[The R.M.C. 803 session was called to order at 1350, 18 October 2016.]

MJ [Col SPATH]: This commission is called to order. All of the parties are present. Mr. al Nashiri is present.

Mr. al Nashiri, I just want to ask you a couple of quick questions. You weren't here for the last session we had before lunch for about an hour, hour and ten minutes. Did you voluntarily absent yourself from that part of the hearing?

[The accused indicated a positive response with a thumb's up.]

MJ [Col SPATH]: That's a positive response. Thank you.

Did you know that you could have been here if you had wanted to be?

[The accused indicated a positive response with a thumb's up.]

MJ [Col SPATH]: Thank you. I know it was because you weren't feeling well; is that accurate?

Okay. All right. So let me know if you don't feel well and you need to absent yourself as we move forward.

Okay. Thank you.

All right. Is Mr. Quinn available to get back on the TV or the VTC?

ATC [LT MORRIS]: Yes, sir.

1 MJ [Col SPATH]: All right. Let's proceed.
2 **[Witness resumed the stand]**
3 MJ [Col SPATH]: All right, Mr. Quinn, can you hear me?
4 This is Judge Spath again.
5 WIT: I can hear you, Your Honor.
6 MJ [Col SPATH]: All right. Thank you for returning this
7 afternoon. I just remind you that you are still under oath.
8 And we begin with redirect examination from Commander Pollio.
9 Thank you.
10 WIT: Thank you.
11 DDC [LCDR POLLIO]: Sir, just before I start, any
12 documents that I intend to use, I would only be showing to the
13 witness, just to clarify that for the record.
14 MJ [Col SPATH]: No worry. Just make sure you identify
15 where they're from or if we need to mark them as an
16 additional.
17 DDC [LCDR POLLIO]: Sounds good, sir.
18 **REDIRECT EXAMINATION**
19 **Questions by the Detailed Defense Counsel [LCDR POLLIO]:**
20 Q. Good afternoon, Mr. Quinn. Can you hear me okay?
21 A. Good afternoon, Commander. I can.
22 Q. All right. Great. I just want to follow up on a
23 couple of things that trial counsel discussed when he spoke to

1 you. He went through in great detail a resourcing memorandum
2 that you signed on 31 October 2014. Do you recall that?
3 A. I recall the memorandum, yes.
4 Q. And that was your last official act as the convening
5 authority before you left?
6 A. As the legal advisor chief of staff, yes.
7 Q. And it's fair to say that this was a culmination of
8 pulling together a lot of information from both your position
9 as chief of staff and as the legal advisor?
10 A. It was an amalgam of both. It was pulling together
11 data that we had with respect to what resources were where and
12 what we had had in the past and what we envisioned for the
13 future. So it was an amalgam of both positions, but mostly it
14 was a matter of resourcing and logistics.
15 Q. And you stated you wanted to get that conversation
16 going forward, correct?
17 A. Correct.
18 Q. And this was in regard to resourcing and other
19 various items within the entire Office of the Convening
20 Authority?
21 A. Across -- well, across all of the sections. I needed
22 input from the defense on what -- by laying out a requirement,
23 this many cases, and then putting up a straw man, I wanted the

1 defense, the trial judiciary, the prosecution, I wanted all
2 sections to have an opportunity to say, in light of these
3 requirements, these are our -- these are our resource needs.
4 And we constantly talked about resources across OMC,
5 but this was a way, I thought, to formally try and present the
6 issue and have all of the different parties to the litigation,
7 all of the different sections, you know, come in and make the
8 case and justify what it is that they thought they needed in
9 order to carry out the number of cases that we were
10 anticipating.
11 Q. And, sir, you said that you wanted to get the
12 conversation going. You previously testified that you had
13 daily meetings with Mr. Ary; is this correct?
14 A. With -- with who?
15 Q. With Mr. Ary when he took over.
16 A. Yes.
17 Q. So for his entire first month on board from October 1
18 to October 30th, you had daily meetings with Mr. Ary, correct?
19 A. That's correct.
20 Q. And in these discussions, you were discussing
21 resourcing, correct?
22 A. That was often a topic.
23 Q. You testified that when Mr. Ary was considering

1 Change 1, you were not present at any of the conversations
2 regarding Change 1; is that correct?
3 A. That's correct.
4 Q. Did you have any knowledge that this change at all --
5 were people talking about this when you were in the office?
6 A. Absolutely not. No. I was frankly surprised when
7 this all blew up, I believe it was in January, because it
8 was -- it was not something that I had been a party to or
9 involved in any conversations.
10 Q. So as of October 31 when you were both the chief of
11 staff and the legal advisor, it's your testimony that there
12 were no discussions that you were aware of related to Change
13 1? I just want to ----
14 A. That's correct.
15 Q. Hold on one second. I want to show something.
16 DDC [LCDR POLLIO]: Your Honor, I'd like to publish
17 something to the witness. It is Bates number 1001500130650.
18 MJ [Col SPATH]: Hold on one moment. Has that been
19 included in any Appellate Exhibit?
20 DDC [LCDR POLLIO]: That is -- I am unsure of because,
21 unfortunately, sir, we have received these documents in
22 several formats, so I am not 100 percent sure of that. Hold
23 on one second, if I could confer with trial counsel.

1 MJ [Col SPATH]: You may. And at worst we'll mark it.
2 DDC [LCDR POLLIO]: Sir, I think for just efficiency,
3 we'll have this copy marked as the next Appellate Exhibit.
4 MJ [Col SPATH]: We'll do that. It's going to be 332V, as
5 in Victor. V.
6 Q. Sir, can you see the document in front of you?
7 A. Yes, I can.
8 Q. Okay. And this document was sent on April 9, one day
9 before your e-mail to the entire convening authority
10 clarifying who was in charge of the Nashiri case, correct?
11 A. That's correct.
12 Q. This e-mail subject matter is actually the MRI order,
13 correct?
14 A. It appears to be, yes.
15 Q. And it appears that it was sent to Mr. Toole and
16 Mr. Sheeran, correct?
17 A. That's correct.
18 Q. So you did not receive this e-mail?
19 A. Not in that initial e-mail, no.
20 Q. And to be clear, this is an order of MRI from the
21 Nashiri case, correct?
22 A. This was -- I believe this was the ruling sent by the
23 court administrator, the chief of the Office of Court

1 Administration.
2 Q. Sir, you testified earlier that after you came on
3 board, Mr. Toole was not involved in the Nashiri case
4 whatsoever. Did he discuss this e-mail or this order with
5 you?
6 A. No.
7 MJ [Col SPATH]: Commander, if you would, would you give
8 that to the court reporters so they can mark it.
9 DDC [LCDR POLLIO]: Yes.
10 MJ [Col SPATH]: **[Conferred with courtroom personnel]**.
11 332VV is a two-page document -- one-page document.
12 Sorry, one-page document. Thank you.
13 Q. Sir, I'd like to talk to you a little bit more about
14 Attachment K, which is a document trial counsel has already
15 gone over with you. I'm going to discuss that with them
16 briefly here.
17 MJ [Col SPATH]: That's from 332Y, correct?
18 DDC [LCDR POLLIO]: Yes, sir.
19 MJ [Col SPATH]: All right.
20 Q. And specifically on Attachment K, I'll be showing the
21 fifth page of that document.
22 ATC [LT MORRIS]: Just to clarify, Your Honor, this is a
23 portion that was requested to be under seal, and I'm just

