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1 [The R.M.C. 803 session was called to order at 1533,
2 18 October 2016.]

3 MJ [Col SPATH]: This commission is called to order. All
4 of the parties are again present.

5 Let me just first ask for any update, if we have any,
6 on Mr. Gill. And I can tell you why I'm asking. It's 3:30
7 here. We're also holding people at the Mark Center to have
8 that facility open for us, and I don't want to do that if we
9 don't need to.

10 TC [MR. MILLER]: No update other than the indication that
11 was made to me, representation made to me is they're looking
12 at tomorrow morning.

13 MJ [Col SPATH]: All right. Then we're not going to worry
14 about anything this evening. So the Mark Center crowd can
15 stand down and head home whenever they're going to head home
16 and we will plan to take him up in the morning as soon as he's
17 available.

18 TC [MR. MILLER]: If I get any further updates before we
19 leave court, then I ----

20 MJ [Col SPATH]: If you do, then overnight, just e-mail
21 the defense and us and we'll go from there.

22 CP [BG MARTINS]: I will. Thank you, Your Honor.

23 MJ [Col SPATH]: General Martins.

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1 CP [BG MARTINS]: Your Honor, good afternoon.

2 MJ [Col SPATH]: Good afternoon.

3 CP [BG MARTINS]: I will first review the procedural
4 history of this matter, then I will provide you the
5 government's position on the legal questions your decision to
6 seek in camera review of the communications has raised, with
7 particular attention to the Bowser decision and the mental
8 health records example that the commission cited when this
9 issue was previously argued, and I will conclude.

10 MJ [Col SPATH]: I want to hear that. I just want to be
11 clear, when I cited Bowser, it was not for the remedy, and I
12 certainly didn't mean to cause any disturbance on that at this
13 point. That just happened to be the remedy. What I was
14 citing it for was what I think was the important posture in
15 that case, which is, in camera review is a very acceptable, in
16 fact, desired way to resolve some of these issues. That's
17 all. That's the only thing I was talking about with Bowser;
18 otherwise, it's interesting but not particularly relevant.

19 CP [BG MARTINS]: Your Honor, I would like to address it
20 because it did seem, in review of the transcript, to be part
21 of your thinking. So I would like to -- an opportunity.

22 MJ [Col SPATH]: Absolutely.

23 CP [BG MARTINS]: Counsel had 50 minutes.

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1 MJ [Col SPATH]: No, you have all of the time.

2 CP [BG MARTINS]: So I will provide some attention to the
3 Bowser decision and to the mental health records example that
4 you did cite for that proposition of in camera review and then
5 I'll conclude with our position on how the commission should
6 proceed.

7 While the prosecution has previously proffered, and I
8 hereby confirm that proffer based on personal review, that
9 there's absolutely nothing in these communications that is
10 either relevant to a genuine issue in this case or material to
11 the preparation of the defense under applicable discovery
12 rules or indicative of anything but government personnel doing
13 their duties properly and professionally and in good faith.
14 The manner in which this is being addressed nevertheless
15 raises important concerns that cannot be brushed aside.
16 Indeed, they are so important that the interest of justice
17 require that we pause and make a record.

18 Pauses are frustrating, particularly to those family
19 members and military comrades of the murdered who are
20 observing these proceedings. But pauses are necessary when
21 defense overreaching is excessive to the point of threatening
22 the integrity of the proceedings if left unchecked.

23 These two days of proceedings have been relatively

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1 dignified, but I'll be needing to quote extensively from the
2 proceedings on 9 September, which were, I submit, something
3 else.

4 We, as advocates here on this side of the courtroom,
5 have been perhaps too sanguine that the trial judicial system
6 will reign in such defense abuses, have perhaps erred too
7 greatly on the side of equanimity and discipline, when a more
8 appropriate posture may perhaps have been emphatic rebuttal of
9 the nonsense that we hear from the other side of the courtroom
10 so routinely. To rebut so-called learned counsel's antics in
11 every instance or even more than occasionally could simply
12 reward the defense with the delay and the disruption they do
13 seek.

14 But here the innuendo and baseless accusations have
15 crossed the line and require at least an attempt to blunt
16 defense counsel's abuse of legal tools to malign, in this
17 instance, honest appellate judges as well as those government
18 officials, whom the trial counsel now have come to know
19 because we were tasked by the discovery obligation in this
20 proceeding, were merely reprocessing the renomination and
21 reconfirmation of judges to the court and other administrative
22 matters, a step intended to assure Nashiri of a properly
23 appointed court.

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1 And I should say, Your Honor, that I just reread the
2 scope of both the motion to compel and the discovery request
3 and we see them as coextensive. They're both broad. The
4 motion to compel did not, in our view, narrow it and we don't
5 think that is a proper, conservative careful reading.

6 MJ [Col SPATH]: Well, it says ----

7 CP [BG MARTINS]: The motion to compel ----

8 MJ [Col SPATH]: It says between government counsel and
9 the U.S.C.M.C.R.

10 CP [BG MARTINS]: It incorporated by reference the
11 discovery response which it attached.

12 MJ [Col SPATH]: General Martins, it says relief
13 requested. Relief requested, ex parte communications between
14 you, government counsel, and the U.S.C.M.C.R.

15 CP [BG MARTINS]: Your Honor, there are many counsel who
16 represent the government, but just to ----

17 MJ [Col SPATH]: Government counsel's ex parte
18 communications with the court. That's what it asked for.

19 CP [BG MARTINS]: Okay. We've sought to be ----

20 MJ [Col SPATH]: I appreciate the effort to put together
21 355E and K. I do. And I recognize that was in response to,
22 as I hope you heard me say to them, a broad discovery request.
23 I appreciate the effort that -- undertaken there. And I had

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1 that discussion because I have narrowed my focus down to only
2 communications between government counsel and the court.

3 CP [BG MARTINS]: I understand.

4 So first, the procedural history of our present
5 situation. The government's response to the defense motion to
6 compel recounts the relevant facts up through 28 July, the
7 date that response was filed. I will summarize the highlights
8 of that filing here and supplement those facts with the
9 relevant ones from 28 July to the present, with particular
10 attention to the proceedings of this commission on 9
11 September, when certain hypotheticals of serious misconduct
12 were raised by civilian defense counsel and the commission
13 seemed to be, to some extent, relying upon those
14 hypotheticals. And I say that because of the relief that you
15 were suggesting at that point.

16 MJ [Col SPATH]: I disagree.

17 CP [BG MARTINS]: I don't know what you are seeking to do
18 here but ----

19 MJ [Col SPATH]: I disagree completely.

20 CP [BG MARTINS]: Okay.

21 MJ [Col SPATH]: Those hypotheticals didn't matter to me.

22 CP [BG MARTINS]: Okay.

23 MJ [Col SPATH]: I don't want to disclose a lot about my

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1 thought process because I think it's inappropriate for me to
2 do so. I again will say that Bowser stands for the obvious
3 proposition that, when there is dispute between the parties,
4 you should trust the trial judge to smartly and responsibly
5 review material and turn over appropriate material ----

6 CP [BG MARTINS]: Your Honor ----

7 MJ [Col SPATH]: ---- and that's it.

8 CP [BG MARTINS]: We turn them over to Your Honor. If I
9 can lay out my thought ----

10 MJ [Col SPATH]: I understand. I didn't order that
11 disclosure because of those hypotheticals. My default
12 position wisely, after not just Bowser but any other number of
13 cases that talk about a judge's ability to review privileged,
14 classified, or any other type of information, mental health
15 records, privacy act information, and then wisely disclose
16 what needs to be disclosed to resolve the conflict is a
17 long-standing tradition, and that is ----

18 CP [BG MARTINS]: Your Honor, you have them and we thought
19 through that, and ----

20 MJ [Col SPATH]: I did not ----

21 CP [BG MARTINS]: ---- I ultimately saw your discretion
22 in the matter. If I may.

23 MJ [Col SPATH]: I do. But I want to make absolutely

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1 clear, those hypotheticals, they don't mean anything from
2 either side.

3 CP [BG MARTINS]: I want to recount a few.

4 MJ [Col SPATH]: You may.

5 CP [BG MARTINS]: Thank you.

6 MJ [Col SPATH]: You can respond to them. I appreciate
7 why you might want to.

8 CP [BG MARTINS]: Thank you.

9 MJ [Col SPATH]: You were suggesting they affected this
10 ruling. They didn't.

11 CP [BG MARTINS]: Thank you for clarifying that.

12 MJ [Col SPATH]: You absolutely should respond to them.

13 CP [BG MARTINS]: I need to. And the concern over
14 judicial deliberations actually figures into this.

15 MJ [Col SPATH]: It's very important. I want you to
16 respond to those allegations, of course, or hypotheticals.

17 CP [BG MARTINS]: So the procedural facts all revolve
18 around three main challenges of Nashiri and his attorneys,
19 among the hundreds of challenges they have made, and many
20 hundreds more defense counsel has pledged to make before this
21 trial has concluded.

22 Challenge one sought dismissal of the Limburg bombing
23 charges on what was styled as a lack of commission

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1 jurisdiction to try the charges, but evolved, with the
2 commission's approval, into a claim that Nashiri was entitled
3 to have the government give him an up-front, judge-alone trial
4 before trial on the merits in front of the panel members, of a
5 conduct-focused element of each offense. And this, even
6 though Nashiri has never challenged the true jurisdictional
7 basis, which is his status as a member of al Qaeda.

8 That status gives the commission jurisdiction. This
9 challenge one, we'll call it, began before the commission in
10 August of 2013 with the original defense motion, resulted in a
11 ruling by you on 16 September 2014, and then a ruling by the
12 United States Court of Military Commission Review on 9 June
13 2016.

14 Challenge two sought the striking of an aggravating
15 factor from those the government was relying upon to seek the
16 death penalty. Namely, the factor that in committing
17 terrorism with the attack on the USS COLE, the life of one or
18 more persons other than the victim was unlawfully and
19 substantially endangered.

20 Challenge two began before the commission in March of
21 2014, resulted in a favorable ruling by you a year later on 25
22 March 2015 that not only prevented the prosecution from
23 proving the aggravating factor using evidence regarding

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1 Yemenis in Aden Harbor, but also effectively excluded evidence
2 regarding Yemenis in Aden Harbor in the proving of the
3 terrorism offense itself, namely the element in exploding the
4 massive bomb alongside the COLE in a crowded urban space,
5 Nashiri had evinced a wanton disregard for human life.
6 Challenge two ran its course by 8 July of this year when the
7 United States Court of Military Commission Review reversed the
8 exclusion of evidence on the wanton disregard of human life
9 element of the terrorism offense.

10 Challenge three was a petition for a writ of mandamus
11 and prohibition directly in the United States Court of Appeals
12 for the District of Columbia Circuit seeking to disqualify the
13 military judges on the United States Court of Military
14 Commission Review panel that had been detailed to hear the
15 government's appeal of your favorable ruling on challenge one.
16 Challenge three came out on the original eve of oral argument
17 on challenge one before the U.S.C.M.C.R. in November of 2014.
18 It resulted in a stay of proceedings before the U.S.C.M.C.R.
19 that prevented the government's appeals of both challenge one
20 and challenge two from being heard until the middle part of
21 this year.

22 Challenge three ran its course by 29 April 2016, when
23 the government moved the U.S.C.M.C.R. to lift the stay,

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1 reporting that the renomination and reconfirmation of the
2 military U.S.C.M.C.R. judges had been completed in accordance
3 with a process suggested by the U.S. Court of Appeals for the
4 D.C. Circuit when that court had denied challenge three in
5 June of 2015.

