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1 [The R.M.C. 803 session was called to order at 0911,
2 28 January 2019.]

3 MJ [Col PARRELLA]: Good morning. This commission is
4 called to order.

5 Trial Counsel, please identify who is here on behalf
6 of the United States.

7 CP [BG MARTINS]: Good morning, Your Honor. Representing
8 the United States, Brigadier General Mark Martins, Mr. Robert
9 Swann, Mr. Clayton Trivett, Ms. Nicole Tate, Major Christopher
10 Dykstra. Also present in the courtroom are paralegals
11 Mr. Dale Cox, Mr. Rudy Gibbs; and with the Federal Bureau of
12 Investigation, Kim Waltz and Nicole Taylor.

13 Your Honor, these proceedings are being transmitted
14 via closed circuit television to locations in the continental
15 United States pursuant to the commission's order.

16 MJ [Col PARRELLA]: Thank you, General Martins.

17 Mr. Nevin, if you could please identify for the
18 record who is here on behalf of Mr. Mohammad.

19 LDC [MR. NEVIN]: David Nevin, Lieutenant Colonel Poteet,
20 Ms. Radostitz, Mr. Sowards on behalf of Mr. Mohammad, who is
21 present.

22 MJ [Col PARRELLA]: Thank you. Ms. Bormann.

23 DC [MR. MONTROSS]: For Mr. Bin'Attash, Ms. Cheryl

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1 Bormann, learned counsel; Major Matthew Seeger; and William
2 Montross.

3 MJ [Col PARRELLA]: Thank you. Mr. Harrington.

4 LDC [MR. HARRINGTON]: Judge, for Mr. Binalshibh, James
5 Harrington, Lieutenant Mishael Danielson, and Ms. Alaina
6 Wichner.

7 MJ [Col PARRELLA]: Thank you. Mr. Connell.

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

9 MJ [Col PARRELLA]: Good morning.

10 LDC [MR. CONNELL]: On behalf of Mr. al Baluchi is myself,
11 James Connell; Alka Pradhan; Ben Farley. Lieutenant Colonel
12 Thomas has previously been excused with the permission of the
13 court and the consent of the client. Captain Andreu is sick
14 in quarters.

15 MJ [Col PARRELLA]: Thank you. Mr. Ruiz?

16 LDC [MR. RUIZ]: Judge, myself, Suzanne Lachelier, Major
17 Joseph Wilkinson, Lieutenant Colonel Jennifer Williams,
18 Lieutenant Dave Furry, Mr. Sean Gleason on behalf of
19 Mr. al Hawsawi.

20 MJ [Col PARRELLA]: Thank you. I also note for the record
21 that the chief defense counsel is present in the courtroom.

22 Mr. Connell, with respect to Captain Andreu, the
23 commission is aware that he is unable to attend this morning,

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1 and certainly excuses his presence for purposes until such
2 time as he can return and attend these proceedings. Is there
3 any issue with proceeding in his absence this morning?

4 LDC [MR. CONNELL]: Yes, sir. May I be heard?

5 MJ [Col PARRELLA]: You may.

6 LDC [MR. CONNELL]: Sir, as I represented to the military
7 commission, Captain Andreu is sick in quarters. 10 U.S.C.
8 Section 949c(b) sets forth the requirement of military defense
9 counsel which is implemented in Regulation for Trial by
10 Military Commission 9-1. The Rule for Military Commission
11 which is applicable is 805(c), which provides: As long as at
12 least one qualified counsel for each party is present, other
13 counsel for each party may be absent from a military
14 commission session with the permission of the military judge.
15 And the commentary provides: Ordinarily, no military
16 commission proceeding should take place if any defense or
17 assistant defense counsel is absent unless the accused
18 expressly consents to the absence. The military judge may,
19 however, proceed in the absence of one or more defense counsel
20 without the consent of the accused if the military judge finds
21 that, under the circumstances, a continuance is not warranted
22 and the accused's right to be adequately represented would not
23 be impaired.

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1 I have personally visited Captain Andreu this
2 morning. I am no doctor, but it is my view that he should not
3 leave the vicinity of appropriate facilities. I have
4 consulted with Mr. al Baluchi, who does not consent to
5 proceeding without military counsel. We do object to
6 proceeding without him and request a deferral to 1300. I will
7 provide, if -- if appropriately considered, I will provide
8 status updates on any schedule directed by the military
9 commission.

10 I will just add that we have taken Captain Andreu
11 electrolytes and appropriate medication and -- essentially,
12 flu symptoms, and there might be some opportunity for him to
13 recover today.

14 MJ [Col PARRELLA]: Okay. Thank you, Mr. Connell.

15 In light of what we have scheduled for this session
16 of court this morning, which is, in essence, AE 615, the
17 commission finds that it's not necessary to delay these
18 proceedings, as Mr. al Baluchi nor his counsel have an
19 interest in the equities of AE 615 sufficient to warrant such
20 a continuance. So I do believe that his -- the accused's
21 right to be adequately represented is sufficiently met by the
22 presence of his learned counsel, as well as the presence of
23 Ms. Pradhan and Mr. Farley.

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1 So we will go ahead and proceed with at least taking
2 up the issue in AE 615. I do believe that will probably take
3 us, with recesses, to 1300; and at such time, hopefully,
4 Captain Andreu can either join us or you can apprise the
5 commission of his status.

6 LDC [MR. CONNELL]: I understand. Thank you, sir.

7 MJ [Col PARRELLA]: Thank you.

8 I will now advise the accused of their right to be
9 present and their right to waive said presence. Each of you
10 have the right to be present during all sessions of the
11 commission. If you request to absent yourself from any
12 session, such absence must be voluntary and of your own free
13 will. Your voluntary absence from any session of the
14 commission is an unequivocal waiver of the right to be present
15 during that session. Your absence from any session may
16 negatively affect the presentation of the defense in your
17 case. Your failure to meet with and cooperate with your
18 defense counsel may also negatively affect the presentation of
19 your case.

20 Under certain circumstances, your attendance at a
21 session can be compelled, regardless of your personal desire
22 not to be present. Regardless of your voluntary waiver to
23 attend a particular session of the commission, you have the

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1 right at any time to decide to attend any subsequent session.
2 If you decide not to attend the morning session but wish to
3 attend the afternoon session, you must notify the guard force
4 of your desires. Assuming there is enough time to arrange
5 transportation, you will then be allowed to attend the
6 afternoon session.

7 You will be informed of the time and date of each
8 commission session prior to the session to afford you the
9 opportunity to decide whether you wish to attend that session.

10 Mr. Mohammad, do you understand what I have just
11 explained to you?

12 ACC [MR. MOHAMMAD]: Yes.

13 MJ [Co1 PARRELLA]: Mr. Bin'Attash, do you understand what
14 I've just explained to you?

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

16 MJ [Co1 PARRELLA]: Mr. Binalshibh, do you understand what
17 I've just explained to you?

18 ACC [MR. BINALSHIBH]: **[Speaking in English]** As I told you
19 last time, I cannot answer your questions because you are not
20 qualified judge for this case. Thanks.

21 MJ [Co1 PARRELLA]: Mr. Harrington, Mr. Binalshibh's reply
22 causes the commission some concern. Specifically, while
23 counsel have and are free to challenge my qualifications to

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1 preside over this commission, Mr. Binalshibh is not. So his
2 unwillingness to recognize me as the presiding authority of
3 this commission causes me some concern about his willingness
4 to adhere to the rules of this commission and that, in turn,
5 could potentially put everyone in this room safety in
6 jeopardy.

7 So what I would propose at this point is that -- to
8 give you a brief opportunity to speak to your client. And I
9 understand certainly that he may be simply mimicking or
10 expressing what's been put into motions that are currently
11 pending with the D.C. Circuit; but nevertheless, I want to
12 ensure that he, at least, is recognizing the authority of the
13 military commission and the conduct of what transpires in this
14 room and will adhere to those. Otherwise, I may have to take
15 measures to ensure that everybody's safety in this room is
16 protected.

17 LDC [MR. HARRINGTON]: Judge, first of all, do you want me
18 to do it now? And, secondly, I do not understand what you
19 mean by everybody's safety with respect to what he said.

20 MJ [Col PARRELLA]: Well, Mr. Harrington, if
21 Mr. Binalshibh doesn't recognize my authority as the military
22 judge, then who's to say that he's going to recognize any
23 direction or command that I give in this commission? It's my

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1 responsibility -- not just my duty, it's my responsibility to
2 ensure that folks in this commission, in this courtroom, are
3 safe.

4 LDC [MR. HARRINGTON]: Judge, we've been here since 2012
5 and, other than a couple of verbal statements that my client
6 has made, there has never been any demonstration of anything
7 that would cause anybody to be concerned about safety or
8 physical safety in this courtroom. He always abides by the
9 directions of the guard force and everybody else. And I'm not
10 quite sure -- the fact that somebody doesn't recognize the
11 legal authority of a court doesn't necessarily imply that
12 they're going to act out or do anything else about it. He's
13 never done that before. There's no basis for concluding that.

14 MJ [COL PARRELLA]: Well, and I appreciate that. And as
15 such, I think I've, to date, largely adopted the
16 recommendations or, I guess, existing practice with respect to
17 the manner in which the accused are transported and handled in
18 this commission, or shackling and things of that nature.

19 I don't believe, however, that up until last week --
20 or last session of court, at least, that Mr. Binalshibh failed
21 to recognize the -- at least that the military judge had
22 authority over this commission. So I think that's a new
23 development, and that's my -- my concern is.

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1 LDC [MR. HARRINGTON]: Well, I'm glad to talk to him about
2 it, Judge. Do you want me to do it now or do you want me to
3 wait until you finish the other advice?

4 MJ [Col PARRELLA]: I'll go ahead -- let's go ahead and
5 finish the other advice, and then at that point in time we're
6 going to take a recess anyway so that we can transition the
7 courtroom. I'll give you an opportunity to speak to him at
8 that point in time and then address it again with
9 Mr. Binalshibh. Thank you.

10 All right. Mr. Ali, do you understand what I've just
11 explained to you?

12 ACC [MR. AZIZ ALI]: Yes.

13 MJ [Col PARRELLA]: Mr. Hawsawi, do you understand what I
14 just explained to you?

15 ACC [MR. AL HAWSAWI]: Yes.

16 MJ [Col PARRELLA]: All right. On 26 January 2019, this
17 commission conducted an R.M.C. 802 conference here in
18 Guantanamo Bay with both trial and defense counsel. The
19 accused were absent. At this conference we discussed the
20 order of march for this week's session. I indicated that the
21 commission intended to start this morning's session with the
22 standard identification of the parties and advisement of
23 rights.

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1 After these introductory matters were completed, I
2 indicated that the commission would recess until 1000, at
3 which time we would take up AE 615. This recess would allow
4 the prosecution team to depart and for the special review team
5 to appear on behalf of the government via VTC.

6 After 615, I initially proposed we take up objections
7 to the commission's proposal to close the hearing for AE 616,
8 but upon the suggestion of Mr. Connell and with concurrence of
9 the prosecution, we instead agreed to take up AE 616 after a
10 hearing was conducted in accordance with M.C.R.E. 505(h).
11 Accordingly, we will take -- instead take up any unclassified
12 argument the parties are prepared to make on AE 614.

13 On Tuesday, we will conduct a hearing in accordance
14 with M.C.R.E. 505(h) to take up all pending 505(g) notices.
15 If necessary, and after an appropriate order is issued by this
16 commission, we will thereafter conduct a closed session solely
17 to address the issues in AE 616.

18 As of now, Wednesday is set aside to receive
19 testimony as was ordered by the commission in AE 350RRR,
20 whether that be in an open session, closed session, or a
21 combination thereof.

22 On Thursday and Friday we will take up unclassified
23 and classified argument on the following motion series:

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1 133RR, 118, 574G, 599, 600, 601, and 575. The parties have
2 indicated that, in light of recent filings, AE 538 and AE 561
3 are no longer ripe and so will be deferred to a later session.

4 In response to the proposed order of march,
5 Mr. Connell pointed out that there needs to be sufficient time
6 following the M.C.R.E. 505(h) hearing and the issuance of any
7 corresponding order closing the commission to allow for the
8 public to intervene. Brigadier General Martins indicated the
9 commission has previously ruled on this subject, which I
10 believe is a reference to the commission's order in AE 081A.

11 Do counsel for either side have any additions or
12 corrections to the commission's summary of the R.M.C. 802
13 conference? Trial Counsel?

14 CP [BG MARTINS]: The government does not, Your Honor.

15 MJ [Col PARRELLA]: Mr. Nevin?

16 LDC [MR. NEVIN]: Yes, Your Honor. On behalf of
17 Mr. Mohammad, the record should reflect that you said that you
18 were going to hear argument from us on the 615 issues even
19 though you had already decided them.

20 MJ [Col PARRELLA]: That is correct. And that is set
21 forth in the commission's ruling in AE 613E and 615P.

22 Ms. Bormann?

23 DC [MR. MONTROSS]: No additions, Your Honor.

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1 MJ [Col PARRELLA]: Mr. Harrington?

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

3 MJ [Col PARRELLA]: Mr. Connell?

4 LDC [MR. CONNELL]: Sir, I believe the military
5 commission's summary adequately -- or accurately summarizes
6 the 802 conference. I will note, however, that the proposed
7 order of march does not allow for the possibility of open
8 argument on 616.

9 MJ [Col PARRELLA]: Okay. I think that we can adequately
10 take that up during the -- tomorrow's 505(h) hearing.

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

12 MJ [Col PARRELLA]: You're welcome.

13 Mr. Ruiz?

14 LDC [MR. RUIZ]: That's accurate, yes, Your Honor, thank
15 you.

16 MJ [Col PARRELLA]: Thank you. At this time the
17 commission will stand in recess until 1000.

18 [The R.M.C. 803 session recessed at 0928, 28 January 2019.]

19 [The R.M.C. 803 session was called to order at 1007,
20 28 January 2019.]

21 MJ [Col PARRELLA]: This commission is called back to
22 order. All parties who were present when the commission
23 recessed are again present with the following exceptions: The

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1 prosecution team has departed the courtroom. We have joined
2 with us members of the special review team by VTC. And if you
3 can hear me, if you can please introduce who is present on
4 your end.

5 SRT [MS. BALLANTINE]: Yes, Your Honor. Jocelyn
6 Ballantine, I'm from the United States District Attorney's
7 Office for the District of Columbia.

8 SRT [MR. SHANKER]: Vijay Shanker with the Criminal
9 Division of the Department of Justice.

10 SRT [MS. BALLANTINE]: And we're joined by Supervisory
11 Special Agent John Stofer from the FBI.

12 MJ [Co] PARRELLA]: Thank you. And with respect to the
13 defense teams, it appears Mr. Hawsawi is absent. Are there
14 any other changes to who was present previously?

15 That is a negative response.

16 Okay. Before we take up the issue in AE 615,
17 Mr. Harrington, I want to come back to an issue before we
18 recessed. Have you had an opportunity to speak with your
19 client and do you have an update for the commission?

20 LDC [MR. HARRINGTON]: I don't think you can take that
21 issue up without the main prosecution being here.

22 MJ [Co] PARRELLA]: Okay. We can go ahead and take this
23 issue up first. It did appear -- have you had an opportunity

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1 to speak to --

2 LDC [MR. HARRINGTON]: I have, Judge, yes.

3 MJ [Col PARRELLA]: Okay. All right. We will take that
4 up then. What I'm going to ask then is that when we recess
5 and the prosecution comes back, I'm going to require that
6 Mr. Binalshibh remain so that I can go through that colloquy
7 with him before he returns, if he does choose to absent
8 himself.

