ms. Bormann is correct, they  
15 don't have a dog in this fight; they don't need an extra hour  
16 to read the pleadings; there's nothing for them to litigate in  
17 this.

18                    But by keeping the notice under seal, based on that  
19 category that I referenced in that paragraph B of the notice  
20 and just not mentioning that, or -- you know, that I believe  
21 balances the discretion on personnel security matters that's  
22 contemplated in the DoD Manual 5200.02, with the statutory  
23 rules in 10 U.S.C. 949c, and Rule 806, which generally limits

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1 closure to the public to certain national security and  
2 physical safety matters.

3 As this commission is well aware, there's some leeway  
4 with cases such as Garries and Kaspers to provide ----

5 MJ [COL POHL]: No, we're going to get to the open hearing  
6 and closed hearing at the next part of this thing. I --  
7 there's a separate legal basis on that that I need to discuss.

8 But just simply, the simple issue is whether or not  
9 it's proper to exclude two of the defense teams. That's ----

10 STC [MAJ LEBOWITZ]: All of that background is to say,  
11 we -- the government does not believe based on this fact under  
12 this circumstance on this specific issue, it is not improper  
13 and that the defense teams can have access to the pleadings  
14 and the notice.

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

16 Mr. Ruiz.

17 LDC [MR. RUIZ]: Judge, I will tell you that I don't  
18 normally bat in the bottom of the ninth if I'm the home team  
19 and I'm ahead, and it sounds like we might be, but I do want  
20 to just say that we do need time to review the pleadings.  
21 They are going to be presumably arguments that are going to be  
22 based on the notice itself, and the information that was  
23 revealed there. We think it's fair that we have at least an

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1 hour, as Mr. Ali's team has requested; maybe a little longer,  
2 I'm not sure what's in there. But we certainly -- we request  
3 to have some time to digest that and see if there's anything  
4 that we need to do or not do. So I wanted to push back on  
5 that.

6           Second point, the impact on the parties. I know that  
7 the government is doing this and drawing this narrow focus to  
8 these facts, and that's fine for now. But I'll simply want to  
9 state for the record that we disagree. In a joint  
10 prosecution, we should receive all of the filings from the  
11 prosecution. And Your Honor will be seeing this issue down  
12 the road as well when it comes to discovery and the selective  
13 delivery of discovery to defense teams based on what the  
14 prosecution believes is the impact on individual defense  
15 teams.

16           Our position is that anything that impacts one  
17 defense team in a joint prosecution necessarily impacts all  
18 defense teams, including Mr. al Hawsawi, at least to the  
19 extent that we need to have knowledge and opportunity to  
20 digest that material and make decisions, or not, based on the  
21 information that is provided in this co-conspiracy case.

22           Thank you, Judge.

23           DDC [Maj WAREHAM]: Nothing further, Your Honor.

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1 MJ [COL POHL]: The request by Mr. Ruiz and Mr. Connell to  
2 see all the 552 -- 32 pleadings is granted. I will give you  
3 your one hour. I will direct you to look primarily at 532 --  
4 the notice that was referenced earlier, which is 532 itself,  
5 but also 532Q, which kind of gives you a current status of  
6 20 -- as of 29 November.

7 Commission will be in recess for one hour. We will  
8 reconvene at 1045.

9 LDC [MS. BORMANN]: Judge, just a point of clarification.

10 MJ [COL POHL]: Yes.

11 LDC [MS. BORMANN]: Does the -- do the pleadings remain  
12 under seal for the time being?

13 MJ [COL POHL]: For now, they remain under seal.

14 LDC [MS. BORMANN]: Thank you.

15 LDC [MR. RUIZ]: Judge, one other thing.

16 MJ [COL POHL]: Sure.

17 LDC [MS. BORMANN]: It's obviously going to take a little  
18 bit of time for us to get that pleading from the government.  
19 So could we have an hour and 15 minutes to build in the amount  
20 of time that it will take to get that sent to us?

21 MJ [COL POHL]: How long will it take you to send it to  
22 them? Not to get them all, but give them those two I talked  
23 about initially.

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1 [The R.M.C. 803 session was called to order at 1105,  
2 4 December 2017.]

3 MJ [COL POHL]: Commission is called to order. All  
4 parties are again present that were present when the  
5 commission recessed.

6 Has Mr. Hawsawi rejoined us, Mr. Ruiz?

7 LDC [MR. RUIZ]: No, Judge. There was a mix-up with his  
8 transportation.

9 MJ [COL POHL]: Okay.

10 LDC [MR. RUIZ]: He's going to be departing, I think we've  
11 resolved the issue for right now.

12 MJ [COL POHL]: Okay. It's just hard for me to see all  
13 the way back in that corner.

14 LDC [MR. RUIZ]: No, he's not here.

15 MJ [COL POHL]: Okay. Picking up where we left off, the  
16 next issue is how we're going to discuss 532.

17 LDC [MR. RUIZ]: Judge, before we move on, can I just ask  
18 one more thing?

19 MJ [COL POHL]: Sure.

20 LDC [MR. RUIZ]: Just in terms of -- I understand you  
21 ordered that we are to receive all of the pleadings.

22 MJ [COL POHL]: Uh-huh.

23 LDC [MR. RUIZ]: The logistics of that, we'd like to

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1 request if the judiciary could provide those to us. We think  
2 that's probably the most efficient way to make sure we get all  
3 of the pleadings and conforming copies that have been  
4 providing to the judiciary. The prosecuting team has no  
5 objection to that. So if -- that just seems to be like it  
6 would be the most orderly way of getting -- making sure we  
7 have everything we need.

8 MJ [COL POHL]: Let me double-check with the people who  
9 actually handle that kind of thing to make sure that's not a  
10 problem ----

11 LDC [MR. RUIZ]: Thank you.

12 MJ [COL POHL]: ---- and then I'll get back to you on  
13 that. Okay.

14 Okay. Now, the question before us now is -- is  
15 whether this can be discussed in an open hearing, if it's  
16 going to be -- or in a closed hearing. Obviously, if -- I  
17 believe, Ms. Bormann, you objected to this being discussed in  
18 an open hearing; is that correct?

19 LDC [MS. BORMANN]: Judge, I believe all of the affected  
20 parties, Mr. Mohammad, Mr. Binalshibh, and Mr. Bin'Attash,  
21 objected to that.

22 MJ [COL POHL]: Okay. What would be your way ahead then  
23 of how this could be discussed at all, then?

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1 LDC [MS. BORMANN]: I'm going to take you back to 292, and  
2 the way that you handled AE 292. When there was a security  
3 clearance concern with respect to members of the Binalshibh  
4 team, that eventually morphed into an FBI investigation of the  
5 Binalshibh team, Your Honor took ex parte material, reviewed  
6 it, and took vague, opaque representations on the record from  
7 those who are affected.

8 We would suggest that be the way forward because to  
9 do otherwise would be to take what is now a potential conflict  
10 which may be resolved fairly quickly and then turn it into an  
11 actual conflict.

12 MJ [COL POHL]: Okay. But my question, then: Are you  
13 saying I just decide this on the papers without oral argument?

14 LDC [MS. BORMANN]: About oral argument of?

15 MJ [COL POHL]: On the merits.

16 LDC [MS. BORMANN]: Of?

17 MJ [COL POHL]: 532.

18 LDC [MS. BORMANN]: The motion?

19 MJ [COL POHL]: The motions.

20 LDC [MS. BORMANN]: The filings, 532C, and then the other  
21 defense counsel filed similar motions.

22 MJ [COL POHL]: Uh-huh.

23 LDC [MS. BORMANN]: You could. We are certainly willing

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1 to address, Your Honor, to answer any questions. This is one  
2 of those instances when a closed proceeding is allowed under  
3 the military commission rules. Despite the fact that we don't  
4 have a classified situation necessarily, although I do note  
5 that classified documents are at issue in some respect with --  
6 related to this inquiry, I don't anticipate going into any  
7 classified matters.

8 But what I do anticipate going into in the underlying  
9 allegations are attorney-client privileged materials, the way  
10 work product is done, what decision-making went into that, and  
11 how this affects us going forward. All of those matters  
12 should not be a matter of public record.

13 You've closed proceedings in the past with respect to  
14 information that is sensitive that could, in fact, infect the  
15 entirety of these proceedings in a way that would negatively  
16 affect Mr. Bin'Attash's due process rights, and that's what  
17 I'm asking you to do now.

18 MJ [COL POHL]: Okay. But there's no -- there's no  
19 authority under 806 for me to have a closed session unless you  
20 really stretch the fact that classified information may be  
21 discussed.

22 LDC [MS. BORMANN]: Well ----

23 MJ [COL POHL]: Because I don't see that as the issue.

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1 LDC [MS. BORMANN]: Right. I don't think that's the issue  
2 here, either. So you're going to have to ----

3 MJ [COL POHL]: The issue really is the process.

4 LDC [MS. BORMANN]: Right. You're going to have to remind  
5 me under what rule or regulation we closed the colloquy  
6 between Mr. Bin'Attash and the court regarding ineffective  
7 assistance of counsel issues.

8 MJ [COL POHL]: Well, that was a unique issue ----

9 LDC [MS. BORMANN]: Right.

10 MJ [COL POHL]: ---- because it dealt with privileged  
11 material and other type of things.

12 LDC [MS. BORMANN]: But that's this.

13 MJ [COL POHL]: Well, you say that's this, but I'm saying  
14 is I'm not sure that makes any difference.

15 LDC [MS. BORMANN]: Hmm.

16 MJ [COL POHL]: Not to be -- what I'm saying is the issue  
17 is not -- the issue is not what happened. The issue is what  
18 is happening, right?

19 LDC [MS. BORMANN]: Correct, although I would note for  
20 Your Honor that with respect to 532Q, which is the  
21 government ----

22 MJ [COL POHL]: Uh-huh.

23 LDC [MS. BORMANN]: ---- in the special trial counsel's

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1 most recent filing, which attaches a declaration ----

2 MJ [COL POHL]: Uh-huh.

3 LDC [MS. BORMANN]: ---- from somebody, that that  
4 declaration, as I stand here today, contains allegations that  
5 are not true with respect to counsel for Mr. Bin'Attash, and I  
6 know are not true with respect to several other counsel.

7 So if you forgo a hearing, I would ask that that be  
8 stricken unless that gentleman is subject to cross. Because  
9 there is -- there are a variety of allegations made there that  
10 are simply allegations without any support, and I and my team  
11 are aware that some of them are simply not true.

12 So I don't know how you go about addressing the  
13 motion for abatement without addressing that declaration,  
14 which the government purports to stand for one -- when I say  
15 the government, I mean Major Lebowitz -- purports to stand for  
16 one set of conclusions, when in fact the underlying  
17 allegations contained in the declaration simply aren't borne  
18 out by what we know on the ground.

19 And without going into more, I'm here to tell you  
20 that, you know, when I read that, it alarmed me.

21 MJ [COL POHL]: Well, so where does that leave us as we  
22 sit here right now? I mean, what I have is the 532Q, and I  
23 got Mr. Nevin's pleading which I think is the one updated

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1 today responsive to it. I don't believe you've submitted a  
2 pleading at this point.

3 LDC [MS. BORMANN]: Not yet.

4 MJ [COL POHL]: So the state of the record I got is what I  
5 got.

6 LDC [MS. BORMANN]: Right. And we would certainly adopt  
7 what Mr. Mohammad filed because it's well pled. But my -- you  
8 know, this is clearly something that developed recently, and  
9 so as with respect to the declaration that is filed as  
10 Attachment B to 532Q, we believe that the commission should  
11 take additional evidence on that particular instance.

12 MJ [COL POHL]: And how would I take that evidence?

13 LDC [MS. BORMANN]: You would hold a hearing of some sort  
14 or ----

15 MJ [COL POHL]: And ----

16 LDC [MS. BORMANN]: I mean, that would be the way you  
17 would do it.

18 If I may have a moment?

19 MJ [COL POHL]: Sure.

20 [Pause.]

21 LDC [MS. BORMANN]: I am being informed by my crack United  
22 States Air Force JAG, Captain Brady, that the discussion  
23 portion of the rules, it's 806 under "Public Trial,"

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1 Subsection (c), and it's contained under the discussion reads  
2 the following: "Note, there may be other reasons" -- or I'm  
3 sorry -- "other sources of authority to close the hearing,  
4 such as Military Commission Rule of Evidence 412, or the  
5 authority of a military judge to close a hearing in, quote,  
6 unusual circumstances, unquote, warranting an ex parte  
7 session. See United States v. Kaspers," and then a citation  
8 which I'll omit.

9           We would submit that -- I mean, this is basically  
10 just reiterating what I've already told you that these  
11 circumstance require.

12           MJ [COL POHL]: Is the unusual circumstances that you want  
13 to warrant a closure of 806, that you may discuss privileged  
14 information? Is that the basis for this?

15           LDC [MS. BORMANN]: May -- may -- no, there's a lot of --  
16 you want to talk about the unusual circumstances? The unusual  
17 circumstances here is, yes, we may -- not just may -- will  
18 discuss privileged information. There's no doubt given the  
19 allegations.

20           MJ [COL POHL]: But keep in mind, though, even if I --  
21 even if I accept that argument ----

22           LDC [MS. BORMANN]: Okay.

23           MJ [COL POHL]: ---- on the 806 provision, that the only

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1 part that would be closed would be that part that had the  
2 unusual circumstances, and the rest of it would be open.

3 LDC [MS. BORMANN]: Which is kind of what we're doing now,  
4 right? I'm talking around issues. I mean ----

5 MJ [COL POHL]: I know what you are talking about, and you  
6 know what you are talking about, but I suspect that anybody  
7 watching this has no idea what we're talking about.

8 LDC [MS. BORMANN]: That's right.

9 MJ [COL POHL]: But I'm saying is the underlying issue --  
10 you know, I could only close the session for the part that  
11 needs the protection, but I can't -- but that would  
12 necessitate an open session on, quite frankly, a lot of the  
13 information.