6 The present motion to compel discovery of so-called
7 ex parte communications between anyone in government in some
8 way connected to Mr. Nashiri's case and any U.S.C.M.C.R.
9 personnel stems from defense counsel's self-described paranoia
10 that some sort of unlawful influence caused challenge one and
11 challenge two to fail. And I'll cite you to the transcript,
12 unofficial transcript at 6575 for that word.

13 He points to the relative speed with which the
14 U.S.C.M.C.R. scheduled oral argument on government appeals
15 that were 19 and 14 months old, respectively. He registers
16 alarm at the promptness with which the U.S.C.M.C.R. required
17 completion of the briefing cycles on those appeals. And he
18 assumes there must be something wrong about how the
19 U.S.C.M.C.R. ruled on various motions from Nashiri seeking
20 delay, recusal, and disqualification as well as on Nashiri's
21 additional extraordinary writs alleging that the U.S.C.M.C.R.
22 military judges' appointments remained improper, and that one
23 of the U.S.C.M.C.R. judges had a conflict of interest.

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1 Defense counsel also points to the government's
2 decision to oppose a defense-counsel-led self-named, quote,
3 investigation into whatever pernicious influence must have
4 caused the U.S.C.M.C.R. to rule against him in challenges one
5 and two, and he smears any and all government personnel who
6 communicated with U.S.C.M.C.R. personnel on the proposition
7 that all such communications, even administrative ones, are,
8 per se, improper.

9 Let's be very clear. While all of us have an
10 obligation to avoid ex parte contacts -- and please don't take
11 this the wrong way, Your Honor, but when we're not in court, I
12 avoid you like the plague.

13 MJ [Col SPATH]: You're not the first person to say that.

14 CP [BG MARTINS]: While all of us have that obligation,
15 rules for Article I courts acknowledge a sphere of
16 administrative communications that are exceptions to the
17 general rule against ex parte communications. This is
18 reflected in the rules of court for this very court.

19 You can see the disingenuousness of Mr. Kammen's
20 position on this by reading the briefs. Even as he proclaims
21 a per se rule against any communication with court personnel,
22 he's forced to confess in footnote 4 of his reply brief that
23 members of the team he supervises had ex parte communications

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1 with the court for which no notice was given to the
2 prosecution. And this confession comes only after we pointed
3 out the inconvenient fact of these communications on page 14
4 of our brief.

5 Once thus called out, notice how he pivots in that
6 footnote to an entirely different complaint; namely, that,
7 well, the U.S.C.M.C.R. ought to have more clerks and that it
8 was a structural problem that caused his team to communicate
9 ex parte with court personnel.

10 For the record, I'm not accusing him of anything
11 improper or unprofessional, even though we were in the dark.
12 We were mushrooms on that. Because, as I've pointed out,
13 there's a rule that authorizes such administrative ex parte
14 communication. I only want to point out the disingenuousness
15 of it.

16 So the present motion to compel discovery was filed
17 on 14 July, six days after challenge two was resolved at the
18 U.S.C.M.C.R. against the accused. The initial briefing of the
19 motion had run its course by 3 August when the defense filed
20 its reply. Then on 23 August, the U.S.C.M.C.R. denied
21 Nashiri's petition requesting that it vacate the June 8
22 decision against Nashiri on challenge one, among other things,
23 explains that the U.S.C.M.C.R. judge against whom Nashiri had

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1 alleged a conflict of interest had recused himself upon
2 departing Washington, D.C., on June 3 for a new military
3 assignment that would end his duties with both his service to
4 the Court of Criminal Appeals and with the U.S.C.M.C.R.

5 Although the commission denied both parties' requests
6 to supplement the record, I see that you've now essentially
7 allowed supplementing some of the factual aspects of that
8 today. You did also state that you were aware of the order
9 which was clearly part of the law of the case -- of the
10 commission, and so I'll rely upon it.

11 Despite the government's request that the commission
12 address during the first session back on record in September
13 the impact of U.S.C.M.C.R. decisions against the defense on
14 challenge one and challenge two, including the impact on 21
15 motions and previously issued orders mostly adverse to the
16 prosecution, the commission first took up the late-filed AE
17 355, the defense motion to compel discovery. And we took that
18 up on 9 September before making any apparent effort to carry
19 out the mandates of the U.S.C.M.C.R. decisions of 9 July -- or
20 9 June and 8 July.

21 During oral argument on the defense motion to compel
22 ex parte communications between the court and the government,
23 the defense acknowledged, quote, absolutely that the motion

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1 was a, quote, fishing expedition based solely on its own
2 speculation, and I'm quoting now, "The chief prosecutor saying
3 these are just sour grapes. He's saying it's a fishing
4 expedition. Absolutely."

5 The defense went on to imagine several hypotheticals,
6 in particular ones where the U.S.C.M.C.R. unlawfully
7 influenced the prosecution, or the prosecution unlawfully
8 influenced the U.S.C.M.C.R., repeatedly acknowledging that
9 they were mere speculation. I'm quoting: "It is
10 inappropriate for a clerk or a judge to communicate with a
11 prosecutor and perhaps say, you know, one of the judges wants
12 to leave, one of the judges is in a hurry to go, so we need to
13 speed this process up, or worse. And I don't know that this
14 happened, we don't know, end quote. That's it. 6576 of the
15 unofficial record, unauthenticated record.

16 Again, quote, And likewise, it would be improper for
17 the government, and I don't know whether this happened or not,
18 to say to a clerk, you know, the big G government, wants to
19 make sure that the commissions are back on track before the
20 D.C. Circuit rules so we need to get these appeals done in a
21 hurry so we can send letters to, which they did, to the
22 D.C. Circuit saying, well, the commissions are back on track,
23 end quote. Transcript at 6577.

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1 Again, quote, let's assume, again, the worst
2 possible. Judge King or the clerk says to the prosecution,
3 there are these motions to recuse. We need to get this over.
4 So please do not agree to any defense extension because Judge
5 King wants to recuse himself as quickly as possible because
6 he's afraid he's going to -- some court's going to rule he's
7 resigned by operation of law, and he wants to get this done.
8 And so supposing the court was telling the prosecution not to
9 agree to any extensions, that would be extraordinary.

10 Transcript, 6581 to 82.

11 Then asserting a, quote, responsibility to the truth,
12 end quote, the defense added, and I'm now quoting, "If the
13 truth is that some ugly and sordid occurred -- something ugly
14 and sordid occurred that resulted in an opinion that has a
15 huge impact on this case, that should be known. What would
16 flow from that is who knows? We can speculate all day. I
17 could see circumstances where, and again, you know, you can
18 sit and imagine the worst, end quote. Transcript at 6584.

19 I quote again, we filed motions to recuse the judges
20 because there was and still is and Dalmazzi demonstrates
21 there's a serious question of the unlawfulness of their
22 appointments. And now we know, and suppose it's speculative,
23 but supposing that's what these e-mails are about, that would

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1 be a really big deal, end quote. Transcript at 6599.

2 Now, in oral argument, you acknowledged that the
3 commissions were, quote, not material to the preparation of a
4 defense or mitigation or anything like that for trial, end
5 quote, but you offered that his, quote, concern remains this
6 issue of unlawful influence, end quote, invoking your
7 year-and-a-half old finding of apparent unlawful influence
8 regarding Change 1 to the Regulation for Trial by Military
9 Commission. Transcript at 6591.

10 Speaking to the defense, you further offered, quote,
11 the communications feed into your ability to deal with the
12 unlawful influence motion. You then asked the defense to
13 confirm that their investigation had extended to other areas
14 of the justice system. You're looking for information on --
15 on unlawful -- you're looking for information on unlawful
16 influences on the processes, on one of the agencies on this
17 process writ large.

18 Transcript 6583.

19 Following your lead, the defense counsel agreed and
20 then urged you to order the government to release the
21 communications to prove that the concern, however imagined,
22 was nonetheless unfounded because, quote, somebody has got to
23 protect the integrity of the system, end quote. Transcript,

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1 6600 and also 6578 to page 6580.

2 Representing the government on 9 September, I argued
3 that the communications we had collected and reviewed were
4 neither relevant to any issue in the case, including
5 allegations of unlawful influence, nor material to the
6 preparation of the defense, citing, among other authorities,
7 Rule for Military Commission 701, Supreme Court in
8 Pennsylvania v. Ritchie, and the D.C. Circuit in United States
9 v. Graham.

10 I also argued that's a presumption of regularity in
11 the official acts of public officers and that, quote, in the
12 absence of clear evidence to the contrary, courts presume that
13 they are properly discharging their duties, citing Latif v.
14 Obama.

15 The commission raised two potential authorities,
16 practice under Military Rule of Evidence 513, the
17 patient-psychotherapist privilege in the context of mental
18 health records, and the 2014 Air Force Court of Criminal
19 Appeals decision in United States v. Bowser, which had made
20 reference to that Military Rule of Evidence 513 practice, and
21 applied it to compel in camera review of certain trial counsel
22 notes. Important in both contexts was a factual predicate
23 completely absent here.

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1 Over its own objection, and while preserving its
2 right to assert any applicable privilege, the government
3 reluctantly agreed to provide the communications to the
4 military judge for his in camera review. In his petition for
5 a rehearing on a separate matter before the D.C. Circuit,
6 al Nashiri reported to the court that, quote, a significant
7 issue -- that court, a significant issue had arisen with
8 respect to the U.S.C.M.C.R. Al Nashiri told the court, it
9 came to light that prosecutors were communicating ex parte
10 with the C.M.C.R. about al Nashiri's case. The nature of
11 those communications is currently under investigation, end
12 quote. That's his petition on 7 October to the D.C. Circuit
13 asking it to reconsider its August 30 decision denying
14 al Nashiri's petition for mandamus relief and affirming the
15 district court's denial of preliminary injunctive relief.
16 Those we believe are relevant facts to what follows.

17 I'd like to now speak to legal rules that are bearing
18 upon this issue. I have already cited to rules of relevance
19 and of discovery, and of the presumption of regularity of the
20 official acts of public officers, because the government
21 maintained that these simple, everyday rules called for denial
22 of the defense motion. Here I'll start with applicable rules,
23 Your Honor, of privilege.

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1 Military Commission Rule of Evidence 506(i)(4)(F)
2 states that government information may not be disclosed over
3 government's objection. And we believe Your Honor -- you're
4 observing that, at least for now. We appreciate your
5 willingness to have a record made at this point, as this
6 appears to be a sound procedural approach in light of the rule
7 and what I'll describe as follows.

8 In Rule for Military Commission 703(f), as in
9 Foxtrot, (4)(C) as in Charlie, we find that the military judge
10 may order that evidence be submitted to the military judge for
11 an in camera inspection in order to determine whether relief
12 should be granted. And from this we know, as Your Honor has
13 said, in camera inspections are indeed an authorized part of
14 trial practice, even outside the law of privilege, and in the
15 area of obtaining witnesses and evidence, though we also note
16 that the wording and focus of R.M.C. (f)(4)(C) is of evidence,
17 not discovery. We just want to point that out, and not that
18 discovery that the prosecution has reviewed and deemed not
19 relevant.

20 M.C.R.E. 501 is a general rule of privilege. It
21 states that a person may not claim a privilege with respect to
22 any matter except as required by or provided in the rules or
23 the principles of common law generally recognized in the trial

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1 of criminal cases in the United States District Courts
2 pursuant to Rule 501 of the Federal Rules of Evidence. In a
3 claim of privilege, it's defined in Rule 501 as including but
4 not being limited to the assertion by any person to refuse to
5 disclose any matter or prevent another from disclosing any
6 matter or producing any object or writing.