9 LDC [MR. HARRINGTON]: We understand.

10 MJ [Col PARRELLA]: Thank you. Okay.

11 The purpose of this session is to take up the issues
12 addressed in AE 613 and AE 615. As was previously noted, the
13 commission issued a ruling on 25 January 2019 that has been
14 simultaneously marked as AE 613E and 615P. Although the
15 commission has ruled on the issue of a potential conflict,
16 it -- I did indicate in my ruling that I would afford the
17 parties an opportunity to be heard.

18 I think, given the nature of this potential conflict,
19 what I will do is I will allow Mr. Bin'Attash's team to first
20 speak unless you want to defer to another team.

21 LDC [MS. BORMANN]: Judge, as you are aware, I am sick. I
22 have the flu. So I've asked Mr. Nevin and Mr. Harrington to
23 precede me and I will do what I can to finish up.

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1 MJ [Col PARRELLA]: Okay. I understand.

2 Mr. Nevin?

3 LDC [MR. NEVIN]: Thanks, Your Honor. And I will say on
4 behalf of Mr. Mohammad, our view is that there is a -- at
5 least a potential conflict of interest here that's raised by
6 the declaration of the Bin'Attash team member, or now former
7 team member, and that it's not -- that potential for conflict,
8 at least, is not resolved by the findings that the military
9 commission made -- or the military judge made in 615P and
10 613E; and that this prohibits us from going forward, other
11 than addressing this issue of conflict, which we believe
12 Holloway and the other cases require us to bring to your
13 attention and ask for you to resolve.

14 So let me just do that, and I'll do this
15 expeditiously because I know that you've already ruled on
16 this. But I want the record to be clear about where we're
17 coming from and why.

18 We have, first of all, the declaration of the team
19 member -- or the now former team member of the Bin'Attash
20 team. And what we know is that this person is in the
21 neighborhood of Fort Hood, Texas, for, at least in his mind,
22 other purposes, as -- in the process of transiting to another
23 station. And he's called by someone from Army

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1 counterintelligence, quote/unquote, who said -- this is a
2 person who says he's from Army counterintelligence, and he
3 lies to this person.

4 He tells them, you have to come here and be
5 questioned about your transfer to, my recollection is, Korea.
6 That's not why they were bringing him in. What follows is an
7 instance of "rough surveillance," is the term that I think is
8 commonly used. The team member sees somebody out in front of
9 his house nakedly taking pictures. He gets in -- the team
10 member gets in his own vehicle; the person taking the pictures
11 takes off; the team member follows him. The person pulls
12 over, gets out of his vehicle, and dashes back between two
13 houses and disappears.

14 After that, the team member finds that he's being
15 followed by a different car in traffic. And after making some
16 intermediate stops, he realizes he has to go in the other
17 direction so he makes a U-turn. The vehicle that's following
18 him also makes a U-turn. This is not surreptitious
19 observation without the person being aware of it. It's being
20 done in such a way to make him acutely aware of the fact that
21 he is -- that he's being scrutinized.

22 So he's searched at the gate of the Army base in a
23 way that's unusual and not typically done, involving some five

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1 people, including someone from civilian law enforcement. And
2 finally then our -- or next, let's say, "finally" is not the
3 right word yet -- he's interrogated by two people who identify
4 themselves as FBI agents for two and a half hours. They
5 require his signature on a couple of documents. This is not
6 the first time we've seen this kind of thing. And they want
7 to talk to him about his time on the Bin'Attash case. That's
8 a quote from paragraph 22.

9 And they keep ingratiating or attempting to
10 ingratiate themselves with him. They attempt to suggest to
11 him that they have common beliefs and experiences in an effort
12 to get him to provide them with information and to cooperate
13 with them. They demonstrate that they're aware of specific
14 procedures on the Bin'Attash team, information that they could
15 not have had from just observing from the outside, suggesting
16 that they have someone else that has provided them information
17 from the inside, either from Mr. Bin'Attash's team or from
18 some other team. And they're also aware of this team member's
19 personal activities, his interests, his tastes, where he goes
20 on the Internet, this kind of thing.

21 So this questioning that lasts for two and a half
22 hours focuses not just on Mr. Bin'Attash but -- and his team,
23 but also on the other teams. And I'm quoting now -- or not

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1 quoting but referring to paragraph 31 of the declaration, that
2 80 to 90 percent of the questioning relates to Bin'Attash, his
3 attitudes, and whether his co-defendants are in the same or
4 different position or circumstances. And at paragraph 32, you
5 hear that they also asked about the other defense teams and
6 the other defendants.

7 So in addition to all of this, they require him to
8 come back and take a polygraph on the second day. Two
9 different people administer the polygraph. One of them says
10 that he is from another government agency, and that is just
11 euphemistic speak, particularly in the context of this case,
12 for the CIA.

13 And I will say that the person that originally called
14 this team member and asked him to come in said that he was
15 from Army Counterintelligence. And when the team member goes
16 in for the second day to do the polygraph, he goes to a place
17 where there's a sign that says Military Counterintelligence.
18 So as we count it, we have probably three, possibly four
19 different agencies involved. That would be the FBI, the CIA,
20 and Military or Army Counterintelligence. And probably that's
21 one, last one, but it has -- given the two separate
22 designations, it's possibly four different agencies involved.

23 Now, we've also -- we know that you also met with the

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1 special prosecutor in chambers in a secret meeting, by which I
2 mean one that we were excluded from, despite us asking you for
3 permission to be there.

4 MJ [Col PARRELLA]: So by "secret," you mean ex parte?

5 LDC [MR. NEVIN]: That's -- yes.

6 MJ [Col PARRELLA]: Okay.

7 LDC [MR. NEVIN]: Yes. Because that's correct. I mean,
8 it was ex parte, and it was not secret in the sense that we
9 were not aware of it because you advised us of that, that you
10 were doing that. So, right, exactly. Ex parte.

11 And we asked you for permission to be present, but we
12 are aware also that -- our understanding is that the SRT did
13 not ask for permission to make this presentation to you; that
14 they took the position that the pleading they filed was
15 sufficient for you to decide the case. And your order
16 directing the ex parte meeting recites that they have said
17 that. And you think -- you say, I believe -- and you say, in
18 an excess of caution, that you're going to conduct this robust
19 investigation two days hence. And I believe you issue that
20 order on the 22nd and the meeting is to occur -- the ex parte
21 meeting is to occur on the 24th.

22 And so I'm given to understand, after reading the
23 order that you issued on Friday, that you did, indeed, have

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1 the meeting. You have said that the only exhibit that was
2 offered was the declaration -- the same declaration that was
3 provided to us. And it's not clear to me -- at this point
4 there are two declarations at issue, and I'm not sure exactly
5 which one that refers to. But I gather there was no other
6 documentary evidence that took place in that meeting.

7 So I do have this question: Did someone testify
8 before you in that meeting?

9 MJ [Col PARRELLA]: What I will tell you, Mr. Nevin, and I
10 think it's set forth in the commission's ruling, that in
11 addition to the information that was garnered during the
12 ex parte presentation, the commission did receive ex parte
13 pleadings in AE 613 as well as 613A. And as part of my
14 ruling, I've directed the SRT to redact, as appropriate, those
15 pleadings and to provide them to all the defense teams.

16 I do believe you're correctly summarizing what's in
17 my ruling, that during the course of the ex parte
18 presentation, I received a declaration; but since the SRT
19 subsequently provided that to all the defense teams, there was
20 no reason for me to order that one to be redacted and
21 provided.

22 LDC [MR. NEVIN]: Yeah, no. I -- my question was whether
23 somebody testified in the sense of providing -- being sworn

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1 and giving testimony under oath.

2 MJ [Col PARRELLA]: Well -- so this is your opportunity,
3 Mr. Nevin, to make oral argument to me. I'm not going to go
4 any further into the details of the ex parte presentation
5 other than what I've set forth in my findings of fact. The
6 commission, I think as you're aware, has a duty to conduct an
7 inquiry in these sorts of situations and has an interest to
8 ensure that the defense teams are conflict-free so that we
9 don't find ourselves back here relitigating those same issues.

10 LDC [MR. NEVIN]: Okay. Well, I mean, I take it the
11 military commission won't answer my question. And I ask it
12 because the military commission -- or the military judge, you,
13 and I had a colloquy and some follow-on pleadings previously
14 about the issue of proffers. And I understood that you didn't
15 accept proffers, or that under the circumstances that were
16 presented in our situation you weren't going to accept my
17 proffer.

18 And after that you accepted the government's proffer
19 about 579, Ms. Haspel. And I gather you've accepted a proffer
20 in this setting as well. And I think that's unfair and
21 inappropriate. And if there's testimony, I'll stand
22 corrected. But I hear you that you're not going to answer the
23 question.

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1 So here's what -- here's where we get left after
2 looking at the declaration of the team member, and also
3 reading what we've been given by the special review team, and
4 also reading your orders and findings. And these things,
5 comparing all of these materials together, leave us with a
6 variety of unanswered questions. And, for example, you hold
7 in 615P and 613E at paragraph 3.c. that the ongoing
8 investigation pertains only to the Bin'Attash team. And I
9 refer the military judge to the declaration of the team member
10 this morning, and I point out to you that they asked two -- at
11 least two questions, and probably more, about the other
12 defense teams.

13 And when you say -- or when the special review team
14 says there is no investigation of any other team, I have to
15 ask: What is up with those questions about the other defense
16 teams? Those, on their face, are an investigation of our team
17 and of the other teams. There's not any other reason for them
18 to be asking those questions.

19 Now, this is why I ask you ----

20 MJ [Col PARRELLA]: Of course that assumes, Mr. Nevin,
21 that everything in that declaration is correct, would it not?

22 LDC [MR. NEVIN]: Yes, it does assume that.

23 MJ [Col PARRELLA]: Okay.

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1 LDC [MR. NEVIN]: And so again, I'm asking you, or I asked
2 you just a little while ago: Did somebody tell you something
3 different? And if they did, then I stand ready to be filled
4 in.

5 MJ [Col PARRELLA]: Well, before the commission gets into
6 what is an ex parte presentation, why don't we give -- once
7 the defense teams have had an opportunity to talk, certainly
8 the -- the special review team will have an opportunity, and
9 perhaps that will answer some of the questions.

10 LDC [MR. NEVIN]: Okay. Sure. And I -- you've also -- I
11 noted that you've given them two weeks to redact these two 613
12 and 613A, and I have a request for you in a few minutes about
13 that.

14 But, yeah, I would say I take that to be true. I
15 don't know why that person would have written that in that
16 declaration if it weren't true. And your statement that --
17 your flat statement that there was no investigation of anybody
18 else is contradicted by that. And if you -- if you were told
19 something that leads you to that, I'd be happy to know it.
20 But at this point for me, it's an unanswered question.

21 So you also say at -- in 615P and 613E at
22 paragraph 2.h., you say, no evidence exists to suggest that
23 the FBI investigation is in retaliation for any actions taken

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1 by Defense Teams. And I have to assume that by that you mean
2 no evidence was shown to you. But I don't know how it can be
3 true, or how you can know that there is no evidence that
4 exists to that effect.

5 I mean, there is -- and I'll say -- I want to say a
6 word to you before I stop about the context of this, but I
7 think there's plenty to suggest that this is part of an
8 ongoing process that began in 2009 and leads up to the present
9 that is specifically designed to retaliate against the defense
10 teams for defending our clients.

11 And if there was -- if there were witnesses who
12 testified that establish clearly that there was no evidence or
13 that the -- no evidence exists, I would be very happy to know
14 it. But it's an unanswered question for me at this point.
15 And you find that -- in AE 615P and 613E at paragraph 2.e.
16 that no current member of any defense team assigned to this
17 case is under investigation by the FBI or any other government
18 agency. And again, I have an indication, as I said earlier,
19 that there were three agencies involved; that there was the
20 FBI, there was the CIA, and there was Army or Military
21 Counterintelligence.

22 Now, I know you've directed them to prepare a
23 declaration by February the 8th from another military agency,

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1 which I -- I'm guessing refers to this counterintelligence
2 group or -- whether it's Army or military. And I don't see
3 anything in there from the CIA, with reference to the CIA. I
4 don't know who that other government agency was that
5 participated in the polygraph, and that is another unanswered
6 question for me and for my team.

7 And I have to ask -- certainly one unanswered
8 question for me is why the rough surveillance. If you're
9 really trying to just find out what sort of surreptitious,
10 suspicious, dangerous things this team member is doing, then
11 surely these agencies have some higher degree of
12 sophistication than to be parked out in front of his house
13 taking pictures of it with a cell phone and making U-turns in
14 a white van and following him in traffic. This is what we
15 used to call -- in the old days, it was called "rough
16 surveillance," and that's how I referred to it. It's not
17 designed to acquire information; it's designed to intimidate.

18 As I will tell you in a second, we have a long
19 history in this case of people who leave our defense teams,
20 and sometimes people who haven't even left our defense teams,
21 being recruited to serve as moles or spies on the defense
22 team. And they've been successful at doing it. They did it
23 on my team. And this is -- was litigated in 292 previously

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1 and I'll say another word about it in just a minute.

2 But you also found that by filing 613 and 613A, that
3 the government had fully satisfied the obligation of 292QQ
4 (Amended Order) to give you -- to give the military judge
5 immediate notice if an investigation like this takes place.

6 MJ [Col PARRELLA]: Well, I think there's a distinction.
7 Sorry to interrupt you, Mr. Nevin.

8 LDC [MR. NEVIN]: Sure.

9 MJ [Col PARRELLA]: I think the wording was that they
10 complied with 292QQ, not necessarily that they fully
11 satisfied. And that might be an artificial distinction, but I
12 just want to clarify the record. That's what I think I said.

13 LDC [MR. NEVIN]: Okay. Well, then you get my point then.
14 Because that was my point. They say that the investigation --
15 that the full investigation is opened on November 20th. And
16 my recollection from our prior round of litigating this in 292
17 is that a full investigation very possibly follows a
18 preliminary investigation, which implies at some point before
19 November 20th of 2018 they're conducting this investigation.
20 And they don't get around to giving that notice in AE 613
21 until December the 3rd; at a minimum, 13 days after the full
22 investigation is opened. And I -- that's in our minds an
23 unanswered question. Why is that?

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1 And I will also direct your attention to the fact
2 that when AE 613 is filed, it's filed -- it's supported by an
3 unclassified or a -- I guess the term would be open, a
4 non-ex parte notice, that 613 itself, a secret ex parte
5 pleading, has been filed. But that notice is signed by
6 Mr. Trivett. It's not signed by the special trial counsel,
7 and I suspect that that was done -- and we'll see when we
8 see -- on February the 8th, I guess, we'll see who signed 613,
9 who gave that notice to you in 613. But I suspect that
10 Mr. Trivett signed the declaration, because to -- for the
11 special trial counsel to have signed it would have put
12 everybody on notice that this was happening again. And that,
13 at least, bought them another month or so before it became --
14 before this came to a head. Could I be wrong about that? Of
15 course, I could. But we have those unanswered questions.

