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1 [The Military Commission was called to order at 0907,
2 17 April 2014.]

3 MJ [COL POHL]: The commission is called to order. It
4 appears that all defense counsel are again present that were
5 present when the commission recessed. If that's inaccurate,
6 please let me know.

7 The answer is no.

8 Mr. Mohammad and Mr. Binalshibh and Mr. al Baluchi
9 are here. Mr. Hawsawi and Mr. Bin'Attash are absent.

10 Trial Counsel, any changes in the defense -- or in
11 the prosecution team at this time?

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

13 MJ [COL POHL]: Mr. Swann.

14 CAPTAIN G, U.S. Army, was called as a witness for the
15 prosecution, was reminded of her oath, and testified as
16 follows:

17 **DIRECT EXAMINATION**

18 **Questions by the Trial Counsel [MR. SWANN]:**

19 Q. Good morning. Are you the same Captain G that
20 testified earlier in this week?

21 A. Yes, sir.

22 Q. I remind you, you are still under oath.

23 A. Yes, sir.

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1 Q. Did you have occasion to advise both Bin'Attash and
2 Hawsawi of their rights to attend today's proceedings?

3 A. Yes, sir.

4 Q. And did you execute a form in doing so?

5 A. Yes, sir.

6 Q. All right. Let's take Bin'Attash first.

7 Did you use the form that you've previously used on
8 other occasions to advise him of his right to attend?

9 A. Yes, sir.

10 Q. All right. Did he execute that form this morning in
11 Arabic or in English?

12 A. In Arabic, sir.

13 Q. All right. Do you believe that he understood that
14 he had a right to be here?

15 A. Yes, sir.

16 Q. All right. Did he sign this form?

17 A. Yes, sir.

18 Q. Let's take Hawsawi next.

19 Did you talk to Mr. Hawsawi this morning?

20 A. Yes, sir.

21 Q. All right. And did you follow the procedures that
22 have been previously used in these cases?

23 A. Yes, sir.

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1 Q. All right. And did he execute the form in Arabic or
2 in English?

3 A. Arabic, sir.

4 Q. All right. Now, you have those two documents in
5 front of you?

6 A. I do, sir.

7 Q. And their signatures appear on both of those
8 documents?

9 A. They, do.

10 Q. That's Appellate Exhibit 296 consisting of two
11 pages?

12 A. No, sir. The Arabic form is one page.

13 Q. I understand. Appellate Exhibit 296, one page each?

14 A. Yes, sir.

15 Q. All right.

16 TC [MR. SWANN]: Thank you.

17 MJ [COL POHL]: Ms. Bormann and Mr. Ruiz, do you have any
18 questions?

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

20 MJ [COL POHL]: Thank you. You are excused.

21 [The witness was excused and withdrew from the courtroom.]

22 TC [MR. RYAN]: Excuse me, Your Honor. Detective Patrick
23 Lantry is present in the courtroom today of the NYPD.

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1 MJ [COL POHL]: Thank you. And since we last met, there's
2 been -- the defense, you filed a 292D, which really amounts,
3 as I see, a discovery motion; is that correct.

4 LDC [MR. CONNELL]: Yes, Your Honor.

5 MJ [COL POHL]: I'll come back to that. The government
6 failed a 292F, Foxtrot, requesting time to file a submission
7 by a newly detailed trial counsel. There's an objection to it
8 on 292G. The first objection is failure to confer as required
9 by the rules. And quite frankly, we've not accepted 292F yet
10 because of that failure.

11 As both sides I'm sure are aware of, conferring with
12 the other side is required. If you don't do it, the question
13 is going to be why, and it's generally not accepted for filing
14 because of that. However, given the fact that -- and that's
15 why it was not accepted for filing, but given 292G amounts to
16 a notice of conference and the objection to it, the commission
17 believes the conferring requirement has been met and will
18 accept 292F for filing only.

19 Trial Counsel, it's your view that you wish to have
20 time to make a submission to the commission on this issue, the
21 issue being 292? Mr. Ryan.

22 TC [MR. RYAN]: Good morning, sir.

23 MJ [COL POHL]: Good morning.

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1 TC [MR. RYAN]: Your Honor, I cannot speak to it ----

2 MJ [COL POHL]: I understand.

3 TC [MR. RYAN]: ---- for similar reasons that I raised the
4 other day. You have received a AE 003C, which is the
5 appointment of Special Trial Counsel Fernando
6 Campoamor-Sanchez, an official of the United States Department
7 of Justice, to represent the United States in all matters
8 relating to 292.