1 clarifying that this is only to the witness.
2 MJ [Col SPATH]: It is -- all of these are only going to
3 the witness. Thank you.
4 Q. Sir, can you see that document in front of you?
5 A. I can see that portion of page 4.
6 Q. Okay. To be clear, what we're talking about here,
7 this is the summary that Lieutenant -- excuse me -- that
8 Colonel Sheeran drafted concerning the allegations of
9 misconduct, correct, with regard to Mr. Gill?
10 A. I assume it is.
11 Q. Do you recall seeing this -- this document before,
12 sir?
13 A. I did read it, right, but it's probably been 18
14 months since I've seen it.
15 Q. Fair enough.
16 I'd like to direct you to what is marked as paragraph
17 7, where it states that "Lieutenant Commander Gill's work
18 performance has been satisfactory at best. Mr. Toole can
19 provide more details."
20 Can you please explain why Mr. Toole would know more
21 details about Lieutenant Commander Gill's work at this time?
22 A. Because Mr. Toole was the legal advisor for a period
23 of time and then, when I came back, the deputy. And to be

1 clear, Lieutenant Commander Gill was not just working Nashiri
2 cases, he was being -- **[VTC transmission**
3 **interrupted]** -- responsibilities in the other pending office
4 of military commission cases.
5 So Mr. Toole was the one on a daily basis that was
6 seeing how Commander Gill was fitting into the process and how
7 he was coming along in his ability to perform the
8 responsibilities as a legal advisor, and not just Nashiri, but
9 in the other responsibilities in cases and motions and actions
10 that he was asked to undertake.
11 Q. Well, sir, I just want to make sure I'm clear. Is it
12 your testimony that Lieutenant Commander Gill, in addition to
13 all of the work on the Nashiri case, was also assigned other
14 tasks on other cases?
15 A. You'd have to ask Mr. Toole about that, but he was
16 one of the legal advisors. And as I testified on main direct,
17 nobody was given dedicated cases. It was -- you would work
18 the issues, you know, in a particular case, the 9/11 case or
19 Al Darbi or Hadi al-Iraqi or whatever came in, it would be
20 given to the legal advisor that was determined to be available
21 and the best fit for whatever the action was. So Lieutenant
22 Commander Gill, you know, I think was getting other work other
23 than just Nashiri.

1 Q. So even though it's been your testimony that his work
2 performance was poor, that he needed a lot of supervision, he
3 was getting other work on other cases other than Nashiri?
4 A. That's -- that's correct.
5 Q. And, sir, I'd like to draw your attention to
6 paragraph 8 of the same document. If you could read that.
7 A. Okay.
8 Q. Why would the command be concerned about hearing a
9 complaint about Lieutenant Commander Gill before it had been
10 resolved, before you even questioned him about this
11 congressional?
12 A. I'm sorry. Could you repeat the question so I can
13 understand it?
14 Q. Absolutely. I'm going to rephrase it, it was a
15 little unclear.
16 This letter you received, and trial counsel showed it
17 to you, on 22 April -- on 22 April, you had not yet talked to
18 Commander Gill. That was your testimony. Understanding
19 Colonel Sheeran's input on this matter, did you then decide to
20 talk to Lieutenant Commander Gill on the matter?
21 A. I did not seek to talk to Commander Gill to try and
22 further investigate the merits of the complaints that were
23 filed against him. I made the decision that that was

1 something that we would turn over to the Navy because we had
2 other things we needed to do in the Office of Military
3 Commissions. So the decision was to let that -- whatever
4 process needed to be worked with respect to the nonsupport
5 complaints, his security clearance and the other issues,
6 that -- turn that back over to the Navy.
7 Q. But, sir, you never investigated or asked about that
8 and you turned him over in a week-long period. If this had
9 been resolved quickly, do you not think he could have
10 continued to work for the command?
11 A. No, I didn't think he could continue to work for the
12 command, given all of the things and the issue of his security
13 clearance. It was pretty clear to me that he -- he had too
14 many issues for us to try and wrestle with, and that's why we
15 sent him back to the Navy.
16 Q. But in the letter that you did on the return to
17 service, your stated reason was a report had been made to the
18 DoD adjudication; that's correct?
19 A. I believe the security office did that, yes.
20 Q. You said nothing in that letter about substandard
21 work performance, you said nothing in that letter about
22 temperament, correct?
23 A. That's correct.

1 Q. One second.
2 DDC [LCDR POLLIO]: Sir, that's all the questions I have
3 for now.
4 MJ [Col SPATH]: Lieutenant Morris, do you have any
5 follow-up?
6 ATC [LT MORRIS]: No, sir.
7 MJ [Col SPATH]: All right.
8 Mr. Quinn, some of these I think were answered. I
9 just have some notes. I want to make sure that I have a
10 chance to ask you a couple of questions.
11 **EXAMINATION BY THE MILITARY COMMISSION**
12 **Questions by the Military Judge [Col SPATH]:**
13 Q. Do you have any personal knowledge of any occasion
14 after my order -- so after 4 March of 2015, do you have any
15 personal knowledge of a disqualified legal advisor
16 communicating with the convening authority regarding
17 recommendations or decisions to be made in this case?
18 A. I have no personal knowledge that that ever occurred.
19 And it did not occur during the time that I was back.
20 Q. So I recognize that before you were there, you have
21 an impression it did not occur based on your time there, and
22 then from your -- from when you arrived forward, you are
23 stating it did not occur?

1 A. That's correct, Your Honor.
2 Q. And all right -- believe me, if you want to correct
3 me or something, please let me know.
4 From what I gather, you did not have a private
5 conversation that you recollect with Mr. Toole related to a
6 ruling I made in the case, and that's in reference to the MRI
7 order; is that accurate?
8 A. That's correct.
9 MJ [Col SPATH]: Defense Counsel, any questions based on
10 my questions?
11 DDC [LCDR POLLIO]: No, sir.
12 MJ [Col SPATH]: Trial Counsel, any questions based on my
13 questions?
14 ATC [LT MORRIS]: No, sir.
15 MJ [Col SPATH]: All right. Mr. Quinn, I'm going to have
16 you depart in a minute. What I want to do, I'm going to give
17 you a standard order. It relates to this motion. I don't
18 think it will surprise you. This motion's not likely to be
19 resolved during our session this week. It's probably going to
20 take another session down here to finalize. And so I'm going
21 to give you an order, and that is not to discuss your
22 testimony or your knowledge of the case in relation to this
23 motion and your testimony here over the last few hours until