16 And so we -- we see the pleading of the special trial
17 counsel filed in response to your direction that they -- to
18 your requirement for an expedited briefing schedule. And we
19 see there arguments that we've seen before. We see the
20 argument that a conflict only exists when we -- when you have
21 the same agency investigating the lawyer as is investigating
22 the defendant and the -- and even suggesting that it requires
23 that it be the same prosecutor. And I will say the cases

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1 don't say that, at least not uniformly. You do have to
2 consider the context of each of those cases very carefully.
3 And in our pleading, 615I, I believe we laid some of this out,
4 and I do direct your attention to that.

5 But this is a case in which the entirety -- at one
6 point, probably not anymore, but the entirety of the FBI was
7 enlisted in the investigation of this case, said to have been
8 the largest in the history of the country. And we are dealing
9 with a situation here where the proposed executioners of our
10 client are the very same people who are conducting this --
11 this treatment of this former team member. And that is --
12 that is a -- particularly in the context of what's gone on in
13 the last ten years, which I'll speak to briefly in just a
14 moment, that is not lost on defense counsel. That's something
15 that's very clear to me and very clear to the other people on
16 our team.

17 I call your attention to the fact that most of those
18 cases are retrospective in nature. That is to say, after a
19 conviction on an appeal or on a post-conviction action or a
20 habeas action, clients are saying, my lawyer was under
21 investigation all during the trial and I'm entitled to a new
22 trial because of that.

23 And it's out of that context that you see the cases

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1 that say the lawyers didn't know that they were under
2 investigation and, therefore, there can't have been any harm.
3 And that was an issue the first time around in 292, because
4 our linguist was hauled in by the FBI and didn't tell us. And
5 Judge Pohl made that point. I disagreed with it, but I'm
6 familiar with that issue.

7 But I just want to say to you, in this situation
8 we're dealing with it prospectively. We're dealing with it in
9 realtime, you might say, as opposed to looking back later and
10 saying, please undo everything that's been done because of
11 this thing that we now have found out about or that has
12 arisen. And it's an opportunity for the military judge to
13 deal with this now and get to the bottom of it and do it right
14 so that the record is not tainted by this.

15 There's the argument that there is no conflict; there
16 can't be a conflict here because the person who was involved
17 is not an attorney. And, I mean, I was personally astonished
18 to see that argument being presented at this late date because
19 Judge Pohl specifically ruled that -- that that's not the
20 case, that a conflict can arise out of something occurring
21 with any one of the team members in whom the client has an
22 obligation -- or the -- has a requirement to be in a
23 relationship of trust.

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1 So -- and I think -- I'm sure that by this point, it
2 almost does -- or should go without saying that this is a
3 capital case and all of this has to be scrutinized with a
4 heightened degree of sensitivity. And the United States
5 Supreme Court cases are clear on that point. And so that
6 fact, you might say, turns the volume up on this problem, and
7 is even, you know, an even stronger reason for the military
8 commission to take this not only seriously but also carefully.

9 So that context of -- of my client's state of mind as
10 he sits there is really important because -- given the
11 treatment that he received. And as you know, and as we set
12 out in our moving papers, he's subjected to three and a half
13 years of torture and incommunicado detention. And important
14 for this context is that he was specifically told -- and I
15 believe all the men were -- that you will never be free of us.
16 It was a program that was designed to induce learned
17 helplessness. And the thrust of the program was we control
18 you and we will always control you.

19 And when we have these kinds of incidents arising,
20 they speak to that. They raise that in our client's mind.
21 And it is extremely corrosive of the attorney-client
22 relationship and that is -- that's an issue that I think -- I
23 submit to you should always be in your mind as you think about

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1 how to proceed in this because it's always in our minds. And
2 it would be -- I have to say, it would be -- it would be -- we
3 would be a walking violation of the Sixth Amendment if that
4 weren't always in our mind, if we weren't always paying
5 attention to that issue.

6 So the context of this -- and I think -- I don't know
7 that I've had occasion to say this to you, but the context of
8 this is that this is, as I count it, the ninth time that I
9 personally -- and I'm just -- I will speak to you personally.
10 I'm here on behalf of Mr. Mohammad and on behalf of my team as
11 well, but I feel it very personally.

12 This begins for me in 2009 when I was investigated
13 for three years by the U.S. Attorney's Office in the Northern
14 District of Illinois for -- I gather, for violation of the
15 Intelligence Identities Protection Act. And I hired counsel
16 and waited while that investigation went forward for three
17 years. And in January of 2012, a probable cause affidavit in
18 a criminal case recited that I was indeed -- I and others were
19 indeed subject to this investigation and that -- but that a
20 finding had been made that we'd done nothing wrong. And --
21 but I can tell you that knowing that the United States is
22 investigating you in this way has a particularly chilling
23 effect.

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1 I mentioned to you just a minute ago that our team
2 translator was hauled in by the FBI in 2012, told that some
3 questions needed to be asked having to do with his or her
4 security clearance application or reinvestigation. That was a
5 lie. They wanted to ask that person questions about the
6 operations of MCDO. It wasn't called MCDO then, but they
7 wanted to ask questions about the defense teams. They told
8 that person -- after interviewing him or her, they told that
9 person not to tell the defense team about the contact that --
10 that they were having. And that didn't come out until later
11 when we ended up litigating 292.

12 Then in February of 2014, the government accused
13 us -- and again, me in particular, but my team members as
14 well -- of violating the commission rules, the communication
15 rules within the commission. And you can find the litigation
16 on this subject in AE 018Y and the subsequent pleadings.

17 But these again allege specific violations that
18 were -- and I will say they were not investigated; the
19 allegations were not investigated before they were made, they
20 were simply made in a public pleading. And when -- once the
21 investigation -- once we took a careful look at the situation,
22 it became clear that we hadn't done anything wrong. On the
23 contrary, we'd followed all the rules.

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1 But that was the -- that is the way this goes
2 forward. It's make an allegation first, no matter how
3 serious, and then wait to see later what happens, whether we
4 can stand behind it or not, whether anything has really been
5 done wrong or not.

6 Next, in -- two months later, in -- or three months
7 later, in April of 2014, we have the infiltration of the Ramzi
8 Binalshibh team. And we have a plant on Mr. Binalshibh's
9 team. An amazing development, I might say, for the FBI
10 actually to have recruited a mole to be inside of a defense
11 team, and yet that turned out to be exactly true.

12 Then in July of 2015, suddenly our translator has his
13 security clearance withdrawn. No explanation for why, no
14 explanation for what might happen next or when it could --
15 might be restored. And we have -- the pleadings that follow
16 in that are the AE 406 series. And ultimately, after about a
17 year, his clearance was restored. Again, without any
18 explanation why or what the problem was or what the situation
19 was. Next, five months later -- sorry, a year later, in 2016,
20 in the AE 460 series, we were accused of improperly accessing
21 a secret computer system.

22 And again, it was an incorrect allegation. It was
23 not an improper access. I gather the whole matter has been

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1 dropped, although there's never been a specific statement to
2 that effect. But, you know, there was an allegation used in
3 the specific terms of the criminal statute in 18 U.S. Code
4 referring to unauthorized access. That allegation was made
5 and laid against us and proceeded to be litigated extensively
6 in the 460 series. And whether it's gone away or not now, I
7 don't know.

8 And the next after that occurs in October of 2017
9 when I and others on my team are accused of willfully spilling
10 classified information. I'm talking about the AE 532 series.
11 You understand what it means to willfully spill classified
12 information. And there was an allegation to that effect about
13 us without so much as asking us how that pleading came to be
14 filed and whether we had anything to do with filing it, which
15 we didn't.

16 There it is. Make the allegation now, let everybody
17 twist slowly in the wind, and then later on it goes away or it
18 doesn't. We had testimony from the same man -- Mr. Purtill, I
19 believe his name is -- who has provided a declaration to you.
20 We had testimony in that case about what exactly was going on
21 with that. I believe that's the seventh.

22 And then finally, I -- apart from the one we're
23 dealing with now, which is, in my view, is the ninth. The

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1 eighth situation was when General Martins stands here and
2 tells us that we would be subject to criminal prosecution, at
3 least potentially, for investigating the case, for approaching
4 CIA agents who participated in the torture of our client and
5 asking them questions about that. And instead, the government
6 demanding that we not do that, that we not do our jobs, and
7 that it all take place through Protective Order #4, which I
8 know you're familiar with. But I direct your attention to the
9 proposition that if we had done our job and gone forward to do
10 our job, the government was saying you would be subject to
11 criminal prosecution for that.

12 So this is the environment that we are operating in,
13 and it's not the environment that is supposed to exist in a
14 genuine criminal case. You're not supposed to -- counsel are
15 not supposed to be under constant false -- you know, Your
16 Honor, I understand nobody is immune from investigation if
17 they've done something wrong. That's fine. I -- neither in
18 this case nor out on the street in the world are you -- is a
19 person immune, and I'm not asking to be immune.

20 But I'm telling you about ten years of repeated shots
21 across our bow that were false, that were specifically
22 designed to intimidate us and to make us stand back from the
23 fence. And it's gone on long enough. It's gone on too long.

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1 And when we come to you in this situation, we are coming from
2 that context.

3 And I appreciate your hearing me out so that you can
4 understand the context as well. So when I tell you there are
5 unanswered questions about this, I mean this seriously. The
6 existence of unanswered questions means something. In the
7 real world, genuine questions that are raised by pleadings and
8 allegations and declarations get resolved one way or the
9 other.

10 And I'm happy to have you come to the conclusion and
11 demonstrate to us, sufficient for us to make our own decision
12 about it for our own ethical responsibilities with our -- with
13 our Bar associations, to be confident that we're not under a
14 conflict. I don't want to be under investigation. I don't
15 want to have anybody looking at me, but I have unmistakable
16 indication here that someone is. And until they do, our
17 decision is that we're not going to take further action. Now,
18 maybe that will get resolved by the redacted pleadings that
19 you have directed them to provide us in 613 and 613A.

20 So here's my request for you: First of all, stop
21 these proceedings until we get those redacted -- at least
22 until we get those redacted pleadings. Now, I know you gave
23 them two weeks. You gave them two days to make a robust

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1 presentation to you, quote/unquote. It seems to me that they
2 ought to be able in two days also to prepare redacted
3 pleadings and send them around. I don't know why we have to
4 wait until the 8th.

5 And the declaration from the other military agency,
6 whatever it is, that shouldn't take very long either. I think
7 you could probably direct these folks here on the VTC to turn
8 this over to us by the end of the day today or tomorrow or
9 something to that effect, and maybe this is something we could
10 resolve really quickly. I'd submit to you that it doesn't
11 need to wait -- it doesn't need to wait until the 8th of
12 February.

13 And I would say to you what about the CIA? Why
14 aren't we hearing anything about what their involvement is,
15 whether they have an investigation, why they were present, why
16 someone from another government agency was present or whether
17 that was just another lie, which I recognize is a possibility.
18 But under the circumstances, I think it's something that needs
19 to be addressed.

20 And I guess I would say in one sense, maybe more
21 broadly, tell us what this is about. I'm telling you I'm not
22 claiming that I have a right to be free from being
23 investigated or that my team doesn't or that anybody else

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1 doesn't. But I have a Top Secret security clearance with
2 Secure Compartmented Information and all the tickets as we
3 recite to you on other occasions. Really, I can't be trusted
4 to know some of the basic details about how this started and
5 what it was about sufficient to make my own decision about
6 whether this is yet another false alarm or whether this is
7 something more serious?

8 And I will tell the military judge that we filed a
9 request for discovery with the SRT asking them, in so many
10 words, give us everything you have that relates to this and
11 tell us everything you know about this. And they haven't
12 answered it; the time hasn't run for them to do so. I believe
13 you could direct them to answer that request for discovery
14 right away and provide that information to us immediately and
15 we can wait in place. I mean, we can -- we don't have to go
16 back until whenever it is we're going back, Saturday. We can
17 wait until later in the week and have that material.

18 And I really -- there's another thing that underlies
19 all of this, and that is my belief that this -- these were
20 not -- I recited nine separate instances where somebody stuck
21 their head up out of the water and appeared briefly in the
22 form of an investigation. I don't believe that those are nine
23 unrelated incidents. I think they're all part of a continuing

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1 effort to intimidate the defense teams. And I think that I
2 would be a little bit off my rocker not to think otherwise.

3 So I think what I -- what the military judge should
4 direct the SRT to do would be to state whether any other team
5 member, current or former, at any time during the pendency of
6 this case has ever been investigated, questioned, or
7 communicated with on matters related to or occurring during
8 service on one of the teams. I think we should -- we're
9 entitled to a clear statement of what's been going on under
10 the scenes, under the water, where we're not able to see it.

11 But until we have enough that we can sort out our
12 present situation for ourselves in a principled way, we will
13 decline to make argument or examine witnesses or otherwise
14 participate substantively in the proceedings.

15 So that's what I -- that's what I came to say to you.
16 And pending your questions, I'll sit down.

17 MJ [Col PARRELLA]: No questions at this time, Mr. Nevin.

18 LDC [MR. NEVIN]: Thank you.

19 MJ [Col PARRELLA]: Thank you.

20 Mr. Harrington?

21 LDC [MR. HARRINGTON]: Thank you, Judge. Judge, I'm not
22 quite sure why I'm standing here because of the due process
23 implications of a court rendering a detailed and complicated

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1 decision and then saying, I will give you an opportunity to be
2 heard on it afterwards. I don't know if this is supposed to
3 be treated as a motion for reconsideration or you haven't
4 really settled on your order. I assume that you have. But I
5 think it's distressing in the context of this case where the
6 military commissions have been under attack, in the legal
7 community and around the world, since they started.

8 This is the third iteration of them. The rules in
9 this iteration are somewhat better for due process than the
10 others, but there are still many deficiencies in them. And
11 you know that from the motions that you have -- and orders
12 that you have read from Judge Pohl and the ones that you
13 consider now.

14 But the perception here is this is a race to the
15 finish line and we're going to proceed for the basis of
16 convenience and expediency so that you hold your robust
17 ex parte hearing to make sure that it gets done before we come
18 down here and the prosecutors on the opposite side don't even
19 have to come here. It seems to me that there was absolutely
20 no reason for that to be done. It could have been done in an
21 orderly way, which was done before.

22 The SRT made many appearances in 292 down here and
23 this is the place to do it. And you can say, well, I had the

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1 authority to do what I did. And I suspect an appellate court
2 would probably say you could have done it in Washington. But
3 I go back to the perception about these commissions and the
4 fundamental unfairness that the world looks at about these.

5 And, Judge, the -- I'm not going to repeat what
6 Mr. Nevin said, but I have to bring out some things with
7 respect to AE 292, of which my -- excuse me, my team, and
8 particularly me, were the target of an investigation. And
9 when I think about this, Judge, it has less of an effect on
10 me, I think, than the other members of my team, solely because
11 of my age and where I am with my career. The effects of
12 something like this are much different for me than they are
13 for other -- other members of our team. It doesn't mean that
14 they're not important. It doesn't mean that I don't have
15 concern. But they are far different.

16 But this is really like somebody who has cancer and
17 is successfully treated and the cancer goes into remission.
18 And as time goes by, the person -- it fades somewhat. It's
19 always there. But then when the cancer comes back, it's not
20 like it's a brand new event. You go right back to the first
21 cancer and what happened in that. It comes right to the top.

22 And that's what happened -- that's what happens --
23 has happened to the Ramzi Binalshibh team. When 292 happened,

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1 we went for a long period of time where the SRT came into
2 court and said, Judge, there is no conflict. Nothing is going
3 on. We just have to get a report to you. We'll get a report.
4 It kept drifting and drifting. And the next thing we know,
5 no, everything is abated. SRT stops making that statement,
6 and we're into a full-fledged criminal investigation. And we
7 only find that out at the end. We don't find that out while
8 it's going on.