14 LDC [MS. BORMANN]: So ----

15 MJ [COL POHL]: So I'm just -- I mean, even if I ----

16 LDC [MS. BORMANN]: There are two unusual sets of  
17 circumstances here. The first one involves the protection of  
18 work product and -- and attorney-client privileged matters.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: The second one involves the  
21 dissemination of this information to trial counsel, and the  
22 only way to prevent that is by closing the session.

23 And the reason -- the compelling reason the court has

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1 to do that is to protect what is now a potential conflict  
2 which could be dissipated into an actual conflict which then  
3 would require withdrawal.

4           So what happens ----

5           MJ [COL POHL]: You said that a number of times. I'm not  
6 sure how that makes a difference.

7           LDC [MS. BORMANN]: Well, I can only talk in vagaries, and  
8 I will.

9           So let's assume for a moment that the worst thing  
10 happens. You know, there's a lot of -- in Attachment B to  
11 532Q, that declaration talks about there's a lot of ifs. If  
12 this happens, then this. If this happens, then that. If this  
13 happens, then that.

14           The ifs imagine things happening in the meantime, and  
15 those things -- well, it doesn't matter whether you call them  
16 inquiry or investigation or any other "I" word you can  
17 imagine. The bottom line is there a lot of things that might  
18 happen down the road.

19           If, while those -- that situation there proceeds and  
20 those "ifs" get answered, you require the affected parties  
21 here to argue about that issue and continue with trial  
22 counsel, what you've done is put us in the position of  
23 having -- having to face the very real problem that all of the

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1 cases protect about; and that is the same government that is  
2 doing the "I" thing, whatever you want to call it, is the same  
3 government that we're now forced to litigate against, and  
4 that's the conflict that this court should protect against.

5           Because let me -- as I stand here, let me tell you  
6 that there is -- while this situation unravels or ravel  
7 itself, there is very real concern by defense counsel who are  
8 implicated in the 532 series that we will be and are subject  
9 to all sorts of problems. And we've laid those out for you.

10           MJ [COL POHL]: Doesn't the government already know the  
11 essential triggering event?

12           LDC [MS. BORMANN]: I don't think so. I have no idea  
13 actually. They shouldn't. I can't tell you if Major Lebowitz  
14 has informed them.

15           MJ [COL POHL]: No, but didn't we discuss it in court last  
16 October?

17           LDC [MS. BORMANN]: Hmm. I don't think that we discussed  
18 what is contained in Major Lebowitz's ----

19           MJ [COL POHL]: I didn't say that.

20           LDC [MS. BORMANN]: ---- notice.

21           MJ [COL POHL]: I said the triggering event.

22           LDC [MS. BORMANN]: Yeah, but that doesn't tell them  
23 anything about what the ----

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1 MJ [COL POHL]: What happened after that, I got that. I  
2 got that.

3 LDC [MS. BORMANN]: Right. And how it all happened, and  
4 what happened, and where it is, and all of that, right? Same  
5 situation that you had with Mr. Campoamor, I mean, in AE 292.  
6 That's why he was a special trial counsel, and that's why you  
7 took ex parte pleadings in that. It's really no different.  
8 It's just starting almost identically with the government  
9 saying, oh, no, there's no conflict here. And there was.

10 MJ [COL POHL]: So back to my basic question then: You  
11 take issue with the -- with the declaration on 3 -- or excuse  
12 me, 532Q?

13 LDC [MS. BORMANN]: We do.

14 MJ [COL POHL]: And you're telling me -- you said  
15 something about additional evidence. And you said, Judge,  
16 have a hearing of some sort. I'm not sure what you ----

17 LDC [MS. BORMANN]: I'm not sure either. Because there  
18 are brighter minds than mine amongst this group here, but ----

19 MJ [COL POHL]: Do you wish to ----

20 LDC [MS. BORMANN]: ---- it seems to me that the  
21 discussion section under the public trial rule provides for  
22 just these kinds of unusual circumstances in an unrebutted  
23 declaration.

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1           The other option we have is to supplement the  
2 pleadings, I suppose, in an ex parte manner with dueling  
3 declarations. You know, we certainly can do that as well.  
4 That's one option on the table. And then -- but the problem  
5 for you is, you know, how do you determine what the truth is  
6 if you're not hearing evidence?

7           So there we have it. And this is about as much as I  
8 can talk about in this setting.

9           MJ [COL POHL]: Okay. Okay. Ms. Bormann, I want you to  
10 hold that thought.

11          LDC [MS. BORMANN]: That's hard to do.

12          MJ [COL POHL]: Remember your unusual circumstances,  
13 because I want to hear from everybody else, and then I'm going  
14 to come back to that.

15          LDC [MS. BORMANN]: Okay.

16          MJ [COL POHL]: Mr. Nevin, anything further?

17          LDC [MR. NEVIN]: Just two things very briefly.

18                I did speak to Ms. Bormann yesterday or the day  
19 before, and I said that we would join her in asking that the  
20 proceedings be closed. So she spoke correctly when she said  
21 that -- that I was -- that we were with her on this.

22                As I sit here, I feel very much the same way I did  
23 when I stood up and spoke to you from the table at the outset

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1 of this. I know I would like it to be closed for me because I  
2 don't want to -- I don't like talking about this stuff in open  
3 court where anybody can hear it. I don't think it's good for  
4 me.

5 MJ [COL POHL]: But you know, Mr. Nevin, that's not a  
6 legal basis to close the court.

7 LDC [MR. NEVIN]: Well, but it is a ----

8 MJ [COL POHL]: No, I understand. I understand exactly  
9 what you're saying. But I'm just saying is I need ----

10 LDC [MR. NEVIN]: Oh, no. I get it. That's -- I mean, I  
11 understand.

12 MJ [COL POHL]: Yeah.

13 LDC [MR. NEVIN]: And really, I guess what I'm in some  
14 ways saying to you is we had a thing lately, my team and I, we  
15 look across the table at each other and say, "Is that the  
16 conflict talking?" And it's a fair question because, you  
17 know, one of the points that they make all the time is that  
18 you -- and it's why the -- why conflicts are not reviewed for  
19 harmless error is because you don't always know. You can't  
20 tell.

21 And as I sit here listening to this, I think to  
22 myself, no, I still believe it's in Mr. Mohammad's best  
23 interests to close the proceedings to talk about this, I

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1 guess. But honestly, I feel very conflicted about this. So  
2 anyway, there's that.

3 And the second thing is: I just don't agree with  
4 counsel at all when she refers to this as a potential  
5 conflict. I will tell you, you are free to take off the lid  
6 and walk around in there if you want to. This is an actual  
7 conflict.

8 MJ [COL POHL]: Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, first of all, Mr. Nevin's  
10 comments -- I want you to know that a short time after I got  
11 to know him, I started calling him Hamlet. And I think his  
12 argument today was -- confirms my opinion of him.

13 That being said, Judge, I think that the analogy to  
14 292 is not really appropriate here. Because in 292, we didn't  
15 even know what was going on on the defense side. My team was  
16 the subject of it, we didn't know what was going on.  
17 Everything was ex parte until, at the end, the special trial  
18 counsel shows up and says it's over, and there is no more  
19 conflict. And we argued some about whether there still was a  
20 conflict or not, but we never really argued the merits of it  
21 in open court or in a closed session.

22 So I don't know -- we're in a different posture here  
23 because Mr. Lebowitz followed your order, but he gave us

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1 notice of what it was so we're not -- we're in a bit of  
2 different posture.

3 I agree that I think that the parts of it that talk  
4 about attorney-client privilege, to the extent there's  
5 anything in there, and to the attorney work product exception,  
6 really should be in a closed session; but I think that the  
7 court can bifurcate those arguments, if they're even -- if  
8 they're necessary. And I'm not so sure they are for the court  
9 to address it.

10 But I think the authority for the court to close  
11 parts or all of the session is in the rules of the court  
12 at Rule 6.2a, which says not only for requirements of national  
13 security, but for other overriding interests. And I think in  
14 this situation, where we are in a position where the inner  
15 workings of particular defense teams and the inner workings of  
16 defense teams working on joint motions or combining with  
17 motions, is something that fits into that category.

18 It's clearly work product exception, and there's no  
19 reason that that has to be brought out to the public or to  
20 the -- we'll get to the issue of whether the regular trial  
21 prosecution can be present -- but to the other side, I don't  
22 think it's necessary for that to be done. So I would  
23 certainly ask that the court close any argument with respect

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1 to that issue.

2 MJ [COL POHL]: Mr. Harrington, you know -- and again,  
3 we're -- this is one of those issues where there's a  
4 divergence of opinion on your side of the court. And I guess  
5 what it really comes down to is -- I mean, your position is  
6 the privileged material, work product, if it needs to be  
7 discussed, can be done in a closed session. And this is kind  
8 of what I was talking to Ms. Bormann earlier. But the bulk,  
9 quite frankly, could be in an open session. But Mr. Nevin  
10 would prefer it all be in a closed session. And again, I  
11 don't think there's legal authority for it all to be in a  
12 closed session.

13 But the issue really is -- right now is whether or  
14 not we need to have any session at all, because the other  
15 option is just to decide on the papers. And then down the  
16 road, we decide on what stays under seal or not.

17 So what would be your position on that?

18 LDC [MR. HARRINGTON]: Judge, I should bring the court up  
19 to date because some things have happened since the last  
20 pleadings ----

21 MJ [COL POHL]: Okay.

22 LDC [MR. HARRINGTON]: ---- and it looks like -- we have  
23 an informal opinion that our team is going to be removed from

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1 this, so that this issue may be going away for us.

2 MJ [COL POHL]: Uh-huh.

3 LDC [MR. HARRINGTON]: Given that -- and it's not formal  
4 yet, but we have every reason to believe it's going to happen  
5 based on the source of the information -- I'm probably not the  
6 right person to be making that argument.

7 MJ [COL POHL]: Okay.

8 LDC [MR. HARRINGTON]: All right.

9 MJ [COL POHL]: Okay. I'll come back to Mr. Nevin on that  
10 issue. The issue of -- to avoid the splitting -- to avoid  
11 discussing it in an open session, the other option is to  
12 decide it just on the pleadings without further oral argument.

13 LDC [MR. NEVIN]: I don't support that.

14 MJ [COL POHL]: Okay.

15 LDC [MR. NEVIN]: I don't agree to that.

16 MJ [COL POHL]: Okay.

17 LDC [MR. NEVIN]: Or I would object to it.

18 MJ [COL POHL]: You object. Okay.

19 Major Wareham.

20 DDC [Maj WAREHAM]: Your Honor, briefly, I'd like to state  
21 Mr. al Baluchi's position. Well, first off, any allusion to  
22 292, I would note that we objected to the 292 process at that  
23 time, and we would object to any closure of a hearing, if

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1 there is one at all.

2 We don't take a position as to whether or not there  
3 should be a hearing, but if there is a hearing, it is our  
4 position that 806(b)(2) expressly limits when closure is  
5 appropriate and when it is not, and that it's limited to  
6 physical safety and national security.

7 And yes, the discussion does cover, quote, "unusual  
8 circumstances." We would maintain that those unusual  
9 circumstances, however, would be guided by the standard I  
10 expressed earlier found underneath Press Enterprises as to the  
11 compelling need requirement.

12 Ultimately because this is Mr. al Baluchi's right to  
13 attend as well, and a closure potentially implicates that he  
14 would be excluded from the proceedings.

15 MJ [COL POHL]: Well, would he be excluded from the  
16 proceedings if the closure was based on attorney work product  
17 slash privilege?

18 DDC [Maj WAREHAM]: Unknown, Your Honor, not necessarily  
19 seeing the future. I could see how he could be included but  
20 any of those decisions need to be guided by applicable legal  
21 standards.

22 MJ [COL POHL]: You're right.

23 DDC [Maj WAREHAM]: And 806 covers our express legal

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1 standard and then unusual circumstances and would have to be a  
2 factual analysis or a findings similar to that under  
3 Press Enterprises.

4 MJ [COL POHL]: Thank you.

5 DDC [Maj WAREHAM]: Thank you, Your Honor.

6 MJ [COL POHL]: Mr. Ruiz.

7 LDC [MR. RUIZ]: I don't have anything, Judge.

8 MJ [COL POHL]: Ms. Bormann.

9 I'm sorry, Mr. Harrington, do you have another point  
10 you wanted to make.

11 LDC [MR. HARRINGTON]: Judge, with respect to what I said  
12 about our team potentially being removed from this, I don't  
13 want to in any way imply that we accept the procedure that's  
14 happened or the ramifications of it as being serious and being  
15 an intrusion on the defense and being something that is  
16 extraordinarily chilling to us. I don't want to concede any  
17 of those arguments.

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

19 Ms. Bormann.

20 LDC [MS. BORMANN]: Yes.

21 MJ [COL POHL]: Two things. One is you took issue with  
22 the declarations, so you wish to supplement your pleadings?

23 LDC [MS. BORMANN]: We do.

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1 MJ [COL POHL]: Secondly is -- and again, it's an  
2 interesting dynamic here of different opinions, but that's  
3 okay. On the unusual circumstances -- and the rule cites 412.

4 LDC [MS. BORMANN]: Yes.

5 MJ [COL POHL]: And 412 is an easy one. 513, quite  
6 frankly, is another easy one because it's right written in the  
7 Rule of Evidence.

8 LDC [MS. BORMANN]: Yes.

9 MJ [COL POHL]: So your unusual circumstances would be  
10 attorney work product, slash, privileged material.

11 LDC [MS. BORMANN]: Right, and to prevent ----

12 MJ [COL POHL]: But ----

13 LDC [MS. BORMANN]: ---- the crystallization of an ----

14 MJ [COL POHL]: Okay. The attorney work product  
15 privileged material, as I think Mr. Harrington alluded to, I  
16 understand that concept. I'm not necessarily agreeing with  
17 that it would be closed, but if you want me to close a hearing  
18 on the other part of it, you're going to have to give me an  
19 articulated basis that I'm not getting right now with legal  
20 authority for that effect.

21 LDC [MS. BORMANN]: Okay.

22 MJ [COL POHL]: Okay. So ----

23 LDC [MS. BORMANN]: The -- and on the question of -- I

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1 just wanted to make a comment about the argument that Major  
2 Wareham made, and that is that the conflict is not  
3 crystallized by the presence of Mr. al Baluchi or  
4 Mr. al Hawsawi. The conflict is crystallized by the presence  
5 of the trial counsel, and that is the real issue here.

