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1 [The R.M.C. 803 session was called to order at 1134,  
2 19 October 2016.]

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

5 Just for some planning for post-lunch, I want to  
6 discuss 332AA, and that's the motion to compel discovery. I  
7 want to go through witnesses and make sure we figure out where  
8 we're going to go with 332.

9 LDC [MR. KAMMEN]: Your Honor, if -- we would request to  
10 break a little earlier than normal because we need to spend  
11 some time with our client. You know, so if you ----

12 MJ [Col SPATH]: Do you have an idea of a time?

13 LDC [MR. KAMMEN]: If we could have an hour, and, you  
14 know, maybe an hour or just a little more, that would be very  
15 helpful.

16 MJ [Col SPATH]: And then the defense already indicated  
17 you're going to waive your reply brief on Appellate Exhibit  
18 362. So if we have time, I want to take up 362 and at least  
19 get the arguments.

20 LDC [MR. KAMMEN]: Yeah. That won't be lengthy.

21 MJ [Col SPATH]: And I may well discuss Appellate Exhibit  
22 359, the housing issue, just to get a road ahead. We'll  
23 probably take it up the next time we're here but I want to

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1 discuss some of that. Here's what I'm going to do now,  
2 though. I'm going to give you a ruling on 355. It's going to  
3 be a verbal ruling. I did go slow. I was up for a long time,  
4 and then I was up early this morning, and I spent a lot of  
5 time on this issue.

6           There was kind of an agreement in place, and I agree  
7 with what was posited by General Martins. It didn't play out  
8 exactly as I had hoped, because part of the agreement was the  
9 immediate delivery of a binder. That's the impression we left  
10 behind with people watching. Again, it's not to say it's  
11 anyone's fault, it's just part of the agreement was the  
12 immediate delivery. Without the immediate delivery, I know  
13 with the suspicion that sometimes goes on, unjustified as it  
14 may be, it causes concern and it causes more dispute.

15           The issue at hand is a motion to compel,  
16 straightforward, related to Appellate Exhibit 355E and K.  
17 Those are the two filings created after a discovery request  
18 from the defense. In the discovery request, the defense  
19 requested all communications of any nature between any  
20 governmental agency and the U.S.C.M.C.R.

21           After the request was received, the government,  
22 despite the overbroad nature of the initial request, frankly,  
23 gathered material in compliance to prepare for any perceived

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1 or eventual order from the court. I say obviously overbroad  
2 because any court is going to have multiple, constant,  
3 continual communications with government agencies for any  
4 number of valid, legal reasons dealing with daily workings of  
5 a court. We can think of a hundred examples: Confirmation of  
6 judges, court logistical support, funding, computers,  
7 technical support. The list of communications between  
8 government agencies and a court are likely endless.

9           The prosecution efforts to prepare for the motion to  
10 compel are complimented. I appreciate doing that up front.  
11 The motion to compel differs in language from the discovery  
12 request, material language, and the language in the remedy and  
13 the language in the motions matter. While the prosecution  
14 interpreted the motion as saying the same as the discovery  
15 request, and I appreciate that, it doesn't. It requests  
16 communications specifically between government counsel and the  
17 C.M.C.R. That's what Appellate Exhibit 355 says.

18           It references and incorporates the discovery request  
19 because it has to. That's the only way the issue would come  
20 to this court as a motion to compel, was a denial from the  
21 government, so of course it references the prior filings, or  
22 there has to be a constructive denial by just nonresponse to a  
23 discovery request; otherwise, this court has no ability to

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1 compel anything.

2           The motion to compel is for the communications which  
3 were in the request itself. A355 is clear on its face and the  
4 relief requested in writing to me, and I construct it as such.  
5 That motion to compel is granted. That only relates to Tabs 3  
6 and 10 of Appellate Exhibit 355E. Those are the only two tabs  
7 that are responsive. One includes General Martins and  
8 Ms. Tarin regarding parking, and the other includes Ms. Tarin  
9 regarding a posting of the C.M.C.R. decision on the public  
10 website. Basically it's a discussion about what organization  
11 is going to do a security review. They are administrative  
12 e-mails or communications.

13           There are no other tabs that have any member of the  
14 Office of the Prosecution -- the Office of the Convening  
15 Authority Prosecution in at all. But that does not resolve  
16 this issue and we don't want to come back here and do this  
17 again.