9 But the effect that it had on the members of my team
10 were absolutely devastating. There are still members of my
11 team who were here then who have never fully recovered from
12 that. We had people on our team who wanted to leave right
13 away.

14 Alaina Wichner joined our team right as this was
15 taking place. She spent countless hours talking to paralegals
16 and other members of our team who were genuinely concerned and
17 wanted to leave the team right away. And I'm particularly
18 talking about military persons whose careers and whose
19 security clearance were absolutely essential for their
20 careers. And she would call me and report to me and I would
21 fly down to Washington and I would sit with the members of my
22 team trying to assure them and trying to calm them down and
23 asking them to stay. These were terrific, terrific people on

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1 our team, and they -- it seemed to help somewhat.

2 And I'm saying to myself, Jim, you're a nice guy.
3 That person really likes you. You're the target of the
4 investigation and you're the one that's giving the assurance
5 to the people?

6 So when this episode happens with Mr. Bin'Attash's
7 team, we come right back into that situation again. And so
8 we're back at the same point where members of my team now
9 wonder, should I stay? Should I go? And as Mr. Nevin says,
10 the FBI, prosecutors have an obligation to investigate
11 criminal activity, or other agencies have an obligation to
12 investigate violations of security clearance. We don't
13 dispute that. But we dispute the way that this has happened
14 and what has happened again with it.

15 And when a member of the Bin'Attash team is asked
16 about the other teams, and we're led to believe that our team
17 was specifically one of those that they were asked about,
18 that's a dagger right into the heart and that brings back the
19 early cancer. And it's very, very hard -- very, very hard to
20 get over that.

21 MJ [Co1 PARRELLA]: Mr. Harrington, if I may ask you a
22 question, what led -- leads you to believe that your team was
23 one of the teams specifically asked questions about during

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1 that interview?

2 LDC [MR. HARRINGTON]: Just conversations I've had, Judge,
3 with the parties involved.

4 MJ [Col PARRELLA]: But there's nothing in the
5 declaration ----

6 LDC [MR. HARRINGTON]: No.

7 MJ [Col PARRELLA]: ---- that's evidence before ----

8 LDC [MR. HARRINGTON]: No.

9 MJ [Col PARRELLA]: I understand.

10 LDC [MR. HARRINGTON]: And, Judge, I want you also -- at
11 the end of 292, when Judge Pohl -- we had gotten a report from
12 the SRT and they said it's all over, there's a letter here,
13 nobody is going to get prosecuted. Another letter, nobody is
14 going to lose their security clearance, we're all set to move
15 on. There's always the qualifier, which is, "at this time" or
16 words to that effect. And, obviously, the prosecution is
17 leaving themselves open to -- if something new arrived, that
18 it -- it wasn't over. I understand that. That's common
19 practice in every U.S. attorney's office around the country.
20 I understand that.

21 But Judge Pohl, at our request, forced the SRT to
22 come right out and say, no, the file is closed and, no, we're
23 moving on. We're not -- there's no -- there's no

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1 investigation going. And I think that that is something that
2 has to be done here. And, Judge, I also noticed in your
3 decision that you did not do what Judge Pohl did in 292JJJJJ,
4 the last paragraph of his order was that he directed the SRT
5 to provide our team and any of the other teams that were
6 subject to investigations discovery of what it is that they
7 had done, what materials they had obtained and the rest. And
8 at the conclusion of that, we received a large amount of
9 discovery from the SRT.

10 MJ [Col PARRELLA]: Mr. Harrington, isn't the situation
11 distinct in the -- I think your colleague pointed this out.
12 292 was largely completed at the time that this issue came up,
13 where perhaps we might be talking about a prospective
14 investigation where it would be inappropriate.

15 LDC [MR. HARRINGTON]: Judge, if you're talking about a
16 prospective investigation and one that's still going on, the
17 question is, why are we here and why did you issue the order?

18 MJ [Col PARRELLA]: Well, I think the order was quite
19 clear that the investigation does not involve any current
20 member of any defense team.

21 LDC [MR. HARRINGTON]: And that may well be true. The
22 problem is, if that investigation continues, even for a member
23 not presently of one of the defense teams, if it implicates

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1 the defense team and conduct while the person was on the
2 defense team, it may well, and it raises certainly the
3 potential of a conflict, which means it's unsettled.

4 That's all I have, Judge.

5 MJ [Col PARRELLA]: Thank you, Mr. Harrington.

6 Mr. Connell, do you care to be heard on this issue?

7 LDC [MR. CONNELL]: No, thank you, Your Honor.

8 MJ [Col PARRELLA]: Mr. Ruiz?

9 LDC [MR. RUIZ]: Judge, at the outset, I want to echo the
10 comments of both my colleagues and adopt their arguments in
11 relation to this particular issue.

12 What I want to key in on is the -- there seems to be
13 a focus on the -- the issue of current defense team members.
14 And what I want to explain to the commission is that for our
15 purposes, all of the same duties and all of the same
16 obligations that exist for current members exist for people
17 who have since departed from the team. In fact, for our team,
18 we have each member that departs the team sign a
19 confidentiality, nondisclosure, that basically highlights for
20 them the fact that they still have a duty and a responsibility
21 for privilege, for confidentiality in defense matters; and if,
22 in fact, they are harassed or contacted or investigated, that
23 we need to be informed of those issues.

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1 It's not simply enough for us to say that there is no
2 current defense team member that is being investigated,
3 particularly as Mr. Nevin highlights, when that team member
4 who has since departed the active service of the team is
5 questioned about matters that relate specifically to the inner
6 workings of the team or the inner workings of team members.

7 And this is a delineation that we saw in this -- in
8 the special litigation team's filings. It's one that I'm
9 seeing in your rulings and in your orders that we think is not
10 an appropriate distinction. When a team member departs our
11 team, they carry those same duties and obligations with them.
12 When those team members are questioned, harassed, surveilled,
13 followed about and then asked questions about the inner
14 workings of the team, the communications of not only the
15 particular team they were a member of, but other teams, that
16 is an issue of grave concern to us.

17 MJ [Col PARRELLA]: Although it may be an issue of grave
18 concern and may implicate some other aspect of, you know,
19 attorney-client -- the government's access to attorney-client
20 material, things of that nature, specifically adhering or
21 focused on the issue of conflict, what's the authority to
22 suggest that it creates a conflict if a former member of a
23 defense team is under investigation?

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1 LDC [MR. RUIZ]: The conflict comes from when the
2 individual attorneys in litigation feel that there may be an
3 investigation that relates back to their duties and
4 responsibilities in the ongoing litigation. It's everything
5 that Mr. Nevin talked about in terms of the chilling effect.
6 The chilling effect can come from a direct investigation, as
7 Mr. Nevin underwent, or for an investigation of a former team
8 member that relates back to the inner workings of the team.

9 So, for instance, when I look at that, one of my team
10 members leaves the team, then they are questioned on the way
11 out and they say, well, is Mr. Ruiz patriotic, right? That's
12 a question that was asked I know of at least one of the
13 learned counsel. It was asked of one of the team members who
14 was departing that team. What does that mean, is Mr. Ruiz
15 patriotic? Does it mean that, because I am serving on this
16 case at the behest of the U.S. Government and formerly as an
17 active duty member, that somehow I'm not patriotic? And what
18 is that getting at? Is there -- is there a question there
19 about duty of loyalty to the United States?

20 So when I hear that, that person may technically no
21 longer be on my team, but the fact that they're being asked
22 those kinds of questions does have an impact on the manner in
23 which we assess our positions on this team, our advocacy. And

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1 it may -- in my case it didn't -- that kind of question
2 wouldn't impact me in that sense. But it is something that we
3 have to assess, factor in, analyze. And those kinds of
4 reach-back questions into the inner workings of the team, into
5 the duties and responsibilities of the counsel, whether we
6 communicate a particular way with a client, whether particular
7 information is shared, does relate back to the inner workings
8 of our team.

9 And as we highlighted in 615L, which was
10 Mr. al Hawsawi's objection to the ex parte hearing, the
11 session that you had, we highlighted that we have an
12 independent, ethical legal duty to make an informed decision
13 about whether we may be under a conflict.

14 And what complicates, I think, this particular
15 situation is the way in which the defense was handled, quite
16 frankly, almost as an afterthought. Granted, as Mr. Nevin
17 said, there was an indication and there was notice that you
18 wanted a robust presentation. But that presentation went
19 ahead. And even as of today, there's still no -- no legal
20 ruling with respect to our objection. Obviously you went
21 ahead, so it was denied. But there's no -- there's no
22 response in terms of the legal basis for requesting an
23 ex parte session such as the one that you had when those

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1 ex parte sessions are heavily disfavored.

2 There was nothing in there to address the legal and
3 ethical obligations that we raised that we have such a
4 concern. And it's not enough for us to then look back and
5 say, well now, defense, you can make an argument after I've
6 already issued my ruling. I echo Mr. Harrington's sentiments
7 in that. What is the purpose? What is the reason for that?
8 Is it to put on a show or to show the appearance of fairness,
9 of justice? I'm not sure that there's any utility.

10 Maybe I feel a little better about having the ability
11 and the opportunity to say these things to you, but what legal
12 significance is there? I still don't even have a ruling on
13 the motion that we properly submitted before the court as a
14 proper objection to the hearing that you had requested.

15 So the -- that compounds the issue that we have.
16 That compounds the concerns. But as I indicated in 615L, the
17 manner in which the session was handled also limited our
18 access to information, and also -- and that -- in doing that,
19 has limited our ability to independently assess whether we do
20 have a conflict. And the manner in which it has been handled
21 is the defense is an afterthought. We're going to tell you, I
22 took care of it. You said the court has an interest in
23 determining whether there is a conflict ----

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1 MJ [Col PARRELLA]: Well, Mr. Ruiz, what does the rule say
2 about who has a primary duty to assess whether there is a
3 conflict?

4 LDC [MR. RUIZ]: The court has the duty to address the
5 conflict.

6 MJ [Col PARRELLA]: And do you think that, in part, that
7 could be because some of the material may involve ongoing
8 investigations that have to be handled in an ex parte fashion?

9 LDC [MR. RUIZ]: In some instances, yes. However, another
10 avenue that the commission could have taken was to be as
11 inclusive as possible with the defense.

12 MJ [Col PARRELLA]: Okay, so do you think ----

13 LDC [MR. RUIZ]: Which, in essence, you could have issued
14 a ruling to say we're going to seal this ----

15 MJ [Col PARRELLA]: You are ----

16 LDC [MR. RUIZ]: ---- we're not going to talk about it.

17 MJ [Col PARRELLA]: Hold on. You are aware, and I think
18 we've gone over this, that the commission has -- has taken
19 steps to give the defense as much as possible, hence the --
20 the part of my order that directs that the SRT to provide as
21 much as they can without disclosing potentially ongoing
22 investigations to the defense.

23 LDC [MR. RUIZ]: Well, I mean, that remains to be seen and

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1 so ----

2 MJ [Col PARRELLA]: Well, the order doesn't remain to be
3 seen. Maybe the contents of what's in there remains to be
4 seen, but the order is quite definitive. What I'm getting at,
5 Mr. Ruiz, I think it's somewhat disingenuous to say that the
6 commission isn't making efforts to try to resolve this
7 conflict. As I've pointed out with Mr. Nevin, I mean, I have
8 just as much interest to ensure that you're all conflict free
9 as you all do. And I think that the commission, I certainly
10 will state, takes that responsibility seriously to ensure that
11 it's a thorough inquiry.

12 So my opportunity -- or me providing you an
13 opportunity to be heard is not hollow, it's not shallow. It's
14 genuine. Because I do want to hear what the -- the position
15 of the defense and the concerns of the defense are.
16 Obviously, I didn't have that ability to do that prior to
17 coming down here, and certainly wanted to alleviate the issue
18 that may have been lagging in your mind as to whether to get
19 on the airplane or not, so to speak.

20 But I'm certainly willing to and -- and am fully open
21 to hearing the concerns of the parties and making every
22 attempt to address those so that you do feel better. And I
23 also want to, I guess, address something you've said, because

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1 you've pointed out about a feeling or a fear. If I'm not
2 mistaken, my predecessor addressed whether or not being in
3 fear of investigation constitutes a conflict; is that correct?

4 LDC [MR. RUIZ]: Amongst that -- amongst other things,
5 yes.

6 MJ [Col PARRELLA]: Okay. So there's a difference between
7 being informed and having a feeling. So in terms of
8 information, do you have any information specifically that
9 leads you to believe that your team specifically is under a
10 conflict?

11 LDC [MR. RUIZ]: Well, speaking of disingenuous, I think
12 it's disingenuous for the court to ask me if I have
13 information that you're well aware I don't have, partly
14 because of the manner in which you've chosen to proceed in an
15 ex parte fashion.

16 And what I'm getting at, Judge, and what I think my
17 colleagues were getting at, it's not only is the inception of
18 the issue troubling, the fact that this former defense team
19 member was accosted, was questioned, was harassed, relating
20 back to matters internal to the inner workings of defense
21 teams, but you compounded -- you compounded that concern by
22 the manner in which the commission chose to approach this
23 issue.

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1 You very well could have held off on ruling until
2 after we had an opportunity to make our case to you. You very
3 well could have ruled on the issue that was raised before you
4 regarding the ex parte session. But what that leaves us with
5 is the impression -- and that, myself -- is that the defense
6 was an afterthought. You were going to take care of the
7 assessment and the issue. And I understand that you believe
8 you have that duty and that responsibility, and you do. I
9 definitely don't take issue with that.

10 But what I do take issue with is that the approach
11 seems to be that you don't think that we have an independent
12 duty ourselves to assess whether we have that conflict with as
13 much information as necessary on a timely manner. And so as
14 I'm standing here having this argument with you, I'm at a
15 disadvantage, and I'm at that disadvantage because you've
16 chosen to provide them two weeks to provide us a redacted
17 version of whatever information it is you have.

18 And, yes, that is -- that is part of the issue that I
19 have here. And I appreciate the opportunity to let you know
20 that, and I understand that you can very well just ignore it.
21 It's certainly your authority and your prerogative. But it's
22 a concern.

23 MJ [Co1 PARRELLA]: I understand. Thank you, Mr. Ruiz.

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1 LDC [MR. RUIZ]: Thank you.

2 LDC [MR. CONNELL]: Sir, I'm having a health issue. May I
3 have a brief break?

4 MJ [Col PARRELLA]: You may. Are you okay with us
5 proceeding in your absence or would you like the commission to
6 take a recess?

7 LDC [MR. CONNELL]: Being the learned counsel, I don't
8 think you can proceed without me, but I'll be as fast as
9 possible.

10 MJ [Col PARRELLA]: All right. This commission is in
11 recess.

12 [The R.M.C. 803 session recessed at 1113, 28 January 2019.]

13 [The R.M.C. 803 session was called to order at 1120,
14 28 January 2019.]

15 MJ [Col PARRELLA]: This commission is called back to
16 order. All parties who were present when the commission last
17 recessed are again present.

18 Ms. Bormann?

19 LDC [MS. BORMANN]: Judge, good morning.

20 MJ [Col PARRELLA]: Good morning.

21 LDC [MS. BORMANN]: I am not my normal self today because
22 I have the flu, so I'm going to speak very -- as loud as I
23 can. Please let me know if you can't hear me.

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1 MJ [Col PARRELLA]: Thank you. I will.

