

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1329,
2 19 October 2016.]

3 MJ [Col SPATH]: This commission is called to order. All
4 of the parties who have been present through these proceedings
5 are again present.

6 Well, I've ordered production. I've granted a motion
7 to compel regarding Exhibit 355E, Tabs 3 and 10. General
8 Martins, have you provided that information to the defense?

9 CP [BG MARTINS]: Your Honor, thank you for giving the
10 government time to consider this matter, which may seem to
11 some as trivial and unimportant and the e-mails themselves are
12 certainly benign, but which actually involves important
13 principles overall.

14 I'll begin with the bottom line up front, which I
15 think will please you, but I respectfully request the
16 opportunity to continue to make a record on the matter.

17 MJ [Col SPATH]: I don't know what more record to make on
18 this matter. It's a simple motion to compel. And I recognize
19 you believe it involves significant, important interests, but
20 we have made a lengthy record, and -- so I'm hoping for good
21 news. Have you disclosed it to the defense?

22 CP [BG MARTINS]: A short additional record, Your Honor.

23 MJ [Col SPATH]: Have you disclosed it to the defense?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Bottom line up front is that, without
2 waiving our objection to the lack of basis in the relevance
3 and materiality for producing even these two items, we are
4 providing at this time copies of Tabs 3 and 10 to the defense.
5 We'll give a copy to the commission for convenient marking.

6 And if I just may continue for a moment, Your Honor.
7 I know you want to go on.

8 MJ [Col SPATH]: Again, that's going to be 355L. And I
9 appreciate that you have an objection to it, I do, but you
10 have your rights clearly before you. You can attempt to get a
11 writ, and you're free to do that, and request a continuance
12 while you do that. I'm probably not going to grant a
13 continuance for that effort, but you're welcome to try to get
14 a writ. There's no 62 appeal.

15 CP [BG MARTINS]: I'll only be an additional minute.

16 MJ [Col SPATH]: All right, sir. Please.

17 CP [BG MARTINS]: And, Your Honor, in my determination
18 yesterday and today to make a record and, frankly, to stand up
19 for quiet professionals and good public servants, it was not
20 as apparent as it should always be that ----

21 MJ [Col SPATH]: I just want to -- I only ordered
22 disclosure of 3 and 10.

23 CP [BG MARTINS]: Yeah, I know.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: I know Tab 9 has information in it,
2 General Martins. Tab 9 the defense counsel was copied on.
3 They were in that e-mail chain.

4 CP [BG MARTINS]: Your Honor, we wanted to provide that
5 for context with Tab 10, and that is what I was trying to
6 explain. I'm trying to comply with your order.

7 MJ [Col SPATH]: Well, my order was hand the defense
8 counsel Tab 3, Tab 10; and Tab 3 and Tab 10 are Appellate
9 Exhibit 355L. You're also providing them Tab 9; is that
10 correct?

11 CP [BG MARTINS]: I had hoped to explain that, yeah.

12 MJ [Col SPATH]: The explanation will come. I'm making my
13 record clear.

14 CP [BG MARTINS]: Absolutely, yeah.

15 MJ [Col SPATH]: I ordered disclosure of Tab 3 and Tab 10.

16 CP [BG MARTINS]: And ----

17 MJ [Col SPATH]: That is Appellate Exhibit 355L. If you
18 want to also disclose Tab 9 to the defense, I'm going to mark
19 it as the next appellate exhibit in order. That's going to be
20 355M, Mike. Because I had not disclosed that. They already
21 knew about that for reasons I know you're going to address,
22 but they already had that one because it wasn't ex parte.

23 Now you may put it in context for us.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CP [BG MARTINS]: Thank you, Your Honor. Thank you.

2 And I want to say that, you know, again, in my
3 determination to make a record and protect and stand up for
4 good public servants who are doing their jobs, sometimes I
5 don't make it as apparent I always need to that the --
6 everyone in the government appreciates your need to engage in
7 dialogue, to interrupt, to take things at your pace, because
8 you are the commission. Unless and until the panel is formed,
9 you're the whole commission, and we -- that's the whole
10 purpose of why we're here, to get you the facts and the law.

11 Your Honor, there are judgment calls in this area.
12 And you mentioned public confidence. And I humbly believe
13 that confidence can be sustained in those who already trust
14 their government and can be gained in some of those who don't
15 if they can see us observing rules, even everyday rules like
16 those involving discovery, those involving the production of a
17 witness when ordered. And it is a rule, and a wise one,
18 within our constitutional democracy that information the
19 government has that is not relevant, not material, is not
20 discoverable, and you've heard our position that we should
21 observe that, and it is out of respect for this principle as
22 well that we now observe your order.

23 So on Tab 9, although not including anything that is

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 even construable as an ex parte communication between any
2 prosecutor or the clerk of the U.S.C.M.C.R., which was the
3 substance of your ruling as I understood it, we are providing
4 it as context for Tab 10. And we don't object, we withdraw
5 any objection to public posting of these matters once they go
6 through the required security review to remove certain
7 personally identifying information, license plate numbers and
8 the like. And we expect that Protective Order Number 2 would
9 be constraining the defense with regard to the use of the
10 original versions that they have.

11 Thank you, Your Honor.

12 MJ [Col SPATH]: I turn to 332AA. Recognizing now that
13 we've had testimony in this area, the landscape may have
14 changed or may not have changed. As we began the process of
15 dealing with 332, I ordered the production, and we heard from
16 Mr. Gill. We've added to that. While we were down here this
17 week, we had Mr. Quinn and Mr. Toole testify, and I had denied
18 a number of witnesses.

19 This is not a suggestion or a request that we need to
20 revisit too many issues, but I didn't give the defense a
21 chance to argue about the additional witnesses, and not that
22 we need to hear argument on every motion. What I'm curious
23 about, Mr. Kammen, has your original request changed at all?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Are there less? Are there more? Where are we on 332AA in
2 relation to witnesses?

3 LDC [MR. KAMMEN]: The request is less.

4 MJ [Col SPATH]: Give me -- I'm going to ask you the
5 who -- give me a second to get my notes where I can -- just
6 first -- I'll ask you the why in a minute, but first, just by
7 name, can you tell me who you need now?

8 LDC [MR. KAMMEN]: Lieutenant Colonel Sheeran and -- or
9 Mr. -- I don't remember if he's in the military or not.
10 Colonel Sheeran and Lieutenant Colonel Lewis.

11 MJ [Col SPATH]: Those are the only two, at least for your
12 purposes?

13 LDC [MR. KAMMEN]: Yes.

14 MJ [Col SPATH]: In justification for those, can you give
15 me an idea of why you need those two?

16 LDC [MR. KAMMEN]: Well, I mean, let's sort of back up.
17 In the original situation, even the government agreed that
18 Lieutenant Colonel Lewis was an appropriate witness. When
19 they agreed to Mr. Gill, they also agreed to Lieutenant
20 Colonel Lewis. And then, of course, because of the baroque,
21 I'll call it rules, for lack of a better term, when you
22 approved the other two witnesses -- or, you know, their
23 position changed after they heard Gill.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And, of course, that's part of the problem with
2 giving one litigant control over all of this, is when it's not
3 going so well, then they have the opportunity to change their
4 position, apparently, because that's what's happened. So we
5 think just as a matter of -- you know, they agreed to it. We
6 think she has relevant information because she was clearly in
7 some of the meetings. And there is clearly a dispute about
8 what occurred in those meetings -- in some of those meetings,
9 and so we think, at a minimum, she should be a witness. So
10 that's with respect to her.