6           They -- as your order in 292QQ contemplates, the --  
7 it protects the prosecution in this case, trial counsel, from  
8 exacerbating the conflict, and so that's where we are.

9           MJ [COL POHL]: Okay.

10          LDC [MS. BORMANN]: Thank you.

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

12                 Major Lebowitz, do you have anything you wish to add?

13          STC [MAJ LEBOWITZ]: Yes, Your Honor. The government's,  
14 just for the record, position is that we are fine with if this  
15 commission decides to rule on the papers alone. But again,  
16 this issue, there's no national security or physical safety  
17 matter on this one. It's purely an administrative procedure  
18 matter that we're talking about.

19                 Now, all of the privileged information that the  
20 defense is discussing and the declaration that some of the  
21 defense counsel have been raising to certain provisions of  
22 that, what the defense are attempting to do is -- and I'll  
23 caveat this by saying that Ms. Bormann already used terms such

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1 as security clearance concerns, and she's used the term "I"  
2 words.

3           So what the defense are trying to do is they're  
4 trying to fight and dispute the underlying security function,  
5 the underlying security matter that was articulated both in  
6 the notice and was referenced in the declaration. And that's  
7 not what this commission needs to hear. It's not -- the issue  
8 is, and we can have this conversation at the appropriate time,  
9 is whether or not there is a conflict.

10           But the conflict aspect pertains to where we stand  
11 right now, as this commission has already noted. It stands  
12 for what's going on -- it's not the triggering event that was  
13 referenced before. That's all disputing the security  
14 function. That's already been answered in the declaration.  
15 It's answered in the notice, even, and in all of the  
16 pleadings.

17           We're at a different place now -- and I'm using my  
18 words carefully right now, just because obviously we haven't  
19 had a ruling on this one. But the internal workings of how  
20 the teams interact only serve to litigate and disputes the  
21 security function and internal workings of that. In our  
22 pleadings -- and I'm not going to get too far into that one --  
23 is we cite to -- it's in Q as well as 532N, we cite to Supreme

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1 Court precedent. It's Egan v. Department of the Navy, which  
2 provides great deference to the security function to make  
3 certain decisions, and specifically notes that trial courts  
4 should stay out of security processes.

5 So again, we can have the conflict conversation  
6 without getting into the dispute about the merits of the  
7 triggering event or anything like that, or how the security  
8 function got to where we are at right now.

9 And furthermore, we could have an open discussion,  
10 fully open, without any dispute, if I can essentially say,  
11 which I think -- and I don't see any unusual circumstances  
12 about this at all because what I'm going to reference -- I'm  
13 not going to say it -- is procedural matter. There's  
14 procedural regulations. We've cited them in our pleadings.  
15 It's on the notice on page 2, paragraph C, the very first  
16 sentence.

17 If we can say that, then we can have this entire  
18 argument without closing this session at all pursuant to the  
19 rules.

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

21 LDC [MR. NEVIN]: [Counsel away from podium; no audio.]

22 MJ [COL POHL]: Sure, Mr. Nevin.

23 LDC [MR. NEVIN]: So I agree with what counsel said in

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1 this sense: I understand what Egan says, and it's part of the  
2 problem that's presented here.

3 If you had the authority to simply trump the findings  
4 of these various agencies that are looking at our security  
5 clearances, this would be an awful lot simpler. You could  
6 simply issue an order, make a finding. And maybe you would  
7 issue an order that I recognize I might lose that argument.  
8 But my point is ----

9 MJ [COL POHL]: Uh-huh.

10 LDC [MR. NEVIN]: ---- this situation we have is  
11 complicated, not simplified, by the fact that these  
12 organizations act independently of you and of this process.

13 And I just want it to be clear that I'm not asking  
14 you -- we have not asked you to take that kind of action at  
15 all. We have made the point repeatedly that there is a  
16 conflict of interest, that it requires that the proceedings be  
17 abated, and that independent counsel be appointed to advise  
18 Mr. Mohammad.

19 We have not asked you to issue an order invalidating  
20 some finding that somebody else made, some conclusion, I  
21 think, that they reached. So just so we're clear.

22 MJ [COL POHL]: Thank you.

23 Anything else? Ms. Bormann.

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1           Maybe it's because it's Monday, I'm letting people  
2 talk more than I normally do. So don't take this as a carte  
3 blanche in the future.

4           LDC [MS. BORMANN]: Thank you, Judge. I just want to note  
5 that we are in agreement with Major Lebowitz that the  
6 underlying factual allegations aren't really germane in terms  
7 of you making a decision about -- you can't -- as Mr. Nevin  
8 said, you can't trump any of this, right? You don't have any  
9 control over it. We agree.

10           But here's our concern now: Major Lebowitz, by  
11 attaching Attachment B to his filing 532Q, inserted factual  
12 allegations. And some of those factual allegations are  
13 incorrect. That's the problem we have.

14           We agree, shouldn't -- that's not really the issue.  
15 The issue isn't the underlying factual allegations; yet, I'm  
16 in possession of a declaration filed by Major Lebowitz that  
17 puts into dispute factual allegations. And so when I say we  
18 need to supplement it, I -- we didn't file any motion that  
19 contained underlying facts because we don't think it's  
20 appropriate for you to decide those.

21           So if Major Lebowitz wishes to withdraw Attachment B  
22 from 532Q and strike all of the references to it, we would be  
23 happy to not have to go into those.

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1           STC [MAJ LEBOWITZ]: Your Honor.

2           MJ [COL POHL]: Yes, Major Lebowitz. Would it be fair to  
3 say that you stand by your pleading?

4           STC [MAJ LEBOWITZ]: I do, Your Honor. I have just one  
5 other thing, if the court will indulge me ----

6           MJ [COL POHL]: Uh-huh.

7           STC [MAJ LEBOWITZ]: ---- based on what Ms. Bormann just  
8 said. She said that this commission has no control over kind  
9 of the security matters and the decisions they make. However,  
10 this instance is different because the defense actually does  
11 have some control.

12                   Ms. Bormann makes a point -- again, she is litigating  
13 the underlying factors and litigating the security aspect of  
14 it, but her proposal is to supplement the record to  
15 essentially dispute the declaration. But the government's  
16 position, Your Honor, is that this commission is the wrong  
17 forum for her to dispute the underlying triggering events and  
18 the facts that are mentioned in the notice or in the  
19 declaration.

20                   The appropriate forum, and we've -- it's referenced,  
21 again, in the declaration and in our pleadings -- and I will  
22 say that this is the big reason that counsel for  
23 Mr. Binalshibh is kind of in a better position in this -- is

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1 because the defense has an opportunity, they have been invited  
2 to submit, not to this commission, which they've already  
3 done ----

4 LDC [MS. BORMANN]: Judge, I'm objecting. We're getting  
5 into the underlying facts here.

6 MJ [COL POHL]: Yeah, Major Lebowitz, we don't need -- I  
7 understand what you're saying and I read all of the pleadings.  
8 Quite frankly, we're not to that point anyway. I'm trying to  
9 get it to the point is, what's the way ahead process-wise.  
10 And the issue before me is how we're going to proceed  
11 process-wise before we get to the merits of the thing.

12 Yes, I understand -- I read the pleadings, and I  
13 understand what opportunities the defense may have to provide  
14 information to various people. I got it. I got that.

15 STC [MAJ LEBOWITZ]: My point, Your Honor, was just to  
16 clarify that we can have -- if that part of the discussion is  
17 minimized, then there should be no issue with having it ----

18 MJ [COL POHL]: I got it.

19 STC [MAJ LEBOWITZ]: ---- in an open session.

20 LDC [MR. NEVIN]: Only to provide a time hack ----

21 MJ [COL POHL]: I got it.

22 LDC [MR. NEVIN]: ---- close to prayer.

23 MJ [COL POHL]: I got it. Okay. There's a motion to --

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1 before me to abate the proceedings at this point. And that  
2 motion right now is denied only because, based on the record I  
3 have today, I don't think it's sufficient to do that until I  
4 get the supplement from Ms. Bormann and the legal basis of the  
5 way ahead on this thing.

6           It strikes to me is there's still some outstanding  
7 issue before we get to the merits of this thing, and the  
8 various positions of counsel put me in the position of some  
9 want it discussed in open court, some want it discussed in a  
10 private session. It strikes to me is that that issue has to  
11 be resolved before we can proceed further. And therefore,  
12 when I say the motion to abate is denied, I only mean it's  
13 denied for this week. It is certainly not denied until I --  
14 until the entire -- the rest of the pleadings are done and we  
15 get to it from that point. Okay. So in other words, we're  
16 deferring, would be probably a better term than denied.

17           Mr. Nevin.

18           LDC [MR. NEVIN]: Your Honor, I came prepared to argue the  
19 motion to abate. I haven't done that yet. I thought we were  
20 just arguing whether or not this was going to be a closed  
21 proceeding.

22           MJ [COL POHL]: Yeah. And that's my point, though,  
23 Mr. Nevin, is that Ms. Bormann says she wants to supplement

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1 her pleadings. You want to do it in a closed session.

2 Mr. Connell's -- or Mr. Ali wants to do it in open session.

3 Do you have a legal basis to close it? I asked you  
4 that earlier.

5 LDC [MR. NEVIN]: Yeah, I told you my response to that.  
6 And I assumed that the record is presented -- that the thing  
7 is fully presented to you with respect to closure of the  
8 proceedings. But the record is not fully presented to you  
9 with respect to abatement because what we do for the rest of  
10 the week, if we're abated or not, and what we do for the rest  
11 of the month and until we have more hearings, is directly  
12 impacted by that.

13 MJ [COL POHL]: No, I understand that, Mr. Nevin, but ----

14 LDC [MR. NEVIN]: I mean, I would just like to be heard on  
15 that question.

16 MJ [COL POHL]: No. I understand what you're saying. You  
17 want to get to the merits of it, and so do I.

18 LDC [MR. NEVIN]: Of abatement.

19 MJ [COL POHL]: Yeah. Well, yeah, the merits of 532,  
20 which is the abatement issue.

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

22 MJ [COL POHL]: And I want to get to it also. But what  
23 I'm saying is the procedural posture we have right now is that

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1 nobody can agree on what -- the forum we're going to do this  
2 in. Some say we need to take more evidence, some say it's an  
3 open hearing, some say it's a closed hearing. And I'm giving  
4 them an opportunity to give me a legal basis to do it in a  
5 closed hearing. That's all I'm doing.

6           So denied was the wrong word; it really should have  
7 been deferred. Because until we decide how we're going to  
8 litigate this -- or handle it from the pleadings. I have  
9 given options to everybody and I get different answers from  
10 each team.

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

12           MJ [COL POHL]: So you want to argue it in an open  
13 session?

14           LDC [MR. NEVIN]: I want to argue it.

15           MJ [COL POHL]: Okay. I'll ----

16           LDC [MR. NEVIN]: Well, no, by which I meant -- I meant to  
17 not fully answer that as a way of saying I -- if you decide  
18 that it should be closed or if you decide that it should be  
19 open, fine.

20           MJ [COL POHL]: Here's the -- here's the default. It's  
21 always an open session unless there's an exception.

22           LDC [MR. NEVIN]: Yeah. Okay.

23           MJ [COL POHL]: Okay. Okay.

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1 LDC [MR. NEVIN]: So let's do it in an open session.

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

3 LDC [MR. NEVIN]: I ----

4 MJ [COL POHL]: I'm with you. I'm with you. Okay. But  
5 like I said, that's why I broke this up into pieces. That's  
6 why I broke it up, is now we're a talking about -- you think  
7 it should be in an open session. Mr. Harrington, I don't  
8 think he has a dog in this fight anymore, so I don't want to  
9 speak for other people. But I believe Ms. Bormann doesn't  
10 want it in an open session, that she wants it closed.

11 LDC [MS. BORMANN]: Judge, I'm asking you to make a  
12 decision. That's why we filed the motion. I have supplements  
13 on the underlying motion which we can get to you very quickly  
14 in terms of declarations. And we will be ready to argue  
15 whatever way you think is proper.

16 MJ [COL POHL]: Okay. Okay. I'm sorry, I misunderstood.  
17 I took the premise that everybody wants this as a closed  
18 session. Okay.

19 After lunch, we'll discuss this -- the merits of this  
20 under an open session. The only thing that need not be  
21 discussed in an open session will be any type of privileged  
22 material, attorney work product material. And if you feel the  
23 need to argue that, we will discuss whether or not we can do

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1 that in a closed session. Okay.

2 Everybody understand the way ahead? Okay.

3 Commission is in recess until 1300.

4 [The R.M.C. 803 session recessed at 1146, 4 December 2017.]

5 [END OF PAGE]

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1 [The R.M.C. 803 session was called to order at 1300,  
2 4 December 2017.]

3 MJ [COL POHL]: The commission is called to order with no  
4 changes in any of the parties. The courtroom is still cold.

5 LDC [MR. CONNELL]: Sir, Lieutenant Colonel Thomas is not  
6 present at the moment. He will be along shortly.

7 MJ [COL POHL]: Oh, I'm sorry. Any other defense counsel  
8 no longer present?

9 Mr. Hawsawi remains absent, Mr. Ruiz?

10 LDC [MR. RUIZ]: Yes, Judge.

11 MJ [COL POHL]: Thank you. One moment.

12 [Conferred with courtroom personnel.]

13 MJ [COL POHL]: That brings us to 532L. Before we get to  
14 the merits of it -- and this is -- is this your motion, there,  
15 Major Lebowitz, to ----

16 STC [MAJ LEBOWITZ]: It's not, Your Honor. It's actually  
17 the regular prosecution team's motion for L; although I adopt  
18 their position, obviously.

19 MJ [COL POHL]: Okay. You adopt their position. Okay.

20 And I think I've already heard from the -- at least  
21 Ms. Bormann's view on this. Any other defense counsel want to  
22 be heard on this at this time?

23 LDC [MR. CONNELL]: Sir, I just want to say that Colonel

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1 Thomas has returned to the courtroom.