18           Based on the oral discussions with the parties, the  
19 defense then broaden their clearly written motion to compel to  
20 now request the material that was in their discovery request.  
21 The court will consider the verbal motion, even though the  
22 rules of court don't allow for verbal motions. We'll take a  
23 verbal motion and the verbal response that was presented by

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1 the government yesterday. The government is rightfully  
2 opposed to the remainder of that discovery. That opposition  
3 covers everything else in Appellate Exhibits 355E and K. So  
4 except for Tabs 3 and 10 of Appellate Exhibit 355E, the  
5 remainder will be under seal in the record. A discussion of  
6 the law is important, and I am not for a moment embarrassed  
7 that I look to the law and I look to case law to resolve these  
8 issues. That's probably my plan as we go through this whole  
9 process.

10 R.M.C. Rule 703, production of witnesses and  
11 evidence, we are going to focus on the evidence. The defense  
12 shall have a reasonable opportunity to obtain evidence as  
13 provided in the rules. The discussion is important. The  
14 opportunity to obtain evidence is comparable to the  
15 opportunity available to criminal defendants in a court of the  
16 United States under Article III of the Constitution.

17 Go down to 703(f) in general, subject to Section  
18 949j(c) and R.M.C. 701, each party is entitled to the  
19 production of evidence which is relevant, necessary, and  
20 noncumulative. The discussion is helpful. Relevant evidence  
21 doesn't just go to the defense case in chief or sentencing or  
22 anything like that. Relevant evidence is necessary when not  
23 cumulative and when it would contribute to a party's

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1 presentation of the case in a positive way on a matter in  
2 issue. There's some exceptions to that, of course, with  
3 regard to classified and the like, but that is the framework.

4           And then under 703(f)(4), procedures for relief,  
5 which is why I mentioned Bowser, and I harken back to it and I  
6 will frequently, because I'm sure these issues will happen.  
7 After referral, the military judge may order evidence be  
8 submitted to the judge for an in camera inspection in order to  
9 determine if there should be relief. And, of course, that's  
10 going to require me sometimes to request evidence that is not  
11 relevant and not necessary and may be cumulative, because I  
12 don't know until I see it. That's why it's in the rule.  
13 That's why in camera review has been going on in every court  
14 in any jurisdiction for a long time.

15           703 is, in almost all aspects, the same rule of  
16 discovery found in every state court, federal court, or  
17 military court in existence in our country. And case law,  
18 while not necessarily commission related, case law on  
19 discovery, in camera review, and discovery matters is  
20 abundant, well litigated, and well developed. This isn't some  
21 new issue being dealt with in some ad hoc manner down here at  
22 Guantanamo Bay.

23           Here, if the contents of Appellate Exhibit 355E and

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1 K, again, except for Tab 3 and 10, are relevant, necessary,  
2 and noncumulative to the defense's presentation on a matter in  
3 issue, it would clearly be discoverable. Absent again, a few  
4 exceptions to deal with the classified and the like that we'll  
5 discuss. The contents here are not relevant or necessary to a  
6 matter in issue before us, and that includes a matter in issue  
7 like unlawful influence. Of course that's a matter in issue,  
8 in a general sense, but these aren't relevant or necessary.

9           Any other matter that was discussed, like neutral and  
10 detached appellate judges, whether recusal of an appellate  
11 judge was appropriate or it was done appropriately, any  
12 judicial misconduct of appellate judges, those aren't issues  
13 for me. They can't be.

14           UI at any level is an issue for me. The rules are  
15 clear on that. We'll talk about that some more. I looked for  
16 authority for that proposition that I could intercede in any  
17 way, not because I wanted to find it or hoped to, because I  
18 want to get it right, and there isn't any out there I could  
19 find.

20           UI is different, inasmuch as the MCA at 949b makes  
21 clear, unlawfully influence, either the commission, me, or the  
22 C.M.C.R. is illegal and an issue to which all must be keenly  
23 aware. Case law is clear on that in the UCI context. Given

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1 the language of 949b on its face, if there were evidence of UI  
2 in relation to this case at any level, that would be a  
3 reasonable matter in issue, making it something within 703 for  
4 which the defense would be entitled to relevant, necessary,  
5 and noncumulative discovery.

6           If such evidence happened to exist, it does not exist  
7 in Appellate Exhibit 355E or K. It simply doesn't. This  
8 issue could have been resolved quickly and without the delay  
9 of two hearing days focused on this issue, frankly, if at the  
10 outset the government had simply consented to an in camera  
11 review, if they wanted to gather the records, because that is  
12 clearly envisioned under 703, or some other options, deny the  
13 defense discovery request and don't gather the material.