11 With Colonel Sheeran, I don't see how anyone can
12 plausibly argue he's not relevant. He's on virtually every
13 piece of paper that the government or the defense offered. He
14 was the guy who -- who the first complaint was made to. Until
15 Mr. Quinn came along, he was -- appeared to be in charge and
16 was the person who was not conflicted and, you know, seemed to
17 be running the operation. And, at least according to
18 Lieutenant Commander Gill or to Mr. Gill, he was the -- you
19 know, he -- the first complaint was met -- made to him, he
20 supposedly talked to Toole, at least according to Lieutenant
21 Commander Gill.

22 So I mean, you know, the whole thing really revolves
23 around -- I mean, as it played out, you know, Toole was

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 complaining to Sheeran. Toole was complaining to Quinn. And
2 then all of a sudden, at least what we heard today, and
3 when -- really, when you re-read Mr. Gill's initial testimony,
4 I mean, it's relatively clear, at least to us, what occurred.

5 You know, putting aside he obviously perhaps is a
6 challenging personality, he was complaining and he was -- and
7 he had legitimate complaints. Because what happened is, as
8 soon as Mr. Oostburg Sanz came on board, they changed and did
9 exactly what Gill had been requesting, and they did -- they
10 did exactly the things he was requesting.

11 And because he, Toole [sic], continued to complain,
12 you know, then it became clear that they ran him off. And so,
13 you know, it's kind of like -- we know -- sometimes you can
14 judge the actions by the response. If the response would have
15 been, yeah, we've made all of these changes, now let's go back
16 to work. Well, okay, different situation. But the response
17 was, we've made all of these changes, oh, and by the way, we
18 don't want you out there talking anymore because who knows
19 why, and so, you know, we need to flesh that out to have a
20 complete record.

21 So those are the two witnesses.

22 MJ [Col SPATH]: All right. That is limited from where it
23 was before. I appreciate that. Thank you.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. KAMMEN]: Yeah. Absolutely. I mean -- yeah, I
2 mean, everything else -- you know, I certainly think Stephanie
3 Flannery would be interesting because -- but, you know, there
4 is a point of practicality. And I think she would probably be
5 cumulative and less than -- less than helpful. I think these
6 two witnesses would be helpful.

7 MJ [Col SPATH]: All right. Thank you.

8 Lieutenant Morris.

9 ATC [LT MORRIS]: Good afternoon, Your Honor.

10 MJ [Col SPATH]: Good afternoon.

11 ATC [LT MORRIS]: I think I've said this before, but as we
12 both know, interesting is not a basis to ask this commission
13 to compel a witness. It has to be relevant or material to an
14 interlocutory question, and the question before Your Honor is
15 a serious one. It's one of an allegation of unlawful
16 influence. And, as I've said last time, the government has
17 taken this seriously.

18 The defense has narrowed their request, but equally,
19 Your Honor, they've been given multiple opportunities to make
20 that basis of relevance and materiality to -- for this
21 commission to compel these witnesses, they've had
22 opportunities to brief that, make those. And so what we ask
23 is has there been anything -- you know, the potential question

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 really is has there been anything new today that would cause
2 Your Honor to revisit your ruling during the break between the
3 September session and the October session?

4 And I just briefly look at what defense counsel has
5 cited. I mean, they've said that the -- for Colonel Sheeran,
6 the origin of the first complaint. Well, that was testimony
7 that came to us very clearly from Mr. Gill in the September
8 session. You know, they were given an opportunity to use
9 that. They had an opportunity to use that before Your Honor
10 in their brief to ask for Colonel Sheeran to be compelled, and
11 Your Honor heard that and denied that.

12 The other reason that they talk about is that he was
13 in charge of operations. Well, I don't know if they're
14 confusing it purposefully -- I don't think they are -- but,
15 you know, all of the witness testimony, and as we've been
16 swimming in this issue, we see very clearly the division
17 between operations and the legal side of the house. And what
18 Mr. Gill clearly said was that Colonel Sheeran was in charge
19 of the operations. That was something that had come through
20 in September as well. Well briefed in front of Your Honor,
21 and is not new material in which Your Honor needs to utilize
22 that to revisit whether or not he should be compelled.

23 And the last allegation of Gill being run off, well

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that's more conclusory, that's not a new fact that came off.
2 That obviously is what defense was hoping that the examination
3 through these witnesses would reveal but, you know, it's our
4 submission to Your Honor that the examination has done just
5 the opposite. It's shown a 27-year retired colonel, retired
6 judge, Mr. Toole, acting in accordance with -- acting
7 honorably and acting in accordance with Your Honor's ruling
8 and not making any decisions, not making any recommendations.

9 And Your Honor has parsed out for both parties how
10 you see the issue. You've given us bright-line distinctions
11 between, you know, what may arguably in hindsight have not
12 been, you know, the best way forward on it; however, Your
13 Honor, as Mr. Toole said, there was no book on this. And you
14 see people acting in good faith. But more than that, and more
15 importantly, there was nothing going on. There was nothing
16 going on in the Nashiri case.

17 And really what we have, if we just stopped and
18 looked at this from what Your Honor was saying, let's apply
19 common sense. Let's look at this with common sense. We have
20 the defense's witness on this talking about how General Ary,
21 even after being disqualified, in his words, acted honorably.

22 In the September session, he says, Mr. Oostburg Sanz
23 was well protected from my allegations, so the new convening

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 authority was acting honorably. And arguably, when General
2 Ary wasn't there for the convening authority responsibility to
3 go up to the Deputy Secretary of Defense or the Secretary of
4 Defense, nothing was done, nothing was briefed to the
5 Secretary of Defense.

6 So in your most common sense approach using the
7 defense's, now from September to October, examination of their
8 sole source of this allegation, what has come from their sole
9 source is that these convening authorities post Your Honor's
10 ruling was handled honorably, the convening authorities acted
11 responsibly. So when you really need to look at whether we
12 need to have additional witnesses talking about what was going
13 on in side corners of the convening authority's office, I
14 think we have spent a tremendous amount of time on an
15 important issue, but, at some point, we have to make a
16 decision to say have we heard enough.

17 And as I respectfully submit to Your Honor, we've
18 reached that point. We haven't heard additional information
19 that wasn't heard back in September that would warrant Your
20 Honor to revisit his rulings in these motion to compel
21 witnesses.

22 Lastly, for Lewis, they simply misstate the facts.
23 They say that the government's position changed after hearing

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Gill. That is absolutely incorrect. Your Honor's ruling
2 on Lieutenant Colonel Lewis came on 1 September. We heard
3 Mr. Gill's testimony on 8 September. I mean, it belies simple
4 logic that the government could have changed its position, you
5 know, on -- before your ruling on 1 September when Gill's
6 testimony didn't happen but a week later.