2 MJ [COL POHL]: Okay, thank you.

3 Apparently not. At this point in time, given the  
4 status of the proceedings, the defense -- the government  
5 motion to replace the special trial counsel with the regular  
6 prosecution team is denied.

7 That brings us now to the merits of 532. Defense.

8 LDC [MS. BORMANN]: Judge, before Mr. Nevin starts,  
9 there's a declaration I'd like to serve to special trial  
10 counsel and the other parties, and give a copy -- courtesy  
11 copy to the court ----

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: ---- also to the court reporter.

14 This is what I referred to earlier on, that we would  
15 be submitting a declaration. We were able to prepare it over  
16 the lunch hour.

17 MJ [COL POHL]: Okay. Go ahead. It will be -- what's the  
18 next exhibit? It will be 532W.

19 LDC [MS. BORMANN]: Thank you, Judge. And although we're  
20 submitting this to the record, for the record, and we want the  
21 court to consider it at this point, until you make a final  
22 decision about whether or not certain matters should be  
23 ex parte, we'd ask that the specifics contained in it

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1 regarding how things proceeded not be developed in open court.

2 MJ [COL POHL]: Okay. You said ex parte. You really  
3 meant under seal?

4 LDC [MS. BORMANN]: I did.

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

6 While we're doing that. Mr. Ruiz, your question  
7 about the court exhibits, getting copies of them, actually,  
8 that's more of an appropriate function of the court  
9 administration court reporters. They're the ones who maintain  
10 those copies. And so if ask you them, they'll give you the  
11 copies.

12 LDC [MR. RUIZ]: Thank you.

13 MJ [COL POHL]: Let me see the declaration, please, once  
14 it's marked. One moment, please.

15 [Pause.]

16 MJ [COL POHL]: Okay. Ms. Bormann, have you conveyed this  
17 information to the -- anybody other than to me?

18 LDC [MS. BORMANN]: The ----

19 MJ [COL POHL]: What I mean is because Mr. Harrington  
20 alluded to earlier about -- about possible resolution of his  
21 issue with 532, which I assume meant ----

22 LDC [MS. BORMANN]: Well, Judge ----

23 MJ [COL POHL]: ---- that's he's been communicating with

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1 the CAF folks.

2 LDC [MS. BORMANN]: The content of the declaration speaks  
3 for itself. We did convey it to the director of WHS OSS.  
4 That's paragraph -- let's see ----

5 MJ [COL POHL]: Paragraph 6.

6 LDC [MS. BORMANN]: ---- 6. And after that, that's when  
7 we received the government's filing. So, I mean, at this  
8 point, we're in a bit of a trick bag.

9 MJ [COL POHL]: What is that, trick bag?

10 LDC [MS. BORMANN]: They've already been advised. WHS has  
11 been advised of the facts here long before the government  
12 filed 532. So we can only assume that their determination to  
13 pursue the situation at issue in 532 is regardless of what the  
14 defense team member most in the know about the situation told  
15 them, two of them.

16 [Pause.]

17 MJ [COL POHL]: Okay. Okay. Mr. Nevin.

18 [Conferred with courtroom personnel.]

19 LDC [MR. NEVIN]: All right. Your Honor, thank you.

20 So 532, the original pleading in this series, the  
21 government special trial counsel's notice, announces that,  
22 "Washington Headquarters Services Office of Special Security  
23 has concluded" -- and that's a quote -- they've reached a

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1 conclusion, that we, my team -- and that would be Mr. Sowards,  
2 Colonel Poteet, and myself -- appear to have willfully  
3 submitted classified information on an unclassified network.

4           And that is a conclusion that they have reached. And  
5 their conclusion is that, in doing this, we acted willfully.  
6 And the -- and as a result of that, they refer us to the DoD  
7 CAF, which 532 says "is the entity responsible for making an  
8 adjudicative determination regarding our continued eligibility  
9 for access to classified information."

10           And I think it's also important to note that they  
11 notified the National Programs Special Management Staff,  
12 NPSMS, because they're the SAP access people. And I have had  
13 the occasion to discuss the SAP access people with you before  
14 because our interpreter for 15 months had lost his SAP access  
15 for reasons that were never explained to us; and for months  
16 after it was determined that he had all of his tickets punched  
17 and everything else, he still didn't get his SAP access back.  
18 So that's one that gets my attention also.

19           And they also entered what they call adverse incident  
20 reports in the Joint Personnel Adjudication System, JPAS, and  
21 they also announced that they will provide counsel, which I  
22 take it means me, and the other two on our team, with due  
23 process should it determine that any further action be taken.

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1 And I wrote out in the margin on my copy "It's not over yet."

2 And they also say that if eligibility for access to  
3 classified information comes up again, they'll tell you.  
4 That's in the last paragraph.

5 MJ [COL POHL]: Are you reading from the original notice,  
6 or the ----

7 LDC [MR. NEVIN]: The original notice, 532.

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

9 LDC [MR. NEVIN]: You know, but I'm through reading from  
10 it.

11 So for me, for the third time in this case, I've  
12 hired counsel to represent me and advise me about this stuff.  
13 Because I understand what he's saying about criminal and they  
14 haven't referred it to any law enforcement people and it's  
15 just administrative, it's nothing else.

16 But I also know what willful means, and I know the  
17 military commission does, too. And this -- here it is.  
18 They're telling me they've concluded that I acted willfully to  
19 disclose classified information.

20 Now, when you -- when subsequent pleadings get filed,  
21 we learned their position -- and I'm really referring to --  
22 I'm really referring to 532Q, which is both a pleading by the  
23 special trial counsel, but also an attached declaration from a

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1 Mr. Gregory Williams. And they take several positions here.

2 The first one is that this is an administrative  
3 matter, and that it's non -- law enforcement is not involved,  
4 and an administrative matter by definition couldn't possibly  
5 give rise to a security clearance problem. And I think I  
6 really can -- I don't need to say too much about this because  
7 the military commission already spoke to it in 292QQ.

8 The amended pleading is the one I'm looking at, and  
9 you were quite clear there that -- just -- there are about  
10 four or five places where you say this, but in looking at  
11 these issues, and I'm reading from page 24, subparagraph (d)  
12 of 292QQ, subparagraph (5)(d).

13 You say, "In looking at these issues, the commission  
14 is aware many cases addressing conflicts of interest have been  
15 based on criminal investigations of counsel." And that's a  
16 point that the special trial counsel makes as well. That's  
17 what all the cases that he cited say. Yeah, there are all  
18 sorts of cases where a conflict of interest arises from a  
19 criminal investigation. But unlike you, he doesn't go any  
20 farther than that.

21 You go on to say, "With the ability of the FBI, DoD,  
22 and others to carry on national security investigations,  
23 possibly resulting in a range of punitive actions, from the

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1 revocation of a security clearance and loss of a job, to  
2 criminal prosecution, the commission needs to look at the idea  
3 of conflict in a broader scope."

4           And you saw the cases that we cited then and then  
5 some of which we cited to you again here and some that we  
6 cited here that had not been cited before that stand for this  
7 proposition as well: Professional responsibility. Is  
8 something going to happen to your license? Is something going  
9 to happen to your entitlement to have access to classified  
10 information which is a condition of doing this job, and is a  
11 condition -- is a valued property right, obviously, because  
12 it's a condition of doing other kinds of national security  
13 work in settings other than this present one. And so, of  
14 course, we have a high interest in the outcome of those types  
15 of things.

16           And you referred to this again on page 29 when you  
17 said that -- you were referring to the special trial counsel's  
18 pleadings at that time, and you said you took them at the  
19 literal meaning of their pleadings and their declarations, but  
20 the commission is concerned over the absence of any reference  
21 to intelligence-related investigations or to investigations by  
22 entities other than the FBI which may implicate members of  
23 Mr. Binalshibh's defense teams.

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1           And you wanted to placate the concerns of both the  
2 commission and counsel as to the ability of defense counsel to  
3 continue their aggressive representation of Mr. Binalshibh.

4           And so I remember very distinctly, you know,  
5 disagreeing with the military commission about whether my team  
6 had a conflict of interest at the time, but at the same time  
7 reading this and being reassured by it and thinking, okay, the  
8 military judge understands what we're -- where we're coming  
9 from, what we're getting at here; and that is at least as  
10 useful.

11           So the idea that it can't be -- I mean, none of the  
12 cases that have been cited stand for the proposition that an  
13 administrative inquiry of this kind cannot give rise to a  
14 conflict of interest. They're just -- and there aren't.  
15 There are not such cases.

16           Indeed, the fundamental problem here is the one that  
17 you identified on page 29 of 292QQ that -- that is, the  
18 ability of defense counsel to continue their aggressive  
19 representation, in that case of Mr. Binalshibh. But that's  
20 the fundamental problem.

21           Okay. So the next thing that special trial counsel  
22 argues is that actually the DoD CAF doesn't investigate. So  
23 remember that in 292, a lot of our discussion turned around

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1 the existence or not of an investigation, and I think that  
2 that word "investigation" has taken on some degree of, like,  
3 high significance because -- because the special trial counsel  
4 goes to great lengths to try to say that -- that what the DoD  
5 CAF does is not investigate.

6 And so if it weren't -- if it weren't so serious to  
7 me, I would almost find it laughable, the extent to which  
8 counsel is willing to bend the meaning of these underlying  
9 concepts to get at this.

10 So they say, for example, it doesn't investigate, the  
11 DoD CAF, doesn't investigate. It reviews information provided  
12 to it. That's 532Q at page 2.

13 And there's a note on page 3 at the bottom of page 3  
14 as well that is worth pointing to. They say it doesn't --  
15 "They don't investigate, they adjudicate. And adjudication is  
16 defined as a means for evaluating pertinent data in a  
17 background investigation as well as any other information that  
18 is relevant and reliable to determine whether a covered  
19 individual is suitable for government employment or for access  
20 to classified information."

21 So they're not investigating, they are evaluating  
22 pertinent data. And they go on to say, to point out that the  
23 DoD CAF has the authority to determine security clearances.

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1           What -- the point of this is that whether you want to  
2 call it an investigation, or whether you want to call it  
3 something else, what's going on here is that the government  
4 has already concluded that I and my two co-counsel acted  
5 willfully to disclose classified information, and now they are  
6 going about the business of deciding what to do with us as a  
7 result of that. And they are using their authority to  
8 determine or they are going to evaluate pertinent data or  
9 they're going to review information or they're going to do  
10 whatever you want to call it, but we all know we are now in  
11 their cross hairs. They have information, they've made  
12 conclusions already about us, and we're waiting to see what  
13 happens next.

14           Now, it's also important to note -- and I just sort  
15 of said that last little bit, but there's not any question on  
16 this record that this is still an open investigation. And you  
17 see this all over these materials. You see that -- you see an  
18 assertion that if they -- and I'm looking at the declaration  
19 of Mr. Williams at paragraph 16, as I recall -- if the DoD CAF  
20 renders a favorable determination, then various things would  
21 happen.

22           But if you go down to paragraph 17 and 18, however,  
23 if they decide that there's insufficient mitigating

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1 information on which to render a favorable adjudication, then  
2 various other things will happen. They'll call us up and ask  
3 us do we want to talk to them and so on. And they'll tell us  
4 our due process rights and so on.

5           So this thing is still open, and that -- that sets up  
6 exactly the problem that was -- is present in any conflict of  
7 interest situation like this one. My interests, Mr. Sowards',  
8 Colonel Poteet's interests are to not be sanctioned by these  
9 folks. And these are -- this is the same Department of  
10 Defense that's prosecuting Mr. Mohammad. We would prefer that  
11 they not sanction us. So we are motivated to, on the one  
12 hand -- just like I was standing here at counsel table earlier  
13 today telling you, I would like for this thing to be done in  
14 secret. I don't know if that's the best thing for  
15 Mr. Mohammad or not. I was trying to say to you, this is a  
16 way in which our interests diverge. And the same was true  
17 with respect to the other questions that we talked about this  
18 morning. And that's why I really didn't want to speak to  
19 them.

20           And I think we're in -- we're clear here because  
21 what -- the point of the argument I'm making now is that I ask  
22 that you appoint independent counsel to advise Mr. Mohammad on  
23 this question, because I can't advise him on this question.

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1 I'm even having trouble advising myself. But that's the other  
2 point of this argument, is that there -- I'm laboring under a  
3 conflict of interest as I stand here, as all of us sit here.

4 So you know what ----

5 MJ [COL POHL]: What is unclear to you, Mr. Nevin, as to  
6 what precipitated this actions by the government? What I'm  
7 saying is ----

8 LDC [MR. NEVIN]: What is unclear? You would be better to  
9 ask me what's clear.

10 MJ [COL POHL]: Okay. Well, let me ask you this: A  
11 pleading was filed, okay.

12 LDC [MR. NEVIN]: I don't think it was filed.

13 MJ [COL POHL]: Okay. Was it -- well, okay.

14 A pleading was sent over an unclassified network  
15 containing classified information, true?

16 And on that pleading it had your name and your  
17 counsel's name on it, true?

18 I mean, okay. What I'm saying is -- and that's where  
19 we're at. So is it a spill or is it more than a spill or  
20 something else like that, I don't know. But then it's now  
21 gone through this process. And you say you're -- if your -- is  
22 your issue that, is the process done, or is you don't know  
23 what started this process? I'm trying to figure out what your

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1 lack of clarity is.

2 LDC [MR. NEVIN]: My lack of clarity is what they're going  
3 to -- what's going to happen next.

4 MJ [COL POHL]: Okay.

5 LDC [MR. NEVIN]: They've accused me of doing something  
6 that is a violation of a criminal statute, but set that  
7 aside ----

8 MJ [COL POHL]: Uh-huh.

9 LDC [MR. NEVIN]: ---- they've accused me of willfully  
10 spilling classified information.

11 MJ [COL POHL]: Okay.

12 LDC [MR. NEVIN]: And they claim that they've told me and  
13 invited me to make a statement to them. That's a false  
14 statement. That is not true. That did not happen. They  
15 made -- they came to the conclusion that I acted willfully  
16 without ever talking to me.

17 Now, that has -- I will say in a second that that has  
18 really serious implications for where we are in this case  
19 because of a few other things. But -- but if your point is  
20 what don't I know next, I don't know what's happening next. I  
21 don't want to lose my security clearance.

