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1 [The Military Commission was called to order at 0915, 14 April
2 2014.]

3 MJ [COL POHL]: The commission is called to order.
4 Trial Counsel, please account for all members of the
5 prosecution currently present.

6 CP [BG MARTINS]: Good morning, Your Honor. Present for
7 the prosecution, Brigadier General Martins, Mr. Swann,
8 Mr. Ryan, Mr. Trivett, Mr. Groharing, Lieutenant Korczynski,
9 Captain Lebowitz and Ms. Tarin. Not present today,
10 Ms. Baltes, Major Kirk, Major McGovern and Ms. Tate.

11 MJ [COL POHL]: Okay. Mr. Nevin, who is here with your
12 team?

13 LDC [MR. NEVIN]: Your Honor, Major Wright, Major Poteet
14 and our defense security officer are present at the table,
15 along with Mr. Mohammad.

16 MJ [COL POHL]: Ms. Bormann?

17 LDC [MS. BORMANN]: Judge, here for Mr. Bin'Attash are
18 Captain Swensen, Captain Schwartz and Lieutenant
19 Commander Hatcher.

20 MJ [COL POHL]: Thank you. Mr. Harrington?

21 LDC [MR. HARRINGTON]: Judge, here for Mr. Binalshibh,
22 Lieutenant Commander Bogucki and Major Balfantz.

23 MJ [COL POHL]: Thank you. Mr. Connell?

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1 LDC [MR. CONNELL]: Good morning, Your Honor. Myself
2 and Lieutenant Colonel Thomas.

3 MJ [COL POHL]: And Mr. Ruiz?

4 LDC [MR. RUIZ]: Good morning, Judge. Present are
5 myself and Lieutenant Colonel Sean Gleason on behalf of
6 Mr. Al Hawsawi.

7 MJ [COL POHL]: First thing I'm going to do today is as
8 we discussed at 802, is I'm going to advise four of the
9 accused of their rights to be present and the waiver of that
10 right. Then there's something that was filed over the weekend
11 by the government that I want to discuss before we do anything
12 else.

13 Mr. Mohammad, as I have told you before, I'm going
14 through your rights to be present. You have the right to be
15 present during all sessions of the commission. If you request
16 to absent yourself from any session, such absence must be
17 voluntary and of your own free will. Your voluntary absence
18 from any session of the commission is an unequivocal waiver of
19 the right to be present during that session. Your absence
20 from any session may negatively affect the presentation of the
21 defense in your case. Your failure to meet with and cooperate
22 with your defense counsel may also negatively affect the
23 presentation of your case.

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1 Under certain circumstances your attendance of a
2 session can be compelled regardless of your personal desire
3 not to be present. Regardless of your voluntary waiver to
4 attend a particular session of the commission, you have the
5 right at any time to decide to attend any subsequent session.

6 If you decide not to attend the morning session,
7 but wish to attend the afternoon session, you must notify the
8 guard force of your desires. Assuming there is enough time to
9 arrange transportation, you will then be allowed to attend the
10 afternoon session.

11 You will be informed of the time and date of each
12 commission session prior to the session to afford you the
13 opportunity to decide whether you wish to attend to session.
14 Do you understand what I just explained to you?

15 ACC [MR. MOHAMMAD]: Yes.

16 MJ [COL POHL]: Mr. Bin'Attash, did you hear what I just
17 told Mr. Mohammad?

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

19 MJ [COL POHL]: Do you understand your rights to be
20 present and what I just explained to him?

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

22 MJ [COL POHL]: Mr. Ali, Mr. Aziz Ali, did you hear what
23 I just told Mr. Mohammad?

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1 ACC [MR. AZIZ ALI]: Yes.

2 MJ [COL POHL]: Do you understand what I told him, and
3 your right to be present and the voluntarily waiver of your
4 right to be present?