9 He will essentially stand in our place. We have
10 taken as many steps as we can think of to insulate ourselves,
11 that being the current trial team, prosecution team, from any
12 more involvement in 292 for a variety of reasons. I'm sure
13 all of which Your Honor understands.

14 So for that reason, I find myself in a strange
15 position of having to tell Your Honor that we cannot speak on
16 behalf of the United States as to these matters in 292.

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

18 I do have the submission of 292F. Defense counsel,
19 you've opposed it on two grounds, one I just talked about. Do
20 you wish to be heard on the other opposite? I don't know
21 who -- Mr. Nevin.

22 LDC [MR. NEVIN]: And I don't know that I speak for
23 everyone, Your Honor, but ----

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1 TC [MR. RYAN]: Your Honor, I'm sorry. I must raise an
2 objection to any argument, any further on 292, for the simple
3 reason that the United States does not have its representative
4 here to answer it.

5 MJ [COL POHL]: Mr. Ryan, I understand -- I note your
6 objection. Okay.

7 TC [MR. RYAN]: Okay.

8 MJ [COL POHL]: Okay. And I want to get into procedural
9 matters primarily, only. That's all I'm going to do. Your
10 objection -- you are asking me to basically grant a motion,
11 but I'm going to listen to the other side first.

12 Mr. Nevin.

13 So your objection is overruled.

14 LDC [MR. NEVIN]: Your Honor, we filed 292D and, I take
15 it, the military commission is saying that at this point you
16 want to have argument on 292F, the motion that the government
17 has filed to stop everything until they make -- file an
18 ex parte pleading with you on Monday.

19 MJ [COL POHL]: Yeah. My intent today is to try to set a
20 procedural way ahead. So that's kind of where we're at. I'm
21 going to come back to 292D in a minute.

22 LDC [MR. NEVIN]: Okay.

23 MJ [COL POHL]: But you object to the procedure proposed

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1 in 292F.

2 LDC [MR. NEVIN]: Right. On behalf of Mr. Mohammad, I do.
3 And I think the commission addressed this earlier in the week,
4 or came up with a way forward, and it involves beginning this
5 process of making the inquiry that will allow us to determine
6 what we have to do next, and we argued those matters.

7 And I made the point then, and I won't make it at
8 length again, that the question of whether there's a conflict
9 is a question both for the military commission and for counsel
10 because I have an independent ethical obligation to make my
11 own determination, and if I think there is one, to take
12 appropriate action, and I think the cases say the commission
13 has an obligation to make its determination.

14 Obviously, the government, depending on how it
15 constitutes itself for purposes of this motion or constitutes
16 its representation, plainly has a right to be heard on that
17 question as well.

18 So I don't object to the government being heard,
19 obviously. But I do object to an ex parte presentation to the
20 military commission because it's going to prevent counsel from
21 understanding what has been presented on this question that
22 counsel has an independent obligation to make a decision
23 about.

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1 MJ [COL POHL]: Mr. Nevin, let me ask this: The
2 government's requested an ex parte submission on this. I get
3 such requests on a regular basis from both sides. Okay. One
4 can request anything.

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

6 MJ [COL POHL]: It does not mean said request will be
7 granted.

8 So if your position is that you believe the defense
9 has a right to relevant evidence on this and, therefore, it's
10 not subject to an ex parte submission, I both understand that,
11 and believe that's the state of the law anyway. But if the
12 government wants to initiate it with an ex parte submission
13 and then -- they're just requesting it, as far as I'm
14 concerned. I'm not going to rule on whether it's
15 appropriately ex parte or not, because I can't do that until I
16 see the submission itself.

17 So you understand what I'm saying, what I'm telling
18 you is this: If they make an ex parte submission to the
19 government, I will consider whether it should be ex parte or
20 not, and I will inform the defense of what my decision is, one
21 way or the other, understanding where we are at. Are you with
22 me on this?

23 They're going to request something ex parte, fine.

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1 You request things ex parte, too. Some will -- a lot of times
2 it's considered ex parte, sometimes it's not. But I don't --
3 just because they're asking for it to be ex parte doesn't mean
4 it will -- or it's submitted ex parte will not necessarily
5 mean it's staying ex parte. Do you understand what I'm
6 saying?