22 MJ [COL POHL]: Well, the declaration says is they're not  
23 going to suspend any clearances.

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1 LDC [MR. NEVIN]: No, it does not say that.

2 MJ [COL POHL]: It says right now there's no decision,  
3 make it clear.

4 LDC [MR. NEVIN]: Well, right now, it says that  
5 Mr. Williams has decided that.

6 MJ [COL POHL]: I know it. I'm going to talk to the trial  
7 counsel about who's the real decision-maker here. I got that  
8 part.

9 LDC [MR. NEVIN]: Okay. But, you know, but honestly, you  
10 look at this. I finally did a word search to see if the NPSMS  
11 was anywhere referred to in 532Q, and it's never -- that never  
12 is mentioned.

13 So Mr. Williams says, so far as I'm concerned, I  
14 thought that there didn't have to be any restriction. But if  
15 that were the end of it, what is all of this stuff about --  
16 about the people at the DoD CAF still have a decision to make?  
17 And why isn't there even the mention of NPSMS? They're the  
18 real -- they're the first tripwire in this. You lose your SAP  
19 access and then you're done. So -- so I take it that counsel  
20 is not even purporting to make any representations about them.

21 MJ [COL POHL]: Okay. Did you -- did you receive the --  
22 according to -- in paragraph 14, it says, "On 15 November, the  
23 chief of WHS OSS advised the MCD0" -- and whenever you are

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1 talking about an officer, I'm not quite sure what that  
2 means -- "that additional information either by defense team  
3 member or chief defense counsel could be provided directly to  
4 the chief WHS OSS and that information would be forwarded to  
5 the DoD CAF."

6 Did you get that notice?

7 LDC [MR. NEVIN]: No.

8 MJ [COL POHL]: Okay.

9 LDC [MR. NEVIN]: I did not.

10 MJ [COL POHL]: Okay. And, of course, when they say MCDO,  
11 who knows what that means because that's an office. Got it.  
12 Okay, thank you.

13 LDC [MR. NEVIN]: So I think maybe one thing I should say  
14 is this: At this point I have a lot of doubt about the  
15 legitimacy of this process. Because the first thing out of  
16 the gate that I hear is that -- is that there's been a finding  
17 that I acted willfully. And no one -- and I'm talking a  
18 conclusion here.

19 So this is like the police officer that has you in  
20 custody and says, I've decided that you're guilty of this  
21 offense. Is there anything you'd like to say? And I've spent  
22 almost 40 years as a lawyer telling people not to respond to  
23 that kind of a question. Stand on your right to remain

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1 silent.

2 And now these people have reached this conclusion  
3 without ever talking to me. And now they're saying would you  
4 like to -- guess what, we're still open. We're still willing  
5 to hear you out. Well, I'm not talking to them. They've  
6 already made up their minds.

7 They say in this that they provided me -- and I'm  
8 talking about 532Q at page 13. This is special trial counsel  
9 says that I was provided with the DoD security procedures.  
10 That's false. Okay. So they reach conclusions about me,  
11 they're saying false things about what they told me, and they  
12 think I'm now going to dash in to bathe in their due process?

13 Look at the declaration at paragraph -- paragraph 6.  
14 "On 16 October, defense counsel for Khalid Shaikh Mohammad  
15 submitted a pleading to the military commission just --  
16 declared under penalty of perjury." Really? I submitted a  
17 pleading? How do you know that?

18 Look at paragraph 10 ----

19 MJ [COL POHL]: Well, let me ask you -- I don't want to  
20 get too bogged down in this, but this was, I believe,  
21 originally AE 527? Wasn't it submitted for -- to my office  
22 for an exhibit number?

23 LDC [MR. NEVIN]: I'm sorry. Was it submitted to you for

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1 an exhibit number?

2 MJ [COL POHL]: Yeah. Submitted a filing. This is how  
3 this whole thing -- that's how we became aware of it.

4 LDC [MR. NEVIN]: I -- A -- number one, I saw the e-mail  
5 traffic just like you did.

6 MJ [COL POHL]: Okay.

7 LDC [MR. NEVIN]: But I didn't submit it.

8 MJ [COL POHL]: Okay.

9 LDC [MR. NEVIN]: And listen ----

10 MJ [COL POHL]: But ----

11 LDC [MR. NEVIN]: Can I just say, I don't mean to mince  
12 words with you ----

13 MJ [COL POHL]: Okay.

14 LDC [MR. NEVIN]: ---- we're talking about willfully  
15 disclosing classified information.

16 MJ [COL POHL]: I understand that, Mr. Nevin. And I'm not  
17 minimizing the seriousness of this.

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

19 MJ [COL POHL]: I'm just saying is, I just want to make  
20 sure that you and I are on the same page of the facts. It is  
21 that the pleading I saw had your name on it.

22 Now, I'm not saying that means you stick it on the --  
23 on the computer and you push a button and it goes through,

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1 but ----

2 LDC [MR. NEVIN]: You're not saying it means I submitted  
3 it?

4 MJ [COL POHL]: What does that -- what does that mean when  
5 you sign a pleading and it is submitted?

6 LDC [MR. NEVIN]: I didn't sign it. Well, wait a second.  
7 Wait. Let me just back up.

8 MJ [COL POHL]: Mr. Nevin, what am I going to say, okay,  
9 your name is on the pleadings. From now on, I can't accept  
10 any pleading that doesn't have a wet signature on it?

11 LDC [MR. NEVIN]: No. Well, first of all -- first of all,  
12 let me back up and say we are going to talk about the facts  
13 now? Because if ----

14 MJ [COL POHL]: No, I -- we're not going to talk about  
15 anything that's privileged. I'm simply saying this -- but as  
16 I said, you wanted to talk about this in open court, and I  
17 said we'll talk about it in open court.

18 LDC [MR. NEVIN]: Yeah, and I ----

19 MJ [COL POHL]: So I'm just going back to the factual  
20 predicate here of what was on the face of the filing, and it's  
21 in the declaration, too, of the -- and on the original notice,  
22 the 11 names were gleaned from the names on the filing.

23 LDC [MR. NEVIN]: Yes.

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1 MJ [COL POHL]: Okay. That's all I'm saying.

2 LDC [MR. NEVIN]: Fine. I -- I -- if you -- and you're  
3 concluding from that that I acted willfully?

4 MJ [COL POHL]: No. You're ----

5 LDC [MR. NEVIN]: No, I didn't -- I'm not trying to ----

6 MJ [COL POHL]: You just ----

7 LDC [MR. NEVIN]: ---- be argumentative with you.

8 MJ [COL POHL]: Oh, yes, you are, but that's okay.

9 LDC [MR. NEVIN]: I'm only making the point -- I'm only  
10 making the point that they leapt from that that you just  
11 observed to the proposition that I willfully disclosed  
12 classified information.

13 MJ [COL POHL]: Actually, I'm jumping back to a point you  
14 made earlier that you take issue with the word that you had  
15 filed such a pleading, and my point is ----

16 LDC [MR. NEVIN]: I didn't file it.

17 MJ [COL POHL]: You didn't file it?

18 LDC [MR. NEVIN]: No.

19 MJ [COL POHL]: Who filed it? No, when you say you didn't  
20 file it, I don't know -- see, Mr. Nevin -- I'm not talking  
21 about willfulness here.

22 I'm simply saying, practice in this proceeding has  
23 been is I don't need wet signatures on all pleadings. I just

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1 look at whose name is on them and they came in. I don't know  
2 whether it came from Ms. Bormann's team, Mr. Harrington's  
3 team, or your team. It comes into my office with your name on  
4 it.

5 LDC [MR. NEVIN]: Uh-huh.

6 MJ [COL POHL]: Okay, which started this whole  
7 process ----

8 LDC [MR. NEVIN]: Yes.

9 MJ [COL POHL]: ---- and then we saw that it may have had  
10 a problem with the classification issue on it.

11 LDC [MR. NEVIN]: Yeah.

12 MJ [COL POHL]: But you say it wasn't ever filed. Are you  
13 using that in a very technical term or just saying ----

14 LDC [MR. NEVIN]: Well, I am -- I am trying to speak as  
15 accurately and as artfully as I can, because I feel like  
16 there's a lot on the line here, okay?

17 MJ [COL POHL]: Sure. No, I understand.

18 LDC [MR. NEVIN]: I know you do, too. I'm not accusing  
19 you of not thinking that, too. But I just mean to submit  
20 something is when you -- when we're talking willful or not,  
21 "submit" could mean different things.

22 And it -- this -- an e-mail apparently got sent,  
23 but -- and -- well, I'm really reluctant to talk about the

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1 facts. I'm telling you, you as the finder of -- the decider  
2 in this situation, don't have all of the facts. I can  
3 guarantee you that the people at Washington Headquarters  
4 Service Office of Special Security don't have all of the  
5 facts.

6           And my only point in this really was in -- it really  
7 is the reason that I said let's please argue this now, because  
8 I think you can just take all of this from the face of these  
9 pleadings. I don't think you need anything more than these  
10 pleadings.

11           And I -- I understand that Ms. Bormann filed that  
12 document that indicates that she -- they went and told these  
13 people, and they still got a finding that they had acted  
14 willfully, and that's fine. But I don't want to argue that.

15           I'm content to look at just what these folks have  
16 filed within the confines of 532, and -- because the point is  
17 it shows that there's a conflict.

18           And within the four corners of the 532 materials,  
19 there's a reference to the proposition that there was due  
20 process, and there's a suggestion that we didn't take them up  
21 on their due process.

22           And it is true we -- it is true that we have not made  
23 a submission to them, but we haven't been invited to, number

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1 one; and number two, their process is not trustworthy because  
2 they came to a conclusion before they even asked me things  
3 like what you just asked me.

4           You and I have been talking about this for 15 minutes  
5 and the first -- and it occurs to you to say, "Well, what  
6 happened, Mr. Nevin?" And they didn't -- they didn't even do  
7 that. They simply made the conclusion that I've referred to.

8           And I will say -- so, you know, where we go from here  
9 is another matter. I don't trust their process. I don't  
10 trust them, okay, and not in a situation like this.

11           And let me tell you that this -- or let me argue to  
12 you that this has additional implications in this case. We've  
13 been told three times now not to investigate in this case. We  
14 have been told that in 441. The subject matter of that is  
15 classified; I'm not going to refer to it.

16           We were told it in 524 Attachment B, which is we are  
17 not ever to approach a CIA agent ever.

18           And we were told it in 525G; we were told do not ask  
19 a question of a -- premised on your assumption that ----

20           MJ [COL POHL]: You are talking about the most recent 525  
21 notice?

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

23           MJ [COL POHL]: Okay.

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1 LDC [MR. NEVIN]: Okay. So what kind of a violation of  
2 those proscriptions could get you in trouble? What does it  
3 mean to act willfully in the context of this case?

4 Well, it turns out it means that even knowing what I  
5 know about what my team did or didn't do, it doesn't take very  
6 darn much to have there be a conclusion that you acted  
7 willfully. And that becomes a shadow that -- a cloud that  
8 hangs over this entire case.

9 MJ [COL POHL]: But in essence -- and this is similar to  
10 what happened to the 292 series, eventually, a decision has  
11 got to be made if something's going to happen, right?

12 What I'm saying is, somebody, CAF, whomever, will  
13 decide we're going to take this adverse action or we're not.

14 LDC [MR. NEVIN]: Uh-huh.

15 MJ [COL POHL]: An investigation, if you want to call it  
16 still open, is done.

17 LDC [MR. NEVIN]: Uh-huh.

18 MJ [COL POHL]: And that's the decision point we're  
19 looking for, and then we can go from there.

20 LDC [MR. NEVIN]: Well, we can go from there, yes, sir.

21 MJ [COL POHL]: I mean ----

22 LDC [MR. NEVIN]: That would take us back, I think,  
23 probably to some of the arguments we had previously when we

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1 were arguing 292.

2 MJ [COL POHL]: Uh-huh.

3 LDC [MR. NEVIN]: And we recently filed a pleading with  
4 you in the 530 series that referred to all of the times we  
5 have been accused of doing things, and when I got up here I  
6 said this was the third time I hired counsel.

7 At some point really it becomes exactly what you were  
8 talking about when you said that -- what you said in 292 that,  
9 look, are you too alarmed about these people going around  
10 doing their job investigating? Because if you are, there's a  
11 ready mechanism for that. There's a ready mechanism for  
12 dealing with that. Take death off the table. Dismiss this  
13 case. Do whatever it is.

14 But I'm telling you that -- that same thing is in  
15 play here, and I -- oh, yeah. I wanted just to point out to  
16 you this, and it's really what I stood up to say before, and I  
17 sort of want to say why I think that's important.

18 You can't protect us in this, I mean -- or so it  
19 seems. Because they spend four pages in this -- however long  
20 this pleading was. They spend a good third of this pleading  
21 arguing under the Egan case that you cannot intrude here, and  
22 that what we are really trying to do is to litigate these  
23 underlying security clearance matters.

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1           And I think I made it -- I think we made it clear in  
2 our pleadings that that's not at all what we're trying to do.  
3 We're asking you for only two forms of relief: One is to  
4 abate, and if it's until they make a decision or if it's until  
5 the conflict goes away, but asking you to abate, number one.

6           And number two, asking you to have counsel appointed  
7 for Mr. Mohammad to advise him on this, because for all I  
8 know, maybe independent counsel will conclude it's the right  
9 thing to do to waive any conflict, and if we get to keep our  
10 ability to hold and access classified information, then we  
11 could -- we would be able to go forward in that situation  
12 and ----

13          MJ [COL POHL]: Why does your independent counsel have to  
14 be a learned counsel on this issue?

15          LDC [MR. NEVIN]: Well, this -- this is something that has  
16 come up in another case as well here at the military  
17 commission. And the idea is that there are some things that  
18 are capital in nature and some things that aren't in a case  
19 like this. And I can tell you that it's clear, and everyone  
20 understands it, that there is no such line.