7 Your Honor has had multiple opportunities to examine
8 the relevance and materiality of these witnesses on these
9 issues, and the government respectfully submits that Your
10 Honor's rulings, multiple rulings on these, should stand.

11 Subject to any questions, Your Honor.

12 MJ [Col SPATH]: No, thank you.

13 ATC [LT MORRIS]: And I would just submit that 332AA, Your
14 Honor, is the motion to compel discovery, not witnesses, and
15 I ----

16 MJ [Col SPATH]: Correct.

17 ATC [LT MORRIS]: ---- and I think that motion as well is
18 well settled at this point following ----

19 MJ [Col SPATH]: No. And mine was just witnesses. I was
20 not revisiting the discovery order yet. So I appreciate that,
21 thank you.

22 ATC [LT MORRIS]: Yes, Your Honor.

23 LDC [MR. KAMMEN]: I didn't think we were arguing the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 merits, so I didn't go there and I'm not going to.

2 I mean, you know, we don't have any power here so --
3 they control it. It's a question of how much deference you're
4 going to give to them. If we're going to make a record, you
5 know, we only can make the record that you guys allow us to
6 make. And so, you know, a litigant with no power, you know,
7 is just on bended knee if you think -- you know, I mean,
8 obviously the goal -- well, the government wants -- the
9 government's an adversary and they want to present the
10 strongest possible case. So it is well in their interest to
11 limit our ability to present witnesses. That's the way this
12 deal works.

13 And so, you know, when we -- when we submitted the
14 stuff in September, I mean, when we argued this before, and
15 said well, you didn't -- you know, we -- the position -- their
16 position was, well, even if we know what the witnesses are
17 going to say and even if we think they're relevant, you have
18 to jump through the hoops. Well, then we jumped through the
19 hoops and, well, that's not good enough. And, you know, so
20 it's a moving target. These people are clearly relevant.
21 They have information. If you all don't want to hear it,
22 fine. You will make your decision. And, you know, it's just
23 yet another inequity in this process, because there is nothing

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 like an Article III court. In an Article III court, we could
2 have delivered subpoenas to these witnesses, they would be
3 here; we would call them in the order we want, without
4 interference, and without the government being able to pick
5 and choose. This is nothing like an Article III court.

6 I understand it mimics the court-martial, but here
7 is -- and then I'll quit -- here is the problem: You talk
8 about the fidelity to the rules and everybody here cites these
9 rules. The rules that the Secretary of Defense passed -- or,
10 you know, they didn't pass, they just enacted -- gut the
11 statute. That's the fundamental problem here. This system
12 doesn't look anything like what Congress passed in the
13 statute.

14 And, you know, I had this discussion with Colonel
15 Pohl at the very beginning, and this is the problem, and it's
16 going to come up time and time again. Everyone says, yeah, we
17 follow the rules. That's what he said. And I asked him the
18 question, well, when you follow the rules and it leads you to
19 an unjust result, where are we? And he says, I follow the
20 rules.

21 So if following the rules leads us to an unjust
22 result, that's just where we are, and we don't have any power
23 here, you know. So y'all do what you're going to do.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Because, like I say, we're on bended knee. You know, I'm
2 tempted to be flip. It's the old story when the -- you know,
3 the judge is in the middle of the case and the lawyer says,
4 Judge, if you are going to try the case for me, please don't
5 lose it.

6 Well, if you're not -- you know, if you're not going
7 to let us call the witnesses, you're not going to let us call
8 the witnesses. But we think they're clearly relevant. In our
9 judgment, they're necessary, and -- to flesh this all out. If
10 you disagree, then you disagree. We have no power here.
11 So --

12 MJ [Col SPATH]: All right. Thank you.

13 Then for Appellate Exhibit 362, Defense Counsel, you
14 indicated you were going to waive the reply brief, or you
15 weren't going to file one and we were prepared then to have
16 discussion about that motion to compel funding.

17 LDC [MR. KAMMEN]: [Microphone button not pushed; no
18 audio].

19 MJ [Col SPATH]: Microphone.

20 LDC [MR. KAMMEN]: Did you want to talk about the
21 production of evidence on 332?

22 MJ [Col SPATH]: That is AA. Give me just a second.

23 [Pause.]

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: Yes, Mr. Kammen. Let's talk through
2 that. Oh, sorry. Commander Pollio.

3 DDC [LCDR POLLIO]: Good afternoon, sir.

4 MJ [Col SPATH]: Good afternoon.

5 DDC [LCDR POLLIO]: With respect to 332AA, there are still
6 a few items of discovery that are outstanding. And without
7 going through the entire listing, I'm just going to be
8 referring to the discovery request that was an attachment to
9 that motion.

10 One of the issues that was discussed with great
11 frequency throughout the testimony of all of the witnesses was
12 the legal tracker in this case. What information was on that
13 tracker that was visible to all of the legal advisors, to
14 include disqualified legal advisors after your ruling, the
15 defense still does not have that tracker or the subsequent
16 mutations of that tracker.

17 And understanding that perhaps some information on
18 the tracker related to other cases might be redacted, all of
19 the items with respect to the Nashiri case are relevant and
20 necessary for this particular issue. Both Mr. Quinn,
21 Mr. Toole, and Lieutenant Commander Gill all made reference to
22 this tracker and it was, in fact, a hot-button issue in making
23 sure that this tracker was separated.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The government did provide a -- one tracker to the
2 defense. We do not believe it was this particular tracker,
3 because the only information on the tracker previously
4 provided to the defense included hearing dates for each case.
5 It did not include requests, defense requests and action items
6 for legal advisors. So that is one item of discovery
7 outstanding. The defense still requests and still believes is
8 relevant and necessary for this particular motion, and that
9 is, I believe, paragraph -- subparagraph b. in paragraph 4.

10 Another item in that initial request that is still
11 outstanding is in relation to subparagraph e., and that is the
12 rating scheme and evaluation scheme within the legal advisor
13 office. Again, this was a matter of considerable testimony
14 from all of the witnesses. Whether or not Mr. Toole, a
15 disqualified legal advisor, had input, supervision, oversight
16 over Lieutenant Commander Gill, input into his rating, is
17 relevant and necessary for this particular motion.

18 Moving on to subparagraph h., any communication
19 between Mr. Foster and Mr. Toole regarding the case after the
20 disqualification order came out, we have not received any
21 e-mails between Mr. Toole or Mr. Foster. We are unsure if
22 that is because they don't exist. We heard testimony from
23 Mr. Toole indicating that it seemed he had at least contacted

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Foster. It's unclear as to whether or not that's e-mails,
2 phone calls, but the discovery request was for communications.
3 And the government did not provide any discovery indicating if
4 there was a phone call, on what day, if there was an e-mail.
5 No e-mail.

6 So given the testimony and the conflict between
7 Mr. Toole's testimony, Lieutenant Commander Gill's testimony,
8 and, quite frankly, the government on cross-exam of Lieutenant
9 Commander Gill in the September hearing made it seem
10 preposterous that Lieutenant Commander Gill would even reach
11 out to Mr. Foster. And that testimony from Mr. Toole
12 yesterday made it abundantly clear that there had been some
13 communication. The defense needs to flesh that out a little
14 bit further and we need the discovery to do this.