7 LDC [MR. NEVIN]: Yes, sir, I understand what you are
8 saying. Of course, my concern is if it makes its way into
9 your consciousness on an ex parte basis, it now affects how
10 you decide the question of whether it's ex parte, and it seems
11 to me that the question of what -- that any information
12 bearing on whether there's a conflict here can't be presented
13 to the military commission ex parte.

14 I would obviously appreciate it if the military
15 commission upon reviewing it said, thank you very much, I'm
16 going to circulate this to the parties, I think that -- I
17 would be happy if the military commission did that. But my
18 concern is that if once the military commission sees it, then
19 let's say hypothetically that you say this should not be
20 presented ex parte ----

21 MJ [COL POHL]: Then it will be returned to the government
22 for a decision that they make of what they want to do next,
23 and I will ignore it. Judges do it all the time on stuff.

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

2 MJ [COL POHL]: I understand your point, Mr. Nevin, but it
3 just it strikes to me as there's no way to consider whether
4 it's appropriately ex parte unless you see it, and if I said
5 we -- judges do this all the time where if you get a piece of
6 evidence or you hear a suppression motion and you grant the
7 suppression motion or you ignore the confession or the
8 evidence that's the subject of the submission motion. If the
9 government submits it ex parte, and I look at it and say, no,
10 this shouldn't be ex parte, you have to give it to the defense
11 to decide this issue and it goes back to them and they decide
12 what they're going to do next.

13 LDC [MR. NEVIN]: I understand, Your Honor.

14 MJ [COL POHL]: Probably. There may be a scenario where I
15 would give it to the defense anyway. But I can't decide until
16 I see it, is kind of my point.

17 LDC [MR. NEVIN]: Right. I understand, Your Honor, but
18 the military commission would note my objection to ----

19 MJ [COL POHL]: Sure.

20 LDC [MR. NEVIN]: ---- to proceeding that way.

21 MJ [COL POHL]: I understand.

22 LDC [MR. NEVIN]: I guess the other point -- the only
23 other point that seems to me to be raised by the government's

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1 pleading is the suggestion that we should stop everything now,
2 and that we shouldn't consider the submission we made in
3 response to the military commission's direction.

4 MJ [COL POHL]: You're going to 292D now.

5 LDC [MR. NEVIN]: Correct. I don't mean to argue the
6 substance of it, but I mean to say I object to not arguing the
7 substance of it, to -- I think the military commission should
8 go ahead and enter the order that's requested in 292D,
9 and ----

10 MJ [COL POHL]: But I'm going to give the government a
11 chance to respond, though. I mean you've -- I understand that
12 when this came up, and I'm not -- obviously not saying the
13 defense has been late in filing things. I'm not saying that
14 at all. But what I'm just saying is you filed a 150-page
15 motion, primarily a discovery motion, I believe yesterday, and
16 the government is going to have an opportunity to provide
17 their response in writing and then we'll go from there.

18 LDC [MR. NEVIN]: Understood, Your Honor. I just ask that
19 the military commission go ahead and issue an order that gets
20 the process started at least, and object to waiting.

21 MJ [COL POHL]: Okay. Okay. As far as -- okay. I think
22 that addresses -- I don't know, any other defense counsel have
23 anything to add on -- let me break this up on 292G and F?

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1 LDC [MR. CONNELL]: Your Honor, my point on Foxtrot is
2 just a procedural one, which is that Foxtrot does not itself
3 request an ex parte pleading. What the government says at the
4 bottom of page 2, top of page 3, is that the United States
5 will also file a motion respectfully seeking permission to
6 file its submission ex parte. My only request is that we
7 have some short period of time, probably could do it in three
8 days, to respond to their request. When they do file a
9 motion, if and when they file a motion, to go ex parte, we'd
10 like to respond.

11 MJ [COL POHL]: The normal procedure will really apply.
12 You get an opportunity to respond.

13 Okay. Again, as far as 292D, the government will be
14 given an opportunity to provide a written response to that.

15 TC [MR. RYAN]: Judge, might I be heard briefly
16 procedurally as well, sir?

17 MJ [COL POHL]: Sure. Just keep it on procedure,
18 Mr. Ryan.

19 TC [MR. RYAN]: Sir?

20 MJ [COL POHL]: Procedure only.

21 TC [MR. RYAN]: Yes, sir. An important point, Judge. At
22 the point yesterday that the special trial counsel was
23 appointed, we took the steps, again as part of insulating

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1 ourselves, of removing ourselves from the distro list and
2 making it known to special trial counsel that he should do so.
3 I'm announcing this right now to just let the commission know
4 that as far as the government pleading which I believe you
5 said was 292F, we never even received that ----

6 MJ [COL POHL]: Okay.

7 TC [MR. RYAN]: ---- based on our own instructions. As to
8 the defense, I think we did receive Golf, but we would ask at
9 this point that as far as 292 is concerned, until there's
10 been -- until and unless there's been some steps taken at a
11 later point to determine that we are in fact able to view it,
12 but from this point forward, we are -- as said, we have taken
13 ourselves off the distro list, and we would ask that the
14 parties as well as the judiciary list would do the same.