1 this issue has been decided. Do you understand my order?
2 WIT: I do understand, Your Honor.
3 MJ [Col SPATH]: I know you traveled, so thank you very
4 much for traveling to testify and thank you for your
5 testimony.
6 WIT: Thank you, sir.
7 MJ [Col SPATH]: All right. We can disconnect.
8 **[The witness was warned, excused, and the VTC was terminated.]**
9 LDC [MR. KAMMEN]: Your Honor, if I may.
10 MJ [Col SPATH]: You may.
11 LDC [MR. KAMMEN]: Regarding Mr. Gill, I just want to
12 update the commission.
13 As I think everyone is aware, last night as a matter
14 of courtesy, I sent Mr. Gill an e-mail indicating that you had
15 denied his motion for relief and suggesting to him in my role
16 as an officer of the court that he ought to reach out to the
17 prosecution. I understood from the prosecution as of this
18 morning that he had not. I suspect that remains the case.
19 He apparently, however, has reached out to Lieutenant
20 Commander Greg Young, who works in D.C. at the Office of
21 Military Commissions, who advised us that he received a call
22 from Lieutenant Commander Gill this morning. He acknowledged
23 that he received my e-mail and that you had denied his

1 request, and at least I understand it's been overtaken by
2 events, but he was aware you were considering, as of last
3 night, issuing a warrant.
4 Mr. Gill told Lieutenant Commander Young that he is
5 traveling today to support a military funeral. And while he
6 can view his e-mail, he cannot send a response. He asked
7 Lieutenant Commander Young to relay that Mr. Gill intends, as
8 soon as he has e-mail access, to file a response for
9 reconsideration by e-mail, which apparently will be sent to
10 General Martins, and advised that he would be requesting the
11 judge -- or essentially ask somebody, us, I guess, to request
12 the judge grant him 24 hours to file his request before taking
13 any further action.
14 I understand you've issued the warrant, the writ of
15 attachment. I just wanted to make the record clear as to the
16 status of events. To be clear, Lieutenant Commander Young
17 says he did not discuss any substantive issues with Lieutenant
18 Commander Gill regarding his concerns, and he did say
19 Lieutenant Commander Gill indicated in passing that he might
20 be willing to testify via VTC from the Naval War College. But
21 again, I assume that ship has long sailed.
22 So I just wanted to make the record clear as to our
23 most recent communication.

1 MJ [Col SPATH]: All right. Thank you, Mr. Kammen.
2 TC [MR. MILLER]: Thank you, Your Honor. At this
3 juncture, Mr. Gill has forfeited his right to make demands on
4 the court. My information is that he has been taken into
5 custody and that he -- although I don't know beyond that. It
6 just happened very recently. So I suspect that we'll be
7 notified shortly as to his whereabouts, what the housing
8 arrangements are, and what the court's preferences are as far
9 as getting him somewhere or getting him to the Mark Center so
10 that he can testify.
11 My at least initial impression is that would probably
12 be, at the earliest, tomorrow morning. That's -- as soon as I
13 have more information -- I don't want to give the court ----
14 MJ [Col SPATH]: No, I appreciate that.
15 TC [MR. MILLER]: So thank you, sir.
16 MJ [Col SPATH]: Thank you. Thank you, Mr. Kammen. Thank
17 you, Mr. Miller.
18 Assuming -- and I realize we're all dealing with
19 information being reported to us, so we don't know where we're
20 at, if that is accurate and there is a discussion about my
21 preference, my preference would be the sooner the better to
22 have him testify. I don't want him held any longer than need
23 be because I don't want it to be any more punishment than it

1 needs to be to get him here to testify -- to the Mark Center
2 to testify.
3 TC [MR. MILLER]: We understand that, Your Honor. Excuse
4 me. We understand the court's preference.
5 In the unlikely event we can get him to the Mark
6 Center tonight, would the court be interested in taking his
7 testimony tonight? By tonight, I mean 6:30, 7:00.
8 MJ [Col SPATH]: The issue -- would I be interested, yes.
9 It probably won't be feasible, just because of the timing of
10 transporting Mr. Nashiri, and making sure he has the right to
11 be here and with the guard force and all. And so just update
12 us as you find out this afternoon and we can readdress.
13 But what we'll do, in all likelihood, is make a good
14 start time tomorrow to have his testimony first up.
15 TC [MR. MILLER]: All right. Thank you, Your Honor.
16 MJ [Col SPATH]: Thanks for the update.
17 All right. In relation to 332, there were other
18 requests for witnesses. I was going to have a discussion
19 about those, but now that it appears there's a possibility we
20 might have Mr. Gill testify while we're here, I'm just going
21 to hold off on 332 until we either hear more of an update or
22 we have Mr. Gill's testimony completed. And then, Mr. Kammen,
23 I told you I would happily at that point listen to any more

1 argument about witnesses I had denied, since we did not have
2 any oral discussion about that, it was a written ruling, and
3 then any outstanding discovery you think you're entitled to
4 based on the motion practice thus far, and I did order some
5 discovery turned over. But I think all of 332 we can just put
6 on hold, and we can come back to 332 depending upon the
7 update.
8 Let's hopefully resolve issues with 355 then. So
9 first for some background on 355 -- and, Mr. Kammen, I know
10 you have some additional information that you want an
11 opportunity to present. Let me give some background first and
12 then we'll figure it out.
13 Before we closed the September session, so that was
14 Friday, 9 September, General Martins offered to provide the
15 commission -- me, in particular -- a binder, to use the words
16 used there, containing Appellate Exhibit 355 discovery for an
17 ex parte review. The offer was it would be provided right
18 after this. I went back to go through the record to make sure
19 I had the wording correct. So part of this, I think, is the
20 rules of the court and filing and maybe some confusion as to
21 where to go from there, because we got off the record
22 reasonably quickly after that, if you remember. But it was my
23 impression that there was a binder in existence and it was

1 going to be delivered to me, frankly, right after the session
2 ended.
3 I had the legal advisor for me go out and ask, and it
4 wasn't going to be as easy as that, apparently. So there was
5 no delivery at that point right after the session of any
6 binder. I did get a binder after some back and forth between
7 the court reporters and the prosecution and the judiciary
8 staff and the prosecution. Ultimately we got it on Saturday,
9 10 September, and it was part of an ex parte pleading. Or I
10 might have gotten it the night of 9 September. I reviewed it
11 on the airplane on 10 September. I think I did get it late in
12 the evening on -- or in the evening on 9 September, but it was
13 after 7:00, I know that for sure.
14 I reviewed it informally on the plane because the
15 acceptance of it didn't occur until 12 September because of
16 the operation of the rules of court. Even though it was
17 filed, we didn't accept it until then. But I saw a copy long
18 before 12 September. My understanding at the conclusion of
19 the day and then when the binder of information was presented
20 is that it contained the responsive documents. Then on 29
21 September we received a second ex parte pleading, 355K, which
22 was given -- or which contained additional documents.
23 355E is the first one, 355K is the second one. So I