7 Another relevant rule in what will follow is
8 government information under -- other than classified
9 information, Rule 506, and this is, except where disclosure is
10 required by an act of Congress, government information is
11 privileged from disclosure if disclosure would be detrimental
12 to the public interest. And government information includes
13 official communication and documents other than classified
14 information that is within the custody and control of the
15 Federal Government.

16 MJ [Col SPATH]: Let me ask a couple of questions.

17 CP [BG MARTINS]: Uh-huh.

18 MJ [Col SPATH]: You know the contents of -- again, I'm
19 not suggesting disclosure, but you know the contents of E and
20 K. Are you suggesting their disclosure would harm the public
21 interest, truly?

22 CP [BG MARTINS]: Your Honor, I am suggesting that ----

23 MJ [Col SPATH]: That's all I -- I just want to know an

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1 answer to that question. Do you think that they're ----

2 CP [BG MARTINS]: Your Honor, well, you're asking me to
3 talk about the ----

4 MJ [Col SPATH]: Just, do you think they would --
5 disclosing the contents of those binders ----

6 CP [BG MARTINS]: I would like to lay out methodically the
7 approach we believe the court should take. There is a
8 qualified judicial privilege that doesn't cover things outside
9 deliberations in the core interests. You actually referred to
10 it a little bit before. There is a qualified judicial ----

11 MJ [Col SPATH]: There is.

12 CP [BG MARTINS]: ---- privilege, and I'm not the one who
13 can invoke it. And that recommends a careful approach to what
14 we're doing here.

15 MJ [Col SPATH]: It does.

16 CP [BG MARTINS]: What we're doing here is deputizing
17 Mr. Nashiri to do an investigation of your review in court,
18 and that ----

19 MJ [Col SPATH]: I am -- well, I'm not. What I'm asking,
20 quite simply, is the disclosures that you made to me in camera
21 in 355E and K, do you believe -- because that's the privilege
22 you're citing, is your information other than classified, we
23 can talk about deliberative in a moment ----

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1 CP [BG MARTINS]: Yes.

2 MJ [Col SPATH]: ---- but do you believe that that would
3 harm the public interest?

4 CP [BG MARTINS]: I do. And if you allow me to elaborate,
5 please.

6 MJ [Col SPATH]: Yes. I wanted an answer to that first.

7 CP [BG MARTINS]: I very much intend to make that argument
8 because it needs to be understood in the context ----

9 MJ [Col SPATH]: It does. But ----

10 CP [BG MARTINS]: ---- that is provided.

11 MJ [Col SPATH]: But does it cover government
12 communication, does it cover ex parte communication?

13 CP [BG MARTINS]: I believe the way in which this court
14 should deal with the judicial privilege of your review in
15 court, and brother and sister judges who have a privilege they
16 care about every much -- every bit as much as you, that
17 communications that involve their clerk, they have to be --
18 have some ability to input into boundaries of privilege, and
19 I'll explain that. There's a good case on it that I will get
20 to. So I would ask you to allow me to lay out why we think
21 this is an area where we need to be careful. And I do believe
22 there is a -- there is a public interest in these e-mails from
23 your reviewing court to different government people.

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1 The privilege -- by the way, who can claim a
2 privilege? We're in the law of privilege. I'm not on the
3 court and I'm not going to claim to be the proper claimant at
4 the core of the privilege; however, I am the United States's
5 representative in the courtroom. And the rules are clear that
6 my ability to invoke the privilege should be presumed unless
7 you have evidence to the contrary. And I do believe I have
8 the authority to make this argument to you and to propose a
9 way ahead with this material. That's the sense in I'm
10 invoking it.

11 I do want to touch on the patient-psychiatric
12 therapist privilege that you mentioned. There is the same
13 privilege in Military Commission Rule of Evidence 513, I know
14 you were using it by analogy, but that is a place where you
15 have the military judge instructed to actually examine
16 evidence or proffer in camera. And there's a -- an express
17 reference to in camera, and it can be -- it contemplates that
18 it could be against the will of one of the parties; whereas,
19 in camera discussions in Rule 506, 505, you have often a
20 situation where counsel is coming to you saying, hey, I need
21 to have some help on this invocation of privilege and we want
22 to turn things over.

23 So now I'd like to with -- in light of those rules go

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1 back to the transcript of 9 September, do a bit of analysis,
2 and then go to where we -- the position we believe you should
3 take on where to -- with respect how to deal with this
4 information.

5 So Bowser. This is -- your reference is to Bowser
6 and you've mentioned it, but I think it's valuable to go
7 through. United States Bowser -- v. Bowser, military court,
8 it was a 62 -- obviously you're referring to Article 62, UCMJ
9 appeal, and there the trial judge ordered attorneys to turn
10 over notes for the in camera review, the attorneys refused,
11 and judge dismissed with prejudice. And Air Force Court and
12 then C.A.A.F. upheld that dismissal with prejudice, which is a
13 significant remedy.

14 A little further on, both courts upheld it and said
15 in camera review is the favored manner for resolving issues
16 because it prevents unauthorized discovery. It prevents
17 fishing expeditions. It prevents many things. What it does
18 is promote confidence. A little later, you say, "The
19 proposition for in camera review is the answer to questions of
20 privilege, or answers to the questions of mental health
21 records, or answers where in large part, not fishing
22 expeditions, but an opportunity for the neutral person to look
23 at the material and make the determination. And I'm just

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1 asking the questions." The transcript at 6589 to 90.

2 Then you state the 513 example, and it goes like
3 this: The defense wants to see the mental health records,
4 that if the government says no, it's a fishing ----

5 MJ [Col SPATH]: Slow down a little bit. I just saw the
6 interpreter ----

7 CP [BG MARTINS]: Well, this is actually in the record
8 from before so we have a good record on the transcript.

9 MJ [Col SPATH]: I believe you, General Martins. I just
10 know that the interpreters are talking into the microphone as
11 hard as they can, and just slow down a little.

12 CP [BG MARTINS]: Thank you.

13 The government says no, it's a fishing expedition,
14 you can't get there. And the defense points to what little
15 they can. I've talked to her friends, they say there's a
16 problem. I've talked to her husband, he says there's a
17 problem. And finally we get to a point where the judge,
18 wisely, I think, says, I'll look at them.

19 So I want to point out that we did turn these over
20 after looking at the authorities and realizing you have great
21 discretion on these matters, and that you respectfully
22 disagreed at some point with our threshold for when you should
23 do that. But we did turn them over in light of that.

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1 MJ [Co1 SPATH]: You voluntarily turned them over.

2 CP [BG MARTINS]: We did.

3 MJ [Co1 SPATH]: I was not issuing a ruling. I was having
4 a discussion and asking questions and you on your own, General
5 Martins, turned them over before I made a ruling.

6 CP [BG MARTINS]: Absolutely. I ----

7 MJ [Co1 SPATH]: Now they're here.

8 CP [BG MARTINS]: I'm contrasting that with where we are
9 here. Because we did, we examined the authorities and we
10 ultimately said that this is -- these are areas where you have
11 significant discretion, and they have -- it does have those
12 policy-oriented benefits. And you have seen them, and I --
13 I'm not going to put words in your mouth, but you know how
14 benign these are.

15 So your own hypothetical presumes facts nowhere
16 present here, though. So a -- you know, your thought process
17 went to two witnesses saying there's a problem. And in
18 Bowser, as you know, Your Honor, there was extrinsic evidence
19 from paralegals who had sat in on those -- there was testimony
20 before the judge went to in camera review.

21 MJ [Co1 SPATH]: Agreed.

22 CP [BG MARTINS]: Okay.

23 MJ [Co1 SPATH]: We got here because before ----

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1 CP [BG MARTINS]: Okay.

2 MJ [Co1 SPATH]: ---- I issued a ruling ----

3 CP [BG MARTINS]: Okay.

4 MJ [Co1 SPATH]: ---- you all made a determination,
5 strategically, we'll hand them over.

6 CP [BG MARTINS]: Good. No, I understand.

7 MJ [Co1 SPATH]: And I think that's important. I was
8 giving a hypothetical.

9 CP [BG MARTINS]: Agree.

10 MJ [Co1 SPATH]: But then there was a decision to hand
11 them in before there was a ruling.

12 CP [BG MARTINS]: I understand.

13 MJ [Co1 SPATH]: All right.

14 CP [BG MARTINS]: I'm just highlighting that, because
15 we're in a different position at this point, because now
16 you're thinking about -- I don't know what you're going to do,
17 but you're thinking about disclosure against what I'm going to
18 claim here on behalf of the C.M.C.R., a judicial privilege.

19 So then at that point, you switch to -- from those
20 scenarios into an unlawful influence, one, and connect it up
21 to an unlawful influence allegation. But I -- the last thing
22 I wish to ----

23 MJ [Co1 SPATH]: Let me just say this, because it's

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1 important for everybody, when we're in motion hearings, I want
2 to be comfortable asking questions. And they're not always
3 going to be the smartest, they're not always going to be the
4 most well thought out, but I think it's better than me sitting
5 here listening, frankly, to both sides sometimes making
6 arguments that aren't supported by the law -- I'm not talking
7 about this one -- sometimes making comments that are
8 inaccurate that I think I at least get to ask about, and
9 frankly, a constant evolving battlefield, which is what a case
10 is. And I ----

11 CP [BG MARTINS]: Your Honor ----

12 MJ [Col SPATH]: ---- and I am engaged in what I hope is a
13 discussion. It's not telegraphing how I'm going to rule.
14 It's not telegraphing what I'm thinking -- it's what I'm
15 thinking in the instance that I'm asking a question, that's
16 all it is. And so ----

17 CP [BG MARTINS]: Your Honor, I'm actually arguing for a
18 similar deference to the judicial deliberations and thought
19 processes of your review in court.

20 MJ [Col SPATH]: And I -- I agree with you, except I know
21 the contents of the e-mails we're talking about, as do you.

22 CP [BG MARTINS]: May I?

23 MJ [Col SPATH]: This is hardly their deliberative

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1 process. It's things like parking spaces, General Martins.

2 CP [BG MARTINS]: Your Honor, may I?

3 MJ [Col SPATH]: It's important ----

4 CP [BG MARTINS]: I object to you disclosing contents
5 because you haven't heard ----

6 MJ [Col SPATH]: I understand that. But you -- this is
7 not, all of a sudden I have had the ability to look into the
8 U.M.C.R. the U.S.C.M.C.R.'s decision overturning me. It's
9 not like I now have e-mails from what I presume is a
10 discussion from three trial judges about what should we do,
11 because I assume they discuss it somehow. Maybe they do it in
12 a conference room. And again, I shudder to talk out loud as I
13 think through this. I've seen these. I have great respect
14 for the judicial privilege. I think that's important, of
15 course, be it my brothers at the trial level, or my brothers
16 at any appellate level, depending on where I am, of course,
17 the Air Force Court, or here, I do. And I want you to know
18 that, and I think you do.

19 CP [BG MARTINS]: Your Honor, may I get to some important
20 authority ----

21 MJ [Col SPATH]: You may. But I know I asked Mr. Kammen
22 questions, I ask you questions.

23 CP [BG MARTINS]: Well, I -- if I can ----

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1 MJ [Col SPATH]: Again, ultimately, one, I'm the judge;
2 and two, I get to think through this, and I'm going to think
3 through it in public. And sometimes I'm going to ask
4 questions out of order in your argument and there's nothing
5 wrong with that.

6 CP [BG MARTINS]: That's fine.

7 MJ [Col SPATH]: And so I am making clear here, first off,
8 I didn't order your disclosures to me. That was your choice.