15 Moving on to paragraph i., I believe. This is the
16 binder that was provided to Mr. Quinn when he returned as the
17 legal advisor in the Nashiri case. The government in its
18 initial response stated that they had requested the
19 information from the convening authority. To date, we haven't
20 received that binder. This again is a topic that was
21 discussed quite a bit in testimony. To the extent that
22 Mr. Toole was supervising Lieutenant Commander Gill in
23 creation of this binder, he stated that he glanced through it,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 without that binder it is hard to put any meaning to what that
2 means. We know that he removed some documents from the
3 binder. But again, the defense needs the entire binder to
4 determine how he was able to do that to put context to that
5 testimony. And again, this is something that the government
6 had stated that they would provide but just has not done so
7 yet.

8 With regard to paragraph -- let's see -- r., which
9 are documents and information related to the convening
10 authority office in seeking a new legal advisor, one of the
11 things that came up in both direct testimony and cross-exam
12 testimony of several of the witnesses is how was a legal
13 advisor for this case selected, when there is conflict over
14 the reasons for Lieutenant Commander Gill's removal. And any
15 information related to how the office went about seeking a new
16 legal advisor to replace Lieutenant Commander Gill, who, by
17 all accounts, provided the convening authority with a resume,
18 went through a vetting process; are you a good fit for the
19 convening authority; our understanding is that his replacement
20 was sent on a TAD basis.

21 And if that replacement was sent simply to be a yes
22 man, that would certainly be relevant information after
23 Lieutenant Commander Gill, according to him, and by all

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 accounts, some of the evidence suggests, because he was
2 raising questions with this commission's -- excuse me, with
3 the office's compliance with the order, what was the
4 requirement in the new legal advisor.

5 The government again initially stated that they had
6 requested the information from the convening authority. We
7 just haven't received any information on that. And given the
8 testimony that was presented in this case, that information is
9 certainly relevant.

10 The last piece of information that is a little bit of
11 overlap between the initial request and the new request that
12 was submitted, I believe it was as a result of the last
13 hearing, I think it was in the 332, our initial brief, and
14 that was a request from Mr. Kammen directly, and it's also
15 attached, I believe, to that motion, for all of the notes and
16 memorandum and e-mail and communication between Mr. Sheeran
17 and/or Mr. Toole and/or Mr. Quinn and any of the convening
18 authority staff concerning Mr. and Mrs. Gill. And a lot of
19 communication related to the congressional and some of the
20 information requested in the initial request was also related
21 to communication related to his removal.

22 The one item that came up quite frequently, it was
23 discussed by Mr. Quinn pretty frequently, was a DoD

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 notification to a security officer that there was a concern.
2 And that's the conflict here. The heart of the matter -- part
3 of the heart of the matter, I should say, is that the
4 convening authority now states that the reason for his removal
5 was misconduct, he was substandard, he had all of these other
6 issues. In writing at the time of removal, the only basis
7 that they provided was a notification to DoD Central
8 Adjudication Authority. And we have yet to see that
9 notification and we have significant doubts whether or not a
10 notification was ever, in fact, made.

11 And if that's the case, if there was no impact on his
12 security clearance, which was the stated reason at the time
13 for his removal, that would certainly be significant and
14 relevant on whether or not he was actually removed because he
15 questioned the office compliance with the order or whether or
16 not he was able to get a security clearance. So I believe
17 that any steps actually related to that report and any
18 subsequent measures related to that security clearance are
19 relevant and we request that. And I believe it's encompassed
20 within these two requests, but if it's not clear, I want to
21 make that clear now.

22 MJ [Col SPATH]: All right. Thank you.

23 DDC [LCDR POLLIO]: Thank you.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: Lieutenant Morris.

2 ATC [LT MORRIS]: Your Honor, I didn't recognize that we
3 were taking argument on the discovery motion, but I would like
4 to respond using the defense counsel's footnote in response to
5 Your Honor's request, and that was in 330KK, to brief this
6 issue. Your Honor asked the defense to try and establish if
7 they had shifted the burden to provide for Your Honor any
8 additional witnesses and then any additional discovery. If
9 there's any doubt whether the defense knew that, well, from a
10 plain reading of Your Honor's order, there shouldn't have
11 been. But defense acknowledges this, and this is on page 4.
12 The defense reads the commission's order as requesting
13 briefing only in evidence relevant to the defense's
14 affirmative burden to show some evidence of UI ----

15 MJ [Col SPATH]: It's 332 -- you're referring to the
16 defense brief?

17 ATC [LT MORRIS]: I'm referring to 332LL, page 4.

18 MJ [Col SPATH]: I thought you said K. I misunderstood,
19 and that's perfect. But really exhibit 332LL, and where are
20 you there?

21 ATC [LT MORRIS]: I'm on page 4 and I'm on their footnote
22 at the bottom there.

23 MJ [Col SPATH]: Thank you.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LT MORRIS]: It's really just to submit to Your Honor
2 what is a plain reading of Your Honor's ruling, which was,
3 parties', defense, if you have additional discovery that you
4 want, let me know; base those in some rules, and then I will
5 rule. Instead of doing that, in their motion they simply just
6 attached collateral matters. And, you know, the government in
7 its response attempted to point back to Your Honor's ruling.
8 And Your Honor ruled on what they did submit.

9 Now, at this point, here we are post-briefing, and
10 defense is saying, well, here are the items that we still
11 think are outstanding. I asked the simple question to
12 defense, why weren't these included in response to Your
13 Honor's clear order in 332KK when you said, if you have
14 additional discovery on the underlying issue, then include
15 them in this motion. They did not include one line. They did
16 not dedicate one line in response to Your Honor's order.

17 And now here we are at the tail end of this, you
18 know, where we are winding down, and they say, well, here are
19 the things that we're going to need at this stage. So the
20 very basic question is: Why did defense not follow Your
21 Honor's order?

22 The second thing, Your Honor, is -- and I will
23 re-represent this as I did last time that, but for those areas

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that we fenced off with ex parte concerns of not being exposed
2 to ex parte material and just simply going inside the
3 convening authority's drawers, we asked for responsive
4 material. We represented to Your Honor those areas in which
5 we did not see based in any relevant or required rules of
6 production, but overall, the hundreds and hundreds of pages
7 that we provided. The 117 pages in our 332Y attachments; the
8 multiple productions, including the latest iteration that
9 happened last Thursday, has been a voluminous record for a
10 very limited amount of time.

11 And, you know, this more than opening the doors of
12 the convening authority's office beyond, you know, having any
13 basic restrictions of requiring them to be rooted in
14 discovery. A lot of these we just looked at, handed over. So
15 here we are. The defense had an opportunity to brief these,
16 failed to take that opportunity, and I would submit that Your
17 Honor's ruling in 33200 should stand.