1 just -- I want to ask a few questions to make sure I
2 understand where we're at and what I have. I think I do.
3 I've reviewed the submitted documents, but just a few
4 questions, General Martins.
5 CP [BG MARTINS]: Can I go to the podium?
6 MJ [Col SPATH]: On 9 September when you said I have a
7 binder available that I'm happy to give to the court for an
8 ex parte review, was there an actual, physical binder in
9 existence printed somewhere at that time?
10 CP [BG MARTINS]: Your Honor, we did. We had a binder of
11 responsive e-mails. We didn't have it indexed to a standard
12 that we thought allowed us to be able to provide it to you
13 immediately, and we wanted a copy of whatever we gave the
14 court. So that's what caused us to need a little bit more
15 time.
16 MJ [Col SPATH]: And without disclosing contents
17 necessarily, there was an index that then was put on 355E
18 describing the contents in good detail, and then 355K as well.
19 So was that what caused the pause from right after
20 court until later in time?
21 CP [BG MARTINS]: Correct. We were seeking to get a
22 filing designation to figure out precisely how -- and once it
23 wasn't going to go directly to your staff right after court --

1 I recall Mr. Sims actually coming and asking for it. When
2 that wasn't going to be possible, we then realized we needed
3 to file something, provide a notice of an ex parte filing,
4 et cetera, and that had -- there were rules of court for that.
5 So we were trying to interpret those and provide that to the
6 commission.
7 MJ [Col SPATH]: The binder that I got -- and, again, be
8 it the evening of 9 September or at the airport on 10
9 September, I don't know. I know when I physically had my
10 hands on it so that I could review the information. The
11 binder that was turned in with the index, did it contain the
12 same physical information, all of the same physical
13 information that was in the binder that you referenced in
14 court?
15 CP [BG MARTINS]: It is what I was referencing in court,
16 except for the index.
17 MJ [Col SPATH]: So 355E -- I realize additional documents
18 were discovered down the road.
19 CP [BG MARTINS]: Correct.
20 MJ [Col SPATH]: 355E contains all of the documents that
21 were in the original binder being referenced.
22 CP [BG MARTINS]: That's what we had as of that date. And
23 it was a continuing discovery request, and there was a -- you

1 know, we were continuing to feel we were under the obligation
2 to look and ----
3 MJ [Col SPATH]: So after looking after that session ----
4 CP [BG MARTINS]: Yes. Yes.
5 MJ [Col SPATH]: ---- 355K came into existence.
6 CP [BG MARTINS]: Correct.
7 MJ [Col SPATH]: All right. Probably a little more
8 complicated than anticipated. Maybe I should have been more
9 clear or stayed here to take physical possession. Because I
10 do worry about it, and I think fair, the perception you all
11 tell me you do, and I believe that, and you all, of course,
12 do, and I believe that, was that it was going to be delivered
13 right then and that's what I wanted to ask is kind of what
14 happened and make clear for the record what had transpired
15 after the session.
16 So at this point, as far as you know in response to
17 the defense discovery request, you are current with the
18 information you have in your possession?
19 CP [BG MARTINS]: Correct.
20 MJ [Col SPATH]: And both of those, I realize, are under
21 seal. Okay.
22 All right. Thank you, General Martins.
23 CP [BG MARTINS]: Your Honor, are we going to have time

1 for additional discussion of this?
2 MJ [Col SPATH]: Yes. Yes. I wanted to -- I just wanted
3 to make the procedural history clear.
4 Now, Mr. Kammen, in regard to your additional
5 information, is this in relation to -- because 355 is a motion
6 to compel right now and it's to get you information that I
7 know you believe will lead to additional information in a UI
8 motion of some sort.
9 So I want to focus in on the motion to compel now.
10 So the additional information you have, is that going to the
11 motion to compel, offering more information on that? All
12 right. Then, please -- those were "yes" to the last two
13 questions. Make sure you use the microphone, Mr. Kammen.
14 LDC [MR. KAMMEN]: I apologize. If I may just approach
15 the ----
16 MJ [Col SPATH]: **[Conferred with courtroom personnel]**.
17 LDC [MR. KAMMEN]: Your Honor, the starting point is that
18 the government bears a heavy burden of justification when
19 ex parte communications between a prosecution and a court are
20 discovered. And I want to direct the court's attention to
21 United States v. Barnwell, 477 F.3d 844, a decision of the
22 Sixth Circuit Court of Appeals which reversed a criminal
23 conviction after discovery that there had been ex parte

1 communications between the prosecution and the judge. And the
2 court goes on to say, "Because in addition to defense counsel
3 not knowing the substance of these ex parte communications,
4 they had no knowledge that the communications were taking
5 place." Exactly what occurred here.
6 As stated during oral argument, Barnwell's counsel
7 were mushrooms kept in the dark. Same thing. "Moreover, not
8 only" -- and I'm quoting Barnwell again, "Moreover, not only
9 was there fluid ex parte conversations between government
10 counsel and the trial judge, but during adversarial
11 proceedings, they appeared to be taking turns moving the
12 proceeding in the direction most favorable to their joint
13 enterprise."
14 MJ [Col SPATH]: I don't have Barnwell handy and I don't
15 have any -- I may never have read it, I'm not sure. Let me
16 ask this question about it: What were the substance of the
17 communications in that case? What did they identify the
18 substance to be?
19 LDC [MR. KAMMEN]: They were ----
20 TC [MR. MILLER]: Your Honor, before we do that, could we
21 just have a cite?
22 LDC [MR. KAMMEN]: Yes. I gave it.
23 TC [MR. MILLER]: I'm sorry.

1 LDC [MR. KAMMEN]: 477 F.3d 844.
2 TC [MR. MILLER]: Thank you.
3 MJ [Col SPATH]: Sixth Circuit case.
4 LDC [MR. KAMMEN]: Yes.
5 MJ [Col SPATH]: I'm curious about the substance of the
6 communications going from a prosecutor or prosecution team to
7 the judge.
8 LDC [MR. KAMMEN]: And I get -- I want to be clear, I
9 don't recall specifically. I gather from what I have just
10 read that it was how do we move the case in this direction.
11 Because as the court says, "During adversarial proceedings in
12 open court, they appeared to be taking turns moving the --
13 moving the proceeding in the direction most favorable to their
14 joint enterprise."
15 It goes on to say, "This approach, whereby the trial
16 judge informed the government that they will handle the matter
17 jointly, had conversations off the record before putting them
18 on the record, and worked together in a spirit of cooperation
19 to protect the government's interests constitutes a violation
20 of Barnwell's constitutional rights."
21 Now, I've taken the -- what I'd like to do, because I
22 don't know that it was clear from our argument, and we were
23 concerned -- we understood, as apparently you did, that there

1 would be one transmission -- and, again, to put this in a
2 context, what we've learned today is particularly alarming.
3 You know, we made the request, and the prosecution essentially
4 acknowledged the existence of ex parte communications on -- we
5 made the request on 7 July and they responded that our request
6 was overbroad and then subsequently we filed in this court.
7 As we argued before, our position was that once they said it
8 was overbroad, that was essentially an admission, which we
9 know to be true, that there were ex parte communications. I
10 cannot imagine a world in which, when a litigant, a lawyer,
11 knows that the subject of the ex parte communications -- we
12 have been completely transparent that we think this is beyond
13 unethical, that ----
14 MJ [Col SPATH]: Part of it -- part of it would depend on
15 the substance ----
16 LDC [MR. KAMMEN]: Well ----
17 MJ [Col SPATH]: ---- of the communications, is that ----
18 LDC [MR. KAMMEN]: Well, may I?
19 MJ [Col SPATH]: You may, but I just -- it's important
20 because the rules that we operate under, at least in the
21 military, for our ethical rules are very similar to my state,
22 which is fortunate. And so there is the capacity for me to
23 have an ex parte communication about a purely administrative