15 MJ [COL POHL]: Okay. You want to be off all of the
16 distro list and that is 292?

17 TC [MR. RYAN]: Yes.

18 MJ [COL POHL]: Okay. I will inform my staff of that as
19 well as defense counsel and also comply with that.

20 That's where we are at procedurally.

21 Now, let's talk about the way ahead.

22 Ms. Bormann.

23 LDC [MS. BORMANN]: Judge, thank you.

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1 On a completely unrelated, nonprocedural matter,
2 sort of, with respect to 008HH, which was filed by us, the
3 government responded two days ago. We're in agreement, and
4 the PRT simply needs an oral order from you to allow them to
5 review my client's own generated words, which we are required
6 to mark as TS in order that we provide them back to them.

7 It is contemplated by your order, it isn't clear in
8 your order. The government believes your order allows that.
9 We believe your order allows it. The PRT does not.

10 MJ [COL POHL]: We're way out of order here, and the
11 defense has asked me to do nothing until 292, but ----

12 LDC [MS. BORMANN]: I ----

13 MJ [COL POHL]: Got it. Trial Counsel, on this issue, do
14 you object?

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

16 MJ [COL POHL]: And all he wants is me orally to say --
17 just make sure it's clear, that if the accused detainee writes
18 something in his own handwriting and it's taken out, the same
19 paper can be brought back in, reviewed for his handwriting,
20 that it went in and out. If that's -- if everybody agrees
21 with that, then you have your order.

22 LDC [MS. BORMANN]: Thank you.

23 MJ [COL POHL]: Okay.

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1 LDC [MR. RUIZ]: Judge, I'm sorry, can you indicate again
2 what you intend to put in the order as far as language?
3 That's important to us. That's the order?

4 MJ [COL POHL]: That's it. You just heard it. That's
5 what was requested. If there's a need for something in
6 writing, again, draft one for me, I will send it to the
7 government. Nobody objects, I will sign it and we can send it
8 to the PRT. That may be a cleaner way of doing it rather
9 than ----

10 LDC [MS. BORMANN]: I've been trying to do that, but the
11 PRT has told us that they will accept your oral
12 representation.

13 MJ [COL POHL]: Okay. Good. Back to 292.

14 I'm going to wait for the government's submissions,
15 both the response to 292D and whatever they want to submit,
16 but the way ahead as contemplated is this, and I know -- I
17 don't expect to hear a response from the government on this,
18 but here are orders I am contemplating.

19 One, is there a need for an order releasing
20 Mr. Harrington's DSO from the NDA, or is my previous order
21 sufficient.

22 Two, once he is released from the NDA, there will be
23 an order to hand-prepare a declaration -- these are going to

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1 come out in the fullness of time -- a declaration
2 memorializing the 6 April meeting. What I'm going to have him
3 do is do a declaration, put it in a sealed envelope, not to be
4 read by anybody, given to Mr. Harrington, who will then submit
5 it to the commission, and then we'll see where we're at.

6 Three -- and, again, similarly, Mr. Nevin, is the
7 DSO declaration will probably be given to all of the defense
8 counsel. Again, I want to look at it first to make sure
9 there's no issue. Particularly, there may be issues of
10 privilege with regard to Mr. Harrington's team, that they may
11 want to have a first look at it before it's shared with
12 others.

13 Now, the issue about conflict -- and I'm looking at
14 defense here, and I'm willing to listen to a counterargument
15 on this or an argument on it -- is that right now it appears
16 from the state of the current record, is there is some type of
17 investigation into -- by the FBI into Mr. Mohammad's team, and
18 they're all -- okay. I just want to start with that.

19 Therefore, it would appear to me at this time, no
20 matter how that plays out, there may be a need for an
21 independent counsel to advise Mr. Mohammad on the -- I'm not
22 saying there is a conflict, but the state of the record now is
23 there is. Do you disagree with that, Mr. Nevin?