18 Thank you.

19 MJ [Col SPATH]: Thank you.

20 DDC [LCDR POLLI0]: Sir, I'd just like to comment about
21 the timing and some of the actual history.

22 At the last hearing, if you will recall, we briefly
23 discussed AE 332CC, the discovery. At that time, we did

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 present that there were items. I think I specifically talked
2 about the rating and evaluation scheme. I don't have the
3 transcript in front of me, but this motion was discussed. And
4 it was determined at that time, because there were going to be
5 ongoing issues with witness testimony, because of the
6 cross-exam of the government, that there would be a need for
7 perhaps new evidence and new witnesses, that we would table
8 that particular -- this particular -- the older motion as it
9 related to production of evidence.

10 So that issue was briefed and discussed in the
11 outlying motions. At no point did the defense indicate that
12 those issues with production of evidence were resolved. It
13 was just determined at the hearing and given the status of
14 play of AE 332, that we would take it up during this hearing,
15 which we have done.

16 In the response brief, AE 332LL, trial counsel is
17 correct in stating that we did request new discovery. And
18 again, this is in direct response to trial counsel's own
19 cross-examination of the witness. This did not in any way
20 override or supercede the outstanding discovery request and
21 responses and issues that were presented in prior motions to
22 compel evidence.

23 So to say that the defense did not brief the issue or

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that the government is somehow caught unaware of this issue,
2 isn't correct. The additional discovery request, while there
3 is a footnote that discusses discovery, Attachment B of that
4 very same filing is the subsequent discovery request. So to
5 say that there's been no notice, again, is not quite entirely
6 true.

7 Again, all -- as I said, without over -- going
8 through each line item again, given the testimony, given the
9 discrepancies and the fact that credibility is clearly at
10 issue here, the documentation, the document evidence, is
11 necessary.

12 Thank you.

13 MJ [Col SPATH]: All right. Let's take up 362. That,
14 again, is the argument regarding funding for Mr. Kleinman.

15 LDC [MR. KAMMEN]: To put us all on the same page, there
16 are two potential witnesses who have been convicted in, I
17 believe, the Eastern or Southern District of New York. They
18 are serving life sentences. They -- we have good faith reason
19 to believe that they have information that is relevant to the
20 defense of the case and mitigation. They are represented by
21 Mr. Bernard Kleinman, who is an attorney in the Eastern
22 District of New York. He is not appointed anymore by the
23 district court, but he is still their lawyer, and they are

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 under SAMs, Special Administrative Measures, and so their
2 access to the public is quite limited.

3 We have reached out to them through appropriate
4 channels, including the Bureau of Prisons, and they have
5 agreed to be interviewed so long as Mr. Kleinman is present.
6 So we are requesting funds to allow Mr. Kleinman to be
7 present.

8 Now, I think we -- you know this, I presume
9 Mr. Miller knows this, one of the realities of death penalty
10 litigation is that, when we are done, whenever that is, and
11 the appeal is done, whenever that is, another group of lawyers
12 is going to come and go through our files and grade everyone's
13 paper. And so at some point, someone will interview these
14 witnesses.

15 Now, it may well be that when we get there, they
16 really add nothing to the equation, and, at that point, so be
17 it. But if in the future, if this request is not granted and
18 we can't find another way to do this, especially given the
19 fact that a great deal of the government's case is hearsay,
20 from statements taken in Yemen now 16 years ago, then
21 witnesses who were in a position who were perhaps in Yemen or
22 Afghanistan or Pakistan or wherever, then these witnesses may
23 be very, very crucial. And a future court may well say, well,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the denial of access to these witnesses was extraordinarily
2 prejudicial.

3 There are, of course, two kinds of -- the most common
4 cause of reversal of capital cases is ineffective assistance
5 of counsel and prosecutorial misconduct. I don't want to get
6 in -- we'll be discussing that piece at length in the future.
7 And there's two kinds of ineffectiveness of counsel.
8 There's -- where we simply don't do the work, where we're just
9 dilatory or perhaps because maybe the lawyers -- you know,
10 when we don't do the work well enough, we don't know how to do
11 the work, or we're paranoid or whatever, you know, maybe we're
12 already into that. But there's personal ineffectiveness. But
13 then there's systemic ineffectiveness, and that is when the
14 system conspires in a way to deny us resources, to deny us the
15 ability to do our job properly.

16 What the government -- the convening authority and
17 the government essentially both say, and this is sort of a
18 common theme in resource requests, is you haven't shown us a
19 rule. You haven't given us the authority. I mean, we heard
20 that at length in the MRI discussion. We've heard it in other
21 discussions. The reality in this case is that -- I don't want
22 to overstate it, but more times than not when we go to the
23 convening authority for resources, their position is no. And

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 I don't want to say it's a default position, but they seem to
2 start from the position of, how can we get to no. And that
3 seems to be the stare decisis that Mr. Gill was referring to,
4 was how do we get to no. Now, sometimes they can't get there.
5 But, of course, whenever they get to no, and then we have
6 to -- you know, and a lot of times because they -- in our
7 case, the position seems to be, you have to do these things --
8 you know, the prosecutors get a vote on our resources. So the
9 prosecutor's position is no as well. And certainly that's the
10 situation here.

11 Now, you know, do I have any authority that says you
12 should give -- essentially allow funds for a lawyer
13 representing witnesses to be present at their interview when
14 those witnesses want them present? No. Absolutely not.
15 Now -- but the problem is this, and here is the problem: In
16 the military commissions, as we've discussed at length, there
17 is no precedent because essentially we're in a new system.
18 And I don't know what's gone on completely in the other case,
19 but there are no real cases. I mean, there's only these two
20 capital cases that are floating around.

21 MJ [Col SPATH]: Here -- have you been able to find any in
22 federal practice?

23 LDC [MR. KAMMEN]: Well, I was coming to the federal

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 practice.

2 MJ [Col SPATH]: Okay.

3 LDC [MR. KAMMEN]: The difference in federal practice is
4 huge. Because in federal practice, all the resource requests
5 are ex parte, by statute. And so they never -- the only way
6 they ever get reported is if they are denied, if the person
7 receives a death sentence, and if that is an appellate issue.

8 And so the fact that we have none doesn't mean it
9 hasn't come up. It just means if they're ex parte and they
10 are granted, it -- there's no public record of it. The
11 operative federal statute is 18 U.S.C. 3599(f), which
12 provides, "Counsel may obtain funding for investigative,
13 experts, or other services if they are reasonably necessary
14 for the representation of the defendant in connection with
15 issues relating to guilt or the sentence. The showing of
16 reasonable necessity may be made ex parte, and any such
17 proceeding or request shall be transcribed and made a part of
18 the record available for appellate review."

19 So I don't know what's floating out there in other
20 cases, you know, and other terrorism cases such as the World
21 Trade Center bombing or some of the other -- many of those
22 cases weren't capital cases. The few that were, you know,
23 frankly, there's nothing in the appellate record that I have

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 been able to find that would be on point.

2 But I can, you know, only tell you from my experience
3 that the term other services in federal court is interpreted
4 broadly because federal judges understand that the best way to
5 do this is to grant the resources, which ends the issue. You
6 know, and what are we talking about here? We're talking about
7 \$8500? You know, airfare -- an airplane ticket and his time
8 at the federal CJA death penalty rate of \$183 an hour, which
9 is what I'm being paid.