2 LDC [MS. BORMANN]: If for some reason I can't finish,
3 Mr. Montross will.

4 MJ [Col PARRELLA]: Okay.

5 LDC [MS. BORMANN]: This case, as the other co-counsel
6 have so competently argued, has been filled with what occurred
7 just recently. And Mr. Bin'Attash's team is the team that is
8 directly affected by what happened with our paralegal.

9 So a little background for the public because -- and
10 for you, because there is no posting of the motion online.
11 But on December 20th of 2018, I received a call from our
12 military paralegal who had been permitted to travel to
13 Fort Hood, Texas, where his family resided to help transition
14 them while he was awaiting orders. His orders for his new
15 position were to begin on January 16th, and they were
16 overseas.

17 So still a member of our team, that paralegal was
18 misinformed and tricked to appear for a two and a half hour
19 interrogation by FBI agents. The -- you asked my other
20 colleagues how we know this had to do with our team, and all I
21 can say to you is circumstantial evidence.

22 So let's take an old prosecutor trick and talk about
23 snow on the ground when they're arguing in closing argument

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1 about how we know it snowed. So you go to bed at night and
2 there's no snow on the ground. But you wake up -- I live in
3 Chicago, so this is really apt. You wake up in the morning,
4 and there's snow on the ground. That's circumstantial
5 evidence, very strong circumstantial evidence, that it has
6 snowed overnight, even though you didn't actually see it snow
7 overnight.

8 So what do we have here in terms of circumstantial
9 evidence that this investigation entails the very center, the
10 core, and the focus of Mr. Bin'Attash's defense? First of
11 all, we have the circumstances of the interrogation itself.
12 It was a big lift to get the two FBI agents to Fort Hood,
13 Texas. As you know, and as counsel for the SRT know, there
14 aren't resident FBI agents living on Fort Hood. In order to
15 get FBI agents onto Fort Hood, there had to be coordination
16 between the Federal Bureau of Investigation, the Department of
17 Justice, and the Army. That doesn't happen overnight.

18 We also know that the FBI agents were in the National
19 Capital Region, what we call -- that's what we call in
20 Department of Defense the area around Washington, D.C. And we
21 know that because, assuming they told our former paralegal the
22 truth, they had gone to his house in Woodbridge, Virginia,
23 which is south of the Washington, D.C. area, to go look for

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1 him one week earlier.

2 So on December 13th, those same FBI agents were
3 knocking at a door in Woodbridge, Virginia, looking for
4 Sergeant Skeete. We also know that this was about inner team
5 workings and that our paralegal was not the target because
6 they didn't issue him Article 31, what we call in the civilian
7 world Miranda warnings. So I'm not a military justice expert,
8 but I am an expert in criminal law; and when someone is a
9 target of an investigation, they're required to be Mirandized.
10 Our former paralegal was not given his Article 31 rights; and
11 so from that piece of circumstantial evidence, I can garner
12 that he wasn't the target.

13 The questions put to Sergeant -- our paralegal. I
14 don't want to use his name because it seems to me that we've
15 already besmirched a fellow that I found particularly helpful
16 in handling this case. The two and a half hours of
17 interrogation centered on -- what we found, 85 to 90 percent
18 of it -- so something like two hours and 15 minutes of the two
19 hour and 30 minute interrogation centered on my client,
20 Mr. Bin'Attash, the members of Mr. Bin'Attash's defense team,
21 with particular attention directed to the three civilian
22 defense counsel. That would be me, Mr. Edwin Perry, and
23 Mr. William Montross sitting in the back there.

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1 They asked about the work of Mr. Bin'Attash's defense
2 team, what we did, how we did it. They asked who among the
3 defense team Mr. Bin'Attash trusted. They asked the specific
4 duties that individual members of Mr. Bin'Attash's defense
5 team performed as part of their regular duties. They asked
6 which defense team members communicated with Mr. Bin'Attash
7 and how. They asked the nature of the content of the defense
8 team communications with Mr. Bin'Attash.

9 They asked whether Mr. Bin'Attash communicated -- and
10 this is a quote directly from what the FBI agent -- and all we
11 have is a first name, Chris, asked our paralegal, how he
12 communicated with, quote/unquote, the outside world. The FBI
13 agents asked whether -- or how Mr. Bin'Attash communicated
14 with the outside world. They asked what views Mr. Bin'Attash
15 held of individual defense team members. They asked what
16 views Mr. Bin'Attash's family members held about us, about the
17 defense team members. They asked whether Mr. Bin'Attash was
18 difficult to work with. They asked if Mr. Bin'Attash was
19 difficult to work with, to what extent he was difficult to
20 work with and how.

21 They asked whether Mr. Bin'Attash's co-defendants
22 were the same or different from Mr. Bin'Attash in that regard.
23 They asked what extent, if any, were Mr. Bin'Attash's

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1 co-defendants the same or different. They asked about the
2 personalities of individual defense team members, including me
3 and Mr. Montross and Mr. Perry. They asked our paralegal's
4 personal opinions of Mr. Bin'Attash and his personal opinion
5 of each and every team member. They also asked about the
6 cadre -- or individuals who worked as confidential ex parte
7 consultants for our team, experts for our team.

8 That's two hours and 15 minutes of the interrogation.
9 There's nothing mentioned not about Mr. Bin'Attash's defense.
10 The rest -- the other 15 minutes was rapport building, was
11 attempts by the FBI agents to garner information by doing a
12 traditional rapport-building type of interrogation. That is,
13 we're all on the same page here. We're all good Americans.
14 We just need your help. All of this evidence can be found in
15 our attachment that is our paralegal's declaration attached to
16 615, our original filing.

17 The SRT in its filing didn't deny any of it. And as
18 I stand here today, there's absolutely no doubt in my mind
19 that what they were questioning that sergeant about relates
20 back to something he did for the defense team prior to the
21 first filing by the regular trial counsel in December.

22 MJ [Co] PARRELLA]: But, Ms. Bormann, similar to what I
23 asked your colleagues, I mean, you would concede -- I mean,

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1 you're speculating. At the end of the day, you can talk about
2 circumstantial evidence, but no -- of no fault of your own,
3 you don't have all of the facts.

4 LDC [MS. BORMANN]: I don't, because we've been denied
5 them.

6 MJ [Col PARRELLA]: Correct.

7 LDC [MS. BORMANN]: All I have -- all I have and all I can
8 go on and all that's informing my very deep fear is everything
9 that I'm listing for you that I have that's circumstantial.
10 And until I receive direct ----

11 MJ [Col PARRELLA]: Well ----

12 LDC [MS. BORMANN]: ---- evidence -- it is possible like
13 you said, right -- or like I said earlier, it's possible that
14 maybe a snow machine came in the middle of the night and
15 dropped snow on my front yard and that's why it ----

16 MJ [Col PARRELLA]: Okay. So where I'm going with this --
17 and I'm sorry to interrupt you, but where I'm going with this
18 is that because you don't have access to all of the facts, in
19 AE 615, you ask this commission to make the inquiry. And that
20 relief was granted, despite the fact that the SRT, in their
21 response to AE 615, suggested that the commission didn't need
22 to do that inquiry because they had in the attached
23 declaration assured all the teams that they were conflict

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1 free.

2 So the commission, notwithstanding what the SRT
3 suggested, granted the relief and conducted that inquiry. So
4 understanding that you may have initially been operating from
5 a severe disadvantage and have every right to feel suspicion
6 that you were under investigation, and even though you
7 perhaps, out of no fault of your own, do not still have access
8 to documents and presentations that were ex parte, explain to
9 me, now that the commission has specifically indicated to all
10 parties that there is no ongoing investigation by any agency,
11 to include background security checks -- other than routine
12 background security checks, what facts you have here to
13 suggest that there is still a conflict. In other words, why
14 wasn't the commission's very specific findings of fact and
15 conclusions in AE 615 and '13 sufficient?

16 LDC [MS. BORMANN]: I didn't see any specific fact-based
17 determinations. I saw the fact that you had a meeting with
18 attorneys from the Department of Justice who advocated for a
19 position, and you didn't have anyone else from any other side
20 asking questions, and then you accepted their advocated
21 position. In any sort of process ----

22 MJ [Col PARRELLA]: That's speculation as well. I mean
23 obviously, it was ex parte, and I understand certainly ----

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1 LDC [MS. BORMANN]: Obviously.

2 MJ [Col PARRELLA]: ---- that the defense wasn't there to
3 ask questions, but it's speculative to say that the commission
4 didn't ask questions or make further inquiry or just accepted
5 the government on their proffer. Had I wanted to do that, we
6 would have probably never had that ex parte presentation
7 because I would have granted their relief that they requested
8 in their response to your motion.

9 LDC [MS. BORMANN]: But you ----

10 MJ [Col PARRELLA]: But the finding of fact I'm
11 specifically referring to is -- and I think it's probably a
12 couple of places, but it is very clearly stated in this
13 commission's ruling that no member of a current defense team
14 is currently under investigation by either the FBI or any
15 other government agency, and that's not just a criminal
16 investigation but also background security checks.

17 LDC [MS. BORMANN]: I understand that. But -- so let me
18 take you a little bit back. And maybe this is because I've
19 been living through this since 2011.

20 So no current defense team member is currently under
21 investigation is exactly the words.

22 MJ [Col PARRELLA]: I don't think that was the words. It
23 was "No current member...is under investigation" and then I

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1 think I even elaborated that -- if you give me a moment, I'll
2 find the specific language.

3 LDC [MS. BORMANN]: Thank you.

4 MJ [Col PARRELLA]: But that there was no indication that
5 any member of a defense team would be under investigation.

6 LDC [MS. BORMANN]: So I can't tell you how -- I have no
7 idea how you determined that, and I don't remember reading
8 that in your -- in your ruling. But I can tell you that the
9 special review team represented that exact scenario to Judge
10 Pohl back in 2014, and Judge Pohl, thankfully, didn't accept
11 it. He required more.

12 And so I'm going to talk to you a little bit, and
13 hopefully not lose my voice.

14 MJ [Col PARRELLA]: Before you do, I'll just reference to
15 page 6 of the commission's ruling where it says: "Based on
16 the totality of information, this Commission is thoroughly
17 satisfied that no member of the five Defense Teams is
18 currently, or likely to be, under investigation by the FBI or
19 any other government agency."

20 LDC [MS. BORMANN]: Thank you for that.

21 So let me talk a little bit about how -- the part you
22 didn't get when you had your ex parte meeting with the special
23 review team. The paralegal who was examined worked for me for

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1 three years. He was an integral part of the team. And as you
2 know, as every lawyer here knows, paralegals don't operate in
3 a vacuum. They don't make legal decisions and then act upon
4 them. They -- they are assigned tasks and they do things at
5 the direction of the attorneys and other staff, the team.

6 So it is clear from the facts that whatever is
7 alleged to have occurred occurred before November 20th --
8 because we know from the supervisory agent's declaration that
9 a full investigation was begun on November 20th. On November
10 20th, that paralegal was a defense team member. If that
11 defense team member was performing -- the paralegal was
12 performing -- excuse me. I'm sorry. I don't feel well.

13 If that defense team member was performing an action
14 that is related to anything having to do with his duties as a
15 Bin'Attash defense team member, then we are all implicated.
16 And I don't know if -- Judge, if you considered that or not.
17 I have no idea, because I've not seen the basis of the
18 information. But I do know that I have not seen anything
19 factually that leads me to believe that this was anything but
20 focused on what that paralegal did prior to his finally
21 PCS'ing to his new orders.

22 And so I understand that the inquiry has to be done
23 by a judge. But I also understand that I have a separate

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1 ethical duty to determine whether or not I am burdened by a
2 conflict. And I'll direct your attention -- you asked ----

3 MJ [Col PARRELLA]: Ms. Bormann, in making that
4 separate -- and contrary to what Mr. Ruiz represented, which
5 was flat-out wrong, I do understand and appreciate that
6 counsel have that independent ethical duty. But is it not
7 fair to say then that, in making that assessment, you can rely
8 upon the finding of the judge in part?

9 LDC [MS. BORMANN]: I can rely upon a finding of the judge
10 if there's some basis for me to rely upon the finding of a
11 judge. Right now I have conclusions; and, frankly, given the
12 background information that I have, the thing I operate under
13 is a quotation from Holloway, and it's found at page 20 of our
14 initial finding. And it says, in addressing conflicts, trial
15 courts are clearly instructed to defer to the judgment of
16 defense counsel whether a conflict exists because counsel
17 himself is usually, quote, in the best position professionally
18 and ethically to determine when a conflict of interest exists
19 or will probably develop in the course of a trial, unquote.
20 And that's found at 435 U.S. 475, page 485, in the Holloway
21 case.

22 I don't want to be difficult here, but given the
23 state of the record and where we're at -- I mean, my team is

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1 at a distinct disadvantage. Everybody on our team is
2 terrified that an FBI agent is going to come knocking at their
3 door. You know, I haven't had to hire counsel three times,
4 but I have had to hire counsel, and it's not fun.

5 So all of that being said, we are operating under a
6 conflict. We are burdened by a conflict. When and if the
7 investigation ends, or if there is -- if the investigation
8 doesn't involve anything that's team related, there's no
9 reason why it can't be provided to us with an order to seal.
10 If it's team related in any way, then we're under a conflict.
11 So it should be one or the other. But I shouldn't have to
12 stand here and rely upon the prosecution and their recitation
13 of the facts when, in fact, everything that I've seen says
14 something very, very different.

15 So that's where we are. Of course, I, as a lawyer,
16 respect all courts. But you'll have to bear with me, when
17 there's no facts to back up a conclusion and it deals with my
18 license, we have a problem. I'm here to say we have a
19 problem.

20 Subject to your questions, I'm done.

21 MJ [Col PARRELLA]: I have no questions. Thank you.

22 LDC [MS. BORMANN]: Thank you.

23 MJ [Col PARRELLA]: Okay. At this point in time, I'm

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1 going to turn it over to the special review team.

2 SRT [MS. BALLANTINE]: Thank you, Your Honor.

3 We have a discrete and specific question here, which
4 is, are defense counsel operating under a potential or actual
5 conflict of interest, as those terms are defined by law,
6 because their loyalties are divided. The claim here is that
7 they are because they are under investigation. And that claim
8 has been demonstrated to be incorrect, and not by anything
9 ex parte, but by declarations that were made on the record.

10 The court appropriately conducted an ex parte hearing
11 in order to learn the details of an ongoing national security
12 investigation, the integrity of which would have been
13 undermined by an open hearing. That investigation was opened
14 as a full investigation on November 20th. Contrary to
15 Mr. Nevin's assertion, there is no long history of
16 investigation that predates that 11/20 opening date.

17 The SRT has been involved in this investigation since
18 its inception, which is unlike prior investigations that this
19 court has reviewed, and we have been working diligently to
20 wall off the prosecution and to ensure that there is an
21 entirely -- that the prosecution team and its supervisors
22 remain entirely clean.

23 We will comply promptly with all of the commission's

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1 orders to provide additional information to defense teams in
2 the form of the redacted AE 613 and AE 613A, and we will
3 continue to comply with AE 292QQ in order to provide requested
4 information ex parte to Your Honor in order to permit you to
5 comply with your duty to ascertain whether there is a
6 potential or an actual conflict so that counsel can continue
7 to rely on -- at least in part, on your findings as to the
8 existence of those potential or actual conflicts.