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1 LDC [MR. NEVIN]: No, Your Honor.

2 MJ [COL POHL]: Similarly, given the state of the record
3 right now, is there would appear that at least on 6 April that
4 a member of Mr. Binalshibh's team was both a privileged member
5 of the team and arguably a cooperating source, or whatever the
6 technical term is, for the FBI.

7 So based on that, it would appear to me at least on
8 6 April, perhaps it no longer exists, there was also an -- at
9 least an appearance of a conflict with that particular team,
10 and in my view, therefore, may need to have an independent
11 counsel appointed at this time for Mr. Harrington's team.

12 Mr. Harrington, do you take issue with that?

13 LDC [MR. HARRINGTON]: I do not, Judge.

14 MJ [COL POHL]: Okay. Now, as far as the other three
15 teams, at this point in time, there may or may not be a
16 conflict. And based on the record that we have right now, I'm
17 not sure there is a need for independent counsel for the other
18 three teams. Right now. That need may arise, but I'm willing
19 to listen to an argument to the contrary.

20 Ms. Bormann.

21 TC [MR. RYAN]: Again, I must ask the commission not to
22 take argument on this matter. Independent -- the United
23 States is not represented in this argument.

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1 MJ [COL POHL]: I got it. I got it. Okay.

2 Ms. Bormann, I'm going to grant Mr. -- sustain
3 Mr. Ryan's objection.

4 If any of the other three believe they need an
5 independent counsel at this time, file an appropriate motion.

6 LDC [MS. BORMANN]: Okay.

7 MJ [COL POHL]: Got it?

8 LDC [MS. BORMANN]: Got it.

9 LDC [MR. CONNELL]: Your Honor, I alerted you on Tuesday
10 to some exhibits that we have that we think are relevant that
11 are privileged under the Protective Order No. 1. May we have
12 permission to file those ex parte in support of our ----

13 MJ [COL POHL]: Okay. At this time I want to make sure
14 that we all understand this because -- the government has a
15 request before me that we don't do anything more today until
16 we get their submission.

17 TC [MR. RYAN]: On 292, yes.

18 MJ [COL POHL]: On 292. Okay. Okay.

19 I do not interpret that to mean that counsel for the
20 defense can submit matters on 292. It's just that the
21 representational aspect from the government is not here and,
22 therefore, they can respond to the things in writing.

23 So your question is can the defense submit things in

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1 writing in reference to 292. My answer is yes.

2 LDC [MR. CONNELL]: Sure.

3 MJ [COL POHL]: That is with the spirit of the
4 government's position now. And I understand the government's
5 position that they're in, and that's why we're going to do it
6 that way.

7 LDC [MR. CONNELL]: Sure. More specifically, and perhaps
8 I wasn't articulate, is that we have four exhibits which fall
9 under the privilege ex parte portion of Protective Order
10 No. 1. They're already designated as privileged. And I was
11 asking leave of court to file those four exhibits ex parte so
12 that the court -- the court was very clear about, based upon
13 on the record that it has before it right now, which has
14 obvious limits to it.

15 MJ [COL POHL]: Right.

16 LDC [MR. CONNELL]: There are some matters that I have
17 that I would like to submit.

18 MJ [COL POHL]: If you want to supplement it, you can.

19 LDC [MR. CONNELL]: Thank you. And those four on the
20 ex parte basis. That's the four that I'm asking leave of
21 court for.

22 MJ [COL POHL]: As I told Mr. Nevin, same rules apply to
23 all ex parte submission. You can request that it be submitted

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1 ex parte. Sounds to me I will probably consider them
2 ex parte, but I can't say until he actually see them.

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

4 MJ [COL POHL]: You can submit them ex parte. Whether
5 they will actually be received ex parte, is second.

6 LDC [MR. CONNELL]: Understood, sir.

7 MJ [COL POHL]: Okay. Okay.

8 I believe that -- one moment, please. I just want
9 to be clear on this, that I'm not making any finding at this
10 time as to whether there is an actual or apparent conflict of
11 interest for any member of any defense team. I'm simply
12 addressing potential issues that need to be resolved before
13 completing litigation on 292. That being said, I don't
14 believe there's anything else on 292, but I may be wrong,
15 because Mr. Nevin is standing.