1 matter ----
2 LDC [MR. KAMMEN]: Yes.
3 MJ [Col SPATH]: ---- with an exception, which is, I do
4 then -- the way I read the rule, and I think it's very clear,
5 and I tell the trial judges, if you and I were to have an
6 ex parte administrative conversation ----
7 LDC [MR. KAMMEN]: Right.
8 MJ [Col SPATH]: ---- I would then notify the government
9 of the conversation and the substance of that.
10 LDC [MR. KAMMEN]: Yes. Absolutely.
11 MJ [Col SPATH]: No dispute. Okay.
12 LDC [MR. KAMMEN]: Okay. And so ----
13 MJ [Col SPATH]: And there's nothing improper about purely
14 administrative.
15 LDC [MR. KAMMEN]: And -- but when you keep the other side
16 in the dark, which is what occurred here -- and, again, a
17 trial judge -- a trial situation is extraordinarily different
18 than an appellate court.
19 In a trial court, there will be times, certainly just
20 referring to state or even federal court, you know, where I
21 might call the clerk of the court and say, something has come
22 up, I'm going to be late. Would you advise the judge? Or
23 they may say, you talk to the judge. And that sort of thing

1 happens. That, we understand. But then the judge would say,
2 you know, call the prosecutor. Tell him. You know. No one's
3 kept in the dark.
4 But an appellate court, again, operates on a
5 different timeline. Appeal's filed, briefing schedule is set.
6 If the court is going to hear oral argument, oral argument is
7 set. The court hears oral argument. In the absence of some
8 emergency, these things just happen.
9 And that's why when we argued before, I said -- and
10 all of my experience and the experience of every other
11 appellate lawyer I've spoken to, nobody can recall this kind
12 of situation. Nobody has ever encountered this before, where
13 there are apparently more than one or two ex parte
14 communications between a litigant and an appellate court or
15 the court's staff where the other side is kept in the dark.
16 Now, it is not surprising to me, and, in fact, I
17 would have expected that when we were in court that, at a
18 minimum, the prosecution would have all of the e-mails in a
19 format so that if you said turn them over, they would walk
20 over and hand them to us. Or if you said, I want to review
21 them in camera, they'd have walked up and handed it to you.
22 The notion that we now have two productions is particularly
23 troubling because that shows a pretty shocking indifference to

1 the gravity of this situation; the fact that they didn't find
2 them the first time and had to go back.
3 And our concern, Your Honor, is that, as you reviewed
4 these, that the context -- and again, we're quoting Barnwell,
5 like mushrooms in the dark here, there's obviously something
6 and we have no idea what they are. So what I wanted to do,
7 with the court's permission, is take you through the timeline
8 so that whatever you have in front of you, you can put in the
9 context.
10 MJ [Col SPATH]: Yes. And I want you to do that. I want
11 to highlight -- I think what's important for the discussion.
12 And without yet disclosing anything in either filing from the
13 government, your discovery request on 7 July 2016, it came
14 from Commander Pollio, and from what I -- that's why I had the
15 discussion with General Martins. The discovery request is
16 what led to the creation of the binder ----
17 LDC [MR. KAMMEN]: Right.
18 MJ [Col SPATH]: ---- 335K, in anticipation of maybe a
19 court order or something or -- 355E, sorry, the first one.
20 And then recognizing an ongoing potential for discovery, the
21 second disclosure was put together, 355K, and that's what's
22 important.
23 So in the discovery request, the request was for all

1 ex parte correspondence or communications between counsel or
2 agents of the government, not just the prosecution, and the
3 United -- U.S.C.M.C.R. And the U.S.C.M.C.R. was then designed
4 to be judge's clerk and staff. And then the government was
5 widely defined as government agency, office of personnel,
6 contractor, and anyone else, and it went through DoD, OMC,
7 convening authority, prosecutor, FBI.
8 So I will say there's an issue there, which is,
9 that's a broad request. And so gathering the documents -- I
10 know you're going to say, but why are there all of these
11 discussions? We'll get there, I promise.
12 The motion to compel is government counsel and the
13 U.S.C.M.C.R. And so the first thing is there's just -- it's
14 disconnected and it's -- I think it's important for all of us
15 to understand that, that when the prosecution team went out
16 and put together the two filings, they were responding to a
17 much broader request than what was filed for me as a motion to
18 compel.
19 And I think that's important, because again, without
20 disclosing the contents yet, I will tell you there are two
21 e-mail chains, two, involving, one, General Martins and, one,
22 a government representative. Only two. And as you said I
23 think a moment ago, one or two, you might expect. That's it.

1 From what I've been provided, and I -- again, as officers of
2 the court, I believe I have the filings.
3 And so I think that's important to make sure that
4 we're clear with, here's our discovery request and here's our
5 motion to compel. They're not the same.
6 LDC [MR. KAMMEN]: Right. I understand.
7 MJ [Col SPATH]: Okay. That's why I have multiple pages
8 that do not comport with the motion to compel.
9 LDC [MR. KAMMEN]: Okay.
10 MJ [Col SPATH]: If that makes sense.
11 LDC [MR. KAMMEN]: It does. Although why some of the
12 others would be communicating with the C.M.C.R. is troubling
13 as well, but we certainly made the judgment because we didn't
14 want to -- look, we need to get to the bottom of this. And we
15 don't want to be sitting here a year from now fighting over
16 whether the discovery request is overbroad. Frankly, the fact
17 that we're having this discussion at all is -- is
18 breathtaking.
19 You know, if -- the fact that it's not just the
20 prosecution but other government agencies that are trying to
21 influence the C.M.C.R. ----
22 MJ [Col SPATH]: Well ----
23 LDC [MR. KAMMEN]: And, again, I don't know.