9 MJ [Col PARRELLA]: Ms. Ballantine, let me ask you a
10 question. With respect to the point raised by Mr. Nevin,
11 what's the status of the redactions to AE 613 and 613A; and
12 notwithstanding the date specified in the commission's order,
13 could they be provided earlier?

14 SRT [MS. BALLANTINE]: I've completed the redactions for
15 AE 613A and I'm awaiting FBI review to make sure their
16 equities are protected. It will not take me long to redact
17 AE 613 and I believe we will be able to comply with the
18 court's order well before the 8 February date specified in
19 your order.

20 MJ [Col PARRELLA]: Thank you. I'm sorry, one other
21 question. What about the status of the declaration that was
22 directed by the commission? Do you have an update on that?

23 SRT [MS. BALLANTINE]: I do, Your Honor. I spoke with the

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1 investigating body, which is Army 902nd, on Friday. They
2 agreed to provide me with a declaration today. I don't know
3 whether we will need additional edits to that declaration. I
4 understand what the court wants that declaration to contain,
5 so we need to make sure that it is a fulsome declaration
6 that's responsive to the commission's order.

7 Once we have completed that process, I will provide
8 an unredacted copy to the court ex parte and we will provide a
9 redacted copy to the defense teams as well. I imagine we'll
10 be able to complete that by the end of this week, which would
11 be 1 February of 2019.

12 MJ [Col PARRELLA]: Thank you. You may please proceed.
13 Do you have anything else, Ms. Ballantine?

14 SRT [MS. BALLANTINE]: I do not, unless the court has
15 specific questions for the SRT.

16 MJ [Col PARRELLA]: I do not.

17 Mr. Nevin?

18 LDC [MR. NEVIN]: Yes, Your Honor. I heard you ask -- I
19 can't remember if you asked me or not, but I heard you ask
20 some of the other counsel what makes you think you're under
21 investigation. And that's in part why I laid out the -- the
22 context, the history of my team, and me in particular,
23 being -- having been under investigation many times and this

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1 raising a high degree of concern or scrutiny on our part to be
2 sure that we understand what's going on before we go forward.

3 But I also pointed out to you that there were several
4 very specific things that were inconsistencies that were not
5 addressed by your order. So I spoke of the fact that this
6 team member -- Bin'Attash team member was told that someone
7 from another government agency, which in our speak is the CIA,
8 was involved in administering a polygraph. So -- but no one,
9 including your order, says anything about the CIA.

10 So was he lying about that? Was that just a -- was
11 he -- I mean, why was that said? Or is there independent
12 evidence that -- that you asked me about assume -- it assumes
13 that the team member's declaration is accurate, and it does.
14 But I don't -- I haven't been given any reason to suppose it's
15 not.

16 Do I just ignore that? Do I just walk away from that
17 and later on when it turns out the CIA is involved in this and
18 has been all along and someone says, well, why didn't you
19 raise that? Why weren't you concerned about that? Why didn't
20 you ask about that? Am I a walking violation of the
21 Sixth Amendment? I think I might be if I don't ask you or the
22 SRT or somebody to say, what's up with that?

23 And that's something that we raised in our moving

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1 papers. Those were in your hands before you issued 615P and
2 E, and there's no -- you don't speak to it. And I asked you
3 about it today and you declined to tell me about what went on
4 or to answer my questions about who testified or what they
5 said.

6 What am I supposed to make of that?

7 MJ [Col PARRELLA]: I think what's pertinent is that I've
8 made it clear that none of the teams are under investigation
9 by either the FBI or any other government agency, which would
10 be inclusive of the CIA. I mean, the fact -- the only
11 reference to the CIA is an assumption you're making based on
12 the declaration saying "other government agency." You know,
13 given the individual's history working with the commissions, I
14 would assume that they could have provided more specificity.
15 But regardless of whether it's that agency or any other
16 agency, I think the pertinent point is that no member of any
17 defense team is under investigation by any government agency.

18 LDC [MR. NEVIN]: And let me ask again: How do you know
19 that?

20 MJ [Col PARRELLA]: So certainly, Mr. Nevin, that --
21 there's -- the commission has received information in an
22 ex parte fashion. I mean, it seems to me what you're
23 wanting -- and I can certainly appreciate your wanting to know

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1 it -- is what did I receive that led me to that conclusion?
2 And so I am not going to go down there. I'm not trying to
3 avoid your questions, but I don't want to inadvertently
4 divulge information that was presented ex parte because it's
5 part of an ongoing investigation or perhaps is classified.

6 So instead, what I'm going to do is to order the
7 government to produce that information, to the extent they
8 can, directly to you so that you have it directly from the
9 source, not from the commission. But my role in it was to
10 make my independent, thorough inquiry, which I've done, and
11 can emphatically state that, based on what information I was
12 presented, there is no current conflict.

13 LDC [MR. NEVIN]: Okay. Well, I -- I mean, I've -- you
14 know, you see the position I'm in. I've articulated to you
15 that there are unanswered questions, and I think it's fair
16 that they're unanswered. I mean, you're saying the answer is
17 no, but you're not giving me anything on which to say what's
18 the basis for that. And I ----

19 MJ [Col PARRELLA]: Yeah.

20 LDC [MR. NEVIN]: I use this example of the CIA, the guy
21 in the CIA who is asking questions or who appears to be. And
22 it -- sure, it might be that that person has been interviewed
23 and he says, I never said that; or it might be that he says, I

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1 said that but it's -- but that wasn't true. I did it to try
2 to intimidate him and get him to talk, or whatever it is.
3 There -- yeah, I recognize there could be an explanation other
4 than the CIA or some other government agency.

5 It doesn't make any difference whether it's the CIA
6 or not. If it's some other agency that's involved, then what
7 effort has been made. And SRT has gone to some lengths, and
8 it strikes me as incomplete, but nonetheless, they've queried
9 database -- a database and they've made some statements about
10 that, which I think they see, and you presumably see as well,
11 the question logically asks someone to say, how do we know
12 there's not an investigation? Okay, so you were offered some
13 material from the -- from the FBI about querying a database.
14 What do you have from the CIA? What's the explanation for
15 this other -- other issue?

16 And believe me, we've been in this long enough to
17 know that when there is -- when you have, you know, a list of
18 ten things but five is missing, that's not an accident.
19 There's a reason that you're not being told that. There's a
20 reason that that little -- that that little part of the thing
21 is not being -- is not being spoken about. And, you know,
22 we've learned that over the years.

23 So you asked me how do I know that I'm being

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1 investigated? And I know it in part by what you're not
2 telling me or by -- or by what the SRT is not telling me. And
3 those things are real for us, is all I can tell you.

4 And there are other aspects of this, Your Honor, that
5 I mentioned during the first part of my argument. There's not
6 been an explanation that I've heard at this point for why
7 these people are asking the team member questions about the
8 other defense teams. And if that's not investigation of the
9 other defense teams, what is it? Is it just idle chatter or
10 is it a rogue agent or is it -- what does it mean that there's
11 an investigation or that there's no investigation?

12 Somebody was obviously investigating the other teams,
13 someone who claimed that they were an FBI agent. Was that a
14 lie, too? An FBI agent is asking this person questions about
15 my team. I mean, not -- I understand this is different -- I'm
16 in a different position from Ms. Bormann, but they're asking
17 questions about my team. And they're official law enforcement
18 people. They're investigators. They're not investigating me?
19 Okay. So great. They're not investigating me. So what? The
20 team member is lying?

21 MJ [Co1 PARRELLA]: Okay. So I asked this question of
22 Mr. Harrington. The declaration references questions about
23 other teams. What leads you to presume it was your team?

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1 LDC [MR. NEVIN]: Because I'm another team.

2 MJ [Co1 PARRELLA]: Well, it doesn't mean ----

3 LDC [MR. NEVIN]: What leads you to conclude it's not?

4 MJ [Co1 PARRELLA]: There's four other teams -- three
5 other teams besides the Bin'Attash team. Why couldn't it have
6 been questions about those other teams?

7 LDC [MR. NEVIN]: It could have. Tell me.

8 MJ [Co1 PARRELLA]: So it is an assumption. My point is
9 it's an assumption. You're stating with a lot of certainty
10 that your team was -- questions were asked about your team.
11 That's not a true -- that's not a true statement to say that
12 you know that.

13 LDC [MR. NEVIN]: I know that I am one of the other
14 defense teams and I know that a question -- well, I mean, I
15 have a declaration that -- under oath that says that questions
16 were asked about other defense teams. I am one of the other
17 defense teams or -- or the Mohammad team is one of the other
18 defense teams.

19 Now, I take it you're telling me that those questions
20 about the other defense teams were not about my team. So ----

21 MJ [Co1 PARRELLA]: I think what the commission's ruling,
22 and what I attempted to make clear, is that no defense team is
23 under investigation. No current defense -- member of any

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1 current defense -- "No current member of any Defense Team...is
2 under investigation." But I think I went one step further to
3 basically -- and I'll just read the language. And what I'm
4 reading is from page 6, paragraph c, "To the extent the
5 ongoing investigation relates to any Defense Team, it pertains
6 *only* to the Bin'Attash team. This is not to suggest that any
7 member of the Bin'Attash...Team is under investigation, but
8 rather to emphasize that no other Defense Team is even
9 remotely connected to the subject matter of the
10 investigation."

11 So I guess what I'm failing to see, Mr. Nevin, is I
12 don't know how, using the English language, I can be any more
13 clear about that factual assertion to say, you know, I can --
14 aside from Ms. Bormann's team, none of the other teams are
15 even remotely connected to this investigation. So it's --
16 that's where I guess I'm having a hard time, where you come up
17 and you say you're emphatically sure that you're under
18 investigation when you can't possibly be.

19 Because, again, as -- no fault of your own, I
20 understand the disadvantage you're at because you're not
21 invited to those ex parte presentations, or don't have access
22 to the ex parte information, but you are operating from an
23 information deficit that the commission has access to. And

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1 because of that I believe in part that's why the rule suggests
2 that it's my duty to make that inquiry, which I've done, and
3 pretty clearly stated no conflict.

4 LDC [MR. NEVIN]: Yeah, and I appreciate your doing that.
5 That's fine. But you also recognize that I have to do this
6 too.

7 MJ [Co1 PARRELLA]: And I hope -- I do understand that you
8 have to do that, and I certainly hope that the documents
9 that ----

10 LDC [MR. NEVIN]: Me too.

11 MJ [Co1 PARRELLA]: ---- are directed to be released will
12 alleviate some of your concerns.

13 LDC [MR. NEVIN]: Me too.

14 MJ [Co1 PARRELLA]: I certainly do, because I'm very much
15 aware and sensitive to the context of this case and its very
16 unique nature and its long history and the investigations that
17 have taken place in the past.

18 LDC [MR. NEVIN]: Okay. And, you know, you're right, I am
19 operating from a deficit of information. And you could read
20 all the pleadings we've filed so far to be boiled down to
21 saying please give us more information so that we can make
22 this decision and be confident about it. And you're quite
23 right about that.

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1 And maybe it is like an ontological problem with the
2 way the English language works. But I've told you that they
3 say there's -- they're asking questions about other defense
4 teams. You've said that's not about you. And I'm just
5 saying, will you please tell me why? Will you give me
6 something to indicate why you know that's not about me? Is
7 it -- they asked that question. The point of that
8 investigation has to do with the Binalshibh team and the AAA
9 team, it doesn't have to do with the Mohammad team. Okay,
10 great. That gives me something I can go on.

11 But you're just saying no, but you're not saying why.
12 I've got a clear indication that they're investigating the
13 other teams. I'm one of the other teams. And no one is
14 telling me why that doesn't equal my team at least at that --
15 on that day was under investigation. And as I say, I don't
16 know how I can say it any more directly than that either.

17 And so just -- I mean here's -- here's another
18 example. This is what happens when you're on the outside
19 looking in, right? Okay. So you write -- on page 5 of your
20 order, you write, "The SRT was directly involved within one
21 week of the FBI opening the investigation and took steps to
22 ensure those involved in the investigation," et cetera,
23 et cetera.

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1 Ms. Ballantine just a couple of minutes ago says that
2 the SRT was involved from the beginning. So did she tell you
3 or they or someone, did someone tell you something different
4 that led you to write that? And I know you're not going to
5 answer that question, but -- or at least I assume you're not.
6 And -- and I know I can't make you, but, I mean, when you're
7 standing on the outside looking at this stuff trying to --
8 when -- and when you're on your ninth investigation, when
9 you're going around this merry-go-round for the ninth time
10 within ten years, you'd like to know what's going on. You'd
11 like to have some specific -- when you've been around this
12 merry-go-round nine times, you look for stuff that -- where
13 all the I's dot and all the T's cross. And they're not
14 dotted, they're not crossed.

15 They leave you in the position where you say, wait a
16 minute. They're telling him something different from what
17 they're coming into open court here and saying. Is it an
18 innocent mistake? Probably. But the point is, you look at it
19 and you think, what's going on? And if it's the first time
20 that it's ever happened, okay, yeah, sure. But it's not the
21 first time. And we deserve more information than this.

22 And so -- and, I might say, I gather some fairly
23 important things are going to happen the rest of this week.

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1 And I think Mr. Mohammad is entitled to be represented in
2 them. And we're on the horns of this dilemma or this Hobson's
3 choice, or whatever you want to call it, as we have in the
4 pleadings. And our view is until this gets clarified and
5 resolved, we can't go forward.

6 But I've also asked you -- we've also asked you in
7 our earlier pleadings to say, just wait. Just wait until
8 this -- wait until they give us these redacted pleadings, or
9 whatever it is they're going to give us, so maybe then this
10 whole thing will get wrapped up. Or answer the questions that
11 I've propounded to you today in good faith and give us some
12 way to get to yes and then we can all go forward. Or else
13 just wait.

14 And why do we -- why are we jamming forward on this
15 until we're -- until we've been put in a -- in good-faith
16 terms, in a position to do it right. That's the whole idea of
17 that prospective thing as opposed to it being a postconviction
18 action looking back. It's a chance to do it right.

19 So I guess that my request to have it before
20 nightfall is maybe not going to happen. But please don't put
21 us in this position until we have this other information which
22 may resolve these issues.

23 Thank you for hearing my argument.

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1 MJ [Col PARRELLA]: Thank you, Mr. Nevin.

2 Mr. Harrington?

3 LDC [MR. HARRINGTON]: Judge, I didn't mention it before,
4 but I'm not quite sure what the word "robust" means when
5 you've directed them to come in, whether that's a term of art
6 that I don't know about. I don't know. I don't know what
7 that entails.

8 But I guess that the arguments that you've listened
9 to here, I think to an outsider might almost sound paranoid.
10 And the problem here is that there is a real basis for our
11 paranoia. I mean, just because you're paranoid doesn't mean
12 they're not following you. And when we got the discovery in
13 292, we got three really big binders of information. I don't
14 know what, if any of that, was submitted to Judge Pohl. We
15 were in a different place with Judge Pohl because he
16 immediately put a stop to it and appointed conflict counsel.
17 So as it went on, you know, we had no knowledge of what was
18 going on, so it was a bit different than the context that you
19 have with it.

20 But just so you know, and you've probably heard this
21 before, but we came to these proceedings and we were told that
22 the security light that you have there could only be operated
23 by the court security officer. And it went off one day when

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1 Mr. Nevin was talking and the court security officer didn't
2 know about it. And it turns out a third party had access to
3 that and shut it down.