21           Everything in this case implicates capital  
22 punishment. Everything here cuts one way or another with  
23 respect to the ultimate penalty. You take death off the table

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1 in this case and it becomes a completely different case. And  
2 it -- the volume on almost everything gets turned way, way  
3 down. But while we're doing it that way, everything  
4 implicates the potential ultimate penalty.

5 The U.S. Supreme Court has ruled repeatedly that your  
6 right to -- that your right to capitally qualified counsel  
7 begins at the beginning, before the first court appearance,  
8 and it continues all the way through to the finish.

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

10 LDC [MR. NEVIN]: Thank you, Your Honor.

11 MJ [COL POHL]: Mr. Harrington, are you going to wish to  
12 be heard on this, or do you stand by your other position?

13 LDC [MR. HARRINGTON]: No, I need to be heard, Judge.

14 MJ [COL POHL]: Okay. Go ahead.

15 LDC [MR. HARRINGTON]: Judge, first, this morning when I  
16 said that we were in a different posture, that is true. But I  
17 do adopt Mr. Nevin's arguments. And until, in fact, we  
18 receive something formally that says that we're not in that  
19 posture, we're still in the cross hairs just like Mr. Nevin  
20 indicated.

21 And obviously in this kind of a situation, there are,  
22 I think, degrees of violation, if -- alleged violations,  
23 there's degrees of culpability, and there's degrees of impact

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1 on the attorneys. And all of those kind of come together to  
2 help to form this conflict issue and this conflict difficulty.

3 And I noticed in the response from Mr. Lebowitz that  
4 he talks about our team submitting ----

5 MJ [COL POHL]: Mr. Harrington, you referred to  
6 Mr. Lebowitz. Let's call him Major Lebowitz.

7 LDC [MR. HARRINGTON]: I'm sorry, Judge. I apologize.

8 MJ [COL POHL]: That's okay. He just got promoted, he  
9 needs the affirmation. Go ahead.

10 LDC [MR. HARRINGTON]: I apologize, Judge, to Major  
11 Lebowitz.

12 He refers to submitting matters in mitigation. We  
13 didn't submit any matters in mitigation. We submitted  
14 exculpatory information. There's no mitigation about it. We  
15 said you are wrong and you should not have accused us of this.  
16 But the end result of the accusation still has a profound  
17 impact on our team.

18 And as you know, our team was -- and I in  
19 particular -- were the subjects of 292. And when Major Lanks  
20 and Major Stuard joined our team, and to a certain extent,  
21 Ms. Wichner, who came right at the end of the -- of the 292  
22 factual incident, they came into our team under a horrible  
23 cloud. And it dramatically affected our team. Some people

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1 left our team. Some people did not renew staying with our  
2 team. It had nothing to do with working with me or working  
3 with other members of the team, it had to do with the impact  
4 that that investigation had on us.

5           And each one of us on our team suffers in different  
6 ways right now. For me, I think it's -- it's less than the  
7 other members of my team. I'm up for renewal of my security  
8 clearance. It expired at end of last year and it's in the  
9 renewal process now. And part of the notice that we got was  
10 that that's suspended now, that renewal is suspended until  
11 this issue is resolved.

12           For Major Wichner, who served for 13 years with a  
13 distinguished military record, she faces the possibility, if  
14 and when she leaves this team, of wanting another job with  
15 security clearance of having that jeopardized by having this  
16 filed.

17           And the other military members, not just Major Stuard  
18 and Major Lanks, but also the other military members on the  
19 other teams, face a very difficult situation. And let me just  
20 explain that Major Lanks anticipates leaving the service in  
21 July. And even though we may have a recommendation that this  
22 is going to be removed against us, it's going to be settled,  
23 it may not be by then. We have no idea when any of these

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1 people are going to act.

2           For Major Lanks, if he wants to go into the -- look  
3 for jobs in the next seven months, and those require a  
4 security clearance, he has a scarlet letter on the form, JPAS,  
5 for him, just like the rest of us do. If he leaves before  
6 this is adjudicated, he has no remedy to adjudicate it.

7           One of the members of my team who was -- who lost his  
8 security clearance in the 292 incident never got an  
9 opportunity to appeal that, never got any due process because  
10 he was hired by a private company. The company owned his  
11 security clearance. Once they fired him, he had no standing  
12 to challenge this -- these allegations, even though he  
13 vigorously disputed them. And it's affected him since then in  
14 terms of -- he's a friend of mine. It's affected him since  
15 that time. There are massive and enormous consequences.

16           For Major Stuard, he intends to stay in the service  
17 even after he leaves our team. He presumably will work in  
18 some field that requires security clearance.

19           And these are things that I -- that I know that  
20 you -- that you are aware of. But the implications for this,  
21 the collateral implications for this are major. It's not just  
22 having a criminal investigation against you, it's -- and it's  
23 not just affecting your future livelihood, but it's affecting

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1 your ability to even participate in this case.

2           And then we have the situation which is the most  
3 important of all, which is, how do -- does Mr. Binalshibh view  
4 this. And now he's in a position of looking at our team again  
5 having another allegation against us. He's been through the  
6 process before of having independent counsel appointed for  
7 him, so he has some awareness of this. And we are back in  
8 that same situation. And that -- even though ultimately this  
9 may be resolved in our favor so that it goes away, at this  
10 point in time, it's real, and it's serious.

11           And he needs independent counsel to advise him. And  
12 I agree with the other arguments that this -- the proceeding  
13 has to be abated and he has to have independent counsel.

14           And, Judge, just in terms of your consideration of  
15 that, we never resolved in 292 what kind of independent  
16 counsel was needed. And Mr. Binalshibh at that time was  
17 appointed independent military counsel. And the issue of  
18 whether he should have had learned counsel was something that  
19 ended up never being adjudicated because the underlying issue  
20 went away and the court determined that any conflict was gone.

21           But in terms of the court's consideration, if you do  
22 determine that independent counsel needs to be appointed, we  
23 would ask that it be capitally qualified counsel.

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1 MJ [COL POHL]: Anything further?

2 LDC [MR. HARRINGTON]: No, sir.

3 MJ [COL POHL]: Mr. Nevin, you're going to have to wait  
4 your turn.

5 Ms. Bormann, do you wish to be heard on this? Okay.

6 LDC [MR. NEVIN]: Sorry. Come on. I just wanted to say  
7 that when I sat down, I got handed an e-mail from General  
8 Baker to me, apparently, I didn't -- I don't recall reading  
9 it, but it was dated November 16, saying here are the  
10 procedures for contacting ----

11 MJ [COL POHL]: Okay.

12 LDC [MR. NEVIN]: ---- people. And I will say, that's  
13 three weeks after they've already concluded that I acted  
14 willfully.

15 MJ [COL POHL]: Okay. But you did get that -- when they  
16 say on 15 November, you did get the notice?

17 LDC [MR. NEVIN]: I did. So I misspoke before.

18 MJ [COL POHL]: Okay. Thank you, Mr. Nevin, for that  
19 clarification.

20 Ms. Bormann.

21 LDC [MS. BORMANN]: So I adopt the arguments of the two  
22 men who preceded me. They're much brighter than I am. But we  
23 have a slightly different issue, and that's why I sought leave

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1 to file 532W, which is a declaration of all of  
2 Mr. Bin'Attash's defense counsel of record.

3           The -- the filing, the actual pushing the button  
4 occurred by one of our defense team members, and after the --  
5 we appeared in court that morning, you and I had a colloquy on  
6 the record, and you were concerned. I wasn't concerned  
7 because my intention was not to file a classified document.  
8 And then later on when I had a chance to review the final  
9 product, there had been direction happening on my team, it was  
10 apparent that there was an unintentional mixup by a defense  
11 team member of a classified and an unclassified document, as  
12 well as some guidance on what was classified and unclassified.

13           Conversations ensued between the defense team member  
14 for Mr. Bin'Attash who accomplished the filing and various  
15 members of WHS that week. They occurred on the 16th, the  
16 17th, and the 19th of October. During those conversations,  
17 although I was not present, between that defense team member  
18 and two members of WHS, including the Director of WHS OSS, it  
19 was explained that it was an unintentional error. There was  
20 confusion between two documents and some classification  
21 guidance that had determined that one of those documents  
22 was -- had been declassified.

23           That conversation ensued while we were here on the

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1 island, and defense counsel for Mr. Bin'Attash went home  
2 thinking everything had been resolved.

3           Then some close to two weeks later, we received  
4 AE 532 filed by the special trial counsel, claiming that  
5 despite the person most in the know having contacted and had  
6 numerous conversations with representatives from WHS about the  
7 unintentional mixup of the documents involved in 527, there  
8 had been a conclusion made by the Director of WHS OSS, one of  
9 the individuals who had been contacted by the member of  
10 Mr. Bin'Attash's defense team, that that conclusion was that  
11 the violation had been willful.

12       MJ [COL POHL]: Actually, it says "appear to be willful."

13       LDC [MS. BORMANN]: Well, actually, so let me -- let's  
14 see.

15       MJ [COL POHL]: If you are talking about the original  
16 notification.

17       LDC [MS. BORMANN]: On paragraph B it says "On  
18 24 October" -- which would be some week after.

19       MJ [COL POHL]: Right. I got it.

20       LDC [MS. BORMANN]: It says they concluded, "The office  
21 of -- WHS Office of Special Security (OSS) concluded that the  
22 defense teams appeared to have willfully submitted classified  
23 information on an unclassified network."

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1           At that point they had been in contact with and  
2 interviewed and discussed the matter with the person who  
3 actually did the filing. Let's just say we were a bit taken  
4 aback.

5           The loss of clearance -- okay. Let's -- I can't walk  
6 away.

7           Let's see, military members, what happens to them?  
8 They can be discharged. We take this very seriously. It  
9 raises a conflict. I think it's pretty obvious.

10           Subject to your questions.

11           MJ [COL POHL]: Just one. On your declaration in  
12 paragraph 10, you indicate that no one from WHS OSS or DoD CAF  
13 has contacted the undersigned and requested additional  
14 information pursuant to paragraph 17 of the declaration.

15           LDC [MS. BORMANN]: None of us.

16           MJ [COL POHL]: Okay. But now in paragraph 14, which is  
17 what I asked Mr. Nevin about, that they had told the MCDO  
18 apparently with -- by via e-mail, because Mr. Nevin just  
19 referred to it, did you get that same notification?

20           LDC [MS. BORMANN]: I don't remember seeing it. I may  
21 have. I receive about a hundred e-mails a day.

22           MJ [COL POHL]: I got it.

23           LDC [MS. BORMANN]: So it may very well have arrived in my

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1 inbox.

2 MJ [COL POHL]: Okay.

3 LDC [MS. BORMANN]: Frankly, I mean, we have already  
4 provided the information.

5 MJ [COL POHL]: I got it.

6 LDC [MS. BORMANN]: The person with the most knowledge,  
7 which wasn't me or any of the defense counsel, actually sat  
8 and discussed the matters with two members from WHS, including  
9 the person who, after having the discussion, referred the  
10 matter because he concluded that the submission had been  
11 willful.

12 MJ [COL POHL]: Okay.

13 LDC [MS. BORMANN]: So I don't know what I could  
14 offer ----

15 MJ [COL POHL]: Okay.

16 LDC [MS. BORMANN]: ---- that that person hadn't already  
17 offered.

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

19 LDC [MS. BORMANN]: Thank you.

20 DDC [Maj WAREHAM]: Your Honor, for Mr. al Baluchi, all we  
21 would emphasize to the court is that which we outlined in  
22 AE 292, and was supplemented by AE 292L. When confronted with  
23 an actual or potential conflict, the military commission

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1 [The R.M.C. 803 session was called to order at 1410,  
2 4 December 2017.]

3 MJ [COL POHL]: Commission is called to order. Any  
4 changes from the defense side? Apparently not.

5 Major Lebowitz, you're still here by yourself. The  
6 podium is yours.

7 STC [MAJ LEBOWITZ]: Thank you, Your Honor.

8 Your Honor, first I just want to note that counsel  
9 for Mr. Binalshibh essentially had a very similar argument  
10 based on the pleadings that counsel for Mr. Mohammad had made.  
11 And now we have this declaration from counsel for  
12 Mr. Bin'Attash that also has information from that defense  
13 team that kind of goes with the underlying facts.

14 So I just wanted to show how -- because I think that  
15 the WHS people were a little bit maligned in the last  
16 argument, I want to show how the facts actually can work and  
17 this administrative process can work, although, again, it's on  
18 a case-by-case basis.

19 MJ [COL POHL]: Let's -- you're getting into an area  
20 talking about the merits of the decision of the referral to  
21 CAF, right? I mean, at the end of the day is WHS took what  
22 information they had and they sent it to the DoD CAF, right?

23 STC [MAJ LEBOWITZ]: Yes, Your Honor.

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1 MJ [COL POHL]: Okay. At that time, according to  
2 Ms. Bormann, they had their input of what happened, okay,  
3 apparently not accepted by the referral people. Then it went  
4 to WHS and then Mr. Williams then reviewed all the material  
5 that he had. Did he have the -- and then after he did that,  
6 he concluded he wasn't going to suspend any clearances, right?

7 STC [MAJ LEBOWITZ]: There's a few -- that's where it gets  
8 a little -- it's not exactly accurate.

9 MJ [COL POHL]: Okay.

10 STC [MAJ LEBOWITZ]: I mean, the facts as you say,  
11 essentially; however, WHS does not have the authority to  
12 conclude anything. What we're talking about -- and this is  
13 why I was getting at, when I first started speaking, the  
14 administrative process.

15 MJ [COL POHL]: Uh-huh.

16 STC [MAJ LEBOWITZ]: So the information, the underlying  
17 facts that WHS received were the same things that this  
18 commission is well aware of that occurred in court. So when  
19 they looked up this material and said this is apparently  
20 willful, so what then they followed -- there's a process,  
21 there's a procedure, it's an administrative procedure. So WHS  
22 was obligated to refer it to the DoD CAF.

23 And as this commission will note in the declaration

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1 that we submitted, that the WHS director noted again that, you  
2 know, his opinion was that no access should be suspended or  
3 any impact on any access.

4 MJ [COL POHL]: So when he says in paragraph 12, "I  
5 decided that suspension of access to classified material for  
6 counsel whose signature blocks were included on the pleading  
7 was not and is not warranted," is he the decision-maker?