1 MJ [Col SPATH]: ---- I understand.
2 LDC [MR. KAMMEN]: But that is a crime. That is a -- and
3 frankly, if General Martins or the prosecution is aware that
4 the FBI or someone in the Department of Defense is trying -- I
5 would expect them to be reporting that to the proper
6 prosecuting officials and to the commission and, frankly, to
7 the defense. I mean, I wouldn't think it would take a motion
8 to get the prosecution to report unlawful influence activity.
9 Now, again, you know, if the FBI is sending a note to
10 the C.M.C.R. saying we want to have an agent there and so
11 start the argument at 10:00, that's certainly not criminal,
12 but it also ought to be disclosed. I mean, because it's
13 benign. But if the, you know, the Department of Defense is
14 saying to the C.M.C.R., decide this case on such and such a
15 day so that Judge King can leave, that's pretty bad. That's
16 criminal. That's unlawful influence.
17 And frankly, we shouldn't have to jump through these
18 hoops, because that's the only point of Barnwell. You don't
19 leave the other side in the dark.
20 Now, let me just -- I mean, so you know, I mean ----
21 MJ [Col SPATH]: Yeah, the timeline, I am interested.
22 LDC [MR. KAMMEN]: Let me put this in a context. And I've
23 provided -- we -- I can make this a filing, a supplemental

1 filing and give it another AE number. That might be the best
2 way to do it.
3 MJ [Col SPATH]: We're on 355L, as in Lima. Steal your
4 thunder while you're there. I know you've shown it to the
5 security officer already. Thank you.
6 Make it a supplement to 355. And, Trial Counsel, you
7 certainly will have the opportunity to respond in writing, to
8 respond, if you need to at any point.
9 CP [BG MARTINS]: I'm sorry. In writing?
10 MJ [Col SPATH]: If you want to respond in writing to 355,
11 the supplement, you will certainly have the opportunity.
12 CP [BG MARTINS]: I see. Thank you, Your Honor.
13 MJ [Col SPATH]: I'll hand it right to you, Mr. Kammen.
14 Let me just take a look.
15 LDC [MR. KAMMEN]: I actually have a copy, if you ----
16 MJ [Col SPATH]: Oh, okay. Good. Then let me -- okay.
17 LDC [MR. KAMMEN]: And this has been cleared so that this
18 can be shown to whoever.
19 MJ [Col SPATH]: Yes.
20 LDC [MR. KAMMEN]: The starting point of all of this is on
21 April the ----
22 MJ [Col SPATH]: And let me just for display purposes for
23 the technical support, you can put it up on all of the

1 screens.

2 LDC [MR. KAMMEN]: The starting point on all of this for
3 purposes of this discussion occurred on 29 April when the
4 government filed the motion in the C.M.C.R. saying to lift the
5 stay of proceedings on the grounds that the judges of that
6 court had been properly reappointed. I don't want to revisit
7 the Dalmazzi issue, but this really does intertwine with the
8 Dalmazzi issues concerning the prop -- whether these judges
9 were properly reappointed. There is a great deal of overlap.
10 Two days later, the clerk notified the defense and
11 the prosecution that the court was considering an oral
12 argument on June 2nd or 3rd. We -- the defense was in Saudi
13 Arabia at the time and asked the court to decide scheduling
14 after we had a chance to respond. We were pretty busy.
15 After we returned from Saudi Arabia, before the
16 motion -- before there was a formal motion -- before the stay
17 was lifted, the prosecution notified the C.M.C.R. of its
18 intent to file a supplemental briefing in the first appeal.
19 The prosecution, in that notification, told the C.M.C.R. that
20 they understood that, in light of the magnitude of their
21 supplemental briefing, we might -- we, the defense, might be
22 requesting additional time.
23 Now, remember, the stay has not been lifted. There

1 is no order lifting the stay, but the clerk instructed the
2 prosecution to get us the brief anyway and then said -- and
3 you can -- said to the government, the prosecution, you can
4 file it after the stay has been lifted.
5 Now, the next relevant date -- I don't know how you
6 make this work, but -- is 16 May in which we, the defense,
7 filed a motion requesting the C.M.C.R. not to lift the stay
8 and filed a series of motions requesting that the two military
9 judges recuse themselves because they had essentially a
10 financial stake in the outcome of their decision because we --
11 the question was, are they still in the military or have they,
12 by operation of law, resigned their commission. And if they
13 had, they would have forfeited pension rights and a host of
14 other rights that we understood would be pretty significant.
15 And also, we -- and requested that essentially the
16 court -- these judges recuse themselves and -- and we also
17 requested that the C.M.C.R. certify this matter to the
18 D.C. Circuit. Let a neutral court decide it.
19 Now, these were significant pleadings. And 18 May
20 they're denied out of hand. You know, if we thought that the
21 C.M.C.R. was a real court that gave real, you know, service
22 to, you know, real lawyers, then this would be a different
23 issue. But remember, the C.M.C.R. has never been affirmed on

1 a major issue by the D.C. Circuit. It is zero for lifetime.
2 So okay, we understood.
3 On 20 May, we were in Guantanamo at the time for a
4 client visit. We filed a request for additional time to
5 respond to the government's additional brief, which was quite
6 lengthy, and that request was denied out of hand the same day,
7 at 8:30 that night.
8 Now, as we piece things together, between 20 May and
9 2 June, two things are going on in the background. The first
10 thing that is going on is that the C.M.C.R., which -- I mean,
11 we didn't have time to respond to the government's brief,
12 their supplemental brief. But without allowing us to respond,
13 we -- you know, without giving us additional time, the
14 C.M.C.R. was drafting its opinion overruling Your Honor based
15 on what the government argued in its supplemental brief. And
16 that was going on behind the scenes.
17 Additionally at this time, somewhere along in this
18 time, Judge King is trying to leave the C.M.C.R. and he was
19 seeking reassignment. So all of those things -- and wanted to
20 go to another assignment in San Diego and was essentially
21 wanting off the court. And it's unclear, but all of that is
22 going on in the background between 20 May and 2 June. And to
23 be specific, on -- prior to 2 June, Judge King, one of the

1 panelists on the first Nashiri case, was requesting release
2 from the C.M.C.R., as well as reassignment from the
3 Navy-Marine Court of Criminal Appeals. And that was pending
4 approval by the Department of Defense general counsel,
5 apparently within the bureaucracy. And this comes from the
6 pleadings in the C.M.C.R.
7 We have the oral argument on 2 June and, according to
8 the C.M.C.R., for the next several hours, they -- the three
9 judges meet and are finalizing their opinion. Now, on 3 June,
10 Judge King departs the Washington, D.C. area and apparently
11 was preliminarily released from his assignment at the Navy
12 Marine Court of Criminal Appeals. According to the C.M.C.R.
13 in pleadings and in their filings, because the opinion had
14 apparently been drafted in advance and finalized on June 2,
15 Judge King did not participate -- and this is important -- in
16 "any substantive," and that's quotes -- "any substantive
17 actions after leaving the D.C. area and after preliminarily
18 ending his duties with the Marine Corps court."
19 Now, none of that background about Judge King wanting
20 to leave, about the opinion being written in advance, was
21 disclosed to the defense for months.
22 Now, on June 9, the C.M.C.R. gets around to releasing
23 the opinion that had been written and apparently finalized on

1 June 2. And on June 14, and this is what alerted us that
2 there was something peculiar going on, there was a request by
3 the government that the C.M.C.R. authorize public release of
4 the opinion so that the government could attach that opinion
5 to a Rule 28(j) filing in the United States Court of Appeals
6 for the D.C. Circuit which, of course, was Nashiri II in that
7 court.
8 And the significance of all of this is that one of
9 the issues in the oral argument in the D.C. Circuit was the
10 fact -- and this was alluded to in the opinion and the
11 prosecutors talked about it earlier, one of the things that
12 was alluded to is if the government -- if the D.C. Circuit
13 didn't reach the issues that we wanted it to reach, either by
14 mandamus or habeas, and instead ruled as it did, that we had
15 to go through the whole process, they might not see the case
16 again until 2024.
17 So our suspicion -- and I will be clear, this is a
18 suspicion, was that there was pressure in the C.M.C.R. to have
19 a decision and to get the commissions back on track so that
20 the Government, big G, could go to the D.C. Circuit and say,
21 it's all good in Guantanamo. So all of this was theater so
22 that they could file the -- a series of 28(j) letters in the
23 D.C. Circuit.