4 We were told when we came here that the
5 microphones -- which at that time were on all the time; if you
6 wanted to talk to your colleague or your client, you push the
7 mute button. But they didn't tell us they were field
8 microphones so that when one goes off, the other expands its
9 listening so those could be heard. We didn't -- we had
10 representations to us of who could hear that, but we -- we
11 don't know if those representations were accurate because the
12 people who were telling us didn't have the accurate
13 information.

14 A smoke detector was found in our visiting room -- or
15 looked at. It wasn't a smoke detector, it was a listening
16 device. They let us look at the operation room at the
17 visiting area and they said, we don't have the capability of
18 recording, it is just for listening and it's for other
19 purposes. It's not being used with you. But they had
20 machines there that had rewind and clearly showed that there
21 was capability of rewinding. In the Nashiri case, they found
22 a listening device hidden in an electrical socket, apparently.

23 And just to expand on the paranoia, recently a cable

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1 company had to come to my house and the guy is going around
2 and he's saying, I don't know what this is. You know, we have
3 ingress and egress points and some places have excess egress.
4 And he said the reason for that is that they have listening
5 devices that government agencies have that -- listening
6 devices they can use, and you're a hotspot for it. What does
7 that mean? Does that mean that they're listening to me or my
8 TV watching or something at my home? I don't know.

9 I turn my computer off in my office and I wait until
10 it's shut down. Nine out of ten times when I come in in the
11 morning, my computer is on. What does that mean? I've had
12 our IT people look at it and all that stuff. They can't
13 explain it. I don't know.

14 All I'm saying to you is: When you ask us to accept
15 representations made to you by the government, I'm not
16 faulting the lawyers that are sitting here. They're as good
17 as the information given to them. We have reasons to distrust
18 the law enforcement agencies that are involved in this case,
19 and they're real; and it heightens the impact that this kind
20 of an investigation has on all of us.

21 Thank you.

22 MJ [Co] PARRELLA]: Thank you, Mr. Harrington.

23 Mr. Ruiz?

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1 LDC [MR. RUIZ]: A couple of points, Judge.

2 First, if I indicated during my argument that you did
3 not know or were unaware that we have an independent duty to
4 make a conflict assessment, that's not what I meant to say.
5 Certainly I believe that you are well aware of that and were
6 well aware of that even before we filed our objection to the
7 ex parte session.

8 Whether wordsmithship or articulated it poorly, what
9 I meant to say was that my impression on Mr. al Hawsawi's
10 team, and certainly listening to some of the discussions we've
11 had here this morning, is that you don't care about it that
12 much, and you don't value it certainly as much as we do. And
13 that comes because you feel like you have the independent
14 duty, as you do to make a final ----

15 MJ [Col PARRELLA]: If that were the case, though,
16 Mr. Ruiz, why would I order the SRT to release anything to you
17 at all? Why wouldn't I just make my determination and say
18 I've made my determination and we're moving on? I mean ----

19 LDC [MR. RUIZ]: I understand that.

20 MJ [Col PARRELLA]: ---- that's the whole reason ----

21 LDC [MR. RUIZ]: But also why would you not wait until
22 we've had an opportunity to review those materials and make
23 our case as to why we do or do not think that we may have a

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1 conflict?

2 MJ [Col PARRELLA]: The first thing we need to do is
3 establish -- we just can't talk over each other. These fine
4 gentleman in front of me are going to get very upset at me, so
5 let's try not to speak over each other.

6 I made my determination and, knowing your
7 requirements, directed the release as much as I can possibly
8 release. But ultimately it's a determination, given the
9 nature of the investigation, the information, that
10 predominantly I have to make because there's just -- it's --
11 and perhaps we'll get to a point in time where -- and I see no
12 reason why we wouldn't follow Judge Pohl's precedent in 292
13 where we can, when everything is said and done, order that
14 discovery to be turned over to the defense as well. We're
15 just not there yet. So I'm giving as much as I can as quickly
16 as I can.

17 LDC [MR. RUIZ]: I understand that. My only point was to
18 say I didn't mean to infer that you had no lack of knowledge
19 of that independent duty, but I certainly wanted it to be
20 clear that the impression is that you certainly think your
21 duty overrides our independent assessment. And that's based
22 on not only some of the discussions that we've heard this
23 morning but also on the manner in which you chose to approach

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1 the resolution of the issue.

2 MJ [Col PARRELLA]: I think it logically has to override
3 it because you simply don't have access to the information and
4 can't get access to it. So the commission is not a party.
5 The commission has got to make that inquiry and give you
6 assurances that there's no conflict.

7 LDC [MR. RUIZ]: And I think we can agree and -- to
8 disagree on that. Certainly the fact that we're going to get
9 a redacted transcript or redacted pleadings leads to the
10 reasonable inference that there were many things that were
11 discussed during that session that were not matters that
12 impact national security or an ongoing investigation.
13 Certainly if they're going to be released to us now, that
14 seems to be the judgment that is being made.

15 The special litigation team has indicated it wouldn't
16 take very long at all, which seems to indicate there isn't a
17 whole lot of information that would need to be redacted.
18 Which then leads to my reasonable inference that the session
19 was not narrowly tailored -- 505 leading to an 806 is in order
20 to narrowly tailor what then becomes a closed session, which
21 is why the rule exists, right? You want to narrowly tailor
22 what the public is excluded from. Here all I'm simply saying
23 is that it appears that there was no narrowly tailoring, and

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1 we're ultimately going to see exactly what that is.

2 Having said that, I just wanted to clear that point
3 up. And in answer to your comment about how you don't know if
4 you can be any more clear in the English language, I
5 understand your statement in that regard. But I want to offer
6 perhaps maybe an explanation or additional context as to why
7 experience has taught me and has taught, I think, my
8 colleagues as well that words are particularly important.

9 Very early on in my career, and I think all of us
10 have now learned this lesson, we learned that the government
11 very carefully chooses the words that it uses when they're
12 answering questions, when they're submitting pleadings, when
13 they're doing those kinds of things.

14 So if I ask somebody, was this person interrogated,
15 an agent may simply respond and say no, they were not
16 interrogating. I have to ask, well, were they questioned?
17 Because the agent may be simply thinking, well, I didn't
18 interrogate the person, I interviewed them; or I didn't
19 interview them, I debriefed them.

20 So the lesson that we've learned over time is that we
21 have to be very precise in the language that we use to follow
22 up and to understand and to account for perhaps that kind
23 of -- that kind of dialogue, that kind of back and forth.

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1 In this instance when I hear there is no
2 investigation, there is no current investigation, what I'm not
3 sure is how the word "investigation" is being defined, right?
4 And I think you certainly had some experience as a Department
5 of Justice prosecutor, so I'm going to assume that you have a
6 little bit of this context in terms of how the Department of
7 Justice or federal agencies define what an investigation is.

8 And there is a continuum when an inquiry ultimately
9 becomes an investigation. And if I'm wrong about that, then
10 please correct me. But certainly it is true that I heard
11 the -- one of the prosecutors indicate that the investigation
12 was open full on 20 November, right? So the question that I
13 have in my mind is: Everything that happened before that, is
14 that considered an investigation? Or in the verbiage of the
15 Department of Justice, federal prosecuting authorities, does
16 an investigation become an investigation when they decide to
17 call it an investigation on 20 November, a full, open
18 investigation? Before that, is it considered background? Is
19 it considered an inquiry? Is it considered a person of
20 interest? That type of specificity is important for me, it's
21 important to make that kind of assessment.

22 So when I hear there is no investigation, I'm
23 thinking, well, how are you defining "investigation"? Do you

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1 understand?

2 MJ [Col PARRELLA]: What do you see to be the pertinent
3 time period?

4 LDC [MR. RUIZ]: I -- you know, quite frankly, I don't
5 know, because I don't have full insight as to what they call
6 an investigation or what you define as an investigation. So
7 if there is a period in time before that when there is -- for
8 instance, the questions they asked about the other defense
9 teams, right, their definition, that may not be an
10 investigation. That may be simply certain questions or
11 inquiries.

12 My view and Mr. Nevin's view, we look at that as
13 questions about the inner workings of our team, the manner in
14 which we do our job, we're being -- they're asking questions
15 about what we do. Law enforcement agency's investigation that
16 may lead to whatever they call it, a full-open or a -- a
17 full-blown investigation. Why not? That's the kind of
18 information and that's why a lot of times we spend a lot of
19 times dancing on the head of these pin needles, is because we
20 have learned the lesson over time that we have to be very
21 precise in our language and that we need to have very precise
22 context to understand and to be fully aware of exactly what is
23 meant in that document.

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1 And that's also why we fight for access. It's why we
2 try to get access to additional information, so that we can
3 make our independent assessment and look at it in the context
4 of your assessment and say, well, Judge, you know, what? In
5 the 292 series, if you -- if you had an opportunity to look at
6 that, Mr. al Hawsawi's team looked at that issue after we
7 received some discovery and said we don't have a conflict.

8 MJ [Col PARRELLA]: Okay. So, Mr. Ruiz, is it your
9 concern that the investigators who provided information to the
10 commission are -- are essentially manipulating the English
11 language to use -- and maybe they're saying "investigation"
12 but they're doing an inquiry? Or are you concerned that the
13 commission is doing that in its ruling?

14 LDC [MR. RUIZ]: I'm not saying there's malicious intent
15 in that. I do believe that there's very specific verbiage
16 that is used. So when I ask -- you know, to use the example,
17 when I ask an FBI agent, did you interrogate the person? And
18 they say, no, I interviewed them. You know, are they
19 manipulating the language? I'm not necessarily sure that
20 that's a manipulation, because that infers that there's some
21 malicious intent somewhat. But they're certainly using
22 different dialogue and different language to address the same
23 issue that I'm looking at. I look at that as an

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1 interrogation.

2 MJ [Col PARRELLA]: I understand your argument.

3 LDC [MR. RUIZ]: So what I would like is to have some type
4 of assurance and understanding that when you say there is no
5 investigation, that means that any -- any degree, any inquiry,
6 any questioning, anything along those lines.

7 MJ [Col PARRELLA]: Thank you. Ms. Bormann or
8 Mr. Montross?

9 LDC [MR. NEVIN]: We have prayer time coming up at 12:14,
10 I believe.

11 MJ [Col PARRELLA]: Okay. Ms. Bormann, how long do you
12 anticipate needing?

13 LDC [MS. BORMANN]: Not very long, Judge.

14 MJ [Col PARRELLA]: Okay.

15 LDC [MS. BORMANN]: Because I don't think I could do it.

16 All right. A couple of points. One, when we filed
17 AE 615 in early January, we were required to seek a request
18 for position from the special review team. And -- excuse me.
19 And so I reached out to General Martins and I solicited the
20 names of the folks in the special review team. And I received
21 an e-mail back from Mr. Trivett that said, without conceding
22 that there is an ongoing investigation, you can contact
23 Ms. Ballantine.

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1 And then we wrote, you know, we intend to file a
2 Holloway inquiry into a potential conflict based upon an FBI
3 investigation. The response I got back from the special trial
4 counsel was "Because we are unaware of any FBI investigation,
5 we must oppose the relief requested."

6 Now, when I got that, I thought, well, that's odd.
7 And then it got even odder. Because we filed 615 on -- I
8 think it was the 9th -- I might get the days wrong here,
9 please forgive the cold medicine -- of January. The day after
10 we filed -- we had no idea that 613, filed by Mr. Trivett, was
11 in any way related to an ongoing investigation. But the day
12 after we filed AE 615, there was a subsequent filing in 613 by
13 the SRT. And so, you know, again, using circumstantial
14 evidence, I -- I thought to myself, hmm, this must be involved
15 with the investigation.

16 So what it looks like, and again, I haven't seen the
17 filings, is that trial counsel was involved in the first
18 notification to the commission and that the special review
19 team, unless they were not being honest, didn't know about it
20 until we filed AE 615. And then they must have coordinated
21 with trial counsel to learn there had been a previous filing
22 under 613 and then they put together something and filed on
23 613. That is the only thing that makes sense, assuming

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1 everybody is operating in good faith.

2 Now I want to talk -- you asked Mr. Ruiz about
3 whether or not your -- whose bad faith is involved here. And
4 I just want to say to you, it's less about bad faith than it
5 is about just not knowing, or sometimes the misuse of the
6 English language. Judge Pohl on numerous occasions in AE 292
7 found the following things: In AE 292QQ (Amended Order) at
8 page 27, Judge Pohl said he views with a jaundiced eye the
9 legal representations of the special review team.

10 In that same filing, AE 292QQ (Amended Order), he
11 said that the parsing of the SRT's assertions, quote, does not
12 provide the commission with the confidence necessary to make a
13 definitive finding as to whether a conflict of interest
14 exists. That's at page 28.

15 And then ultimately in his final ruling on 292, which
16 is AE 292JJJJJ at page 6, Judge Pohl finds that the commission
17 was well-served to reject the SRT's initial protestations
18 because it is evident that the concerns -- and I'm quoting
19 now -- the concerns of the commission at that time were not
20 unwarranted.

21 At the time Judge Pohl was making these
22 determinations in AE 292, he had been on this case for more
23 than two years. He had -- understood the nonstop

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1 investigations, the smoke detector that was -- I'm sorry, the
2 microphone that was disguised to look like a smoke detector,
3 and the ungated feeds to an OCA, et cetera, et cetera.

4 So the reason I bring it up is not about
5 assassination, it's about what we feel subjectively. You
6 asked why it is that I can't just say, well, Judge, you ruled
7 that way and that's okay. I have an independent duty. And
8 given everything that I know, I can't, not without more
9 factual basis.

10 I want to know we're not under investigation. I
11 terribly want some factual basis from which I could determine
12 we're not under investigation, but it doesn't exist yet. So
13 I'm asking you to provide us that before we go any further.

14 I have nothing further unless you do.

15 MJ [Col PARRELLA]: Thank you, Ms. Bormann.

16 Ms. Ballantine, anything further from the SRT?

17 SRT [MS. BALLANTINE]: No, Your Honor.

18 MJ [Col PARRELLA]: Okay. At this point the commission is
19 going to recess until 1530. I'd ask that the SRT please come
20 back at that time, at 1530. All right. Commission is in
21 recess.

22 [Pause.]

23 It was just pointed out to me that 1530 is -- is

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1 counsel all here? -- the second prayer time. So if I
2 remember correct, maybe 1545 would suffice. Okay. So we're
3 going to go with -- okay. Is that an affirmative? Okay. So
4 1545. Thank you.

5 [The R.M.C. 803 session recessed at 1224, 28 January 2019.]

6 [The R.M.C. 803 session was called to order at 1552,
7 28 January 2019.]

8 [No audio.]

9 MJ [Col PARRELLA]: ---- the five defense teams is
10 currently or likely to be under investigation by the FBI or
11 any other government agency. This commission also indicated
12 it was satisfied that no member of the five defense teams is
13 under any other type of investigation, to include nonroutine
14 security clearance investigations. As such, the commission
15 found that no member of the five defense teams is currently
16 operating under a conflict of interest that would prohibit
17 them from ethically representing their clients.

18 Counsel have suggested that this court's ruling in
19 AE 613E and 615P make today's oral argument futile, as the
20 commission's mind was made up. This statement represents a
21 misunderstanding regarding the purpose of today's hearing.

22 The relief requested in AE 615 was for this
23 commission to conduct a thorough inquiry. That portion of

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1 AE 615 was granted, thus negating the need for oral argument
2 as to whether an inquiry should be conducted. As is set forth
3 in the record, the commission conducted its inquiry and
4 concluded no conflict exists.