5 ACC [MR. AZIZ ALI]: Yes.

6 MJ [COL POHL]: Mr. al Hawsawi, did you hear what I told
7 Mr. Mohammad about your right to be present?

8 ACC [MR. AL HAWSAWI]: Yes.

9 MJ [COL POHL]: Do you understand your rights to be
10 present and under certain circumstances to voluntarily waive
11 your right to be present?

12 ACC [MR. AL HAWSAWI]: Yes.

13 MJ [COL POHL]: Trial Counsel, yesterday you filed
14 ex parte a motion 152V which relates to the 909 issue. You
15 requested me to consider it ex parte, and so I read it. At
16 this time, I'm not going to grant your motion without a
17 hearing. Do you wish to pursue it?

18 DTC [MR. GROHARING]: Are you referring to an ex parte
19 hearing, Your Honor?

20 MJ [COL POHL]: What kind of hearing do you want?

21 DTC [MR. GROHARING]: That would be the -- we would --
22 to the extent that the military judge has questions regarding
23 our filing, the government would request to have that

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1 discussion in an ex parte hearing with the military judge
2 consistent with M.C.R.E. 505.

3 MJ [COL POHL]: Okay. It would seem to me that because
4 it goes to the 909 issue, we have to do that first, assuming
5 you want to pursue this issue.

6 DTC [MR. GROHARING]: Yes, Your Honor.

7 MJ [COL POHL]: Okay. We'll conduct the hearing. It
8 seems to me it's logistically -- I'll hear you in a second,
9 Mr. Connell. Logistically -- should we just recess for the
10 day for everything else, and then just do this? Understanding
11 that it may not be as clean as you think it is.

12 DTC [MR. GROHARING]: Your Honor, I don't know the
13 nature of your questions.

14 MJ [COL POHL]: Okay.

15 DTC [MR. GROHARING]: From our perspective, it would
16 seem that this matter could be addressed over maybe the course
17 of an hour as opposed to an entire day.

18 MJ [COL POHL]: Okay. What I will do -- okay. Got it.

19 Mr. Connell, you wanted to say something?

20 LDC [MR. CONNELL]: Your Honor, on numerous occasions we
21 have briefed the question of whether the government can
22 proceed ex parte outside of the narrow categories established
23 by the Rules for Military Commission. Obviously, I don't know

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1 the topic of the ex parte submission. Normally -- or often
2 the government puts its statutory authority for proceeding
3 ex parte in the heading so I have some sense of whether it's a
4 motion for substitutions or whatever.

5 We are in fact in the process of preparing our --
6 slowing down -- preparing our response to 152V. If the court
7 could give us an hour, we could have a filing to the court on
8 it.

9 But at this point, I would like to note our
10 objection to an ex parte hearing if it falls outside of the
11 narrow statutory and rule-based authorization for ex parte
12 communications by the government.

13 MJ [COL POHL]: Okay. Just to be clear, it will be
14 obviously transcribed and made part of the record. So your
15 objection to it, and what happened at the hearing, will also
16 be all part of the record.

17 LDC [MR. CONNELL]: Very good. Thank you.

18 MJ [COL POHL]: Okay. You have a filing you wish to add
19 to 152V.

20 LDC [MR. CONNELL]: Your Honor, if you could give me an
21 hour, I could have it to you.

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

23 LDC [MR. NEVIN]: Join that objection, Your Honor.

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1 MJ [COL POHL]: Got it.

2 LDC [MS. BORMANN]: We also join the objection.

3 MJ [COL POHL]: Got it.

4 LDC [MR. HARRINGTON]: Also, we join.

5 MJ [COL POHL]: Let me ask Mr. ----

6 LDC [MR. RUIZ]: Yes, on behalf of Mr. al Hawsawi, we
7 also join.

8 MJ [COL POHL]: Okay. Mr. Harrington.

9 LDC [MR. HARRINGTON]: Judge, last evening we filed an
10 emergency motion -- I don't know if the court has had an
11 opportunity to see it yet -- but it goes to whether the court
12 can continue anything right now, especially the 909 hearing
13 with respect to Mr. Binalshibh.