9 Now that I've reviewed them and I know what they are,
10 we -- I want to make sure we're having the right discussion,
11 and I'm just asking some questions. But I want to be clear, I
12 appreciate, I respect, and I value both privilege and the
13 judicial privilege. Maybe I have a bias towards it.

14 CP [BG MARTINS]: Your Honor, as do I want us to get to
15 the right answer, and I am trying to have a prerogative of
16 quoting from transcript.

17 MJ [Col SPATH]: I agree.

18 CP [BG MARTINS]: I'm making argument.

19 MJ [Col SPATH]: You are. But again, I've interrupted
20 every counsel who has talked.

21 CP [BG MARTINS]: You obviously feel comfortable
22 interrupting and doing ----

23 MJ [Col SPATH]: I do. I should, I think.

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1 CP [BG MARTINS]: You should.

2 So if I could ----

3 MJ [Col SPATH]: You may.

4 CP [BG MARTINS]: ---- may I? That's fine. If you have
5 any other questions?

6 Military Commission Rule of Evidence 606(b) actually,
7 although it deals with witnesses, foreshadows the scope,
8 anyway, of what courts have looked at as the judicial
9 privilege because it's looking at whether court members could
10 testify. And it does exempt extraneous prejudicial
11 information that deals with unlawful influence and other types
12 of things, specifically excepts it, so I'm just trying to
13 point to the scope. And I think this is one of the reasons
14 this is a very important consideration where we have to be
15 careful.

16 So here we have rank speculation that there is a
17 totally different alleged source of influence, mechanism of
18 influence, effect, and appearance, and yet, you know, there
19 was this -- this is what was causing some -- I'll say
20 suggestion, because those were just your thought processes of
21 relevance. And I have already distinguished Bowser, so let me
22 move to what we believe the commission should consider for
23 proceeding.

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1 In short, we request that you deny the motion
2 completely. Having received the e-mails into the appellate
3 record, they're there. They're preserved. They're not going
4 to go anywhere.

5 In the alternative, if you're unwilling to take what
6 we would submit is an already expansive effort, as you put it,
7 to restore confidence, we request that you authenticate the
8 pertinent portion of the record and forward it to the
9 U.S.C.M.C.R. for appropriate action with that appellate
10 record, including the still-ex parte, in camera, and under
11 seal e-mails.

12 We believe this would be -- both these courses of
13 action would be careful and appropriate consideration of
14 judicial privilege issues that are present here.

15 Such an approach would be consistent with a process
16 that was endorsed by the Court of Military Appeals in an
17 analogous situation implicating a judicial privilege of a
18 service court of appeals. The law does recognize a qualified
19 judicial privilege. Your Honor may be familiar with Court of
20 Military Review V. Carlucci, 26 M.J. 328, Court of Military
21 Appeals 1988.

22 It cites prominently a 11th Circuit case, perhaps the
23 leading case in federal court on the judicial privilege matter

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1 of certain complaints under investigation by an investigating
2 committee of the judicial council of the 11th Circuit. That's
3 783 F.2d 1488, with 1517 being the point cite for the judicial
4 privilege discussion. That's an 11th Circuit case from 1986.
5 Recognition of the judicial privilege is relatively recent.
6 The privilege extends to a court's deliberative processes and
7 to communications relating to official business, such as the
8 framing and researching of orders, opinions, and filings.

9 We acknowledge that aspects of Nashiri's self-named
10 investigation, that's what he called it to the D.C. Circuit,
11 may not invade judicial privilege. Government trial counsel
12 make no claim that the e-mails themselves include the
13 deliberations of appellate judges on the U.S.C.M.C.R., which
14 is the core of the judicial privilege. No e-mails were -- and
15 you know this -- were addressed to or sent from any judges.
16 And while all involved U.S.C.M.C.R. clerical personnel, the
17 e-mails were clearly administrative in nature, including
18 coordination of judicial reconfirmations with nonprosecuting
19 government attorneys so as to assure Nashiri of a
20 constitutionally appointed panel.

21 Nevertheless, the very speculation that fuels
22 Nashiri's investigation, and the imagined scenario that at
23 least in part has -- because you're concerned with

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1 appearances, has led to sponsoring this inquiry through
2 discovery, the very speculation is that U.S.C.M.C.R.'s
3 deliberations were corrupted to Nashiri's detriment. There
4 were illicit influences on how they were deliberating. That's
5 the core of the privilege.

6 As the Court of Military Appeals noted in the closely
7 analogous situation in Carlucci, I quote, There is a
8 substantial risk that the inquiry will intrude into the
9 court's deliberative process, end quote, and that at the very
10 best, there may be some practical difficulties in determining
11 the exact boundaries of the area covered by the judicial
12 privilege.

13 And that was about ex parte communications, it wasn't
14 about internal deliberations. If you look at that case, Your
15 Honor, it's similar in that regard. And the approach that the
16 court took is instructive, even though it wasn't dealing with
17 deliberations. In fact, the opposite is true, because it's --
18 the allegation, the complaint, there it was an anonymous
19 complaint that the decision-making processes were corrupted.
20 That caused the court, other judges looking at this, to be
21 careful, to be very careful.

22 28 U.S.C. Section 372(c), that's the statute that the
23 Court of Military Appeals cited to. And it has been

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1 superceded since 2002 by appellate court investigative
2 procedures along the same lines, but it was incorporated by
3 reference into the Carlucci decision. So I'm going to cite to
4 it here.

5 It caused the Court of Military Appeals to block an
6 outside investigation of matters that could impinge upon the
7 judicial privilege. And the court ultimately appointed a
8 special master to protect any privileged areas while
9 facilitating legitimate inquiry, if any.

10 And here the measures that are in that Section 372(c)
11 that seemed to inform what the U.S.C.M.C.R., according to its
12 own processes for investigating allegations of impropriety
13 should do, in 372(c) -- Section 372(c), "Any person alleging
14 that a judge has engaged in conduct prejudicial to the
15 business of the courts may file with the clerk of the court of
16 appeals for the circuit a written complaint containing a brief
17 statement of the facts constituting such conduct." It also
18 allows the court to self-refer itself. "Upon receipt of a
19 complaint, the clerk shall promptly transmit such a complaint
20 to the chief judge of the circuit. If the conduct complained
21 of is that of the chief judge, to the circuit judge in regular
22 active service next senior in date of commission, and the
23 clerk must simultaneously transmit a copy of the complaint to

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1 the judge whose conduct is the subject of the complaint.

2 "After expeditiously reviewing the complaint," I'm
3 still quoting from 372(c), "the Chief Judge may dismiss the
4 complaint if he finds it to be, one, not in conformity with
5 the earlier paragraph; two, directly related to the merits of
6 the decision or a procedural ruling; or three, frivolous.

7 "The chief judge shall transmit copies of his written
8 order to the complainant and to the judge whose conduct is the
9 subject of the complaint. And if the chief judge does not
10 enter an order under the subsection, such judge shall promptly
11 appoint himself and equal numbers of circuit and district
12 judges of the circuit to a special committee to investigate
13 the facts and allegations contained in the complaint." So a
14 process that ensures that somebody who's not in the
15 decision-making is doing the investigating.

16 So, Your Honor, if you grant the defense motion and
17 enter an order that we disclose the e-mails to defense
18 counsel, we request, in the alternative to our view, that you
19 should just deny the defense motion. We ask that you act
20 consistently with this other situation in which a court had to
21 deal with an allegation of ex parte communications and
22 judicial misconduct, and yet where the public interest, the
23 public interest in protecting the integrity of the judicial

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1 function is implicated.

2 So we would say pause, refer it. Don't you make the
3 determination of what's privilege and what's not. It's their
4 privilege.

5 Your Honor, are there any other questions about the
6 Carlucci case?

7 MJ [Col SPATH]: No.

8 Let me ask this with regard to privilege. Again,
9 it's a deliberative process, as you rightfully stated. It's
10 similar in many courts and it has to do with opinions,
11 rulings, crafting of decisions. I understand all of that.

12 So you're claiming that these e-mails fall within
13 that privilege? Because ----

14 CP [BG MARTINS]: Your Honor -- yeah.

15 MJ [Col SPATH]: ---- you're not ----

16 CP [BG MARTINS]: No, I'm claiming -- I'm claiming that,
17 A, you should not turn over any government e-mails over our
18 objection. And I was distinguishing the voluntary
19 submission ----

20 MJ [Col SPATH]: I understand.

21 CP [BG MARTINS]: ---- of disclosure to you of government
22 information based on oral argument last time.

23 MJ [Col SPATH]: I'm looking at the two -- I'm trying to

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1 figure out if a privilege is being claimed or you believe it
2 is privileged.

3 CP [BG MARTINS]: It is implicated.

4 MJ [Col SPATH]: Okay.

5 Implicated is different.

6 CP [BG MARTINS]: It is.

7 MJ [Col SPATH]: And then the other is, under 506, your
8 privilege other than classified information. So that's what
9 I'm trying to figure out is -- so you're claiming that turning
10 over these e-mails over your objection would harm the public
11 interest because of this implicit or impacted privilege?

12 CP [BG MARTINS]: You're rewording ----

13 MJ [Col SPATH]: I am.

14 CP [BG MARTINS]: ---- Carlucci. What I'm saying is go
15 slow because you're -- a learned, wise court went slow in a
16 very similar situation.

17 MJ [Col SPATH]: I've -- the book on -- unfortunately, on
18 the commissions is that we've gone slow, General Martins.

19 This ----

20 CP [BG MARTINS]: Your Honor ----

21 MJ [Col SPATH]: ---- this started last month. I've spent
22 a month getting ready for this hearing, and so I've gone slow,
23 and I haven't made a decision yet, so I'm still going slow.

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1 I'm trying to understand your argument so when I
2 depart here, assuming I don't come to a ruling, that I
3 understand when I leave and work through it. Part of me feels
4 like I'm comfortable with where I'm at, and I think you'd be
5 surprised just based on, again, you turned these over for the
6 in camera review before I made a ruling.

7 CP [BG MARTINS]: Correct.

8 MJ [Col SPATH]: And so now I'm trying to make clear if
9 you're claiming 506, that it will harm the public interest if
10 I turn over what's in these binders. That's one set of
11 analysis. If you're claiming privilege, it's a different
12 analysis. Maybe there's a different analysis for each e-mail,
13 frankly. And there's also 703, just basic discovery. Should
14 I even turn them over because they're not material to the
15 preparation of the defense? They're not necessary; they're
16 not relevant. There's lots of different areas to look at,
17 frankly, with each e-mail.

18 CP [BG MARTINS]: Your Honor, I want to try to help there.

19 MJ [Col SPATH]: Please do.

20 CP [BG MARTINS]: I am. I am, for the purposes of these
21 proceedings, because general principles of privilege in Rule
22 501 say the claiming of a privilege is a demand not to produce
23 something or not to do something with regard to information.

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1 So I'm doing that. And I have the authority to do that in
2 these proceedings.

3 MJ [Col SPATH]: You do. Don't you have to ----

4 CP [BG MARTINS]: I also have to ----

5 MJ [Col SPATH]: --- don't you have to identify then what
6 falls under that privilege? Are you suggesting by claiming
7 the privilege all of your filing in E and all of your filing
8 in K fall under a privilege?

9 CP [BG MARTINS]: Your Honor, I'm suggesting what the
10 Court of Military Appeals wrote in Carlucci. So I am asking
11 for relief, if you -- the procedural posture of this is we are
12 seeking a type of ruling here, respectfully asking for a
13 ruling that you deny the motion, in the alternative that you
14 act consistent with Carlucci, and with the concerns we should
15 have about the privilege and where the boundaries of it are.
16 Because the allegation is that these e-mails are somehow
17 indicative -- somewhere in that theory, that they're
18 indicative of corrupted processes to his client ----

19 MJ [Col SPATH]: Absolutely -- that is one of the,
20 frankly, assertions or hypotheticals as we discussed the last
21 time that was made.