14           Because if there's no initial showing, you don't have  
15 to collect the information, or seek relief, and let me know  
16 it's an overbroad request. But once the government decides  
17 they're going to gather the information and put it into  
18 binders, an in camera review is the obvious, likely,  
19 appropriate, and expected road of resolution. And once we  
20 gathered the material, we didn't need a hearing to get there,  
21 that's the answer.

22           Now, as I mention now, the review has been done by  
23 offer of the government after they had collected the material

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1 and before I ordered it. And again, I hope I've made this  
2 clear, there's no relevant, necessary information in those two  
3 filings to support an allegation of unlawful influence on  
4 anybody.

5 In the world of unlawful influence, the defense has  
6 an initial burden to present some evidence. 355 is a motion  
7 to compel discovery. But what I don't want to do is delay  
8 these proceedings constantly. If the UI on the appellate  
9 court is based on Appellate Exhibit 355E and K, there is no  
10 evidence. It's not there. If there's something else out  
11 there, I've made clear, of course, I would look at it.

12 Now, the government -- yesterday we discussed  
13 privilege, both limited judiciary deliberation privilege and  
14 the limited government communication privilege, as some relief  
15 regarding disclosure of these e-mails. They do not -- and  
16 this is important -- those two privileges do not apply here.  
17 That's clear as well.

18 The e-mails remain nondiscoverable and that's  
19 perfectly clear, as I've said, under the law of discovery,  
20 again, straightforward law in any jurisdiction. The rules  
21 surrounding privilege apply when there is a privilege, and  
22 then, of course, privileges have a hierarchy, as we know, in  
23 existence.

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1           The discovery rules change when a privilege is  
2 claimed because then we move more into a due process  
3 constitutionally required analysis before we pierce a  
4 privilege, because privileges are important. Information  
5 protected by privileges are important and long-standing.  
6 That's why I'm making so clear that this ruling is based on  
7 703, because these are not privileged. These are purely  
8 administrative in nature.

9           So let's look at the two privileges. Under 501, of  
10 course, a prosecutor can assert a privilege as a  
11 representative. There's no doubt about that. Rule 506 talks  
12 about government information other than classified  
13 information. Except where disclosure is required by an act of  
14 Congress, government information is privileged from disclosure  
15 if disclosure would be detrimental to the public interest.  
16 Who may claim the privilege, under C, the head of the  
17 executive or military department or government agency  
18 concerned.

19           Think about who has to claim that privilege. The  
20 privilege for records and information of the inspector general  
21 of the executive or military department or government agency  
22 may be claimed by the immediate superior of the inspector  
23 general officer responsible for creation or any other superior

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1 authority. Of course, trial counsel can be authorized to  
2 claim the privilege, and the authority of a witness or trial  
3 counsel to do so is presumed to be so in the absence of  
4 evidence to the contrary.

5           But I also have to use common sense in an assessment  
6 of this privilege that we have here in the commissions as I  
7 look at what would it be for. It is not for administrative  
8 communications at low levels about nothing. Counsel also know  
9 that that type of privilege about analogy outside of the  
10 commissions, when you're dealing in criminal settings, falls  
11 lower on the hierarchy when you compare it to something like  
12 an attorney-client privilege or, arguably now, the mental  
13 health privilege. And if you look in the context of FOIA, we  
14 see how courts deal with it; and if you look in the context of  
15 criminal matters, how limited courts are going to view that  
16 privilege.

17           The hierarchy of privilege is fairly well  
18 established. There was no evidence suggesting that trial  
19 counsel couldn't assert the privilege, but, again, you review  
20 those e-mails, there is no identifiable threat to the public  
21 interest. What it would convince the public of is the routine  
22 nature of communications. That doesn't make it discoverable,  
23 I understand that. Identifiable threat to the public interest

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1 is pretty important, isn't it? Because the word there is  
2 identifiable. Not hypothetical, not presumed, not argued, not  
3 suggested; identified. The court and the prosecution have the  
4 contents of the e-mail, and there is no identifiable threat to  
5 any public interest in those e-mails. They are routine,  
6 administrative, and never intended to be covered under  
7 M.C.R.E. 506. These aren't pre-decisional e-mails about a  
8 pending legal issue or a legal discussion with some type of  
9 privileged advice. They're routine.

10           The second discussed privilege is a limited judicial  
11 deliberative process privilege, one that I'm fond of. A  
12 privilege that is focused on the deliberative process of a  
13 judiciary body and has rightfully been extended to support  
14 staff, like clerks, but it is a limited judiciary deliberation  
15 privilege. On the hierarchy again, it falls lower than some.

16           Rule 509 here, M.C.R.E. 509, has encapsulated it for  
17 us, and it says, "Except as provided in Military Commission  
18 Rule of Evidence 606, the deliberation of courts, grand and  
19 petite juries, and military commissions are privileged to the  
20 extent that such matters are privileged in trial of criminal  
21 cases in the United States District Court. But the results of  
22 the deliberations are not privileged."

23           So after spending some time in district court cases,

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1 what is clear is this applies to the extent that it impacts a  
2 matter under deliberation by a court or a jury, a grand or  
3 petite jury. The cases also strongly suggest that matters  
4 must also be kept within bounds of the privilege. Like other  
5 privileges, if a judiciary body e-mails out the information to  
6 third, fourth, and fifth parties, arguably they waive the  
7 privilege. A pretty common issue with privilege.

8           Here the e-mails aren't within a judiciary function.  
9 They're not even from the judges. Again, arguably the clerk  
10 falls under this deliberative process privilege, the cases  
11 suggest it does. Once you start e-mailing them outside of  
12 your court to people who aren't part of your privilege, one  
13 could argue waiver. But again, forget that. They're not part  
14 of a deliberative process. They're not about a ruling, a  
15 decision, a case, an opinion, or a legal matter which is being  
16 decided. They're routine, administrative communications. The  
17 privilege does not apply.

18           Carlucci, at 26 MJ 238, is irrelevant to the issue at  
19 hand. This isn't an investigation of judiciary misconduct, as  
20 I made clear. It's not the focus of this court. It has no  
21 application here. I'm focused on an alleged unlawful  
22 influence issue. And while not cited in any filing before the  
23 court, during argument Carlucci was discussed. It just

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1 doesn't offer guidance for me on the issue at hand.

2           But again, make no mistake, disclosure is not  
3 required under 703. That was an easy call. It's not  
4 required. It's not discoverable. It's not even close.  
5 That's the benefit of the in camera review. And the fact that  
6 the in camera review is the respected way to do it is because,  
7 hopefully, the judicial officer doing it is able to make the  
8 call and assure the public that they wouldn't hide something  
9 or not disclose something that's discoverable to a matter in  
10 issue.

11           So as for any allegation of ex parte communications,  
12 Tab 3 and 10 have been disclosed. And you can provide copies  
13 of those to the defense over the break.

14           Regarding the other e-mails, I have very limited  
15 advice. The parties involved are going to have to determine  
16 if they're ex parte, and again, the only two that involved,  
17 arguably, arguably, Counsel, for the prosecution have been  
18 disclosed. For the others, those parties would have to  
19 determine if they're ex parte, which has legal meaning. And  
20 if they were, everyone should look at their professional rules  
21 of responsibility for dealing with them. Those parties, not  
22 the prosecution, those parties, would have to figure out if  
23 they then need to be disclosed in any manner to the defense.

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1 I find it hard to believe that every agency who engages in  
2 communication with people connected to the U.S.C.M.C.R. or  
3 other courts are engaging in ex parte communication or my  
4 in-box would be empty. Frequently, most days, I get hundreds  
5 of e-mails about routine administrative matters that are not  
6 ex parte communications, even if those people are involved in  
7 other disputes pending. So the actors can figure that out on  
8 their own.

9           We talked about Barnwell yesterday and Paylor, the  
10 case from the District of Columbia. What those cases show is  
11 that administrative or routine ex parte communications -- so  
12 not just routine communications, but administrative or routine  
13 ex parte communications are not on their face inappropriate  
14 and don't warrant any relief. But again, my focus is 703,  
15 relevant, necessary information that would impact a matter in  
16 issue would be discoverable. There's none here. 355E and K  
17 are routine, administrative, nondiscoverable communications.

18           As a practical matter, these commissions have been  
19 fraught with delay, with multiple reasons for it, and enough  
20 fault to go around. Allegations of secrecy or improper  
21 conduct -- allegations of secrecy and improper conduct and  
22 such swirl around us. So sometimes the legal answer might be  
23 X, but, you know, sometimes Y might be the right answer. It's

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1 what we tell staff judge advocates when they give advice to  
2 commanders all the time. But that is not my job. As I said  
3 yesterday, my job is to follow the law; not to suggest what I  
4 would do in the same case, what another side should do, what's  
5 the best course of action. None of that matters.