8 STC [MAJ LEBOWITZ]: He can make that decision for access.  
9 There's a difference between losing a security clearance and  
10 adjudication ----

11 MJ [COL POHL]: Okay. Okay.

12 STC [MAJ LEBOWITZ]: ---- and access.

13 MJ [COL POHL]: So he made a decision that he wasn't going  
14 to suspend access at that time.

15 STC [MAJ LEBOWITZ]: Yes, Your Honor.

16 MJ [COL POHL]: Okay. And I'm just talking about process  
17 here, Major Lebowitz. I know you want to talk about something  
18 else, but let's talk about what I want to talk about.

19 STC [MAJ LEBOWITZ]: Yes, Your Honor.

20 MJ [COL POHL]: Then it goes from him, and he sends it  
21 over to the DoD CAF ----

22 STC [MAJ LEBOWITZ]: Yes, Your Honor.

23 MJ [COL POHL]: ---- right? And correct me if I'm wrong,

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1 but the way I'm reading this, again back to the declaration,  
2 and that is where it sits today.

3 STC [MAJ LEBOWITZ]: There's a little bit of a change with  
4 Mr. Binalshibh's team.

5 MJ [COL POHL]: Okay.

6 STC [MAJ LEBOWITZ]: And that's -- what I want to say  
7 about that is, because that is a change, is I have -- if the  
8 court will allow, I submitted for submission -- it's a  
9 premarked as 532X (Gov STC), and this is an e-mail from WHS to  
10 the defense for Mr. Binalshibh since the declaration was  
11 drafted.

12 And I want to just highlight where it says, "In  
13 providing the supplemental information" -- that apparently  
14 counsel has submitted, that they stated that, "This appears,  
15 this supplemental information wholly mitigates for  
16 Mr. Harrington, Ms. Wichner, Major Lanks, and Major Stuard the  
17 security matter addressed in the supplemental information."  
18 So that is a change from ----

19 MJ [COL POHL]: Okay. But that doesn't change it for --  
20 and again, this -- this is from the chief of OSS here, who  
21 apparently works for Mr. Williams. Would that be correct?

22 STC [MAJ LEBOWITZ]: That's correct, yes, Your Honor.

23 MJ [COL POHL]: Okay. Who is the director. I'm just

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1 trying to get the decision tree done here, and that's my  
2 problem. Not my problem, just my query ----

3 STC [MAJ LEBOWITZ]: Yes.

4 MJ [COL POHL]: ---- is it starts with OSS here. They  
5 send it to OSS Washington. Washington sends it to DoD CAF.  
6 That kind of the ----

7 STC [MAJ LEBOWITZ]: Well, anybody -- as you know, anybody  
8 can submit ----

9 MJ [COL POHL]: I'm talking about this case.

10 STC [MAJ LEBOWITZ]: This issue, yes, Your Honor.

11 MJ [COL POHL]: In this case. So on Mr. Harrington's most  
12 recent submission, the OSS here said it appears that they're  
13 off the hook.

14 STC [MAJ LEBOWITZ]: And they're going to submit that  
15 "only mitigating" language ----

16 MJ [COL POHL]: Okay. And that goes over to Mr. Williams,  
17 I assume, and then he looks at it and decides, and then he  
18 sends it over to the CAF.

19 STC [MAJ LEBOWITZ]: That's my understand, yes, Your  
20 Honor.

21 MJ [COL POHL]: Okay. Okay. Then Ms. Bormann and  
22 Mr. Nevin at this point -- although I don't know whether  
23 Ms. Bormann's most recent submission to me will go to the

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1 whole process, but let's just assume it does.

2 But really, what I'm kind of trying to focus in here,  
3 and it comes back to Mr. Nevin's point, of: Is there an  
4 ongoing investigation or not? And you use words about inquiry  
5 and adjudication, whatever. Okay. But the real issue is --  
6 and I'm reading from Mr. Williams' declaration, it appears to  
7 me that we're still waiting to hear what the DoD CAF will do.

8 STC [MAJ LEBOWITZ]: That's correct, Your Honor.

9 MJ [COL POHL]: Okay. And when will we know that?

10 STC [MAJ LEBOWITZ]: Well, it will be -- typically, it  
11 will be a very long time. I mean, it could be well over a  
12 year. This is not something that happens ----

13 MJ [COL POHL]: No, no, wait a minute. Wait a minute.  
14 Make sure I'm understanding this.

15 STC [MAJ LEBOWITZ]: Okay.

16 MJ [COL POHL]: I want to make sure we don't conflate two  
17 separate issues. There's issue number one over here about  
18 periodic reviews or if you are putting in for your clearance  
19 the first time. And that takes quite a while. I've got that.  
20 That's the OPM piece, and then it also goes to the local DoD  
21 part. Okay.

22 You're telling me that we have an allegation of the  
23 appearance of willful disclosure of classified information,

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1 and it will take a year for somebody at DoD to decide whether  
2 to suspend the access to classified information for the people  
3 who are accused of doing that? That's how -- meanwhile, the  
4 people still have access to classified information. And it  
5 takes a year to do that?

6 STC [MAJ LEBOWITZ]: Well, a year is just an arbitrary  
7 number, Your Honor.

8 MJ [COL POHL]: I know it's the one you picked.

9 STC [MAJ LEBOWITZ]: Right. I'm just saying that -- my  
10 point is that you're the CAF ----

11 MJ [COL POHL]: You know, Major Lebowitz, I know you don't  
12 speak for the whole DoD, but I'm just trying to understand  
13 that.

14 We use terms like "extraordinary damage to national  
15 security," "serious damage" -- because this is a secret  
16 spill -- "to national security." You have an allegation that  
17 somebody's done this, and you don't suspend their access, you  
18 don't suspend anything.

19 STC [MAJ LEBOWITZ]: That's part of the process, Your  
20 Honor.

21 MJ [COL POHL]: Yeah, I got it it's part of the process.  
22 But then so we let this person we're suspected of doing this  
23 maintain access to classified information, and maybe a year

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1 from now we'll decide whether or not anything's going to  
2 happen.

3 STC [MAJ LEBOWITZ]: Well, I would say, Your Honor, that  
4 it's not a matter of the CAF is just going to say, okay, we  
5 decided, you're done. It doesn't work that way. And I think  
6 we have articulated that in our pleadings and even in the  
7 declaration, is that -- there is -- again, it has been calling  
8 it an administrative process because it really is a process.

9 So DoD CAF will have this information for the people  
10 that -- the PRs, you know, it's going to be ----

11 MJ [COL POHL]: I'm not talking about the PR.

12 STC [MAJ LEBOWITZ]: I understand. So for ----

13 MJ [COL POHL]: What I'm simply saying is: Does the DoD  
14 CAF make any decision on this issue? Forget the PR. I got  
15 that.

16 STC [MAJ LEBOWITZ]: There are a number of steps before  
17 they would make that decision and any decision.

18 The steps would be down the road -- and again, no  
19 accesses have been suspended. We've ----

20 MJ [COL POHL]: Oh, no. The decision's -- yeah, I  
21 understand that. I just ----

22 STC [MAJ LEBOWITZ]: From that level the decision was  
23 made, do not suspend any accesses to ----

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1 MJ [COL POHL]: Okay. Let me ask you this: When this was  
2 sent over to the DoD CAF, could they have suspended access as  
3 soon as they got it?

4 STC [MAJ LEBOWITZ]: No, Your Honor, because there is a --  
5 there is a process. And what the DoD CAF would have done  
6 is -- whenever they make -- decide they want to make a  
7 decision, it's called a statement of reasons.

8 And that is when -- in normal instance, that's when  
9 the affective party would be notified, normally. And that's  
10 where the due process would kick in where that's ----

11 MJ [COL POHL]: Okay. Now -- and maybe it's just because  
12 I'm naive when it comes to this, but if they're protecting  
13 classified information, wouldn't they make that decision  
14 relatively quickly in the sense of saying, well, we've got  
15 this problem, so we're going to give them a chance to respond;  
16 here's your statement of reasons, you tell us what you want to  
17 do.

18 STC [MAJ LEBOWITZ]: I think because we're focusing so  
19 much on terms such as allegations -- and I understand, you  
20 know, what the referral is, but the process is set up so that  
21 if there is something very serious -- for example, there is a  
22 lot of talk about 292QQ, such as national security  
23 investigations and criminal investigations and

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1 intelligence-related investigations.

2           So the process is set up so that certainly someone at  
3 the lower level, the non-CAF, such as OSS for example, they  
4 have the ability to suspend access. That's the process, but  
5 they did not -- they did not -- the director of security did  
6 not believe in this instance and under these facts that it was  
7 warranted, so -- but it was he was still obligated to refer it  
8 to the DoD CAF to come up with, you know, through that process  
9 because there was this security inquiry that -- where somebody  
10 said this is the issue, this is what we believe. So it's  
11 obligated -- this is all an administrative function. It's  
12 part of essentially the regulation, so it's just a process.

13           But again -- and that's where we come back to what  
14 counsel was talking about is that they seize on language in QQ  
15 such as "revocation of the security clearance," but they gloss  
16 over the context which is criminal investigations, national  
17 security investigations, and intelligence-related  
18 investigations. That's not what this 532 issue is about.  
19 This is about essentially a process.

20           And, I mean, you can look at other avenues. I mean,  
21 for -- in the Army, what is it 600-8-2, which talks about  
22 flags. There's no flags on anybody. You know, it's -- you  
23 know, this is like -- excuse me, Your Honor.

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1 [The R.M.C. 803 session was called to order at 1431,  
2 4 December 2017.]

3 MJ [COL POHL]: Commission is called to order. All  
4 parties are again present.

5 Before you speak.

6 Mr. Ruiz, I'm just thinking of scheduling matters  
7 now. On your 505(h) hearing, how many witnesses does it  
8 impact on? I'm just trying to -- all of them? Some of them?

9 LDC [MR. RUIZ]: At least two. Definitely the two agents.

10 MJ [COL POHL]: Now, would the two agents include the VTC  
11 witness tomorrow?

12 LDC [MR. RUIZ]: I can't remember who the VTC witness is.  
13 Who is that?

14 No.

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

16 Major Lebowitz.

17 STC [MAJ LEBOWITZ]: Your Honor, thank you for allowing  
18 me ----

19 MJ [COL POHL]: That's okay.

20 STC [MAJ LEBOWITZ]: ---- to take a break.

21 I just wanted to -- I received a little more  
22 confirmation that I think goes straight to your question.

23 MJ [COL POHL]: Okay.

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1           STC [MAJ LEBOWITZ]: That the DoD CAF actually did make a  
2 decision not to suspend access when they got this, when the  
3 referral came.

4           MJ [COL POHL]: Okay.

5           STC [MAJ LEBOWITZ]: So how the process works now is,  
6 based off of that decision, now this goes into the normal  
7 course of business. And there's no set timeline and ----

8           MJ [COL POHL]: Okay. So -- and during the break, I  
9 picked up the DoD Manual 5200.02. And if I'm reading it  
10 correctly, it says the DoD CAF should make these decisions  
11 within 15 days of receiving it. You said such a decision has  
12 been made.

13          STC [MAJ LEBOWITZ]: They made that decision, yes, Your  
14 Honor.

15          MJ [COL POHL]: Do you have something in writing to that  
16 effect?

17          STC [MAJ LEBOWITZ]: I do not have anything in writing  
18 from that. That's ----

19          MJ [COL POHL]: Okay. And then you indicate that they've  
20 decided, and then -- so let me make this clear: The DoD CAF  
21 has said they're not going to suspend access. Does that mean  
22 on this issue they're taking no adverse action at all?

23          STC [MAJ LEBOWITZ]: What it means is that they review --

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1 when they got this, within the 15 days they decided, we're not  
2 going to suspend access. It's not something that, you know,  
3 needs to be suspended.

4 So what it does is now it's in the normal course  
5 of -- now it's through the process. It's in -- it's just in  
6 the normal course, it's not -- there's no expedites, issues,  
7 anything like that. It's just, okay, we'll get it to it when  
8 we get to it.

9 MJ [COL POHL]: And what does that mean? I don't  
10 understand.

11 STC [MAJ LEBOWITZ]: Well, how the process works is  
12 that -- so the lower-at level ----

13 MJ [COL POHL]: I mean, it's part of the PR process now?

14 STC [MAJ LEBOWITZ]: Eventually for the people that have  
15 the PR pending, when -- I think the declaration actually talks  
16 about that.

17 MJ [COL POHL]: Uh-huh.

18 STC [MAJ LEBOWITZ]: So I think that he says that it's  
19 essentially set aside, or I think he puts it it's in abeyance  
20 until -- again, in the normal course of business.

21 So it will just be included with all their other  
22 background information when the CAF does the adjudication  
23 process, but ----

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1 MJ [COL POHL]: So the only thing left is the PR process,  
2 so -- that deals with this issue, correct? So it's just  
3 rolled up with that?

4 STC [MAJ LEBOWITZ]: Yes, sir, Your Honor, because it does  
5 not get their access ----

6 MJ [COL POHL]: Now, if it does have any impact on the PR  
7 process, are the people involved in the PR process given  
8 notice?

9 STC [MAJ LEBOWITZ]: Yes, Your Honor. That's how the  
10 process works, is if no -- if the CAF within those 15 days  
11 does not suspend access, which they didn't here, it's in the  
12 normal course of business, so in that case it's the PR  
13 process.

14 And if anything happens, meaning there's any -- they  
15 see any issues that might cause some concern, that's when the  
16 affected party would actually be notified.

17 MJ [COL POHL]: That's just the PR, periodic -- just for  
18 everybody else's, the periodic review process when you're  
19 renewing your security clearance?

20 STC [MAJ LEBOWITZ]: I believe it's for all parties  
21 involved in this.

22 MJ [COL POHL]: So that's the only thing that's left with  
23 this issue?

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1 STC [MAJ LEBOWITZ]: My understanding, yes, Your Honor.