14 In this motion we have alleged, based upon
15 information that was provided by one of the members of my
16 team, that he was visited by two members of the FBI a week ago
17 yesterday, and asked to sign an agreement with them, and asked
18 questions specifically about Mr. Mohammad's team, specifically
19 about my team, and specifically about the other three teams.

20 Obviously, to say that this is a chilling
21 experience for all of us is a gross understatement. The
22 problem we have here is it has created a conflict of interest,
23 or at least a potential conflict of interest, because we have

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1 to advise our client on all sorts of matters, including issues
2 which this particular member of our team has worked on, some
3 of which relate to the 909 proceeding. The conflict arises
4 because if we are the subject of some inquiry, investigation
5 or whatever by the FBI or some other government agency, then
6 we have an interest in how that comes out. And the question
7 becomes whose interest do we protect first, ours or our
8 client's.

9 They have put us in this position. I am not aware
10 of any wrongdoing by my team. I'm not aware of wrongdoing by
11 the other teams, but that's the position that the government
12 has put us in.

13 And we -- in this conflict, Judge -- in the motion
14 that we filed -- first of all, we set forth some of the
15 history with respect to 018Y, which KSM -- or Khalid Shaikh
16 Mohammad's team has addressed with the court already, and I --
17 I believe that's ready to be argued, but that's -- we believe
18 the premise of some of the inquiry, and that was specifically
19 mentioned to my team member.

20 But we're in a position now, Judge, with respect
21 to my team, that this team member obviously can no longer be a
22 member of our team. He was our -- he held a critical position
23 on our team. He now has to be replaced. We have to do an

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1 investigation within our team of what communications he had
2 with other team members. We have to do an independent
3 investigation of our own.

4 But we have brought this issue to the attention of
5 the court, and cited in the motion is our cases that say that
6 the court now must undertake an independent inquiry to get to
7 the bottom of this. And I think that the government has to
8 come forward in some way to try and give the facts of what it
9 is that was -- that happened, and what the nature of the
10 inquiry was before we can proceed with anything.

11 Part of the problem here, Judge, is that
12 ultimately, after the court does such an inquiry, in whatever
13 manner is decided that it has to be done, I think you have to
14 appoint independent counsel to advise each of the five accused
15 of their rights with respect to us. If there's any potential
16 conflict with any of the defense counsel, that has to be
17 waived. And we can advise the clients with respect to that
18 waiver. They need independent counsel to advise them of that.
19 But before we can go forward with anything, the court has to
20 address this issue.

21 As I mentioned, this is a very, very difficult
22 position for each of us to be in in talking to our clients,
23 and in the relationship with our clients. And it comes on the

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1 heels of the incident in the court where the security light
2 went off, where the -- there was recordings at the counsel
3 table -- or not recordings, but monitoring at the counsel
4 table, where there were recordings in the visiting rooms with
5 our clients. And as you know, in this case, this is one of
6 the most difficult cases that there is, it's very difficult
7 for us to maintain a relationship and a trust with our
8 clients, and now these things keep happening. And this one is
9 a little bit different than the others. This is more than --
10 this is more than just something where there's some
11 circumstantial evidence that something might have happened.

12 Here it really happened. There's evidence of it.
13 At a minimum, some sort of inquiry has to be made with respect
14 to the people who participated in it, which would be my team
15 member and the agents that were involved. And I think that's
16 only the beginning of it, and it has to be peeled back from
17 there. But until that's done, I do not see how anything can
18 go forward.

19 MJ [COL POHL]: Thank you. Ms. Bormann.

20 LDC [MS. BORMANN]: I discovered this yesterday after
21 the 802 conference, and just to illustrate the potential
22 conflict, I know I've done nothing wrong. I suspect that none
23 of my team members have done anything wrong, but I also know

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1 that two FBI agents have requested information regarding our
2 activities.