10 So, you know, I mean, we -- that's a number that will
11 certainly cover the couple of days, and -- you know, and so
12 it's -- the Government, big G, or the prosecution says, well,
13 let's be penny-wise and pound foolish. Let's not do this.
14 Let's take our chances later on, and then we'll assume that
15 they really don't have anything to add to this. But, of
16 course, if later on it turns out they do, then that will yet
17 be another weight on the side of reversal.

18 And again I come back to the broken record, the
19 D.C. Circuit has left us in this almost unimaginably difficult
20 position of saying, okay, we're going to look at all of it
21 whenever this is over. And so, you know, whenever this is
22 over, if the D.C. Circuit says, gees, we would have liked to
23 have known what these people say, let's go interview them, you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 know, I mean, who knows how that's going to play out.

2 You know, the fact of the matter is, we've made the
3 good faith judgment that they have information. We're
4 prepared to do -- to share that with you in camera and
5 ex parte if that's really part of the issue. We've made the
6 good faith judgment that our failure to at least try to do
7 this would be -- would compromise and leave the mitigation
8 investigation inadequate; and I will tell you also, the
9 guilt/innocence, because in this area they perhaps overlap.

10 And so, you know, it's -- it's not like this system
11 is starved for money. It's -- you know, and it's not like
12 this is -- I mean, the waste is unimaginable here, and, you
13 know, we need it. It's reasonably necessary for the defense.
14 It's reasonably appropriate. Obviously it's within your
15 discretion. If you decide we don't get it, then we don't get
16 it, and later on we'll learn one way or the other if that was
17 correct.

18 Thank you.

19 MJ [Co1 SPATH]: Trial Counsel.

20 ATC [LT JOLLY]: Good afternoon, sir.

21 MJ [Co1 SPATH]: Good afternoon.

22 ATC [LT JOLLY]: We respectfully submit that this is
23 another occasion in which we do not need oral argument on the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 pleadings, sir. The defense has still offered you no basis
2 upon which we can provide the relief that they seek.

3 MJ [Col SPATH]: Just move the mic a little bit. Perfect.
4 Thank you.

5 ATC [LT JOLLY]: We do not necessarily oppose the relief
6 sought by the defense, sir, we're simply looking for a way to
7 help them -- help us help them. And the defense counsel is
8 mistaken, sir, in suggesting that it's within your discretion.
9 Because when we even look at the ineffective assistance cases
10 and we look at Strickland, those are not enabling funding
11 cases, sir.

12 The defense crafted their request as a request for an
13 expert consultant to the convening authority. We've already
14 addressed that issue. You cannot request another attorney as
15 an expert consultant. The case law is very clear on that.
16 But to somehow suggest that the defense mitigation
17 investigation would be constitutionally deficient because the
18 defense is not able to interview two convicted felons serving
19 life sentences, the law simply does not support that, sir.

20 And, in fact, in the two cases the defense actually
21 does cite ----

22 MJ [Col SPATH]: Slow down just a little bit. Sorry.

23 ATC [LT JOLLY]: Yes, sir.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 They quote the ABA guidelines, and that's Wiggins at
2 524, discussing the ABA Guidelines, and specifically there,
3 sir, "investigations into mitigating evidence should comprise
4 efforts to discover all reasonably available mitigating
5 evidence."

6 And if we're talking about interviewing witnesses who
7 don't want to talk to anybody without their lawyer present, I
8 would respectfully submit, sir, that that evidence is not
9 reasonably available. If the defense can articulate some
10 legal authority to enable us to provide them the relief they
11 seek, we are happy to support that, sir. And, in fact, the
12 convening authority was also happy to support that. But the
13 problem here is the defense has not met their burden.

14 And there are rules, sir. It's 703. And until they
15 can meet their burden, we're not actually able to follow
16 through and provide them the relief they seek.

17 MJ [Col SPATH]: Let me ask, I guess the question would
18 be, is the answer they clearly don't want to disclose the
19 what?

20 ATC [LT JOLLY]: Aye, sir.

21 MJ [Col SPATH]: We agree with that, I think.
22 Understandably, maybe from their perspective. And so is the
23 answer an ex parte filing with the details?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LT JOLLY]: No, sir. We're not seeking the identity
2 of the witnesses. The concern here is the legal authority to
3 actually provide the funding, because otherwise we're looking
4 at an Antideficiency Act violation.

5 I mean, you don't have the authority to order us to
6 spend money ultra vires and I think the commission addressed
7 that in 208C, sir, and I know that was Colonel Pohl at the
8 time.

9 MJ [Col SPATH]: No, but I do have authority for expert
10 consultants. And I guess the discussion then is this 18
11 U.S.C. 3599(f), other services. I'm going to go look at it.
12 Is that maybe the place you go look for this authority?

13 ATC [LT JOLLY]: Sir, we're happy to consider it. I would
14 like to point out that that was not briefed by the defense,
15 either to the convening authority or in the original defense
16 motion. So we'll happily consider it. But we're still
17 looking at, you know -- there's still prongs to the analysis,
18 sir, and it's under Freeman and it's also under Bresnahan, you
19 know, how is the defense able to do this themselves. I still
20 think they would need to know the analysis. We don't need to
21 know the identity of the witnesses as they conduct their
22 mitigation investigation. They still need to meet their
23 burden, sir, under 703.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: Let's make sure I don't have any other
2 questions.

3 I don't. Thank you.

4 ATC [LT JOLLY]: Thank you, sir.

5 LDC [MR. KAMMEN]: I gather they think in this area.
6 We're ineffective, and maybe they're right.

7 I have two other sources. Of course 949j says that
8 we have the reasonable opportunity to obtain witnesses and
9 other evidence, and it should be equivalent to what's
10 available in an Article III court, which, of course, makes
11 3599, I think, highly relevant. Then, of course, the section
12 regarding employment of expert witnesses. And this is where
13 it gets peculiar, and essentially, you have this systemic
14 problem. On the one hand, they say, well, you can't have an
15 expert consultant who's a lawyer, which then you can't have --
16 but on -- in other circumstances, they say you can't have an
17 expert consultant -- you can't have a lawyer. You only have
18 the right to two lawyers and you can't have another lawyer.

19 So there is no real category to fit it in under these
20 rules. But even the history of this case, there has been
21 expert consultants appointed who are lawyers. They are not
22 doing legal work, they are doing consultant work, but they are
23 attorneys.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Now, this -- you know, this -- Mr. Kleinman -- the
2 witnesses are happy to talk to us, they just want their lawyer
3 there. Not an unreasonable -- you know, when you're serving a
4 life sentence, that's not an unreasonable request. And we
5 can, you know, parse it out and say, well, you know, there's
6 this, there's that and the other, but that's -- you know, they
7 have that right. And, you know, again, we're not trying to
8 force the witnesses to do anything. We -- they're happy to be
9 interviewed. And, you know, they're -- they'll be interviewed
10 under the most rigorous security situations. They are
11 confined at Supermax. They're under SAM.