16 LDC [MR. NEVIN]: Yes. I probably better come here.

17 I just want to be clear that the commission is going
18 to accept the -- or the commission is going to go forward with
19 the proposal that the government will submit a pleading by
20 close of business Monday that will be -- that will be
21 considered on an ex parte basis, but the commission is
22 reserving a ruling on whether it will be accepted on an ex
23 parte basis, but that is to occur by the end of -- by Monday,

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1 correct?

2 MJ [COL POHL]: That's what the pleading says, so I assume
3 it will be.

4 LDC [MR. NEVIN]: Okay. Your Honor, I have a question not
5 on 292, but on -- if the military commission is going to
6 recess for the day, I have a question about what we do after
7 that.

8 So I don't -- but it's not about 292. Should I
9 speak to that now or ----

10 MJ [COL POHL]: Well, I know the government's position is
11 that we can do other things other than 292. My position
12 hasn't changed since Tuesday. So I understand the
13 government's position. But ----

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

15 MJ [COL POHL]: Sure, Mr. Ryan. I will always give you an
16 opportunity to present your position.

17 TC [MR. RYAN]: First, Judge, another procedural matter
18 just to clarify. We -- in asking both the judiciary and the
19 defense to remove this prosecution team from the distro list
20 for pleadings, it's probably obvious, but I should make sure
21 anyway, we would ask that special trial counsel be added for
22 purposes of all litigation of 292.

23 MJ [COL POHL]: That's -- and he will have -- we will have

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1 some way of doing that?

2 TC [MR. RYAN]: Well, I was ----

3 MJ [COL POHL]: I'm saying I'm assuming there's some way
4 technologically that can be done.

5 TC [MR. RYAN]: I'm probably the wrong one to ask, sir.

6 MJ [COL POHL]: Obviously I'm not the right one to ask, if
7 I'm asking the question, but I got it.

8 TC [MR. RYAN]: I have great faith in those who handle
9 that work, sir.

10 As far as the way forward, there are at least a
11 couple of matters, Judge, that we believe are imperative that
12 the commission consider.

13 One is 052, which requires a closed session without
14 the accused, and the other is the matter that is pending
15 regarding I believe Mr. -- of Major Wright's leaving of the
16 team, and leaving of the military service. Then, of course,
17 there are the witnesses who are present and ready to testify
18 on the 909 and the 152.

19 Thank you.

20 CP [BG MARTINS]: Your Honor, if I could just add one
21 thing to that.

22 MJ [COL POHL]: Sure.

23 CP [BG MARTINS]: We waive oral argument on 008.

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1 MJ [COL POHL]: Okay.

2 Major Wright.

3 DDC [MAJ WRIGHT]: Good morning, Your Honor.

4 MJ [COL POHL]: Good morning.

5 DDC [MAJ WRIGHT]: So I take it the trial counsel has
6 proposed that we address the issue regarding my forced
7 separation from the U.S. Army. Your Honor, if you have any
8 questions, I did tender ----

9 MJ [COL POHL]: Let me ask you this. What do you want me
10 to do?

11 DDC [MAJ WRIGHT]: Nothing at this point, Your Honor.

12 MJ [COL POHL]: Let me see if I got this straight.
13 Because quite frankly, I wasn't expecting to address this
14 today, so ----

15 DDC [MAJ WRIGHT]: Nor was I, Your Honor.

16 MJ [COL POHL]: Okay. You have been notified to attend
17 the advanced course, and if you don't attend, you will be
18 REFRAD'd?

19 DDC [MAJ WRIGHT]: Yes, sir. I can give you the brief
20 factual outline.

21 MJ [COL POHL]: Yeah. Go ahead.

22 DDC [MAJ WRIGHT]: Any Army officer who is a judge
23 advocate, upon promotion to major at some point is required to

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1 go to the Graduate Course in Charlottesville, Virginia, to
2 obtain a special degree in law, an LL.M. at the JAG school and
3 through Army process you're allowed to request a deferral for
4 operational or personal reasons. So I was granted deferral
5 for last year's Graduate Course. They typically run from May
6 of a given year to August of the following year, similar to --
7 I'm sorry, August to May, similar to any other academic
8 calendar.

9 For the 62nd Graduate Course, last year I was
10 granted a deferral and the approval authority is the Judge
11 Advocate General of the Army. This year, by administrative
12 process, I was also notified that I was again on the list to
13 attend the Graduate Course, and I was notified in January of
14 this year. And again I was given an opportunity to request a
15 deferral for operational and personal reasons, and I again
16 requested a deferral based on my representation of
17 Mr. Mohammad in this capital prosecution.