3 MJ [COL POHL]: From whom?

4 LDC [MS. BORMANN]: From a member of the Binalshibh
5 team.

6 MJ [COL POHL]: Okay. Yeah. Okay. My only question
7 was whether they visited any other team, and ----

8 LDC [MS. BORMANN]: Well, I ----

9 MJ [COL POHL]: ---- to your knowledge ----

10 LDC [MS. BORMANN]: Well, I don't know that, because,
11 see, here's what happened -- so they visited a defense
12 security officer for the Binalshibh team, and they asked about
13 Mr. Mohammad's case, they asked about Mr. Binalshibh's case,
14 they asked about Mr. Bin'Attash's case, they asked about
15 Mr. al Baluchi's case and they about Mr. al Hawsawi's case.

16 I don't know what that DSO told them. That has
17 never been conveyed to me. The content of that conversation
18 is unknown to anyone on this side of the courtroom because
19 even Mr. Harrington's own DSO has not given him that
20 information. I don't know if there are accusations against my
21 team members. I cannot advise Mr. Bin'Attash that there is
22 conflict-free counsel now, because I quite honestly don't know
23 that there is. I know I've done nothing wrong, but I can't

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1 vouch for anybody else on my team. I can't vouch for anybody
2 else in this joint defense. And so we're in a position where
3 until Mr. Bin'Attash has been advised at least of the
4 parameters of what the allegations are here, he can't make a
5 decision about whether or not he has conflict-free counsel.

6 So I am hesitant to advise him about anything.
7 Because as a lawyer I have a duty, an ethical duty, to
8 maintain no conflict. If I'm being investigated, am I likely
9 to try to curtail my activity in this case for fear that I
10 might wind up as a defendant? Absolutely. Even though I did
11 nothing wrong.

12 So we have a conflict of interest. And until
13 either we find out that there is no conflict, which right now
14 there appears to be, or Mr. Bin'Attash is apprised of enough
15 facts to be able to competently waive it, he is in a position
16 without counsel, because I can't effectively represent him.

17 MJ [COL POHL]: Thank you. Trial Counsel?

18 CP [BG MARTINS]: Your Honor, the government's position
19 is that this motion, which is styled emergency motion, filed
20 just before 10:00 p.m. last night, when the -- we received it,
21 should take second priority, at least to the first order of
22 business here today. Now, I understand Your Honor has elected
23 to hear oral presentation regarding the ex parte motion.

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1 The emergency motion to abate is not the
2 appropriate relief here. You've got a capacity issue. Also
3 important, also something that has been on the docket, and our
4 position is we should proceed with that, have witnesses
5 available for that, and then allow us to digest this emergency
6 motion that apparently deals with facts. One fact alleged
7 occurred on 6 April.

8 So, you know, had it been such an emergency, one
9 would hope joint defense motion, that would have been some
10 notice of this. We were thinking perhaps there would be a
11 hearing that went by without a motion to abate. This one
12 arrived. It arrived last night, and we're not surprised by
13 it, but we would have hoped that we would have gotten some
14 notice of -- a very well-composed motion, I should note.

15 MJ [COL POHL]: So, General Martins, the fact that the
16 alleged activity occurred a week ago means that we should wait
17 two months to hear this motion?

18 CP [BG MARTINS]: Your Honor, the government's position
19 is we should proceed with what you have at the top of the
20 docket and then given us a chance to read this well-composed,
21 with a declaration, so styled emergency motion, and allow us
22 to then provide you some thoughtful ----

23 MJ [COL POHL]: How do you respond to Mr. Harrington's

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1 point that until this is resolved, at least -- in other words,
2 I'm just going to point to that particular team, because
3 that's actually the only team involved in the 909 issue, is
4 until this is resolved, how can they be sure they don't have a
5 conflict with their lawyer, with their accused, and therefore
6 they can't represent him on the 909 motion?

7 CP [BG MARTINS]: Well, I mean, the -- we have a
8 situation where there's a question relating to an accused who
9 may or may not understand the proceedings. There's a bit of a
10 situation where the commission has to deal with a couple of
11 very pressing issues. Which order you do it in -- I mean, we
12 had this same issue in the arraignment when counsel all wanted
13 to stop everything and have us consider a defective referral
14 motion first. I mean, you've got to take these things up
15 methodically. And a good place to start is where we have
16 prepared counsel, a lot of work has been done to provide that
17 issue to the commission in an orderly, methodical way with no
18 ambushing and so forth.