22 But another one is simply, now that I have asked the
23 defense counsel and made clear the scope of his request, is

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1 was there ex parte communication from -- I point to the
2 prosecution as a whole -- from you all to some kind of
3 judicial body, was there ex parte communication?

4 So how do we analyze this? How about if I don't
5 disclose any e-mails -- I'm not suggesting there are any, this
6 is a hypothetical. I don't disclose anything that is said by
7 a clerk, a judge, or anybody over on the other side for any
8 number of reasons. We'll say privilege for a moment.

9 That's why I'm asking.

10 CP [BG MARTINS]: I have ----

11 MJ [Col SPATH]: What about the ex parte communications?

12 CP [BG MARTINS]: Every one of those e-mails involved a
13 clerk, as you know.

14 MJ [Col SPATH]: I do.

15 CP [BG MARTINS]: Every one of them.

16 MJ [Col SPATH]: I'm not asking you to disclose that.

17 General Martins, that's why I'm struggling.

18 CP [BG MARTINS]: And I'm ----

19 MJ [Col SPATH]: Your argument is, frankly, very smart
20 legally. I am trying to inject some common sense into a
21 process. Because earlier it was said that the D.C. Circuit
22 indicated it was unfair to the accused, this process. It is
23 equally as unfair to anyone else who has an interest in this

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1 process, to include family members, to include alleged
2 victims, to include outside entities watching. There are lots
3 of interests who are impacted by what is going on here. And I
4 know you have empathy with that; Mr. Kammen has indicated he
5 has empathy with that.

6 CP [BG MARTINS]: Your Honor ----

7 MJ [Co1 SPATH]: My question to you here is ----

8 CP [BG MARTINS]: Do you think I can waive one e-mail?

9 MJ [Co1 SPATH]: Here's my question ----

10 CP [BG MARTINS]: You know, the doctrine of privilege
11 involves -- you can't just turn it on and turn it off.

12 MJ [Co1 SPATH]: If it's privileged. If it's privileged.
13 You know the contents of the notebook. So to say it could be
14 privileged, you know the contents, we are not talking
15 hypotheticals.

16 CP [BG MARTINS]: I would like to think about it. I have
17 a large organizational client that I represent.

18 And this -- this was a very broad discovery request
19 and it involves a lot of e-mails ----

20 MJ [Co1 SPATH]: Concur.

21 CP [BG MARTINS]: ---- and so ----

22 MJ [Co1 SPATH]: Concur.

23 CP [BG MARTINS]: Rather than on the fly, I'd like to

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1 think about that. But I would like ----

2 MJ [Col SPATH]: Here's my question, because it relates to
3 two e-mail chains. That doesn't disclose contents. Two
4 e-mail chains that involve somebody here and not a judge;
5 you've already said they involve the clerk, and that's
6 correct. It is two chains. And don't I have an obligation,
7 for the public trust of this process to let everybody know
8 there's nothing here so that we can move on?

9 CP [BG MARTINS]: Your Honor, I'd love to be able to
10 show -- but I'm representing a large government, and I will --
11 I just have to tell you, you can't turn on and off a privilege
12 that easily. And if there is privilege viewed here, I'm
13 turning over the e-mails of, or in the blanks or the ----

14 MJ [Col SPATH]: I know. But you know ----

15 CP [BG MARTINS]: ---- turn over the appellate court's
16 e-mails.

17 MJ [Col SPATH]: What privilege are you claiming,
18 deliberative process? You know the scope of the deliberative
19 process.

20 CP [BG MARTINS]: I know the Carlucci decision which
21 defines it and describes it and, Your Honor ----

22 MJ [Col SPATH]: You know the scope, so I'm going to give
23 you a hypothetical. If it relates to what time does court

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1 start today, because you're running late -- this is a
2 hypothetical. This is not in the e-mails, to be absolutely
3 clear, this is a hypothetical. You're running late and
4 somebody on your staff says, General Martins is running late.
5 Can we delay court by 20 minutes?

6 CP [BG MARTINS]: Carlucci, Your Honor. Thank you, Your
7 Honor. Thank you. I understand the hypothetical.

8 MJ [Col SPATH]: Okay.

9 CP [BG MARTINS]: Carlucci says, who's doing the
10 investigating, and if you rule against him at some future
11 point and he doesn't like it and he wants your e-mails, okay,
12 they're administrative, are you just going to turn them over
13 really? I mean, there's precedent issues here. It's who's
14 doing the investigating. That's what Carlucci is thinking
15 about.

16 MJ [Col SPATH]: That's true.

17 CP [BG MARTINS]: The allegation goes to the core of your
18 deliberative process.

19 MJ [Col SPATH]: But this is not an investigation.

20 CP [BG MARTINS]: Read the -- with respect, Your Honor,
21 read how it describes it.

22 MJ [Col SPATH]: But that's not what I'm doing.

23 What I'm doing is trying to wisely, smartly move this

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1 process in a meaningful way forward. And by the way, you have
2 an interest in that, you say ----

3 CP [BG MARTINS]: We thought this could have been dealt
4 with rather quickly.

5 MJ [Col SPATH]: You say ----

6 CP [BG MARTINS]: So ----

7 MJ [Col SPATH]: The defense on the record say they don't
8 have an interest necessarily in moving the case forward for a
9 number of reasons. The end result the government wants,
10 obviously the sentence. Mr. Kammen said on the record a
11 number of sessions ago we don't necessarily share on that same
12 thing. Today he said we do have some interest.

13 Look, you all have competing interests. That's been
14 made clear over multiple months down here. I'm not doing an
15 investigation. I am not doing a judicial inquiry that I know
16 about the appellate court, whether or not there should have
17 been a recusal, a removal, somebody was quitting. None of
18 that -- none of that is important to me right now. It is not
19 anything, I don't believe, within my purview, frankly.

20 CP [BG MARTINS]: Can I have overnight to review ----

21 MJ [Col SPATH]: I'm going to give you a minute. I want
22 to be clear. I'm looking at these e-mails voluntarily
23 disclosed ----

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1 CP [BG MARTINS]: To you ----

2 MJ [Col SPATH]: ---- before ----

3 CP [BG MARTINS]: ---- before ----

4 MJ [Col SPATH]: I know, sir. Before I made a ruling.

5 And so now I have also judicial economy. And you're saying it
6 could be privileged when I'm talking about two e-mail chains,
7 and you know the contents.

8 And so I don't understand how you're claiming
9 judicial, deliberative privilege for those e-mail chains. I
10 don't.

11 CP [BG MARTINS]: Well, I'm claiming the applicability of
12 an important precedent, and that's what I'm claiming.

13 Okay, so I'm ----

14 MJ [Col SPATH]: Carlucci is precedent. I agree with you.

15 CP [BG MARTINS]: Okay. So that's what I'm claiming.
16 I've explained the nuances with regard to invoking the
17 privilege. I can't talk to the C.M.C.R., that's the
18 complaint, nor I do want to. That would be revoking their
19 privilege.

20 MJ [Col SPATH]: Nor do I want you to. This is a motion
21 to compel that has been narrowed specifically to
22 communications from you, your team here, and the appellate
23 court, we'll include the clerk.

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1 CP [BG MARTINS]: Has been narrowed by whom?

2 MJ [Col SPATH]: Mr. Kammen. Up here.

3 LDC [MR. KAMMEN]: [Microphone button not pushed; no
4 audio].

5 CP [BG MARTINS]: Yeah. I'm not sure. I'm not sure that
6 we did.

7 MJ [Col SPATH]: Well, did you when you were standing
8 here, Mr. Kammen?

9 LDC [MR. KAMMEN]: And I apologize. Not only am I a
10 mushroom, I'm a pushover. When I reread the motion, it was
11 clear that it was broader than what you had anticipated.

12 MJ [Col SPATH]: It says what it says.

13 Okay. So word choice is important, and so that's --
14 that is an important distinction. I would like you to look at
15 two tabs, 3 and 10 in E, 355E. Take a look at them for a
16 moment. Here's my question: I don't know if I'd release my
17 own e-mails if that question comes up, right? Depends.
18 There's lot of scenarios where maybe I would. I don't know.
19 If there's a discovery request for e-mails, we'll cross that
20 bridge when we get to it. And you're correct, it's a very
21 slippery slope. I agree.

22 Having the public interest in mind, though -- so
23 looking at 506, understanding that ex parte communications

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1 could be viewed as something worth looking at, right? The
2 public ----

3 CP [BG MARTINS]: Uh-huh.

4 MJ [Col SPATH]: And then resolving their issue, so when
5 they look at them, they say, really? We fought about this?
6 We fought about this?

7 CP [BG MARTINS]: Your Honor, but there's an investigative
8 process for complaints.

9 MJ [Col SPATH]: We're not investigating. I am not
10 investigating a complaint against my superior court. I am
11 not. I am not interested in it. That's not what I could do.
12 The only complaints I can investigate -- we have a very
13 similar process up in the Air Force trial judiciary. When
14 there is a complaint against a trial judge, it comes to me and
15 same, I either I set up an inquiry or I don't. I can dismiss
16 it out of hand.

17 CP [BG MARTINS]: You would agree, Your Honor, those
18 processes can instill public confidence, too, if they're
19 properly ----

20 MJ [Col SPATH]: They can. And that's why they're kept
21 under cover, right. That's why they're private because if we
22 made public every dispute against a trial judge, it would
23 undermine public confidence because many people complain about

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1 trial judges for many reasons: They don't like a ruling; they
2 don't like a look; they don't like a comment; I should talk
3 less on the record.

4 But we know those things are true and that's why the
5 complaints come to me. So in the judicial complaint process,
6 that's different. All's I'm doing here is trying to work
7 through a motion to compel where I got documents. Again, I
8 didn't ask for them. We'll never know how I would have ruled,
9 because I didn't have the opportunity. I got the documents.
10 I've looked at them. I am -- let me -- maybe I can say this:
11 I read -- on the break, I got the defense's case and spent
12 some time with it, Barnwell. Just so the public knows,
13 Barnwell's ex parte communications were egregious. They were
14 between a trial judge, a prosecutor directly; not a clerk, not
15 a staff member of yours. They were between a trial judge and
16 a prosecutor and a jury foreman about matters pending in the
17 jury deliberation room and nobody told the defense. And
18 rightfully the court had some issues with that. I'm not
19 surprised. At the same time that they had issues with it,
20 they said, the mere occurrence of ex parte conversations is
21 not a constitutional deprivation.

22 Better, because it has some authority over us, right,
23 is Paylor v. Winter. It is a United States District for

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1 Columbia, 600 F.Supp.2d 117. And it makes clear,
2 communications that are administrative in nature are not
3 prohibited. And it goes on to discuss, quite frequently those
4 are not unusual. I appreciate that both sides keep them
5 unusual in my court, frankly. I don't get communications with
6 you all directly. I haven't had any ex parte, that I know of,
7 about administrative matters. That -- my staff has certainly
8 dealt with a few and we try to alert both sides, as we should.

9 So that's how I'm looking at this, is okay, so in a
10 broad sense, you're right. These are administrative in
11 nature. Mr. Kammen, if you have faith in me, as you've
12 indicated at times you do, these are all administrative in
13 nature. They're not discoverable.