18 This year the Judge Advocate General of the Army
19 declined to accept my deferral. On 26 February of this year I
20 learned that, and under Army regulation -- I believe it's
21 600-8-2 and also Army Regulation 350-1 -- I was given 30 days
22 to either accept the orders or to reject them. The option of
23 failing to respond to the orders means I accept them by

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1 default, and that's under Army regulation.

2 There's a pleading in the record. It's just been
3 released, Appellate Exhibit AE 283, which outlines in greater
4 detail the factual scenario. But on 26 February I was given
5 the choice of either voluntarily severing the attorney-client
6 relationship and going to this course or being forced to
7 voluntarily sever the attorney-client relationship by
8 resigning from the military. And by operation of the
9 regulation, given that framework of either go to the Graduate
10 Course or resign, both leave me with the position of me
11 leaving Mr. Mohammad.

12 So on 26 March I tendered my resignation. The
13 reason is that the resignation allows me to represent
14 Mr. Mohammad that much longer. Were I to be compelled to
15 attend the Graduate Course, I would be out of the service
16 effectively of this case in July. That's the report date for
17 the Graduate Course. And I was advised by the Judge Advocate
18 General staff that for the duration of the course I would not
19 be able to work on this case, and then following the course,
20 you incur a two-year service obligation, and that I would not
21 be reassigned to the case following the completion of the
22 course.

23 So that left me with an option, do I represent the

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1 best interests of my client or do I represent the best
2 interests of the U.S. Army. And in this situation, I had to
3 choose representing the best interests of my client. So I
4 filed AE 283 to put the court on notice. I felt I had an
5 obligation as an officer of the commission to do that and I
6 also tendered a separate pleading to the court earlier this
7 week to advise the commission as to further steps that we're
8 taking to try to continue the attorney-client relationship
9 between Mr. Mohammad and me.

10 So that's the current scenario, sir. I will keep
11 the commission updated.

12 MJ [COL POHL]: Okay. At this point, you're not asking me
13 to do anything, then?

14 DDC [MAJ WRIGHT]: No, sir. There's no request for relief
15 from Mr. Mohammad's team at this point.

16 MJ [COL POHL]: Okay. And right now, your REFRAD date
17 is ----

18 DDC [MAJ WRIGHT]: Yes, sir. Right now, I received the
19 order to separate from the military -- it was actually dated
20 18 March, even though I filed my -- I tendered my resignation
21 on 26 March. But I received it on 4 March, I believe, Your
22 Honor, and my separation date when I become Mr. Wright is
23 26 August.

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1 And I have reviewed the case law -- and I don't
2 recall the name, it might be Alcott -- but I have to do
3 everything I can do, all the way up until the end to continue
4 to represent my client, which means that I will not be taking
5 transition leave, so the accrued leave days, and I would like
6 to be here for the August hearings. I do plan to be here for
7 the June hearings.

8 I don't see foresee at this point any outprocessing
9 requirements that would take me from that, but there is a
10 possibility that I may not be here for the August hearings and
11 that, as I understand it, your order to undergo about 15 days
12 of outprocessing by the local base commander and others in
13 order to go through the various Army agencies and complete a
14 checklist. And I will advise the court of when I receive this
15 checklist and what is the timeline for that.

16 MJ [COL POHL]: Are you going into the Reserves?

17 DDC [MAJ WRIGHT]: I do plan to perhaps be Inactive Ready
18 Reserves ----

19 MJ [COL POHL]: Okay.

20 DDC [MAJ WRIGHT]: ---- but I haven't proceeded any
21 further. I don't know that.

22 MJ [COL POHL]: Major Wright, I appreciate you giving me
23 the notice of this.

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1 DDC [MAJ WRIGHT]: Yes, sir.

2 MJ [COL POHL]: Generally I don't like notices without
3 people give me notice of all sorts of stuff and they don't ask
4 me to do anything.

5 DDC [MAJ WRIGHT]: Okay.

6 MJ [COL POHL]: But in this particular case, I appreciate
7 that. I think it's helpful. Given the time frames we're at,
8 if you want to request -- again, I'm not saying that I can do
9 anything ----

10 DDC [MAJ WRIGHT]: Yes, Your Honor.

11 MJ [COL POHL]: ---- the normal relief that you are
12 requesting, but it strikes to me, by the June hearings if you
13 have a pleading you wish to request relief, file it in a time
14 for the June hearings so we can address this at that time, in
15 case you don't get to come back in August, and also gives you
16 some time to be flexible on that. Okay?