2 MJ [COL POHL]: Okay.

3 STC [MAJ LEBOWITZ]: And one thing I did want to correct  
4 when I was talking about flags and things like that,  
5 sorry ----

6 MJ [COL POHL]: Go ahead.

7 STC [MAJ LEBOWITZ]: ---- and aspects like that is I was  
8 referring to suspension of favorable access regarding  
9 administrative investigations, but this does not apply, you  
10 know, like for example 15-6s and things like that, this is not  
11 contemplated ----

12 MJ [COL POHL]: Just so I'm clear, okay, is that -- what  
13 you're telling me, so I can understand this, is that the CAF  
14 has got the information that it has which includes  
15 Mr. Harrington -- well, it may or may not include  
16 Mr. Harrington as -- whatever. But based on the information  
17 it has, it's decided not to take any further adverse action,  
18 not to suspend access, not to do anything, except to roll this  
19 into a periodic review to ask questions about it and give them  
20 an opportunity to respond at that point. That's all that's  
21 out there.

22 STC [MAJ LEBOWITZ]: For the people that have periodic  
23 reviews pending.

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1 MJ [COL POHL]: What about for those who don't?

2 STC [MAJ LEBOWITZ]: Then it's just in the normal course  
3 of business.

4 MJ [COL POHL]: What does that mean?

5 STC [MAJ LEBOWITZ]: Which means that there's no rushing  
6 around.

7 MJ [COL POHL]: Well, I understand it means -- it's  
8 bureaucratic language for doing things slowly. I've got that  
9 part of it.

10 STC [MAJ LEBOWITZ]: Yes, Your Honor.

11 MJ [COL POHL]: But I'm asking you what does it really  
12 mean? Does it mean they're going to come back and talk to  
13 them about it, or it's there ----

14 STC [MAJ LEBOWITZ]: Your Honor, they would only come back  
15 and talk to them if there's something to talk about.

16 MJ [COL POHL]: Well, that's good. I'm glad they're not  
17 coming to talk to them when there's nothing to talk about.

18 STC [MAJ LEBOWITZ]: What I'm getting at, Your Honor, I  
19 think you see where I'm going with that, is that ----

20 MJ [COL POHL]: I really don't, but try me anyway. I'm a  
21 little bit slow, and I have got a little bit of a cold, so  
22 help me here.

23 STC [MAJ LEBOWITZ]: I have the same cold that you have,

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1 Your Honor, so I feel for you.

2           What it means is that -- I don't want to go back and  
3 restate the process because it will get me started on that one  
4 again, is that because they made a decision not to suspend  
5 access, they -- if there is any reason that the CAF finds in  
6 reviewing the same facts that you're well aware of already on  
7 this issue that the people that weren't subject to the PR ----

8           MJ [COL POHL]: Would this mean -- now just so I'm clear  
9 here, they go through the P -- if something else comes up  
10 that's related to this, they may go back and talk to people?

11           STC [MAJ LEBOWITZ]: No. What I'm saying, Your Honor, is  
12 that if the DoD CAF, whenever they review this in the normal  
13 course of business, thinks that, well, we think that there is  
14 something there, we think that maybe there is something to  
15 worry about, there is a concern regarding national security  
16 regarding this person on a case-by-case basis -- and it is  
17 case by case -- then before the CAF does anything -- because  
18 remember, they have already made the decision not to suspend  
19 access -- that's when they will notify the individuals, and  
20 they say -- they will provide a -- what's called a statement  
21 of reasons, and they'll say these are the reasons why we have  
22 concerns about you. And that sparks the due process that we  
23 referenced in our pleadings, and that's when you will -- the

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1 affected party can talk to them and submit potentially  
2 mitigating information.

3           Now, this instance, what we've already discussed, and  
4 it's highlighted in our recent submission, in 532X, is that  
5 WHS is willing and has, in fact, agreed to forward to the DoD  
6 CAF any information, supplemental information that defense  
7 counsel believes may, in fact, be mitigating, and they will  
8 forward it to the DoD CAF. And in the case of Mr. Binalshibh,  
9 they said that they forwarded their thought that it is wholly  
10 mitigating, and that goes into the process.

11           MJ [COL POHL]: Okay.

12           STC [MAJ LEBOWITZ]: So -- and, Your Honor, I don't want  
13 to go too far. We've talked about most of this already.

14           The defense counsel also talked about conflicts on  
15 this, and I think we've -- the pleadings speak for themselves  
16 regarding the administrative and -- but the defense in their  
17 pleadings seek -- the quote is assurances that there will be  
18 no investigation.

19           A lot of their pleadings -- and they've kind of  
20 backed off on it today to some degree, but a lot of it,  
21 they're speculating that there might be a law enforcement or a  
22 DoD investigation of them moving forward. But the question  
23 is: Who? We can poll every law enforcement entity in the

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1 country right now, and they'll look at us and say what are you  
2 talking about, because that's the epitome of proving a  
3 negative.

4 MJ [COL POHL]: Doesn't it take a referral? I mean,  
5 wouldn't somebody have to contact law enforcement from the  
6 Department of Defense?

7 STC [MAJ LEBOWITZ]: Exactly, Your Honor.

8 MJ [COL POHL]: And who would normally do that?

9 STC [MAJ LEBOWITZ]: Well, WHS could have referred it.  
10 You know, there's a lot of avenues for referral. But note the  
11 declaration -- you asked me earlier, is the declaration still  
12 kind of stand -- is that the facts as it is now? And it is --  
13 and it is, that law enforcement is not involved in this issue.  
14 There's no intelligence investigation involved in this issue.  
15 There's no national security investigation involved in this  
16 issue.

17 292, that the defense raised numerous times in their  
18 pleadings and their arguments, does not apply to this issue  
19 under these facts, Your Honor.

20 MJ [COL POHL]: So the CAF is responsible for -- I'm just  
21 looking at the DoD Instruction; again, there may be others.  
22 But they would have been responsible to ensure derogatory  
23 information is reported to law enforcement authorities as

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1 appropriate, and they're not doing that.

2 STC [MAJ LEBOWITZ]: No. No, Your Honor, and it hasn't  
3 happened.

4 MJ [COL POHL]: Okay.

5 STC [MAJ LEBOWITZ]: And as -- the reason why I'm standing  
6 here is the government is well aware of this commission's  
7 order in 292QQ, and it's not happening.

8 I mean, in light of all of the facts -- honestly, I'm  
9 not sure exactly what the supposed conflict is and  
10 particularly why counsel says they will essentially be pulling  
11 their punches. The defense represents that during the  
12 pendency of this CAF process -- which we have already  
13 established that they've already made this determination not  
14 to suspend access ----

15 MJ [COL POHL]: Yeah, but until you said that today, that  
16 wasn't clear.

17 STC [MAJ LEBOWITZ]: I understand, Your Honor.

18 MJ [COL POHL]: I mean, the affidavit or the declaration  
19 says -- makes a statement that the CAF has not suspended  
20 access. It doesn't say the CAF decided not to suspend access.  
21 And now we're back to the -- now it's just thrown in  
22 somebody's inbox to get to when they get to. There's a big  
23 difference between those two.

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1           STC [MAJ LEBOWITZ]: Yes, Your Honor. Yes, Your Honor.

2   So ----

3           MJ [COL POHL]: So what you're standing up here telling me  
4 is that CAF has made an affirmative decision not to suspend  
5 access, and as far as they're concerned this is just a normal,  
6 for want of a better term, spill situation that they will  
7 investigate in due course.

8           STC [MAJ LEBOWITZ]: Yes, Your Honor.

9           MJ [COL POHL]: Okay. Got it.

10          STC [MAJ LEBOWITZ]: Subject to any more questions?

11          MJ [COL POHL]: I have no more. Thank you.

12                 Mr. Nevin, or any other -- I mean, unless you have  
13 said all you're going to say.

14          LDC [MR. NEVIN]: No, sir.

15          MJ [COL POHL]: I didn't think so.

16 **[Conferred with courtroom personnel.]**

17          LDC [MR. NEVIN]: Your Honor, here's our problem: The  
18 representations that counsel just made were new to us, and we  
19 want -- and what we really need to do is to test their -- to  
20 make sure that counsel has it right as well.

21                 And there is a -- there is a publication that relates  
22 to this exact subject. My colleagues have had a chance to  
23 review it partially, just in the few minutes that we've been

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1 here -- or since these representations were made, and it seems  
2 on review that counsel has -- doesn't -- that we don't quite  
3 have it right yet. And in particular, this distinction  
4 between it being a fait accompli, that a decision has already  
5 been made, it's over, it's done, and there's been a reference  
6 to things happening in the ordinary course, and I'm not sure  
7 what that means. And I think we're going to find that a  
8 review of this audit report suggests that there's more to it  
9 than that.

10 MJ [COL POHL]: Okay.

11 LDC [MR. NEVIN]: My request is that you give us some  
12 time, perhaps the rest of the afternoon, to review this and  
13 that we take this up again in the morning after we've had a  
14 chance to review this, and I think we can speak more  
15 authoritatively to this.

16 MJ [COL POHL]: Are you willing to share what the  
17 reference material is?

18 LDC [MR. NEVIN]: Yes. It is the Office of the Inspector  
19 General of the Department of Defense, the Deputy Inspector  
20 General for Intelligence, DoD Security Clearance Adjudication  
21 and Appeal Process.

22 MJ [COL POHL]: Okay.

23 LDC [MR. NEVIN]: It's Report Number 04-INTEL --

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1 I-N-T-E-L, all caps -- 02, December 12, 2003.

2 MJ [COL POHL]: Okay.

3 LDC [MR. NEVIN]: And it's an audit report.

4 MJ [COL POHL]: Yeah. We're going to have to do things a  
5 little bit out of order here. What I intend to do is we're  
6 going to break. I'm going to let the detainees, again, have  
7 their prayer time at 1500, and then they're to be taken back  
8 right after that. At 1545, we're going to do the 505(h)  
9 hearing on Mr. Hawsawi's 502 issue. Okay.

10 But then my intent will probably be in the morning,  
11 we'll start with -- the VTC is set for 9:00. So we may start  
12 the 502 VTC at 9:00, and then as soon as that's done, we can  
13 come back to this, okay.

14 LDC [MR. NEVIN]: Okay.

15 MJ [COL POHL]: Just for planning purposes. But that  
16 seems that's a good way forward.

17 LDC [MR. NEVIN]: Thank you.

18 MJ [COL POHL]: Okay. Then you will have an opportunity  
19 to review it, and I'll have an opportunity to look at the  
20 information tonight anyway, so that's good.

21 LDC [MR. NEVIN]: All right. Thank you, Your Honor.

22 MJ [COL POHL]: Okay. Good. Mr. Harrington.

23 LDC [MR. HARRINGTON]: Judge, with your permission, we

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1 have some more information also that we'd like to file a  
2 supplement. We'll file it by the end of the day today.

3 MJ [COL POHL]: Okay.

4 LDC [MR. HARRINGTON]: All right. Thank you.

5 MJ [COL POHL]: Yeah.

6 Ms. Bormann.

7 LDC [MR. RUIZ]: Judge, what is your intention in terms of  
8 addressing the seizure of the laptop issue? For us that's an  
9 issue that is quite significant and one we want to address  
10 prior to getting into additional litigation. As we said, we  
11 have been operating without access -- Mr. Al Hawsawi has been  
12 operating without access to his laptop ----

13 MJ [COL POHL]: My intent is to get to it as quickly as we  
14 can. But I have a motion to abate in front of me, and then  
15 we've got the other thing. Hopefully we will get to it as  
16 soon as I can in the course of business -- the ordinary course  
17 of my business, which is a little faster than perhaps other  
18 people's, but ----

19 LDC [MR. RUIZ]: My question more particularly is: Do you  
20 intend to address that motion still after resolution of this  
21 motion, or do you intend to bypass that and go to 502 issues?  
22 Because our preference would be to continue to address the  
23 laptop issue and then get into -- I know you're doing the VTC

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1 because its an availability issue ----

2 MJ [COL POHL]: Yeah.

3 LDC [MR. RUIZ]: ---- but if we're going to get into  
4 testimony of agents, I need to address the access to laptop  
5 first.

6 MJ [COL POHL]: Let me think of the way through. It's --  
7 I mean, the question becomes is -- is that if I grant the  
8 abatement motion, do counsel still want to just address 530  
9 because it's in their clients' best interests to do that now,  
10 or wait? I mean, arguably, 502 only impacts on you, and so  
11 that may not be impacted on the abatement issue. There's a  
12 lot of different variables to this. You guys can talk among  
13 yourselves of how you want me to approach it.

14 But I'd like to -- I understand the 530 issue and the  
15 532 issue as well as the 502 issue, but -- I haven't forgotten  
16 about it, it's just a matter of keeping all the balls in the  
17 air.

18 LDC [MR. RUIZ]: I understand.

19 MJ [COL POHL]: Ms. Bormann.

20 LDC [MS. BORMANN]: On 532, I agree with Mr. Nevin and  
21 propose the same way forward. I would ask, however, that,  
22 given the fact that Major Lebowitz is receiving corrective  
23 messages and relaying information based upon an ever-changing

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1 landscape, that before Your Honor take as evidence what Major  
2 Lebowitz has just told you, you ask for some sort of  
3 declaration from the person that knows.

4 MJ [COL POHL]: Got it.

5 LDC [MS. BORMANN]: Because my understanding of what Major  
6 Lebowitz just said is basically the investigation is over,  
7 so -- because they didn't suspend access in the first 15 days.

8 My understanding of the process based upon the  
9 research we did is that has nothing to do with the outcome of  
10 the investigation. And, in fact, the 15-day no-access,  
11 whether it's suspended or not, is subject to revision at any  
12 point, and the investigation continues.

13 MJ [COL POHL]: I hear you, Ms. ----

14 LDC [MS. BORMANN]: So I'm going to ask Your Honor to  
15 order special trial counsel to provide evidence of what he  
16 provided on the record.

17 MJ [COL POHL]: Let's finish the arguments that we have  
18 tomorrow, and I'll fashion an appropriate way forward. Okay.

19 Commission is in recess. The open session is in  
20 recess until tomorrow at 0900. We'll reconvene at 1545 for a  
21 closed, classified evidence session under Military Commission  
22 Rule of Evidence 505(h). And at that time, it will be the  
23 regular prosecution team.

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