19 MJ [COL POHL]: Well, why don't I take the 909 issue --
20 first of all, there is no 909 motion from the defense.

21 CP [BG MARTINS]: Uh-huh.

22 MJ [COL POHL]: This is a government motion, and the
23 government has a motion. The government has a motion saying

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1 the default is competent but let's hear evidence to show that
2 he is competent. So if I don't take up a 909 today, there's
3 no defense motion on it, then we -- then we simply say, well,
4 he's got the presumption of competency and we go from there.

5 CP [BG MARTINS]: We would -- if you're ruling on the
6 motion, we would like to see that ruling because ----

7 MJ [COL POHL]: What I'm saying is you're asking for a
8 ruling -- you're asking for a ruling that's contained in the
9 rule that the defense is not contesting.

10 CP [BG MARTINS]: I think the rule and the presumption
11 are different from your ruling, based on a record, which the
12 government has a ----

13 MJ [COL POHL]: But if we're going to have a record made
14 in a proceeding, the normal process is that that's done in an
15 adversarial proceeding with the two sides taking different
16 views, it's litigated, then a ruling is made.

17 Procedurally where we're at right now is,
18 government is saying -- he's presumed competent. We want to
19 put on evidence to support said presumption. Defense at this
20 point is not contesting his competency to assist in trial, and
21 so, therefore, you want me to rule basically saying the
22 government has presented evidence to support the presumption
23 of competency.

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1 CP [BG MARTINS]: We do. Your Honor, we believe that
2 your docket, the order you set up, ought to be followed. We
3 have an emergency-styled motion that we got 10:00 p.m. last
4 night, and that we ought to follow an orderly process, and the
5 capacity is a significant, serious issue. Let's resolve that.

6 MJ [COL POHL]: Let me ask you this question, if you
7 know: Was the government -- I'm talking about the prosecution
8 team -- aware of this visit to the ----

9 CP [BG MARTINS]: No, we were not.

10 MJ [COL POHL]: ---- by the FBI?

11 CP [BG MARTINS]: And, you know, we need time, and
12 obviously counsel is alleging in the facts portion -- in the
13 declaration things that we have to be careful about how we
14 approach, because they are entwined with privilege and so
15 forth. So we have got to determine how best to assist the
16 commission in getting at this.

17 But believe the best way -- I mean, you asked for
18 the government's position, Your Honor, it's let's go with your
19 docket, something that we heard not a whisper of in the 802.
20 You know, emergency motion 10:00 p.m., well-composed
21 declaration, motion to abate, not surprising on a Monday
22 morning, but why not -- why don't we go with what you have set
23 out and with what the authority of the commission is behind.

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1 Thank you.

2 MJ [COL POHL]: Mr. Harrington.

3 LDC [MR. HARRINGTON]: Judge, General Martins, a number
4 of times, mentioned the thing about this was filed at 10:00
5 last night. Had we been able to file it sooner, we would have
6 filed it sooner. As this came about only at the end of last
7 week did the events really surface and come into focus for us.
8 When some of the counsel came down here on Saturday, they
9 didn't even know about it. We had a meeting after the 802
10 conference in order to discuss this, and everybody went to
11 work as fast as they could to try and put this motion together
12 and to consider the interests of each of the defense teams,
13 and the input that everybody had to put in it.

14 We did it as fast as we could, and this was -- I'm
15 sorry -- this was not some calculated scheme to delay the 909
16 hearing. When I left on Thursday, I came here intending to
17 conduct the 909 hearing, and this was thrown in our lap.
18 Maybe not by General Martins or this prosecution, but by the
19 United States Government. They're the ones that did this, not
20 us, and we tried to bring it to your attention as fast as we
21 could. And they have put me and my co-counsel in a position
22 now where we have an impossible situation in terms of
23 representing our client, not just on the 909, but I think with

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1 respect to any issue. But the 909 is more sensitive, given
2 the -- you know, the nature of what the hearing is about.