1 In any event, these two communications at 5:27 and --
2 1727 and 1728 on 14 June were sufficiently complicated that it
3 looked to us as though they were really memorializing
4 something that had really been discussed earlier, and that's
5 what caused us to become suspicious.
6 Now, on 23 June, and this is particularly important,
7 I think, both for this court and for the Dalmazzi C.A.A.F.
8 court, if -- on 23 June, we -- both parties received a notice
9 that Judge King had recused himself from any further
10 participation in the al Nashiri C.M.C.R. matter.
11 Now that's actually quite disingenuous. Judge King
12 had left the court. And that's important because the
13 D.C. Circuit in Nashiri I essentially suggests that to fix the
14 problem of principal officers, there has to be an appointment
15 similar to an appointment in a federal court. Now, when a
16 federal judge recuses himself from a case, he says for some
17 reason -- one reason or another, I should not sit on this
18 case. And that is way different than when a federal judge
19 resigns. When a federal judge resigns from the court to take
20 another job, he resigns from the court and moves on.
21 And so the notion of recusal -- Judge King saying he
22 had recused himself was troubling. And so we asked that he
23 identify why. And then there was an e-mail exchange that

1 essentially said if he's going to tell you, he will do it by
2 tonight. And to this day, we don't -- I mean, we know that
3 essentially it wasn't a recusal, it was a reassignment. The
4 fact that it is a reassignment essentially demonstrates that
5 the government's proposed fix that got this all started was
6 not a fix at all. But that's for a different court and a
7 different situation. I understand that.
8 But it really does cast serious doubt on whether or
9 not Judge King was properly appointed to the C.M.C.R., because
10 again he -- he accepted reassignment, which is completely
11 different and essentially was the problem before, that
12 military officers come and go.
13 Now, in this same memo, the parties learned that
14 Judge King had been replaced by Judge Burton, also military
15 judge, and her -- the day or two after on 24 June, briefing
16 was completed on the second appeal. Now, if you will recall,
17 the second appeal was a quite complicated issue. It started
18 out as an aggravator but then it became a change in theory of
19 defense -- or theory of prosecution. There was extensive
20 argument in this court, there was extensive briefing. And,
21 you know, and so this was quite a complicated appeal.
22 The next relevant date is 28 June, because -- by this
23 time, of course, we know that Judge King has gone. We don't

1 know why he's recused himself. And as we pieced things
2 together, we thought that this was -- that part of the problem
3 was that essentially what drove the court, the C.M.C.R., to
4 hurry the case along, at a minimum, was Judge King's desire to
5 accommodate his own personal schedule. We also had the
6 suspicion that it was to influence the D.C. Circuit. But as
7 we raised in our writ of error coram nobis, it would be
8 improper for a judge who's under some kind of timeline to
9 hurry a case along. I mean, at least it would be
10 questionable, and as we pointed out in the writ of error coram
11 nobis, there's a great deal of authority which indicated that
12 that casts doubt on the integrity of the process.
13 Predictably, the C.M.C.R. suggested, well, that
14 doesn't even merit a response and -- you know, and it sort of
15 was floating out there.
16 Now, again on July 7th, we sent the discovery
17 request. And frankly, we wanted to be as -- what's the right
18 word? -- as broad as possible at that point because it -- we
19 felt fairly clear that there had been some kind of improper
20 communications. But it didn't occur to us that it would ever
21 be between the prosecution and the court because that is so
22 outside the pale of what is appropriate and because every
23 state and every military jurisdiction, every service branch,

1 has rules that prohibit anything but the benign kind of
2 ex parte communications that you refer to. So you know, our
3 suspicion was, well, you know, maybe somebody else was acting
4 as a straw man and sort of, hey, how about this, or hey, how
5 about that.
6 Well, as the discussions unfolded, it became -- I
7 think after we got the prosecution's overbroad response, our
8 suspicion was, no, these communications perhaps were directly
9 between the prosecution and the court.
10 And so, on 8 July, the C.M.C.R. -- now, they didn't
11 hold oral argument on the second appeal. Judge Burton --
12 Bruton -- Burton had been on the court two and a half weeks
13 and they decided in a unanimous decision that you should be
14 reversed. And then -- only then, a week later -- and of
15 course, Judge King wasn't part of this, but he is released
16 from the C.M.C.R. on 14 July, but retroactive to 3 June.
17 And so then, of course, on 23 August, the writ of
18 error coram nobis was decided. Again, like in Barnwell,
19 the -- we're mushrooms here and we're in the dark. So we
20 don't know, and -- and this seems to me to be incredibly
21 simple. If these communications are benign, why the
22 prosecution would resist giving them up is absolutely
23 unfathomable. And if you think they're benign, we ask you to

1 give them up because, frankly, if we don't have them -- and I
2 don't want to go down this road unless I have to -- but we are
3 obligated as officers of the court probably to notify various
4 disciplinary agencies of the various bars of the people who
5 are involved of this situation, and they may want to see them.
6 Because -- I certainly know that in Indiana, if a litigant
7 said, you know, Kammen had ex parte -- admits he had ex parte
8 communications with the court and he doesn't want anyone to
9 see them, I know that the Indiana Disciplinary Commission
10 would say to somebody, "Let us see them." And I got to
11 believe that the disciplinary commissions in the relevant
12 states and the military probably would have the same -- the
13 same sense.
14 So if these are genuinely benign, let us see them.
15 If they're not benign, in the context of this, you've got to
16 give them to us. And so this is -- this is very simple. You
17 know, there's a hundred ways to see this in a negative light.
18 And given the history of this court, the C.M.C.R., and given
19 everything that has happened, we see them all. And if this is
20 genuinely benign, great. But in the context of these -- this
21 timeline, I have to tell you, I don't think they are. I have
22 to tell you, I don't think they are. And ----
23 MJ [Col SPATH]: Let me focus on a couple of things.