17 DDC [MAJ WRIGHT]: Yes, Your Honor. Understood, Your
18 Honor.

19 MJ [COL POHL]: Thank you.

20 DDC [MAJ WRIGHT]: Thank you.

21 LDC [MR. HARRINGTON]: Judge?

22 MJ [COL POHL]: Sir?

23 LDC [MR. HARRINGTON]: Just as a procedural matter, in

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1 your oral order this morning on 292, are you going to give us
2 a written order to that effect?

3 MJ [COL POHL]: Yeah. Mr. Harrington, this is just kind
4 of the way ahead. The two on the independent counsel, there
5 will be a written order on that. The other ones may depend on
6 how things unfold.

7 The last time we met on 008, it was fully argued by
8 the defense. The trial counsel has now decided they don't
9 want to argue, but there was a -- as I recall, there was a
10 closed session on that schedule also. Is my memory correct?

11 MDTC [MR. TRIVETT]: Yes, Your Honor, I believe
12 Ms. Bormann had a submission on that.

13 MJ [COL POHL]: And we had the 505(h) hearing, I made
14 findings and said we would have a closed session on the two
15 outstanding issues on that.

16 LDC [MS. BORMANN]: I apologize. I was otherwise occupied
17 discussing other matters with counsel. I missed the
18 beginning.

19 MJ [COL POHL]: What I'm saying is last time we met, we
20 talked about 008. All of the defense counsel argued. The
21 government wanted to argue also, then the 909 issue came up,
22 and then I asked the government, do you wish to argue, because
23 we still had a closed session scheduled, and, therefore, the

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1 issue about -- arguably we could have done that at the time
2 the government requested oral argument. Now they're waiving
3 oral argument in open session.

4 LDC [MS. BORMANN]: So we only had a closed 505 because of
5 some classified elements.

6 MJ [COL POHL]: That you wished to argue, as I recall.

7 LDC [MS. BORMANN]: Okay. That's coming back to me sort
8 of vaguely. However, I'm not prepared to argue that, and I
9 think the commission can understand why. I'm currently
10 operating under a situation, and you sustained Mr. Ryan's
11 objection earlier.

12 MJ [COL POHL]: I got it.

13 LDC [MS. BORMANN]: I am going to advise the court that we
14 will also be seeking the leave to file ex parte submissions
15 that we believe may have resulted in this alleged interference
16 with the defense function by the FBI ----

17 MJ [COL POHL]: Okay.

18 LDC [MS. BORMANN]: ---- and we are also operating under a
19 conflict.

20 MJ [COL POHL]: The 292 series?

21 LDC [MS. BORMANN]: Yes, it's a 292 issue.

22 MJ [COL POHL]: Again, I -- okay. I got you, Ms. Bormann.
23 That's fine. Because quite frankly, I don't think it makes

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1 any difference whether it's an open or closed session, if the
2 issue is to resolve the conflict with counsel.

3 Again, the other day I sent the -- I did issue that
4 order about the NDA, and if there's anything -- again, I
5 expected any response from that to be submitted ex parte. I'm
6 not saying that's what you are talking about.

7 LDC [MS. BORMANN]: Right.

8 MJ [COL POHL]: But don't ----

9 LDC [MS. BORMANN]: I won't. I do have a request
10 regarding that, though. Because there was some lack of
11 clarity with respect to whom it should be sent. And that is,
12 there are members that were not technically part of the
13 defense over the years who have been subject to privileged
14 material, including the members -- the current members of the
15 PRT. And while I have, as I stand here right now, no
16 information that there have been FBI contacts with those
17 members, it is certainly given, what we now have on the
18 record, a possibility.

19 And so I would ask Your Honor to extend your order
20 to allow us to seek information from persons who -- whose sole
21 existence is to protect privilege ----

22 MJ [COL POHL]: I got it.

23 LDC [MS. BORMANN]: ---- to make sure that doesn't happen.

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1 MJ [COL POHL]: I got it. I'm going to leave the current
2 order in place pending another response from the government.

3 LDC [MS. BORMANN]: Okay.

4 MJ [COL POHL]: Okay.

5 That being said, the commission is in recess.

6 [The Military Commission recessed at 0950, 17 April 2014.]

7 [END OF PAGE]

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