14 But I'm asking you to look at 3 and 10, which involve
15 your office, and you were copied on one, fair to say, because
16 you mention the clerk, you were copied on one, those are the
17 only communications that you all have found where the defense
18 wasn't copied. Two of them. And in one of them, the defense
19 was copied at the beginning of the chain. They know the
20 substance at issue. And wouldn't it be better for the public
21 trust to just hand them to the defense and say, Mr. Kammen,
22 this is all we were talking about? This is it. There's no
23 there there from us.

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1 Now, Mr. Kammen has indicated he is now broadening
2 the scope of his discussion again, and you've already gotten
3 some preview on that, I think. If the motion to compel is for
4 everything in E and K, I am unlikely -- I will listen again,
5 Mr. Kammen, but I am unlikely to grant it, because they are
6 nondiscoverable. They're administrative in all of them. They
7 are. There's no there there.

8 I hope, Mr. Kammen, you have enough faith that if I
9 saw something in here that matched one of your
10 hypotheticals -- not you all, but somebody reaching to the
11 appellate court saying, do this, do it now, that it would
12 cause me some significant concern. I hope with Change 1 I
13 made clear. I can't imagine I didn't.

14 I'm telling you that I agree -- I agree and have
15 listened to and read through much of what you've argued. If
16 the question is do these fall within a deliberative -- a
17 judicial privilege, they don't, and they don't because they're
18 administrative, trivial, and unimportant.

19 And as officers of the court, I presume you have
20 given me everything you've got. That's what they are. What I
21 would ask from you all is can you just look at tabs 3 and 10
22 and see if, building part of that bridge, you can just show
23 the defense what you were talking about on the two times they

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1 were left off of an e-mail, inadvertently or advertently, and
2 really put that into not just the public interest, but the
3 public trust in this? Because if you two could have talked
4 about that, I know -- I know it's difficult, I know -- I know.
5 And that's why I appreciate both of your comments. I do. And
6 I -- you needed to address the hypotheticals for the public
7 trust that you're trying to inspire, sir. I got that. I know
8 you all are doing that.

9 My worry is the process. And we have here wasted,
10 frankly, a long time on the motion to compel based on what I
11 was provided. There's nothing in there that meet those
12 hypotheticals. There's nothing in there that is more than
13 administrative, again, trivial communications. There isn't.
14 But sometimes you can be -- it's kind of like with objection
15 practice. Just because you can do it doesn't always mean you
16 should. And I'm just asking, can you look at 3 and 10? And
17 look at those two and say, you know what, here's where at
18 least we were involved.

19 CP [BG MARTINS]: Your Honor, we'll certainly look at
20 that.

21 MJ [Co1 SPATH]: And maybe ----

22 CP [BG MARTINS]: I would ask that you not rule.

23 MJ [Co1 SPATH]: I won't rule tonight.

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1 CP [BG MARTINS]: Okay.

2 MJ [Col SPATH]: Have a conversation about those two tabs.
3 I appreciate, though, that you came up arguing a broader scope
4 for the motion. I was under the impression that that had been
5 fixed during my discussion, and clearly it hadn't. And the
6 motion goes to all of the material that you have gathered.
7 Different discussion. And I want to talk to Mr. Kammen about
8 that because he did say, if I review them, he would have some
9 faith if I told him there's nothing there, and fair for me to
10 talk to him directly about that.

11 But if you all would look at 3 and 10 and see if you
12 can come to some agreement, even if you don't disclose them
13 officially, can you just sit down at a table, here's what we
14 were talking about, so that we can, with a straight face, say
15 to all of the participants watching this, we're going to stop
16 fighting about some of this stuff and get to the fight we all
17 need to get to, Brady, discovery, disclosures, and we can get
18 to trial.

19 CP [BG MARTINS]: We want to move on, Your Honor. We got
20 to handle little things -- supposedly little things as well.

21 MJ [Col SPATH]: We do. I think what I'm saying to you is
22 maybe sometimes there's ways that we can handle them so that
23 we can do this so that we can focus in on these pending issues

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1 that are very big that we need to get through.

2 I appreciate your arguments, General Martins.

3 CP [BG MARTINS]: Subject to your questions.

4 MJ [Col SPATH]: Mr. Kammen.

5 TC [MR. MILLER]: Your Honor, Mr. Kammen, if I could have
6 a second. I'm not trying to steal your thunder. I'm not
7 piling on.

8 MJ [Col SPATH]: No, not a bit.

9 TC [MR. MILLER]: I believe we received notice that the
10 marshals will have Mr. Gill at the Mark Center tomorrow
11 morning at 9:00. With the court's indulgence, if I could just
12 go outside and speak with my people to make sure that that is
13 what, in fact -- I didn't want to just get up and leave.

14 MJ [Col SPATH]: No, I appreciate that. Mr. Miller, you
15 can depart the courtroom and we'll just make it clear when you
16 come back. Thank you.

17 Mr. Kammen, I want to be up front with you. I have
18 spent time reading E and K, as you would expect I would. They
19 are purely administrative. Frankly, they're less than
20 administrative. They're -- there's just nothing in there.
21 Now, it's what I'm provided, I recognize that. I am at the --
22 I am at the mercy and -- I am what I am; I get what I get.

23 But even with that timeline, the e-mails are purely

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1 administrative in nature. And there are only two chains with
2 only a few e-mails that relate to anyone who sits over here --
3 and not just sitting here now, by the way, it wasn't that
4 narrow. It was within General Martins' office. There's only
5 two.

6 LDC [MR. KAMMEN]: If I may?

7 MJ [Col SPATH]: You may.

8 LDC [MR. KAMMEN]: I mean, just to clarify one thing, I
9 apologize. When I look at our request, we clearly
10 incorporated by reference the entire request.

11 MJ [Col SPATH]: You do and, I mean, I did focus in on the
12 remedy where the line said government counsel.

13 LDC [MR. KAMMEN]: Right. I appreciate that. You know,
14 I -- please tell me that the government's position -- you
15 know, is so rigid -- I mean, we're not here -- I hope we're
16 not here over parking spaces, because rational lawyers, when
17 the other guy says, gees, did you have an ex parte
18 communication, would say, yeah, it was about parking spaces
19 here it is. End of issue.

20 MJ [Col SPATH]: So part -- I don't dispute that. Here's
21 my question. One is ex parte. We need to make sure we're
22 talking about the same thing. So what I took from that, and
23 again doing some research, was communication from government

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1 counsel, and again, I included support staff, anyone within
2 the prosecution team staff office, and really, anybody at the
3 court, to include a clerk, in none of those e-mails do we
4 include people who have judicial responsibilities, judges
5 within that court. There is no communications that I have
6 seen there.

7 LDC [MR. KAMMEN]: And again, we don't know what ----

8 MJ [Col SPATH]: I agree. I understand that.

9 LDC [MR. KAMMEN]: So we're operating completely in the
10 dark. And frankly, in a different proceeding where you didn't
11 have five years of history ----

12 MJ [Col SPATH]: I agree.

13 LDC [MR. KAMMEN]: ---- there may be a -- a little bit
14 greater situation, but ----

15 MJ [Col SPATH]: There's been some struggle, right.
16 There's been some struggle with trust. We've talked about it.

17 LDC [MR. KAMMEN]: It's not a struggle.

18 MJ [Col SPATH]: I am trying to be -- I have to be more
19 diplomatic.

20 LDC [MR. KAMMEN]: Okay.

21 MJ [Col SPATH]: But what I'm saying to you ----

22 LDC [MR. KAMMEN]: You know where we are.

23 MJ [Col SPATH]: What I'm trying to get to is at some

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1 point, all of us are going to have to sit in this room, it
2 would appear, for a lengthy period of time. We are, assuming
3 this continues to move forward. And if we're doing that,
4 civility, even in the face of great frustration, is going to
5 be needed.

6 LDC [MR. KAMMEN]: Absolutely.

7 MJ [Col SPATH]: So that's why if they can come to you
8 with the two e-mails, not in a filing, and just say, here it
9 is ----

10 LDC [MR. KAMMEN]: Well, you know, if there's 10, and
11 they're all so benign, why are we messing with this? If this
12 is all as benign as you suggest, then why are we messing with
13 this, because ----

14 MJ [Col SPATH]: Well, you know the why. The why is if
15 the law is ----

16 LDC [MR. KAMMEN]: Well, I understand. But you're
17 absolutely right. You know, you can be a good lawyer and be
18 unbelievably stupid. And if they want to go to an appellate
19 court that may not exist because they don't want to give up
20 e-mails about parking spaces, that would be, in my view,
21 unimaginably stupid.

22 Now, I assume that I'm not dealing with stupid
23 people. And so when we make a request for ex parte

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1 communications and the response is nuclear, not no, but pardon
2 my French, hell no, I've got to assume there's something bad
3 there. Because rational lawyers don't mess around like this.
4 Good lawyers, smart lawyers, don't mess around like this. And
5 so, you know, we are where we are.

6 Now, you know, everyone's got these rules. And you
7 say that's not discoverable because you can find a rule that
8 says it's not discoverable. And fine, we have to live with
9 that. But I will say, I do accept that, but I also have to
10 acknowledge and come back to my concern that I expressed the
11 last time, is that no matter how much you want to see yourself
12 as being above it, you don't want to go back to the C.M.C.R.
13 and get slapped down a third time, and I understand.

14 So I accept that.

15 MJ [Col SPATH]: Here's what I believe: Given all the
16 litigation to come, I will have an opportunity to be back at
17 the C.M.C.R.

18 LDC [MR. KAMMEN]: Well, I'm going to be honest. I
19 believe after Dalmazzi, the C.M.C.R. isn't going to exist.
20 But that's a different fight.

21 The point is, Your Honor, you can say it all you
22 want, and if this were a federal court, if this were a court
23 with a different history, it would be a different situation.

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1 This court, writ large, does not come to the public with a
2 presumption of regularity. It comes to the public with a
3 presumption of ridiculousness. The operative description of
4 this court, in certain circumstances -- obviously not them --
5 is the -- is that it's an insult to kangaroos to call it a
6 kangaroo court.

7 And frankly, with all due respect, because you're
8 invoking rules that make it a kangaroo court. And so here's
9 the chance, you have the opportunity.

10 MJ [Col SPATH]: But I've done -- see, here's the
11 frustration ----

12 LDC [MR. KAMMEN]: No ----

13 MJ [Col SPATH]: Let me finish this. 703, that discovery
14 rule, that's the same one I use in a courts-martial. So I
15 disagree that it is this kangaroo event.

16 LDC [MR. KAMMEN]: No.

17 MJ [Col SPATH]: That's the same analysis.

18 LDC [MR. KAMMEN]: But here's the difference ----

19 MJ [Col SPATH]: And it's based on -- it's based on
20 federal rules of practice, and the Military Rules of Evidence.
21 And as you know, the commission rules of evidence in large
22 part are based on the Federal Rules of Evidence.

23 LDC [MR. KAMMEN]: Absolutely. But here is the

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1 difference, with respect: Federal courts have a structure
2 that everybody knows has regularity. Military commissions do
3 not. One of our challenges, one of our ongoing challenges, is
4 to the structure of this process. Anything that is -- goes to
5 the structure of the process, that suggests that the structure
6 of the process is not appropriate, especially in light of the
7 D.C. Circuit's decision that it all has to wait until we're
8 done, is discoverable. What we do with it is a different
9 situation.

10 Now, if this is all benign, what we'll do with it --
11 what we would have done with it two months ago is said, wow,
12 maybe in the future you ought to follow the rule and let the
13 other side know, but that would be the end of it. But when
14 it's hidden, when it's hidden from us and it's hidden from the
15 public, given the history of the military commissions, given
16 all of the stuff that happens in secret here, all of the
17 completely unusual things that are beyond shocking that are
18 far more serious than this, it's hard for us to simply say --
19 give this the presumption of regularity. And frankly, there
20 are a lot of elements of the public that don't give this the
21 presumption of regularity.