6 703 is clear. My desire to follow the law is  
7 critical to ensure a fair process here. And I need to make  
8 clear, when I do get overturned by an appellate court, I take  
9 zero umbrage. I take it as direction. That's why appellate  
10 courts exist. Reverence for the law is a good attribute for a  
11 trial judge. It's fairly critical. It's something I mentor  
12 about, and I hope it gets the trial judges in the Air Force  
13 through as a matter of course. And I think everyone knows how  
14 I feel about it. And 703 is that: Well established, clear  
15 law. Not some ad hoc issue that we're just dealing with down  
16 here that should surprise people.

17 So inasmuch as the defense has made an oral motion in  
18 limine for disclosure of the other contents of Appellate  
19 Exhibit 355E and K, that is denied. Those are to be sealed in  
20 the record for any appellate review.

21 Appellate Exhibit 355L will be a copy of tab 310 of  
22 Appellate Exhibit 355E. Those are not sealed. Those will go  
23 through the normal review and be shared with the public in the

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1 normal process. But immediately upon recess today, government  
2 provide those to the court reporter to be marked, give the  
3 defense a copy.

4 So that resolves 355.

5 When we come back again, a little bit of discussion  
6 about 332 will be a good place to start, and we'll ----

7 CP [BG MARTINS]: Your Honor, I'm sorry.

8 MJ [Col SPATH]: ---- and we'll go to the remainder.

9 CP [BG MARTINS]: May I be heard?

10 MJ [Col SPATH]: General Martins, the ruling is done. I  
11 don't know what is left to be heard on.

12 CP [BG MARTINS]: I understand, Your Honor. But the -- as  
13 we read the rules -- and, again, I'm dealing with a large  
14 organizational client.

15 MJ [Col SPATH]: I understand.

16 CP [BG MARTINS]: Our reading of the rules is that the  
17 commission, though it has important powers, may not order the  
18 disclosure of any kind of government information without ----

19 MJ [Col SPATH]: Right. This doesn't fall under 506.  
20 That was part of my ruling. This does not fall under 506.

21 CP [BG MARTINS]: Your Honor, we still believe that even  
22 if your privilege analysis is correct, that your powers don't  
23 extend to directing the government to divulge any information

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1 in its files. You have -- you have authorities, you have  
2 sanctions, and you have things you can do, but ----

3 MJ [Col SPATH]: General Martins, this is the deal. I  
4 believe I have authority to do this. These don't fall under  
5 506. They do not. They are not government communications  
6 that will harm public interest. That is my ruling. If you  
7 don't want to provide it to the defense over the lunch break,  
8 that's fine. When we come back from the lunch break, I  
9 imagine the defense will let me know that. We can then argue  
10 about remedies. We can argue about remedies. I have directed  
11 it and I have ordered it. We will go from there.

12 You're correct, I'm not physically going to hand it  
13 over. If you want to be in a position where we're fighting  
14 about tabs 3 and 10 of Appellate Exhibit 355 after lunch, we  
15 can discuss remedies. That's where we're at. The order has  
16 been put in place. You make the call over lunch. I'm not  
17 discussing it. They don't fall under 506. They do not.  
18 Under 506, you could do summaries, substitutions, adequate  
19 copies, I understand that. They don't.

20 When we come back, you can, as I said, claim that. I  
21 can make the order, you can say no, and we can discuss  
22 remedies. That's where we're at, General Martins.

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

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1 MJ [Col SPATH]: That is where we're at. You have the  
2 lunch hour to figure out where you're going to go with tabs 3  
3 and 10.

4 CP [BG MARTINS]: Your Honor, you did say that they were  
5 going to be marked and put in as unsealed exhibits. That's an  
6 irreversible thing relating to things that are on file.

7 MJ [Col SPATH]: I'll pause on 355L until after lunch.

8 CP [BG MARTINS]: Thank you.

9 MJ [Col SPATH]: You have through lunch to provide a copy  
10 to the defense, or we're going to discuss remedies for  
11 noncompliance, because they clearly are not privileged  
12 communications. They are not. And they're not government  
13 communications. They're not government communications. And  
14 because they're not government communications, they don't fall  
15 under privilege. It's a simple discovery issue.

16 And part of -- part of my discovery obligation,  
17 frankly, does involve public trust and confidence. And we're  
18 going to do that. So we'll see how we do after lunch.

19 Defense, I suggest you figure out what remedies you  
20 might want for failure to disclose if we need to go through  
21 this process after we're done.

22 We'll take an hour and 15 minutes. The commission is  
23 in recess.

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