12 So, you know, there's all kinds of -- you know,
13 there's no good reason not to allow this.

14 And all of this, well, you haven't done it right, you
15 haven't -- the truth of the matter is, for these guys, it will
16 never be right. I mean, that's simply the fundamental problem
17 here is it will never be right. You know, so I don't know
18 where we -- I mean, where we are is we think these are things
19 that are -- reasonably necessary is expansive, and you don't
20 want to hear my experience, and I understand that, but I can
21 tell you from experience that every capital case is different.
22 And what constitutes reasonably necessary very often is things
23 that are quite unusual in the context of any other case but

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 make a lot of sense in the context of that case. And that's
2 where we are with this. This is reasonably necessary to help
3 us accomplish our mission.

4 MJ [Col SPATH]: Thank you.

5 I want to talk briefly -- we're not done with the
6 briefing cycle yet, but for 359, I just want to make sure that
7 we kind of figure out where we're going to go with that.
8 That's the issue regarding housing here at the ELC for
9 Mr. al Nashiri when we're in session.

10 Defense counsel, my impression is you have a
11 potential of three witnesses for that motion; your client,
12 plus two.

13 LDC [MR. KAMMEN]: Yes.

14 MJ [Col SPATH]: Is your anticipation that you're going to
15 call your client first in that order?

16 LDC [MR. KAMMEN]: Probably not, quite honestly. And I
17 really hadn't thought that far. I mean, for a host of
18 reasons, including all the classification issues, if there was
19 a way to do it without, but you never know, and ----

20 MJ [Col SPATH]: No, I understand. I just wanted to see
21 where you were in the -- just the planning process because
22 you've asked, I believe, for the guard force commander or a
23 surrogate ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. KAMMEN]: Right.

2 MJ [Col SPATH]: ---- and then a medical officer.

3 LDC [MR. KAMMEN]: Right. And not to play hide the ball,
4 but I assume as this unfolds, we will also be requesting
5 updated medical records. And, in fact, we have sort of an
6 ongoing request for updated medical records that never seems
7 to really get fulfilled.

8 MJ [Col SPATH]: This is not to shape your order of
9 presentation. I know you know in other commissions cases we
10 have had a client testify so -- if you know ----

11 LDC [MR. KAMMEN]: Right.

12 MJ [Col SPATH]: I know we can get there. That is well
13 within your control and your client's control. You know that.

14 LDC [MR. KAMMEN]: Right.

15 MJ [Col SPATH]: And then the other piece of that is, when
16 you're at a point where you believe there's an issue with
17 discovery on the medical records, please file the motion to
18 compel, and ----

19 LDC [MR. KAMMEN]: Right.

20 MJ [Col SPATH]: ---- and if it's appropriate, I'll step
21 in.

22 LDC [MR. KAMMEN]: I mean, there actually was a motion in
23 advance of the last hearing, a request for medical records

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that didn't get reached because some of the issues, frankly,
2 that we thought were going to come up didn't. But that's
3 still floating out there. And, you know, the government has
4 made a modest effort at complying, but we really do need
5 something relatively contemporaneous. We understand they
6 can't give us yesterday's medical records, but there's no
7 reason why we should only have records from a couple of years
8 ago and not the last two years.

9 MJ [Col SPATH]: All right. All right. That helps. I
10 just wanted to get a feel. Let me chat with the government
11 for a minute about it. Thank you, Mr. Kammen.

12 From where I think we are, Government, are you going
13 to have any issues with presenting those witnesses and dealing
14 with that motion?

15 TC [MR. MILLER]: I am, and I anticipate we will be filing
16 our response probably either tomorrow or Monday.

17 MJ [Col SPATH]: All right.

18 TC [MR. MILLER]: What's tomorrow? Tomorrow is Thursday.
19 Either Friday or Monday, sir.

20 MJ [Col SPATH]: I understand. My hope is -- well, do you
21 have anything else on that?

22 TC [MR. MILLER]: No. But as to the medical records which
23 Mr. Kammen spoke, we've recently taken some steps, I think, to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 expedite that process. I understand his desire to get those.
2 So hopefully it will be less modest and more robust in getting
3 them to him.

4 MJ [Col SPATH]: Maybe by December, it will be a little
5 bit different description. We'll see.

6 TC [MR. MILLER]: I think hopefully we'll get something
7 that will satisfy him. Hopefully. Hopefully.

8 MJ [Col SPATH]: Thank you. Good. I hope by then I'll
9 have a good idea of where I am in the review of the documents
10 submitted by you all under seal. I should have a -- at least
11 a feel for the timing.

12 We have outstanding classified issues that I'm hoping
13 to get to in December. We have some outstanding motions that
14 I'd like to get to in December. So I'm going to spend some
15 time today, tomorrow, and then as I have time over the next
16 few weeks going through the filings and where we are to try to
17 give you a realistic docketing order for December.

18 I would encourage, if you all have motions that you
19 want heard in December, early is good so we can get them
20 through the briefing cycle, particularly where we have
21 witnesses that we want. Because to the extent I can resolve
22 these issues, it helps so we have the witnesses lined up to
23 testify, if those issues are something I grant.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 And so I just -- I encourage that, because in some
2 motions, we -- the witness request comes later and it's hard
3 to get those things lined up so we can get the testimony.

4 You may.

5 And with regard to the witnesses on 332, I will let
6 you know very quickly. So as I can communicate with you all,
7 I think we'll be able to build a docketing week that makes
8 sense, and we can do it maybe a little more in advance so our
9 first day on the record we don't spend an hour trying to
10 figure out where we're going to go.

11 LDC [MR. KAMMEN]: With respect to witness and evidence
12 requests, quite candidly, a far more efficient process would
13 be to skip the whole consultation. I don't believe in the
14 history of this case there's been three times when the
15 government hasn't opposed the witness request. So it would
16 really be far more efficient to let us just come to you and --
17 I understand that's unorthodox, I understand that that's --
18 makes everybody crazy, but if you really want to promote
19 efficiency in this, you know, when we're only talking about
20 six weeks between hearings, you know, we have -- we don't have
21 all of these people.

22 I mean, we -- we do not have the staff they have.
23 And so if we've got to write the witness request and then they

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 take few days and then they deny it, then we have to write the
2 motion, and then there's the brief, and then there's the back
3 and forth, and then all of a sudden you're where you are now,
4 which -- on 332, which was it's all at the last minute.

5 So it really would be far more efficient to skip the
6 denial -- just to be far more efficient to skip the denial
7 from the convening authority and just come to you for
8 everything. But that's -- I understand that, in the absence
9 of flexibility, you know, that may not be.

10 But the other thing, and I just want to give you a
11 heads up, and this is sort of personal, and if the answer
12 becomes no, you have a hearing scheduled in May that picks a
13 week that just is a terrible week for me for personal reasons.
14 We're going to move to advance that by a week or two. I don't
15 know how realistic that is, but if you can block off time a
16 week or two earlier, that would be nice.