22 So you can -- you, writ large, they can invoke the
23 rules, you can invoke the rules, you can all find ways to keep

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1 this secret, and we'll have no choice but to accept it. But
2 that doesn't mean that we're not going to be skeptical,
3 because common sense tells me that the smart situation, when
4 there is this kind of challenge to somebody's ethics, is to
5 want to say, here, let me show you. And, you know, if -- if
6 in this case we're wrong, we're wrong.

7 And the truth of the matter is, when we sent them the
8 motion to produce, and I said this before, we absolutely
9 expected them to say there were none. And since there are, I
10 would have expected them to say, here they are. Keep them
11 confidential because they're really sort of administrative, we
12 look at them and we say okay. But instead, it's overbroad.

13 And then when we file the motion, because we have no
14 choice at that point, then it's the nuclear option of we're
15 never going to give this up. We don't want you to see them,
16 Judge. And it was only when it was pretty clear that that's
17 where you were headed that they did it voluntarily. This
18 reminded me -- the last time I saw somebody fight this hard
19 over this kind of stuff, it was Nixon trying to hide the
20 Watergate tapes.

21 Now, if this was about parking spaces, that's crazy.
22 But we don't know, and that's the problem -- that's why the
23 ABA rules avoid all of this. Because the ABA rules absolutely

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1 allow administrative communications. Absolutely. We've
2 always conceded that. But they also say that the judge
3 should -- or the clerk, because the ABA -- the clerk is within
4 the ABA rules, promptly notify all other parties of the
5 substance of the ex parte communication. So we're only -- I
6 suppose in one level only asking you to do what whoever didn't
7 do and apply the ABA rules. And for the record, this is ABA
8 Rules of Judicial Conduct, Rule 2.9, dealing with ex parte
9 communications.

10 MJ [Col SPATH]: But they involve parties and that's why
11 I'm having a conversation about Tab 3 and Tab 10.

12 LDC [MR. KAMMEN]: But here's the other situation in this
13 circumstance, Your Honor, and this is again when we're
14 operating in the dark. And in the history of this, that, you
15 know, you say this is all benign, but I'm not going to let you
16 see them. Well ----

17 MJ [Col SPATH]: But what's your -- I know fairness, I got
18 it. I'm not just in -- I don't -- first of all, I'm not
19 invoking rules. I'm attempting to follow the rules, and it's
20 not just me looking at, oh, the military commission rules
21 say -- they say a pretty standard thing in discovery. If it's
22 irrelevant, immaterial, not part of a defense, not part of
23 mitigation, it's not discoverable.

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1 So I conceded, okay, unlawful influence, that would
2 be discoverable. That goes arguably to a defense, and it
3 certainly goes to a concern any court would have. And so we
4 got there. And I ordered lots of discovery in relation to
5 Change 1. And in this case, I wasn't leaning or not leaning
6 towards ordering production. I was having a discussion.
7 People take those discussions to mean I'm heading a certain
8 way, that's fine. I was having a discussion and they provided
9 the information to me up front.

10 But you know this: In federal court and in a
11 courts-martial, if it's immaterial or irrelevant, you don't
12 have a right to it. That's not a new proposition just here.

13 LDC [MR. KAMMEN]: No, that is true. But there would be
14 no circumstance in a federal court where a prosecutor would
15 fight this hard.

16 MJ [Col SPATH]: That's a different discussion, and not --
17 I ----

18 LDC [MR. KAMMEN]: It's not.

19 MJ [Col SPATH]: I'm trying to break some of those
20 barriers down ----

21 LDC [MR. KAMMEN]: Well ----

22 MJ [Col SPATH]: ---- because I recognize how much time
23 we're going to spend together. I'm trying to break some of

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1 those barriers down. What I'm saying is judges review things
2 all the time. And you indicated if I reviewed it, you'd have
3 at least some confidence in that.

4 If anything that I received gave me a concern about
5 UI, I think I've made clear how I feel about it. I have. I
6 know I have. I'm not even worried about it. They're
7 administrative communications.

8 So then the question is, ex parte administrative
9 communications ----

10 LDC [MR. KAMMEN]: Undisclosed to the defense.

11 MJ [Col SPATH]: ---- should be disclosed to you.

12 LDC [MR. KAMMEN]: Right. That makes them improper and
13 unethical.

14 MJ [Col SPATH]: But that's a different -- that's an issue
15 for you all to deal with. But frequently, there are minor
16 administrative discussions. There's levels of those even,
17 let's face it. Again, the example I gave was late to court.
18 That one could be arguably problematic, maybe it causes
19 significant issues. What time does court start today?

20 LDC [MR. KAMMEN]: If that's what we're dealing with, so
21 be it.

22 MJ [Col SPATH]: And so again, and it also is that -- is
23 it -- you know, the other level is, is it a prosecutor writing

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1 an e-mail or a prosecutor being copied on an e-mail that's
2 being written and it involves something innocuous? I mean,
3 there's lots -- as you know, that's what I was talking to
4 General Martins about. The right analysis for each of these
5 e-mails can be different. Could be privileged for this one,
6 if it fell within a judicial deliberative process. I think I
7 have indicated how I feel about that one.

8 But to do the right analysis on these e-mails, right,
9 you could see how you've got 506. The government can refuse
10 to disclose government communications if they will harm the
11 public interest. If that's the argument, then I'd have to
12 look at the e-mails to go, do they harm the public interest.
13 Trust in the process. But I -- you could analyze these
14 e-mails differently -- maybe not these. These, to me, really
15 come down to 703 and just discovery.

16 LDC [MR. KAMMEN]: And, you know, obviously I see where
17 this is headed. And all I can say, Your Honor, is, you know,
18 you've said what you've said, and, you know, I -- you know, we
19 have no choice but to accept this. But I will tell you that
20 that does not give us any greater faith in this process, and
21 it should not give the public any greater faith in this
22 process.

23 MJ [Col SPATH]: It should because if I don't follow rules

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1 that have been in place in discovery in criminal litigation,
2 that have been in place for years -- if I just willy-nilly
3 say, not discoverable, no legal basis for it, but here you go,
4 that gives the public no confidence.

5 LDC [MR. KAMMEN]: The ABA Guidelines ----

6 MJ [Col SPATH]: For ex parte communications.

7 LDC [MR. KAMMEN]: Yes. Which these are.

8 MJ [Col SPATH]: That's what you've said.

9 LDC [MR. KAMMEN]: That's what he says because he gave
10 them to you in response ----

11 MJ [Col SPATH]: He -- he, being General Martins, produced
12 a lot of information that are communications -- that are
13 communications not from a party.

14 LDC [MR. KAMMEN]: That's even worse.

15 MJ [Col SPATH]: That's a different issue.

16 You -- all's I can do is deal with what your motion
17 to compel deals with, and that's why I had the first
18 conversation with you.

19 General Martins went out and, frankly, got more
20 communications than are probably responsive, that's the
21 choice, and turned them all over to me. Even the wide expanse
22 of what he turned over to me indicates to me that at least it
23 was turned over to me. And again, as officers of the court,

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1 if ----

2 LDC [MR. KAMMEN]: I'll accept that.

3 MJ [Col SPATH]: They're here. They're just simply not
4 only administrative in nature, but -- and benign, they don't
5 fall within the timeline even. They're just -- I don't
6 understand how I can give confidence in the process if I will
7 abandon longstanding rules of discovery. The same ones here,
8 with the absence of classified, I -- that's a different
9 discussion we can have, although classified courts in the
10 federal system, the rules here are reasonably similar, again.

11 But I know you don't like the classified process. I
12 know that. And I know I'm new to this still, even though I
13 have been here for a while. I know I'm new to this, so
14 there's a lot of -- there's a lot of history between these two
15 sides. But I can't abandon it, even if internally I'm like --
16 if I was a prosecutor, and I'm not saying I would do -- please
17 stop reading so much into what I say. If I was a prosecutor,
18 I would simply turn it all over and -- or at least go sit down
19 with the defense and go, here, take a look. Can we be done
20 now?

21 I can't impose just what I think is a good idea,
22 I'm not saying it is, on them and vice versa. I have to look,
23 what is the authority for me at the trial level to do it?

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1 LDC [MR. KAMMEN]: I would suggest, Your Honor, that
2 anything in this circumstance that gives the public
3 confidence, and nothing will give the public -- you know,
4 look, I'm -- if this is benign, I'm happy -- as I said before,
5 I'm happy to say it's benign. Nothing will give the public
6 more confidence than that.

7 Secrecy, hiding -- you can say we have these rules,
8 but we have these rules in a court that has been described by
9 other judges as -- where the rules are ever-changing and the
10 rules have changed and are constantly changing. And so this
11 comes -- this is not the same as a court-martial or a federal
12 court. And so anything that will give the public confidence.

13 Now, when you say you've looked at it. If it were up
14 to you, you'd give them up. I mean, my sense is that this
15 involves parking spaces which, I feel like, you know, Jack
16 Nicholson, please tell me we haven't spent five hours arguing
17 about an e-mail over parking spaces. It does sound like
18 there's some e-mails about the appointment of the judges. It
19 sounded like that, that, you know, the mechanics of their
20 appointment, and whether they were -- you know, how that came
21 to happen. That might be a different issue, because that
22 really is an issue of some contention.

23 But, you know, you -- if you say we don't get them,

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1 we don't get them. And then if later on ----

2 MJ [Col SPATH]: They're in the record, I mean, regardless
3 of ultimately what is disclosed or not disclosed.

4 LDC [MR. KAMMEN]: But if we're interested in
5 confidence ----

6 MJ [Col SPATH]: Yeah. I -- and I agree with that
7 discussion, and that's -- you heard me with General Martins
8 have that discussion. I kept going back to how is it going to
9 harm the public interest. And maybe the public interest is
10 promoted by disclosure. I haven't ruled yet. I really have
11 not indicated what I'm going to do, with one exception: I
12 really want you to look at 3 and a 10 and have a discussion.
13 And tomorrow I'll give you a ruling if we don't have any --
14 any ----

15 LDC [MR. KAMMEN]: It's clear we're not going to get
16 anything that doesn't involve them. And here's the problem:
17 When other agencies are communicating with the court, that
18 doesn't give the public confidence in this situation. We've
19 had other agencies interrupt these proceedings. We've had
20 other agencies, at least in our view, bugging attorney-client
21 workspaces.

22 MJ [Col SPATH]: I hope you know again ----

23 LDC [MR. KAMMEN]: And so ----

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1 MJ [Col SPATH]: ---- as I reviewed these, do you really
2 think if I saw -- I didn't -- if I saw information where
3 another agency, be it one who bugged an attorney's office or
4 whatever, communicated with the court in an inappropriate
5 manner, I would say that's administrative in nature and
6 irrelevant?

7 LDC [MR. KAMMEN]: I certainly hope not, but ----

8 MJ [Col SPATH]: Me, too.

9 LDC [MR. KAMMEN]: ---- but I also hope that if it's so
10 completely benign that the -- you know, as you say, there
11 would be the common sense approach of, let's just end this,
12 and that's the troubling part from our perspective. On the
13 one hand, you say, oh, this is completely benign, but I'm not
14 going to show it to you. And that's the troubling part,
15 because ----

16 MJ [Col SPATH]: I haven't answered whether I'm showing it
17 or not yet. I am engaging in a discussion.

18 LDC [MR. KAMMEN]: Okay.

19 MJ [Col SPATH]: I mean, if the answer tonight is I work
20 through this -- I don't know if I'll get there tonight. But
21 over the next few weeks, if my answer is, public confidence
22 would be inspired by disclosure of all of this, maybe the
23 public doesn't trust what I have to say about it, maybe the

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1 public is really concerned about this, writ large, maybe it
2 will move the process forward in an economical, smart manner,
3 maybe that's -- maybe that is where I get my authority.