3 MJ [COL POHL]: Mr. Harrington, just to make sure I
4 didn't misstate your position: As I understand it, from the
5 defense perspective, you are not challenging your client's
6 competency to assist in his defense?

7 LDC [MR. HARRINGTON]: We are not, Judge.

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

9 Any other defense counsel want to be heard?

10 Mr. Nevin.

11 LDC [MR. NEVIN]: Yes, Your Honor, thank you.

12 We learned of this on Friday, in other words,
13 three days ago. After the 802, as Mr. Harrington said, we
14 went to a meeting. At least one of the defense counsel at
15 that meeting were not aware of the events with
16 Mr. Harrington's DSO. Members of our team worked until about
17 4:00 a.m. Sunday morning preparing a first draft of this
18 motion, and then many different team members -- members of
19 different teams worked all day Sunday and into last night
20 finishing this motion up. And as the court might imagine,
21 there are many considerations in deciding what should be in a
22 motion like this one, and we wanted to do it right.

23 It required a fair amount of research. Cases

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1 indicate that when -- if we let this go forward without
2 telling you -- if we make a decision not to tell you -- I say
3 you, meaning generically, let's say, the presiding officer,
4 whether it be a military commission or Article III court or
5 whatever, if we make the decision not to put this in your
6 hands and bring it to your attention, we are violating ethical
7 rules that apply to us.

8 So our conclusion was that we didn't have any
9 choice but to raise this because of the materials that are --
10 the allegations and the situation that's described in the
11 motion.

12 Now, I appreciate that counsel thinks it's well
13 composed. I think it's well composed, too, and I think it's
14 right, and I think it's a good piece of work. What I don't
15 appreciate is the suggestion that we waited until the last
16 minute to in some way prejudice your ability to consider this.

17 I don't see that we had another choice but to make
18 it as good as we could make it and to get it to you as soon as
19 we could, and that's what we did. So I wanted only to speak
20 to that, Your Honor. Thank you.

21 MJ [COL POHL]: Thank you. Mr. Ruiz?

22 LDC [MR. RUIZ]: Yes, Judge. I just want to make clear
23 that, at least for my purposes, I first learned about this

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1 issue Saturday after the 802. Prior to that, I had had
2 absolutely no knowledge of these facts or circumstances, and I
3 concur with my counsel -- co-counsel, that in fact it was
4 after that meeting that we discussed the issue and tried to
5 find a way forward on how to bring this to the attention of
6 the court in a way that would put it in your possession to
7 make a determination on it.

8 I believe the motion also contains an attachment,
9 which is a document that was provided by the FBI to that DSO,
10 and we also all have the same concerns. I don't think anyone
11 has touched on this one in particular, but that appears to be
12 a document that, in essence, seeks to enlist defense personnel
13 in the assistance of an investigation -- an internal
14 investigation.

15 Had there not been a communication with counsel
16 relating those facts and proper communication, given the
17 concerns that we have about the confidentiality of our
18 communications and the ethical principles that we have to
19 safeguard that information, had that not happened, we could
20 conceivably have a situation which you would have somebody
21 working with the FBI within the defense team, and the defense
22 would be unaware of that. The concern that raises, of course,
23 is a concern about the privilege and the confidentiality of

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1 our communications.

2 I have not had an opportunity to meet with my
3 entire team -- only a portion of my team is present here on
4 the island -- but it is entirely possible that other members
5 of the defense team have been similarly contacted, have been
6 similarly enlisted, and have signed similar agreements with
7 the FBI.

8 MJ [COL POHL]: Wouldn't you expect that if the FBI
9 would have contacted a member of your defense team, they would
10 tell you?

11 LDC [MR. RUIZ]: No, I do not. However, we do have ----

12 MJ [COL POHL]: You do not expect them to tell you that?

13 LDC [MR. RUIZ]: The FBI?

14 MJ [COL POHL]: No, not the FBI. No, I'm sorry. I'm
15 not saying the FBI. I'm saying if the FBI contacted a member
16 of your defense team, wouldn't you expect that member of your
17 defense team to tell you the FBI contacted him or her?