5 As is indicated in footnote 30 to the commission's
6 ruling in AE 613E and 613P, [sic] the commission allowed
7 counsel to be heard today and remained open to supplementing
8 its ruling as appropriate. In other words, the commission
9 does not and did not have an inflexible attitude towards
10 reconsidering any portion of its earlier ruling, but did not
11 wait until today to grant much of the relief sought in AE 613
12 and 615.

13 The purpose of today's hearing was also to allow
14 counsel to communicate their concerns so that the commission
15 could do whatever is realistically within its authority to
16 alleviate any remaining conflict concerns. Now, the defense
17 cite the existence of unanswered questions as a reason for why
18 they remain conflicted. Additionally, counsel repeatedly
19 today on the record referred to feelings, fears, assumptions,
20 or suspicions. While the commission fully appreciates that
21 the defense teams, out of no fault of their own, do not have
22 access to the same facts as either the special review team or
23 the commission, these feelings, fears, assumptions, or

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1 suspicions do not constitute a legal standard relevant to
2 conflicts of interest.

3 As I stated earlier, this commission is certainly
4 aware of the unique nature of this case, to include a history
5 of past intrusions into defense teams, most prominently
6 reflected in the AE 292 series. Because of this, the
7 commission saw fit to conduct a thorough inquiry,
8 notwithstanding the special review team's initial public
9 filing which argued that no additional inquiry by this
10 commission was necessary.

11 This commission performed an inquiry based upon
12 facts, as directed by R.M.C. 901(d), and for which it
13 exclusively -- is exclusively situated to do given the
14 ex parte nature of the pertinent information. To be clear,
15 however, the defense is privy to evidence sufficient to
16 support the commission's ruling and to satisfy their own
17 ethical obligations of ensuring they are conflict free.

18 First, the special review team submitted as an
19 enclosure to AE 615D a three-page declaration by FBI
20 Supervisory Special Agent John Stofer stating that no current
21 known member of any defense team is currently the subject of
22 any open national security or criminal FBI investigation. The
23 declaration details the methodology that the declarant used in

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1 arriving at this conclusion.

2 Second, the SRT also submitted in AE 615N a
3 three-page declaration by Daniel Purtill, Director of
4 Security, Washington Headquarters Services, confirming that
5 the only DoD security clearance actions for known members of
6 the five defense teams pertained to routine periodic
7 reinvestigations.

8 Third, and most importantly, this commission, not
9 satisfied with the SRT's initial filings, directed a robust
10 presentation of the facts and circumstances surrounding the
11 FBI investigation and what additional investigative steps, if
12 any, were contemplated. The SRT complied, and on 24
13 January 2019, this ex parte presentation took place.

14 Finally, as indicated in my ruling and on the record,
15 I have directed the government to release redacted copies of
16 the initial notices in AE 613 and 613A. In light of today's
17 information, I'm also modifying my earlier written ruling to
18 reflect that the SRT shall provide those to the defense as
19 soon as they become available.

20 I further directed the production of a declaration
21 from the Army Intelligence Agency involved in the
22 investigation. The commission did not order the production of
23 these documents in furtherance of additional inquiry by the

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1 commission, but rather to assist in alleviating defense
2 concerns, given the unique nature of this case. The
3 commission remains convinced, and hereby affirms its earlier
4 ruling in AE 613E and 615P, that no member of the five defense
5 teams is currently operating under a conflict of interest that
6 would prohibit them from ethically representing their clients.

7 Moreover, the commission remains committed to a need
8 for continued vigilance and has reiterated with the SRT the
9 need to be hypervigilant to any indication that the
10 investigation's focus has changed to encompass a current
11 member of a defense team and to alert the commission through
12 the procedures established under AE 292QQ if this occurs.

13 The commission disagrees with counsel's assertion
14 that, if a defense paralegal in question was on a defense team
15 at the time the investigation began, then all members of the
16 team are likewise implicated, as this commission ruled in
17 AE 292QQ. When defense counsel is unaware of an
18 investigation, it cannot be the catalyst for any subsequent
19 action or inaction, and consequently cannot be the basis of a
20 conflict of interest between defense counsel and their client.
21 As such, the analysis here begins at the point the defense
22 teams became aware of an investigation, which was after the
23 paralegal in question had left the defense team.

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1 Having reaffirmed its earlier ruling, the commission
2 now considers the matter of a present conflict of interest
3 closed. Earlier today counsel for Mr. Mohammad and counsel
4 for Mr. Bin'Attash represented that, until they can conduct an
5 inquiry to their own satisfaction, they cannot ethically
6 participate in the proceedings. This position is not
7 supported by any articulable law and represents a conscious
8 choice by counsel to disregard the findings of the commission.

9 As such, the commission finds that if counsel choose
10 to not participate, notwithstanding clear findings by the
11 commission issued after a careful factual inquiry, then this
12 would constitute waiver of their right to participate in this
13 week's proceedings. While I sincerely hope that we do not
14 reach this point, the commission will not be unnecessarily
15 forced to delay these proceedings based on the counsel's
16 assumption that a conflict exists when said assumptions are
17 admittedly based on a very limited view of the facts.

18 Does any party have any questions with respect to the
19 commission's ruling?

20 Okay. That being the case, then what I would propose
21 we do is we go ahead and take a brief recess to allow the
22 special review team to disconnect and for the prosecution team
23 to reenter the courtroom.

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1 And just for everybody's edification, the only thing
2 I intend to take up in the remainder of the afternoon is the
3 issue from this morning involving Mr. Binalshibh's statement
4 to the commission. So once that is concluded, we will recess
5 for the evening and resume in the morning with our
6 M.C.R.E. 505(h) hearing.

7 That said, commission is in recess.

8 [The R.M.C. 803 session recessed at 1602, 28 January 2019.]

9 [The R.M.C. 803 session was called to order at 1624,
10 28 January 2019.]

11 MJ [Col PARRELLA]: The commission is called back to
12 order. All parties present when the commission last recessed
13 are again present with the following exceptions: The special
14 review team has disconnected from VTC and the prosecution team
15 has rejoined us in the courtroom.

16 Okay. Mr. Harrington, have you had an opportunity to
17 discuss the commission's concerns with your client?

18 LDC [MR. HARRINGTON]: I have, Judge. Mr. Binalshibh
19 fully understands his rights. He has waived his presence --
20 or waived -- acknowledged the rights many, many times. There
21 have been occasions where he has been equivocal in his verbal
22 waiver where the court has found that, based upon his previous
23 waivers and adherence to the order of the court that he did,

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1 in fact, waive his rights. He is not going to retract his
2 position with respect to this court. And the court obviously
3 will have to make its decision then on whether that
4 constitutes a sufficient waiver. I think based upon his
5 history that it does.

6 If the court -- either way, I would just point out to
7 the court with respect to your concern about a safety issue, I
8 don't know where that came from. Even though Mr. Binalshibh
9 expressed an opinion to you this morning, that's the same
10 opinion that's been filed in legal proceedings in the D.C.
11 Circuit. And he came to court without any problem this
12 morning and he has done that throughout these proceedings.

13 And when he and the other accused come to court,
14 they're advised by the guards -- guard force of what their
15 obligations are in the courtroom every time that they come,
16 and he has abided by those throughout these proceedings. So I
17 don't know where any concern about safety of anybody comes
18 into play at this point in time. And it almost seems to me
19 like it's a threat or a retaliation and that it's unwarranted
20 in these circumstances.

21 And it has far-reaching effects if this court does
22 something like this, since Judge Pohl came up with his
23 procedure that the accused are not shackled in the courtroom.

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1 They're obviously confined to the seat where they are, other
2 than going in and out of the room, and we have restrictions on
3 our access to them and where we can be, and all of us have
4 followed that. And Judge Pohl indicated to the accused when
5 he made this policy that they would have to earn the loss of
6 that unfettered access to their places at the table. And I
7 would hope that this court would continue that, absent some
8 reason in the courtroom that something happened, or even
9 outside the courtroom, that the court found that there was
10 some reason to do something -- something further.

11 But we obviously oppose the court taking any
12 sanctions against Mr. Binalshibh, especially for expressing to
13 the court nothing more than a legal opinion in his mind and --
14 which he did with -- respectfully, and told the court how he
15 felt. So I think it's in your decision now -- your discretion
16 now whether you feel that he was a voluntary waiver or not.
17 And if you decide against it, he will be here when he's
18 supposed to be here.

19 MJ [Col PARRELLA]: So there's two issues you've raised,
20 one being the sufficiency of the waiver. And as I found at
21 our last session of court, for the reasons you just
22 articulated, the commission is satisfied that Mr. Binalshibh
23 understands -- notwithstanding his unresponsive answer, that

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1 he understands his rights and, as such, I will continue to
2 find that, if he chooses not to be here, he sufficiently
3 understands those rights.

4 Additionally, it's not this commission's intent to
5 either force a confrontation or to alter my predecessor's
6 practice of essentially the default is, is you are in the
7 chair and without any kind of restraint or anything of that
8 nature. But what you just said is, absent something in the
9 courtroom, and I guess where we disagree is I think that's
10 what's transpired.

11 When the accused states in open court that he doesn't
12 recognize the authority -- my authority to preside over this
13 proceeding, it could be interpreted one of two ways, and
14 that's what I'm hoping to flush out. And maybe I can do that
15 through a colloquy with your client.

16 It could be that he disagrees with some of the
17 rulings of the court; he's simply articulating the position of
18 counsel that counsel have taken with respect to recusing the
19 military judge or the qualifications of the military judge.
20 And in that regard, I certainly have no issue with
21 Mr. Binalshibh having those positions or -- what I have a
22 concern about, though, is that I have an obligation to
23 maintain not only the dignity and decorum, but also the safety

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1 of those in this courtroom.

2 So what I'm looking for is simply Mr. Binalshibh's
3 recognition that it's my duty as a military judge to enforce
4 those things and that if an issue were to arise that requires
5 me to address him and to maybe tell him to have a seat or to
6 stand against the wall, or whatever it may be, that he
7 recognizes my authority as a military judge and he's going to
8 follow those instructions.

9 LDC [MR. HARRINGTON]: Judge, I don't understand where
10 that concern comes from because he has adhered to all of these
11 rules the whole time, and there's nothing that's been
12 indicated that he's not going to adhere to them ----

13 MJ [Col PARRELLA]: Okay.

14 LDC [MR. HARRINGTON]: ---- in the future.

15 MJ [Col PARRELLA]: So then that should be simple enough.
16 I mean, the indication is when he states now twice in open
17 court that he doesn't recognize me as the military judge,
18 that's the indication. And I agree with you, there hasn't
19 been any behavior to suggest that, but I'm concerned enough
20 that I at least want to make that -- get that assurance
21 verbally from him. It shouldn't be a complex thing to do. It
22 shouldn't be hard for him to say that if -- yes, if you tell
23 me to stand, I'm going to stand; if you tell me I need to sit

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1 down, I'm going to sit down. And if he's not able to give me
2 those assurances, then I do have concern, in light of what
3 he's now stated twice in open court.

4 LDC [MR. HARRINGTON]: Well, Judge, he certainly
5 recognizes that you have control over this courtroom and
6 control over the guard force that's in this thing and that you
7 will enforce the rules that he has adhered to all along, and
8 he knows what those rules are. But you just gave an example
9 of if you tell him to stand, he has to stand; well, they don't
10 stand when you come in. And they're -- you know ----

11 MJ [Col PARRELLA]: And I'm okay with that. That's an
12 example meant to illustrate that there may be a situation that
13 arises that I need to ensure that, whether he agrees with my
14 rulings or not, he recognizes my authority as the presiding
15 officer of this commission.

16 LDC [MR. HARRINGTON]: Well, he recognizes that, Judge,
17 because he knows that everybody in this courtroom on the guard
18 force will do what you tell them to do in this courtroom.

19 MJ [Col PARRELLA]: I will accept that you're telling me
20 that that -- he understands that.

21 LDC [MR. HARRINGTON]: He does, Judge. Sure. Absolutely.
22 Absolutely.

23 MJ [Col PARRELLA]: Okay. And we will go with that

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1 and ----

2 LDC [MR. HARRINGTON]: He's been warned, Judge, about if
3 there is anything in the court, what could happen to him, that
4 he could be forced out of the courtroom. He knows all those
5 things.

6 MJ [Col PARRELLA]: I understand. Between now and the
7 next session of court, I would suggest that if he states the
8 same thing again, this issue may come up again. There's a
9 different way perhaps he can communicate his point without
10 stating the way he's doing and in an open court, because it
11 sounds very much to the commission as a challenge to the
12 commission's authority to do anything.

13 LDC [MR. HARRINGTON]: It is not, Judge. It's a challenge
14 with respect to legal issues and nothing more.

15 MJ [Col PARRELLA]: All right. Well, thank you,
16 Mr. Harrington, and I think that concludes the matter for
17 right now.

18 Anybody else? Trial Counsel, anything from the
19 government?

20 CP [BG MARTINS]: No, Your Honor.

21 ACC [MR. BIN'ATTASH]: [Speaking in English] Please.
22 [Speaking in Arabic.] It is clear that the judge wants to
23 escalate the issue.

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1 MJ [Col PARRELLA]: Okay. Mr. Binalshibh, as I just told
2 your counsel -- or Mr. Bin'Attash, I'm sorry ----

3 ACC [MR. BIN'ATTASH]: Bin'Attash.

4 MJ [Col PARRELLA]: Mr. Bin'Attash, this isn't a matter
5 that really pertains to you, so ----

6 ACC [MR. BIN'ATTASH]: **[Speaking in English]** No, but you
7 threaten us. And it's very clear you want to escalate this
8 problem. I don't know why ----

9 MJ [Col PARRELLA]: Mr. Bin'Attash ----

10 ACC [MR. BIN'ATTASH]: **[Speaking in English]** ---- to us.

11 MJ [Col PARRELLA]: ---- this matter doesn't pertain to
12 you and you're to not say anything more on this issue. Do you
13 understand?

14 ACC [MR. BIN'ATTASH]: **[Speaking in English]** No, but it's
15 really clear you take it personally. I don't know why.

16 MJ [Col PARRELLA]: Not taking it personally, but this
17 does not concern you at this time.

18 ACC [MR. BIN'ATTASH]: **[Speaking in English]** Okay.

19 MJ [Col PARRELLA]: All right. As we discussed earlier,
20 tomorrow we will start with our 505(h) hearing. At the
21 conclusion of that, I anticipate taking a recess and then we
22 will, assuming that the information at the 505 hearing
23 necessitates it, do an appropriate closure order, come back so

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1 that we can argue the classified portion of any argument
2 pertaining to 616.

3 We will then take a recess to allow the courtroom to
4 transition, come back, argue the unclassified portion of any
5 argument pertaining to 616. I know that's sort of reverse of
6 how we normally do it, but I think for ease of transition of
7 the courtroom, it's the appropriate way to do it. And then
8 since the courtroom at that point will be in open session, we
9 can then take up the issue of AE 614.

10 General Martins?

11 CP [BG MARTINS]: Your Honor, we just want to be able to
12 give the right guidance to the guard force for those accused
13 who do not waive presence. The timing of that sounds a bit
14 fluid. Looking to you for guidance.

15 MJ [Col PARRELLA]: Yeah. It's a bit fluid. I would say
16 we can -- I think the earliest we will require the accused
17 would be at 1300, after the midday break.

18 Any other questions? All right. There being none,
19 this commission is in recess.

20 [The R.M.C. 803 session recessed at 1635, 28 January 2019.]

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