1 LDC [MR. KAMMEN]: Sure.
2 MJ [Col SPATH]: General Martins, I'm of course going to
3 give you a turn. Probably take a break before that.
4 And again, we're focusing in on the motion to compel,
5 I know you know that. And I appreciate the timeline. I'm
6 going to look at the e-mails again with the timeline in mind.
7 I certainly knew it in a less graphic sense. So that's
8 helpful.
9 LDC [MR. KAMMEN]: Right.
10 MJ [Col SPATH]: And it may be something we have to
11 discuss down the road.
12 If the concern is UI at the -- in the appellate
13 court, all right, let's -- that's ultimately where we're
14 heading, right? You have concern that there's potential
15 unlawful influence ----
16 LDC [MR. KAMMEN]: Well, there's unlawful influence that
17 runs both ways. Because let's say that the court was saying
18 to the prosecution, you know, please do not agree to the
19 defense having additional time to respond to your brief
20 because we need to get it done, that would be unlawful
21 influence. That would be -- there's -- unlawful influence can
22 run both ways.
23 MJ [Col SPATH]: Concur. And we had some discussion last

1 time ----
2 LDC [MR. KAMMEN]: Right.
3 MJ [Col SPATH]: ---- about where would my authority
4 derive from that I could look to UI at the higher level and we
5 had a pretty good discussion about the dangers of UI and the
6 ability of a trial judge to ensure it does not affect the
7 process. We talked about that last time.
8 Separate from UI, let's now just focus to the other
9 requirement for any appellate court, just like me, is neutral
10 and detached, right? That's a pretty standard requirement of
11 judges. Do I have any authority -- again, forget UI for a
12 minute -- but to delve into whether or not the appellate court
13 over me is neutral and detached, or if there's any way to --
14 for me at my level ----
15 LDC [MR. KAMMEN]: You have not only the authority but an
16 obligation to make this proceeding as fair and transparent as
17 possible. If you -- let's take the worst case. Let's take
18 the worst case that this shows that the C.M.C.R. had said -- I
19 mean, even in my wildest imagination, I don't think this is
20 the case, but let's take the worst case. They send General
21 Martins an e-mail saying, look, you're going to win this case.
22 You need to do it quickly because we understand that the --
23 the Department of Justice wants to influence the D.C. Circuit,

1 but trust us, you're going to win.
2 I don't know that we have -- we can come to you and
3 say disregard the C.M.C.R. at this point, although I think
4 that if C.A.A.F. became aware of that, they would tell you to
5 disregard the C.M.C.R. I do think, however, that you are the
6 only one who can provide any transparency to this. Now, the
7 C.M.C.R. is not going to. I mean, they -- they're not going
8 to -- they don't -- I mean, one of -- the significance of the
9 C.A.A.F. decision to accept Dalmazzi, it is yet other proof of
10 how shallow the C.M.C.R. is.
11 This is a serious issue. The appointments clause
12 issue is a serious issue.
13 MJ [Col SPATH]: It may well be.
14 LDC [MR. KAMMEN]: Oh, no.
15 MJ [Col SPATH]: I understand.
16 LDC [MR. KAMMEN]: And the fact that they wouldn't even
17 require the government to respond before they dismiss it out
18 of hand -- it would be one thing if they said let us respond,
19 you know, and we -- but that's another issue. But the point
20 is ----
21 MJ [Col SPATH]: Let me ask -- but with regard to that,
22 part of the problem -- and not to telegraph it first -- I
23 don't want to give the impression that I don't listen to you

1 all, I do, but Dalmazzi I ruled on as lunch went through.
2 It's not because the arguments weren't important, there's some
3 discussion of the arguments in there. There's always work
4 that goes on at any court prior to arriving. I know you know
5 that.
6 My issue with C.A.A.F. is they have zero authority
7 over this process. They might impact it. If they rule in the
8 manner you're hoping for in the Dalmazzi case on both issues,
9 that still doesn't change tomorrow what it looks like for me
10 until there's an appellate court, either C.M.C.R. or somebody
11 above it, its appellate court, saying something. I still have
12 to follow -- I know you understand -- I mean, I ----
13 LDC [MR. KAMMEN]: I'll accept that for the purpose of
14 this discussion because it's -- we don't know.
15 MJ [Col SPATH]: We don't know.
16 LDC [MR. KAMMEN]: We don't know what C.A.A.F. would say.
17 MJ [Col SPATH]: But C.A.A.F. -- and C.A.A.F. -- choosing
18 my words carefully. Not that I'm afraid of C.A.A.F., they
19 again -- everybody has an opinion, and it's okay. They get
20 paid to do that.
21 C.A.A.F. certifies issues frequently. Frankly, as a
22 person, I might be surprised for a moment, but then they rule
23 on it in a way that I expected. A good one is reasonable

1 doubt right now is floating through an instruction the Air
2 Force has been giving for 20 years. And C.A.A.F. certified
3 it. It's there. It's in their world and they can certify
4 issues and discuss them, even if it's just to finally say, of
5 course, that instruction is okay. We all know it. And maybe
6 that's what's happening here.
7 LDC [MR. KAMMEN]: Absolutely. Absolutely. And if that's
8 what happens, fine.
9 But at this juncture -- and I don't want to get ----
10 MJ [Col SPATH]: Right. I'm definitely focused on
11 discovery and transparency.
12 LDC [MR. KAMMEN]: And at this point, you are the only one
13 who can bring transparency to this process. Because where we
14 got off is the C.M.C.R. is not going to. In fact, I think we
15 may have requested -- and I don't recall specifically, we may
16 have sent a request to the clerk, send us all the e-mails.
17 And if we did that, his response was no way. So the
18 C.M.C.R. -- and I don't know for sure that we did that. The
19 C.M.C.R. is not going to do that. Yeah, we can go up to -- on
20 another writ to the D.C. Circuit, and who knows what happens.
21 But, you know, at some point, you -- you -- since
22 we've been back, you correctly say we need to move this along,
23 and I agree. But there's -- a piece of moving this along is

1 not burying our heads in the sand about what's out there.
2 Because as we discussed the last time, where we are now, and
3 unless something changes, is we could be spending the next
4 three years, or however long it takes us to get to trial, and
5 then ten years from there or six or seven years from there,
6 the D.C. Circuit could say, wow, I can't believe you guys
7 messed this up because this, this, this, this, this, this, and
8 this was wrong; or worse, this case should have never been in
9 a military commission.
10 And so the nature of -- and when we get beyond the
11 politics of this, the notion that we keep kicking this down
12 the road to avoid confronting these hard issues is unfair to
13 everybody that's involved. We all have lives that don't have
14 to involve coming to Guantanamo if this is not appropriate.
15 You know, Judge Tatel in the D.C. Circuit opinion
16 spoke quite movingly about how wrong it is to put
17 Mr. al Nashiri through this unless it's the right court. And
18 certainly, to play -- to keep whatever these e-mails are
19 secret and force us into ancillary litigation that would, you
20 know -- that's just not the write thing to do. You have the
21 authority to order this discovery. What comes next depends on
22 what it is.
23 If in the unlikely event General Martins is hiding an

1 e-mail that says, should our brief be in 12- or 14-point font,
2 what will follow is an apology, sorry to have bothered you.
3 If what follows is the two e-mail threads are less benign,
4 well, then we'll have to see. And I don't know what that will
5 look like because I don't know what it is. Because at the end
6 of the day, we're the mushrooms here.
7 Thank you.
8 MJ [Col SPATH]: All right. Thank you. Why don't we take
9 ten minutes.
10 General Martins, when we come back, you can respond.
11 Thank you.
12 The commission is in recess.
13 **[The R.M.C. 803 session recessed at 1515, 18 October 2016.]**
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