18 LDC [MR. RUIZ]: I do, but if you look at the document
19 that was submitted for your consideration, I can see also a
20 situation where a person that is so confronted -- it's an
21 unsettling situation -- would perhaps think that maybe they
22 can't ----

23 MJ [COL POHL]: I understand.

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1 LDC [MR. RUIZ]: ---- share information with us. I
2 think that's equally plausible. Of course, from my
3 perspective, it's entirely reasonable since the entire defense
4 team is covered by confidentiality, by privilege, and we ought
5 to be able to then determine internally what course we follow.

6 So what I'm saying to the commission is we do need
7 the opportunity to confer with our team. We need the
8 opportunity to explore whether in fact any other team members
9 are working with the FBI unbeknownst to us, because we need to
10 be able to get to that, I think that's part of the thorough
11 assessment that we've asked for you to conduct. Thank you.

12 MJ [COL POHL]: Thank you.

13 Mr. Connell, do you have anything to add?

14 LDC [MR. CONNELL]: I concur with other counsel. I
15 don't have anything to add.

16 LDC [MS. BORMANN]: I do have a bit of follow-up, if I
17 may.

18 MJ [COL POHL]: Sure, Ms. Bormann.

19 LDC [MS. BORMANN]: I'm also in the same position as
20 Mr. Ruiz. I didn't find out about this until after the 802
21 conference. And a cursory review of one of the attachments to
22 the motion that we filed purports to be a sensitive
23 information nondisclosure agreement signed by that DSO. In

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1 that nondisclosure agreement, it purports to limit what the
2 individual who is now cooperating with the FBI can tell
3 anybody outside of the FBI.

4 So when you asked Mr. Ruiz whether or not he would
5 expect a member of his defense team to approach him with this
6 information, I'm here to tell you that if somebody is
7 terrified of the FBI coming knocking at their door Sunday
8 after church unexplained, and the FBI agents require him to
9 sign two documents purporting to limit what he tells anybody
10 outside the FBI, there is a very good chance that if somebody
11 was approached on my defense team and signed one of these, and
12 that person wasn't a lawyer and couldn't read and tell what it
13 said, they would absolutely not tell me. Because if they did,
14 they would think they were violating the law.

15 And so what we have right now is a possibility
16 beyond me worried about maybe, you know, being the subject of
17 an investigation, a team member who is within the privilege of
18 Mr. Bin'Attash, being a cooperating individual with the FBI.

19 I don't know that that's not true. I have some
20 team members here. As soon as I found out about this, I asked
21 them if they had been approached by the FBI. Some of my team
22 members have been able to answer that question in the
23 negative. I only have about half the team here. So I have

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1 not yet had that conversation with other team members. And
2 even if I did, I'm not so sure that I would be told the truth.

3 So we have a real problem, and I'm asking you to
4 address it.

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

6 Here's what we're going to do. Mr. Connell, you
7 said you wanted about an hour to submit something on 152?

8 LDC [MR. CONNELL]: Yes, sir. And as a housekeeping
9 matter, if I could have leave of court to submit it without an
10 AE number, I'm not sure if they can get it to me fast enough.

11 MJ [COL POHL]: Go ahead. We'll add the AE number and
12 submit it as if you submitted it in court.

13 What we'll do is reconvene with just the
14 prosecution on the 152 issue at 1300 hours. We'll reconvene
15 with everybody else tomorrow at 0900.

16 Commission is in recess.

17 [The Military Judge went back on the record.]

18 LDC [MR. NEVIN]: We would like the opportunity to meet
19 with Mr. Mohammad to discuss this and other issues. Is it
20 possible to remain in the courtroom -- did the clerk say 1300?
21 Between now and then, may we remain in the court? May counsel
22 and the clients remain in the courtroom?

23 MJ [COL POHL]: Given time to transport everybody else

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