4 But again, I also have to -- I mean, discovery and
5 motions to compel, I can't simply default every time to I
6 should just hand it over, not because there's a reason,
7 because I feel like I should, because then I am making law.

8 LDC [MR. KAMMEN]: Well ----

9 MJ [Col SPATH]: Then I am making law.

10 LDC [MR. KAMMEN]: And what happens in a case -- in a
11 court where there is no body of precedent is that somebody's
12 got to go first.

13 MJ [Col SPATH]: But there's lots of precedent about
14 irrelevant, nondiscoverable information.

15 LDC [MR. KAMMEN]: But not in the context of ex parte
16 communications. I cannot think of any situation where they're
17 administrative where a court has said, yeah, they're
18 administrative, they're benign, I'm still not going to show
19 them to you. Because the rule is designed and every
20 jurisdiction is designed to absolutely, you have these
21 communications, and absolutely then as soon as practical,
22 otherwise, you include the other side.

23 MJ [Col SPATH]: Right. But there's a legal definition

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1 for ex parte. And so I again have highlighted ----

2 LDC [MR. KAMMEN]: Well ----

3 MJ [Col SPATH]: Take a look. I haven't answered. I
4 haven't said I'm disclosing them. I haven't said a word.
5 I've highlighted two tabs that I think are worth looking at
6 before I rule.

7 LDC [MR. KAMMEN]: And if -- I mean, again we're
8 speculating so I have no idea what we're talking about here.
9 If the Department of Justice was communicating with the court
10 or some other governmental agency was communicating with the
11 court about the appointment and those were really
12 administrative and really benign, I can't imagine why it would
13 promote public confidence to keep that secret.

14 And at the end of the day, Your Honor, what courts
15 throughout the United States have typically done is done what
16 is necessary to promote public confidence. And that always
17 involves showing more rather than less, light on a problem.

18 And, you know, I mean, that's -- that's just
19 typically the situation that it is when we hide and we do
20 everything in secret and we have these ex parte communications
21 and we invoke all of these technical privileges, that all of a
22 sudden people start saying, well, this is really a different
23 situation.

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1 So I understand your position, I understand you feel
2 constrained by the rules, but the ultimate rule -- sorry.

3 MJ [Col SPATH]: No. I'm agreeing with you.

4 LDC [MR. KAMMEN]: No. I think I'm talking too fast.

5 The ultimate rule is one that promotes confidence.

6 MJ [Col SPATH]: And that may well be the place where I
7 figure out the way through this.

8 The key for me is, I don't feel constrained by the
9 rules; I feel bound by them. And I think it is critical for
10 trial judges to feel that way. I voice that frequently. When
11 I go out and lecture, I say it, I -- and I do the best I can.
12 And sometimes being constrained by the rules requires things
13 like public confidence is important in the system, and if
14 there's a way do that in a way that is logically consistent
15 within the body of law, that's good.

16 LDC [MR. KAMMEN]: Well, I mean ----

17 MJ [Col SPATH]: So I know you keep saying you know where
18 this is going. I don't know where I'm going. I don't -- I
19 haven't really thought through it.

20 LDC [MR. KAMMEN]: Well ----

21 MJ [Col SPATH]: I like to engage in discussion.

22 LDC [MR. KAMMEN]: I appreciate that, and I enjoy the, you
23 know, the banter. Not the banter, the colloquy.

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1 MJ [Col SPATH]: It's important.

2 LDC [MR. KAMMEN]: It's important to flesh these things
3 out.

4 MJ [Col SPATH]: And you've seen it. Both sides have seen
5 it. It has caused me to negotiate through and frankly come to
6 rulings that one side or the other is more surprised by than
7 the other. I mean ----

8 LDC [MR. KAMMEN]: Well ----

9 MJ [Col SPATH]: ---- I don't know where I'm going. I'm
10 working through it.

11 LDC [MR. KAMMEN]: You know, again, I certainly hope that
12 all of this hasn't been over parking spaces. Because, you
13 know, that's -- but if it has been, then it has been.

14 Unfortunately, in this circumstance, after five years
15 and an awful lot of -- well, just hasn't gone as smoothly as
16 you would expect in another -- in other situations. And we
17 are where we are, and so -- unless you have any other
18 questions.

19 MJ [Col SPATH]: I don't, thank you.

20 LDC [MR. KAMMEN]: But I did want to correct my
21 misstatement because I hadn't re-read the motion carefully.
22 We really do think we're entitled to all of it. And frankly,
23 we think if it's benign, the public -- if you want -- let me

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1 just throw this out as this occurs to me. If you produce it
2 to us under seal, under a protective order of some sort, and
3 we look at it and we can agree that it's benign, we'll say,
4 yep, we looked at it, it's benign, and we won't disclose the
5 contents to the public. And if we think it is not benign, if
6 we think there's something in all of these that is not benign,
7 we'll identify it and then we'll find a way forward.

8 MJ [Col SPATH]: Thank you.

9 General Martins, any final comments?

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

11 MJ [Col SPATH]: All right. Tomorrow -- here's where
12 we're at, I think. Mr. Gill will be first, that's pretty
13 clear, if he's going to be ready at 0900. So let's just count
14 on that.

15 TC [MR. MILLER]: May I, Your Honor?

16 MJ [Col SPATH]: You may.

17 TC [MR. MILLER]: Your Honor, my information is that they
18 have made arrangements. They have him in custody. He will be
19 arriving at the Mark Center at 9:00 a.m. and he will be ready
20 to testify at 9:15 a.m.

21 MJ [Col SPATH]: We will get on the record a little before
22 9:15 and get started with Mr. Gill at 9:15. We'll have
23 Mr. Kammen's redirect and any recross from Lieutenant Morris.

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1 TC [MR. MILLER]: Thank you, Your Honor.

2 MJ [Col SPATH]: I also then will have discussion about
3 332AA. That's discovery.

4 There's still the -- any other witnesses, any other
5 evidence? I just want to close out the discovery piece, or
6 motions to compel, however you want to frame those. That's
7 important because I need to resolve those before I can resolve
8 the underlying motion at 332X. May or may not get there,
9 we'll see how we do.

10 I would like to deal with 362 as well. That's the
11 funding of Mr. Kleinman. So if we can have that argument
12 tomorrow, we'll do that. 361A and B, that's just the impact
13 of the C.M.C.R. rulings, that has to deal with that. That may
14 take most of the day just because I don't know how long
15 Mr. Gill is going to take. So if I -- if that's not
16 optimistic, as we get towards lunch, we find we'll have more
17 time in the afternoon, maybe we can talk about some other
18 appellate exhibits. But for right now, let's kind of focus on
19 those, since I think that's where we're going to be.

20 LDC [MR. KAMMEN]: I will say that we would prefer to
21 defer 361 to December, if we're here in December, because the
22 person who is going to argue was Ms. Spears and she's not here
23 because she's not cleared yet.

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1 MJ [Col SPATH]: And we may be able to do that. I am
2 going to go through -- I have the joint filing, which is 631A
3 and B. I'm going to go through the joint filing. I don't
4 know if it was necessarily a joint filing. I am going to go
5 through the joint filings. I appreciate the effort of the
6 joint filings. We'll have more of those, I hope. But I'm
7 going to work through those and see if we can come to any
8 closures.

9 I don't think we're going to make any headway with
10 the classified portions this time, and those involve both
11 Appellate Exhibit 359 and 354 and 092.

12 I know there was a request about 092, government, and
13 I just don't know if we can get there, because we have to have
14 the hearing to determine if we're going to do classified and
15 then we have to have the classified hearing. And so just
16 given how long it's taken to work through the issues, those
17 may well come in December.

18 So that's where we're at. That gives us a good idea
19 for tomorrow. I have a feeling Mr. Gill will take some time
20 for us.

21 General Martins.

22 CP [BG MARTINS]: Your Honor, on that scheduling,
23 counsel -- co-counsel has mentioned we're still looking for a

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1 ruling on 044B, which related to just structurally how to deal
2 with classified information. And then we're also seeking
3 505(g) notice with regard to the material we provided that was
4 portion marked 092 so that we can then do the process that we
5 were seeking to do, which was outline what we could do in open
6 session and so forth.

7 MJ [Col SPATH]: All right. We will work expeditiously to
8 do a few things between now and December. I know you've seen
9 the pace of rulings, at least since I was detailed to the
10 case, move along and I will do all I can to continue that
11 pace. While it's nice here on the commissions in that I have
12 help, which is not the same when I'm doing courts in the Air
13 Force, I don't necessarily have a staff that supports. They
14 do take time, the rulings take time. It takes me time to read
15 them. And the other piece is we have the classified filings
16 now in our office in response to 120, and so I'm going to
17 utilize as much time as I can to go through that as well. I
18 should have a good update for you, if not in December -- I'll
19 try before through the judiciary where we're at and how we're
20 doing.

21 LDC [MR. KAMMEN]: Are you in a position to advise us how
22 many pages, because they've been kind of coy about this, of
23 multiple thousands? And in the other case, Judge Pohl said it

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1 was -- and I don't know if he was serious or not, 60,000.

2 MJ [Col SPATH]: It's less. It's less. I'm not -- I'm
3 not in a position to give you an exact number. I can say
4 this, just based on a decent look, 20,000-ish. I'm not off by
5 a lot. But that's a good place to ----

6 LDC [MR. KAMMEN]: That's helpful, thank you.

7 MJ [Col SPATH]: All right. We'll get here a little
8 bit -- oh, sorry. Lieutenant Morris or Mr. Miller?

9 TC [MR. MILLER]: We have two matters. Just quickly for
10 scheduling purposes, Your Honor, I'm assuming just for the
11 party as far as preparation tonight, we won't reach 359, 354,
12 or 092 tomorrow, is that what we're saying?

13 MJ [Col SPATH]: That is what we're saying.

14 TC [MR. MILLER]: I don't think the government has
15 anything further than that. Lieutenant Morris has one last
16 thing.

17 MJ [Col SPATH]: Thanks.

18 ATC [LT MORRIS]: Your Honor asked me to remind you on
19 332Y, Attachment B, the government had provided a draft of a
20 sealing order and we ask that you sign that.

21 MJ [Col SPATH]: That is in regard to Attachments K, N,
22 and O?

23 ATC [LT MORRIS]: Yes. I believe that's laid out in the

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1 draft order.

2 MJ [Col SPATH]: It is. And those were, I know, submitted
3 under seal. We'll get that order signed and seal those.

4 ATC [LT MORRIS]: Thank you, Your Honor.

5 MJ [Col SPATH]: You're welcome.

6 TC [MR. MILLER]: Nothing further from the government.
7 Thank you, Your Honor.

8 DDC [LCDR POLLIO]: Sir, just one administrative matter.
9 Towards the end of the hearing today the feed in Mr. Nashiri's
10 headset was a dual feed, so if we could just have some IT
11 folks -- we didn't want to interrupt the argument on 355, but
12 it is something that needs to be addressed.

13 MJ [Col SPATH]: Please, do not hesitate. If there's an
14 issue, please, Mr. Nashiri, let me know.

15 DDC [LCDR POLLIO]: And to be clear, he personally did not
16 want to interrupt.

17 MJ [Col SPATH]: I think that's it. I'll see you all
18 tomorrow a little bit before 0915, the commission is in
19 recess.

20 [The R.M.C. 803 session recessed at 1724, 18 October 2016.]

21 [END OF PAGE]

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