17 MJ [Col SPATH]: I have to look. Here's what we will
18 do -- okay. Thank you. That helps.

19 I don't think I can on my own abandon rules I have
20 been given that are ----

21 LDC [MR. KAMMEN]: Right.

22 MJ [Col SPATH]: ---- in place. But what I can do, and I
23 will do this, just in general, there are probably areas that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 seem we could agree on. And I'll give you a great example.
2 When we were dealing with Change 1, there were a couple of
3 witnesses in that that seemed obvious were going to be
4 relevant. So if the issue is the submission by the defense is
5 deficient but you know you're going to get there, maybe a
6 phone call between each other and a conversation so we can
7 resolve it.

8 Nobody here could have believed that General Ary
9 wasn't going to testify. There just -- there are some where
10 you all can do this, I know you can. And just call Mr. Kammen
11 and say, we need this to get that request there, but we all
12 recognize it's going to happen.

13 There are -- a good issue is going to be, frankly,
14 the one coming up with housing the accused. The reply brief
15 said, quite accurately, the defense has the burden. And then
16 it says, but you can't call any witnesses. So it's hard to
17 get to your burden.

18 LDC [MR. KAMMEN]: Welcome to military commissions. We
19 have been dealing with this for five years.

20 MJ [Col SPATH]: But I'm just trying to get you all -- I
21 know you know this, Mr. Miller, I know you've recognized this;
22 Mr. Kammen, I know you've recognized this, because you've
23 heard me say it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 LDC [MR. KAMMEN]: Right.

2 MJ [Col SPATH]: You all can come to some reasonable
3 agreements. I know you can. Because for the people back
4 there, that seems odd, right? You have the burden. We won't
5 hear from you. There has to be something that's reasonable to
6 put on to meet your burden, if you have the burden. When you
7 all have the burden, you all have to put on evidence. So
8 there's probably some discussion on that motion with the ELC.

9 I am quite clear on the law regarding getting
10 involved with prison regulations. You all should know that
11 from rulings in the past. But it also requires some evidence
12 to show why they're in place. So I just -- there has to be an
13 ability to help cut through some of the disputes where we know
14 where the answer ultimately is going to be, and that is a
15 fair, full process so I can make the right ruling. So that's
16 that piece.

17 Out coming your way will be a request for a joint
18 filing, because -- and I encourage Mr. Miller and Mr. Kammen,
19 have that conversation. This one is easy and it goes to the
20 May discussion.

21 LDC [MR. KAMMEN]: Okay.

22 MJ [Col SPATH]: The only thing immovable for me is the
23 Judges' Course, the new Judges' Course in Charlottesville. It

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 is the end of April into the first week in May. That's the
2 only thing. I'll give you those dates when I send out the
3 request for filing from you all. I can't fix that, but I have
4 great flexibility on the other side of that. And so there is
5 room to accommodate, if we need to, and also have a hearing,
6 which are in the interests, I know, of everybody, frankly. So
7 there's that. The only other limiting factor, of course, is
8 other groups scheduling hearings here.

9 LDC [MR. KAMMEN]: That's why I raise it now, because if
10 you book the time now, then ----

11 MJ [Col SPATH]: So there I also -- first we have some
12 internal -- judges can talk and try to figure out if there's
13 movement for those cases. So even if it's we prefer these
14 weeks, even though they appear to be booked, that's worth
15 something because I can have that discussion, especially since
16 we're in October and we're talking about May.

17 The other part of that is going to be, as I look in
18 April -- and maybe that's the answer is we move May into
19 April. As I look in April, there's a two-week block from
20 April 2nd for those next two weeks that nobody has anything
21 scheduled here. Easter is at the end of those two weeks, but
22 not in the middle of it. So we don't have to take all of the
23 two weeks. We don't have to take -- and I don't want any

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 answers now.

2 LDC [MR. KAMMEN]: I mean, I'll just say the only problem
3 when you have these hearings close together is you can't get
4 enough done in between.

5 MJ [Col SPATH]: I'm hoping to -- yes. I'm hoping we can
6 start some of the evidentiary issues we have with, for
7 example, real evidence. Again, we've discussed it. I know
8 you don't agree that we have to go through the process twice.
9 I think both in federal court and in courts-martial practice,
10 if they want to pre-admit, they can pre-admit. You can attack
11 the foundation, as you know, in front of the panel, the weight
12 of the evidence, no doubt about that. But if they want to go
13 through the hoops of pre-admitting in front of me and go
14 through the discussion with the panel members, they're welcome
15 to do it. And that may just be a time-consuming process and
16 it's something that I'm hoping we start moving into.

17 So I will send out some clear direction for you all
18 to talk and I'll identify the weeks in April.

19 LDC [MR. KAMMEN]: But I would also ask that you not
20 schedule anything in April without consulting because ----

21 MJ [Col SPATH]: That's why I am ----

22 LDC [MR. KAMMEN]: I don't -- I ----

23 MJ [Col SPATH]: Yes, Mr. Kammen, that is why I'm going to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 turn it over to you all for discussion the week that you're
2 discussing in May, the blocked three weeks that I have, and
3 the opportunity to do something in April. If the two lead
4 counsel can get together and see what flexibility and what
5 dates we can use, we do not have to use all five days, as
6 we've demonstrated, we don't have to use two full weeks.
7 There's lots of ability to use time. So just have the
8 conversation, then provide those proposals, and I think we can
9 then work on a compromise for the May week because we're so
10 far out.

11 LDC [MR. KAMMEN]: That's why I raised it.

12 MJ [Col SPATH]: So I thank you. And again, if it's a
13 week that already booked, just let me know, it's already
14 booked but we'd like it, and we can ask if we can shift other
15 cases right or left, depending on what's going on. So thank
16 you.

17 I think we're at a place where we can stop and then I
18 can get some work done on some more motion rulings and we can
19 get some direction out to you all.

20 What I want to find out is, is there anything from
21 either party before we go off the record here today?

22 Mr. Miller, yes.

23 TC [MR. MILLER]: Noncontroversial, I think. You asked

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the government to advise you of what the status of Mr. Gill
2 was. I'm happy to report that the marshal received the order
3 releasing him shortly after it was signed. They left the
4 premises. He was then taken by the persons responsible for
5 coordinating witnesses. They took him outside the Mark
6 Center, they gave him the option of either going to the
7 airport with a prepaid cab to and from the airport here and
8 his home, or to wait at the Hilton across the street and have
9 lunch, which we paid for. That was the option he took. And
10 he asked for a cashier's check. And my understanding is that
11 we obtained one and gave it to him.

12 MJ [Col SPATH]: Much appreciated.

13 TC [MR. MILLER]: Thank you, Your Honor. Nothing from the
14 government.

15 MJ [Col SPATH]: Mr. Kammen, anything else?

16 LDC [MR. KAMMEN]: No, sir.

17 MJ [Col SPATH]: Hopefully that helped with time for you
18 to meet you with your client. I do appreciate the effort from
19 both sides. I know I say this frequently. I know there isn't
20 going to be complete amicability. There can't be. This is an
21 adversarial process. I do hope that you all continue to find
22 areas of agreement where you can, and let me know where those
23 are. And when you can't, come to me and we'll figure those

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 out.

2 Thanks for your time. Commission is in recess.

3 [The R.M.C. 803 session recessed at 1445, 19 October 2016.]

4 [END OF PAGE]

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT