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1 [The R.M.C. 803 session was called to order at 1134,
2 9 September 2016.]

3 MJ [Col SPATH]: These commissions are called to order.
4 All of the parties who were present before are again present.

5 So we're down to Appellate Exhibit 355.

6 Defense Counsel.

7 LDC [MR. KAMMEN]: I always hate it, Your Honor, when an
8 older lawyer starts talking about his experience, because it
9 always feels like he's patting himself on the back. So I'm
10 reluctant to do that, but when we -- when this issue first
11 arose regarding the government's ex parte communications with
12 some people on the Court of Military Commissions Review, I
13 reviewed my experience as an appellate lawyer, and I have been
14 involved in appeals in two appellate courts in Indiana and
15 five of the 11 judicial circuits as well -- federal circuits
16 as well as the U.S. Supreme Court.

17 But to check my -- and to check my own experience, I
18 spoke with numerous other lawyers who did a lot of appeals,
19 and nobody can remember a time when there were some kind of
20 ex parte administrative conversations with an appellate court.

21 If you think about it, an appeal is a pretty
22 straightforward process, even in the C.M.C.R. the government
23 initiated its appeal, and the court sets a briefing schedule.

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1 Let's -- we'll forget for the moment all the stuff about
2 the -- during the 18 months of delay.

3 Once the case is back on track, normally what happens
4 is the court sets a briefing schedule. Certainly parties on
5 occasion will move to extend the briefing schedule, "I can't
6 get it done in time." That's all done on the record. The
7 court then sets a date for oral argument, or not. That's all
8 done on the record. And the only things that might come up
9 that would require some kind of additional communication is,
10 and I've done this, and other people, is you might call the
11 clerk and say, I'm using 12-point font in Helvetica, and the
12 rules in some cases are that complicated.

13 Even in those circumstances when I've done that,
14 almost routinely, the clerk has said to me, "I'm happy to
15 answer your question. Send me an e-mail or send me
16 correspondence, and include the other side."

17 And so the notion that -- and it's uncontested that
18 there were ex parte communications between the government and
19 somebody on the C.M.C.R. is extraordinary. And the
20 government's response is extraordinary. The government's
21 response is not "Here they are. Let us show you how benign
22 they are. Let us give them to you" because they don't -- all
23 your concerns are way overblown. You're being paranoid and,

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1 you know, stuff, which is the easy solution to all of this.
2 Let us see them. If they're benign correspondence -- we're
3 all big boys and girls here. And so if it's benign, okay, we
4 were wrong, you were right. Show them to us.

5 But their response is extraordinary. Their response
6 is, we've reviewed this. We're confident that this isn't
7 material to your defense. It's not we're confident that we
8 haven't been unethical. It's not that we're confident that
9 these are appropriate. It's these aren't material to your
10 defense.

11 Well, of course, they don't have anything to do on
12 the surface with what will happen in the trial. We
13 understand. But they are highly material to issues of
14 unlawful influence. It is inappropriate for a clerk or a
15 judge to communicate with a prosecutor and perhaps say, you
16 know, one of the judges wants to leave, one of the judges is
17 in a hurry to go, so we need to speed this process up.

18 Or worse -- and I don't know that this happened. We
19 don't know. There has been a motion to recuse the judges
20 because there is serious questions about whether they're
21 properly appointed. And we need to get this done as quickly
22 as possible to put those questions to -- to try and put those
23 questions to rest, or any other numerous problems that could

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1 be impacted because this is not a simple factual situation of
2 what occurred in the court.

3 And likewise, it would be improper for the
4 government -- and I don't know whether this happened or not --
5 to say to a clerk, you know, the big G Government wants to
6 make sure that the commissions are back on track before the
7 D.C. Circuit rules, so we need to get these appeals done in a
8 hurry so we can send letters to -- which they did -- to the
9 D.C. Circuit saying, well, the commissions are back on track.
10 So there's no reason to grant mandamus or habeas relief to
11 Nashiri. And so all of those things would be extraordinarily
12 inappropriate and would go to the heart of the integrity of
13 this process.

14 Now, you talked the other day about how we need
15 robust discovery on -- concerning possibly UI or possible
16 misconduct, and we do. If there are inappropriate proceed --
17 communications, I mean, there's no way to sugar-coat this,
18 those would be prohibited under state bar rules in any state
19 I'm aware of. And certainly if a military person did it under
20 their rules of their various JAG services, which either the
21 commission or somebody associated with this, if discovered,
22 would have an obligation to report.

23 Likewise, and again, I mean, you know, if the

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1 communications were with the clerk, he's a lawyer. He's not
2 just a functionary in this system. The clerk of the C.M.C.R.
3 is a lawyer -- you know, you can't make this up -- employed by
4 the Department of Defense Offices of Appeals. And the clerk
5 is sort of his second job.

6 God forbid the communications were with judges
7 directly, because then you would have huge questions about
8 judicial impropriety. So you're right, they don't -- they're
9 absolutely correct, it doesn't go to a defense, it goes to
10 something far more important, the integrity of what's going on
11 in this and other courtrooms.

12 Now, you know, this is one of those hard situations,
13 you know, that I alluded to yesterday about who's really in
14 control here because this is really an easy resolution. If
15 these are benign e-mails, produce them to us. If there's
16 nothing to them, fine. We'll be happy to walk in here
17 publicly and say nothing to it. But if -- you know, and the
18 communications may be more than e-mails. I mean, they could
19 be phone calls, they could be -- who knows what they are. But
20 if they're genuinely benign, all we need to do is see them,
21 expose them to the transparency that is supposedly the
22 hallmark of this process.

23 There is another piece of this, and again, I -- this

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1 all happens in the context of a bigger issue that we
2 apparently will probably address the next time we're together,
3 and that is the Dalmazzi issue, because Dalmazzi which really
4 considers the recusal or failures to recuse Judge Mitchell in
5 the Dalmazzi case and King in the Army case, despite the
6 government's contention has no bearing, is a huge deal, from
7 what I understand. The fact that C.A.A.F. requested all of
8 the TJAGs to weigh in, I understand really demonstrate what is
9 a huge, huge deal it is.

10 And if these communications somehow related to
11 Judge King's recusal on the C.M.C.R. or Judge Mitchell's
12 recusal on the C.M.C.R., I mean, again, that would -- it's all
13 intertwined. These need to see the light of day, and it's
14 nothing more complicated than that.

15 When you look at the communications that were going
16 on, communications about briefing schedules, communications
17 about when Ms. Spears entered her appearance in the C.M.C.R.,
18 I mean, those are benign, arguably, administrative
19 communications, and everybody was copied on those.

20 So to characterize what occurred in secret as benign
21 or administrative is troubling, because if they're really
22 benign and they're really administrative, based upon what we
23 know, they would have been somehow provided to us before, or

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1 provided -- or copied at the time.

2 So what we ask is very simple, but it really -- it
3 really is a question of who's really in control here. We'd
4 ask you to order the government to produce all communications
5 they had with the C.M.C.R. If those -- including any
6 memoranda or any -- you know, anything reflecting oral
7 communications; or if there were oral communications, we need
8 to know who those were between and what the subject matters
9 were; and if they were communications other than e-mail, in
10 some way we need those.

11 But this needs to be -- you know, this is -- this
12 needs to see the light of day, and it needs to see the light
13 of day promptly. And their characterization is basically,
14 we've reviewed our own behavior, and we find it's appropriate,
15 and so trust us. And that -- if -- if that's acceptable in
16 this commission, then we know where we're at.

17 Thank you.

18 MJ [Col SPATH]: Let me ask a couple of things.

19 LDC [MR. KAMMEN]: Sure.

20 MJ [Col SPATH]: I had a question -- I had a couple of
21 questions jotted down. One is why the material would be --
22 the information would be relevant and material for your trial
23 preparation or strategy, and I think you've already addressed

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1 that. It isn't. It feeds into your ability to deal with the
2 unlawful influence motion.

3 LDC [MR. KAMMEN]: That -- well, certainly. I mean,
4 that's what we know now. It deals with the ability and raises
5 the spectre of other unlawful influence.

6 Now, again, we don't -- we don't know what we don't
7 know. Let's take the worst possible situation. Let's say
8 that there was an e-mail -- and I understand this is
9 hyperbole -- you know, from General Martins to Judge King,
10 that says we really need a quick, positive decision, because
11 we need to get something to the D.C. Circuit. And so we're
12 trusting you to do the right thing, and to do it quickly.

13 You know, obviously at that point there would be all
14 manner, flurry, of litigation in who knows what courts. Let's
15 assume, again, the worst possible -- Judge King or the clerk
16 says to the prosecution, There are these motions to recuse.
17 We need to get this over, so please do not agree to any
18 defense extensions because Judge King wants to recuse himself
19 as quickly as possible because he's afraid he's going to --
20 some court's going to rule he's resigned by operation of law,
21 and he wants to get this done.

22 And so supposing the court was telling the
23 prosecution not to agree to any extensions, that would be

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1 extraordinary. That would absolutely be extraordinary. And
2 in my view, that would probably be an attempt at unlawful
3 influence.

4 So, you know, the range of what could come from this,
5 we don't know, but it is so unprecedented that we need to
6 know. If it's genuinely benign, so be it. But it doesn't
7 feel that way, I have to be honest.

8 MJ [Col SPATH]: And not assuming the worst or the best,
9 just trying to figure out what authority I have. Assuming
10 recusals and the like, for whatever the reason, how can
11 anything -- how is what's occurring there at this stage, the
12 pretrial stage -- not post-trial where you're dealing with
13 that court, because they're my superior court, I'm not afraid,
14 believe me, to order from them, I'm just -- how is it unlawful
15 influence on this, arguably, even arguably unlawful influence
16 on this process here? Because I am concerned about unlawful
17 influence; we've clearly established that. But I'm trying to
18 figure out where's the influence on me? And I'm just asking
19 the questions.

20 LDC [MR. KAMMEN]: But the unlawful influence doesn't have
21 to be on you. It can be on any participant in the system. If
22 somebody tries to influence me to do something, on how to
23 conduct litigation at any point, that's unlawful influence.

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1 If somebody tries to influence them, that's unlawful
2 influence. It doesn't have to be on you.

3 MJ [Col SPATH]: Correct. So that's -- part of your
4 argument here is, separate from the convening authority's
5 office influence we've talked about already, and 332 is the
6 motion practice for it, you're looking for information on
7 unlawful influence on the process on one of the agencies on
8 this process writ large?

9 LDC [MR. KAMMEN]: Yes, because it's unlawful -- it's
10 against the law to try to influence the court, the C.M.C.R.
11 it's -- I think it's a criminal violation. It's certainly
12 part of the unlawful influence. They have protection of
13 judges.

14 They're not going to self-report. That's obvious.
15 The only body, given the realities, that has any way of
16 fleshing this out in any meaningful way, is you. We have no
17 other venue to do this.

18 And so you -- you know, you have a responsibility --
19 we all have -- as I said yesterday, we have a responsibility
20 to history, too. We have a responsibility to the truth.

21 Now, if the truth is benign, so be it. If the truth
22 is that something ugly and sordid occurred that resulted in an
23 opinion that has a huge impact on this case, that should be

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1 known. What would flow from that is who knows. We can
2 speculate all day. I could see circumstances where -- and,
3 again, you know, you can sit and imagine the worst. I could
4 see circumstances where it would be so ugly and so sordid that
5 the -- you may well -- and I think could say, in light of this
6 decision I am reinstating my prior rulings and requesting that
7 the C.M.C.R. re-hear the case in front of a neutral panel.

8 You would certainly have that authority, if it was
9 the worst. There's all manner of possible relief. But we
10 have to know what occurred. We have to know what these
11 allegedly benign administrative communications, that the
12 government doesn't want anyone to see, show. And that's the
13 starting point. And if you -- I appreciate, you know, what's
14 your authority, what's all of this, but you have the authority
15 before the litigants in front of you.

16 And if you don't do this, quite candidly, you are
17 demonstrating, not to us, but to the public, the real nature
18 of this system, because this -- this is unprecedented. And
19 this is -- you know, this is pretty shocking stuff. Or it may
20 be. Maybe it's benign. Maybe they're just -- I don't know.
21 But I've never before seen a lawyer where a question came up,
22 Hey, did you have an improper communication where the
23 communication was benign, refuse to -- that's the easy

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1 solution. Yeah, I met with -- you know, I met with Judge
2 Smith, and here's the memorandum. Here's what happened.

3 So you know, this is a hard -- it may be a hard one,
4 but there's -- you're the only game in town, Your Honor, and
5 if you don't do this, it's never going to happen. And we'll
6 never -- and history will never know the truth, and we'll
7 never know what really occurred up there. And that's, in this
8 situation, where the very legitimacy of this system is
9 constantly being challenged.

10 You know, if we -- if stuff like this is off limits
11 to you, then all the people who are saying this is really just
12 a show trial will be proven correct.

13 MJ [Col SPATH]: Give me just one moment, General Martins.
14 I'm just looking something up.

15 General Martins.

16 CP [BG MARTINS]: Good morning again, Your Honor.

17 MJ [Col SPATH]: Good morning.

18 CP [BG MARTINS]: We oppose the defense motion to compel
19 ex parte communications between the government and the
20 U.S.C.M.C.R. and urge the commission to deny the motion. To
21 grant any relief on completely unfounded, confirmed now as
22 speculation by the defense to grant any form of relief to such
23 unfounded speculation undermines the system of criminal

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1 discovery, violates several longstanding rules of discovery in
2 the criminal process, and ignores the presumption of
3 regularity that is afforded and has to be afforded to the
4 official acts of public officers absent clear evidence to the
5 contrary. And that is the standard.

6 It sounds like from the defense a -- just a minor
7 thing, let's turn over to the defense any and all
8 communications between the government and public officers
9 without articulating any authority. We had a stroll through
10 Mr. Kammen's life and professional work, but no citation to
11 authority. And, in fact, the authorities establish no
12 entitlement to discovery of this sort, and they cite no facts
13 that would overturn that presumption of regularity, and I'll
14 go into just a couple of these before resting on our brief.

15 They cited material to the preparation of the defense
16 basis in their discovery request. United States v. Graham
17 case in the D.C. Circuit is one of the authorities that is
18 most on point here. And although the materiality standard is
19 not a heavy burden, it does require that the information
20 significantly alter the quantum of proof in the defense's
21 favor. There is a burden here, and although it's not a high
22 burden, it has to have a reasonable foreseeability it's going
23 to significantly alter the quantum of proof. They just

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1 haven't met -- that isn't present here. And we have reviewed
2 this material. We have done our due diligence, and it's not
3 material to the preparation of any defense or any claim in
4 this case.

5 Under Pennsylvania v. Ritchie, that's how our system
6 works. If we start fuelling what is very clearly here a
7 fishing expedition by a disappointed litigant, Your Honor,
8 there really isn't an end to this kind of thing.

9 I'd like to also flesh out that presumption of
10 regularity. Latif is the case we cite in our brief.

11 MJ [Col SPATH]: Yes. v. Obama.

12 CP [BG MARTINS]: Right. You're familiar with the case.
13 "Absent clear evidence to the contrary, courts presume that
14 public officers doing official acts have properly discharged
15 their official duties."

16 Let's look at what they cite as their basis. We're
17 not talking about evidence here, Your Honor. We're talking
18 about speculation. The court acted quickly to schedule oral
19 argument after 19 months from a time when we were on the eve
20 of oral argument. The court then scheduled oral argument
21 quickly. That's suspicious and strange and irregular.

22 The defense assertion that Judge King's departure is
23 somehow indicative of partiality or a problem here, we later

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1 learned the court does, in due course, provide an explanation
2 of Judge King's departure. He was reassigned.

3 This is what we have here, is speculation, suspicions
4 about timing. And, Your Honor, these were interlocutory
5 appeals that, under the rules for commission and the rules of
6 the C.M.C.R., they're supposed to be expediting. They're
7 supposed to put it in front of all other business.

8 When defense counsel states that it's irregular that
9 the U.S.C.M.C.R. is denying their writ in the nature of coram
10 nobis about a ruling going against him in the appointments
11 clause challenge, he says that the C.M.C.R. didn't ask the
12 government for a responsive pleading. Well, neither did the
13 D.C. Circuit. I mean, this is not unusual, irregular timing
14 of any sort.

15 Your Honor, you did say you're going to take judicial
16 notice of the Judge King recusal thing in denying our motion
17 to supplement.

18 MJ [Col SPATH]: I did.

19 CP [BG MARTINS]: So we would move, Your Honor, to deny
20 the motion to compel. This is a fishing expedition, and the
21 presumption of regularity that should be afforded the acts of
22 those C.M.C.R. officials and judges and ours, should be
23 respected here.

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1 MJ [Col SPATH]: And so Latif v. Obama is very clear, and
2 that's that public officers are properly discharging their
3 duties, and they get that presumption.

4 A couple of questions. I was just looking at 949b,
5 unlawful influence of either the military commission or the
6 commission review court.

7 CP [BG MARTINS]: Yes.

8 MJ [Col SPATH]: What I gather from Mr. Kammen's argument
9 and, now that we've heard it, his motion is not -- he has
10 conceded this is not to prepare a defense or to prepare
11 anything for trial. It is focused on the issue of unlawful
12 influence. And so the question then is, what does the defense
13 have to show before the court will engage in looking into --
14 when do I say the easy answer is an in camera review? Because
15 U.S. v. Bowser, military court, it was a '62 appeal, and there
16 the trial judge ordered attorneys to turn over notes for an
17 in camera review. The attorneys refused. The judge dismissed
18 with prejudice, and the Air Force court and then C.A.A.F.
19 upheld that dismissal with prejudice, which is significant
20 remedy. I was not the trial judge.

21 The -- both courts upheld it and said in camera
22 review is the favored manner for resolving issues because it
23 prevents unauthorized discovery, it prevents fishing

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1 expeditions, it prevents many things. What it does is promote
2 confidence. So what I'm asking ----

3 CP [BG MARTINS]: Bowser is a very interesting case.

4 MJ [Col SPATH]: It is interesting.

5 CP [BG MARTINS]: And I would say aggravated case with
6 regard to the interchanges between the trial counsel ----

7 MJ [Col SPATH]: Yes.

8 CP [BG MARTINS]: ---- there and the judge. That is
9 certainly ----

10 MJ [Col SPATH]: Yes, sir. That is certainly what led to
11 the dismissal with prejudice, was the trial counsel refusing
12 to comply with an order from the bench. That -- agreed. But
13 the proposition for in camera review is the answer to
14 questions of privilege, or answers to the questions of mental
15 health records, or answers where in large part -- not fishing
16 expeditions, but an opportunity for the neutral person to look
17 at the material and make the determination.

18 And I'm just asking the questions.

19 CP [BG MARTINS]: I understand.

20 MJ [Col SPATH]: And I've moved it away from, on purpose,
21 discovery for preparation for trial. Because I concur with
22 you, it is not material to the preparation of a defense or
23 mitigation or anything like that for trial. My concern

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1 remains, and I think hopefully everyone's concern in the room
2 should be focused on this issue of UI. The spectre of it ----

3 CP [BG MARTINS]: Your Honor, they did cite UI in their
4 brief, but I do want to distinguish Bowser. That is an
5 aggravated situation. There were issues of, you know, what
6 were in trial counsel's notes relating to potential Brady and
7 so forth, and there was a lot of interchange with judge in
8 this case and the trial counsel, with the court in upholding
9 the ----

10 MJ [Col SPATH]: Absolutely.

11 CP [BG MARTINS]: ---- stating that the ----

12 MJ [Col SPATH]: I am not suggesting for a moment that we
13 are looking at those remedies. What I'm talking about is --
14 like I said, the court's discussion of ----

15 CP [BG MARTINS]: In camera review.

16 MJ [Col SPATH]: Yeah. Forgetting the emotion of what was
17 happening at the moment ----

18 CP [BG MARTINS]: Yeah.

19 MJ [Col SPATH]: ---- was the judge saying I don't know --
20 frankly said as much -- I don't know if the defense is at
21 their burden or not, what I do know is an in camera review is
22 such a normal response to these things, that's what the
23 appellate court was saying.

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1 CP [BG MARTINS]: Well, I would submit, Your Honor, that
2 when you have a clear rule, even in your own motion practice,
3 that this does not include administrative matters necessary
4 for administrative management. This is in Rule 3.2. So what
5 you're saying is you're analogizing to Bowser, and frankly
6 stating a default setting for in camera review. That's just
7 not the discovery process.

8 MJ [Col SPATH]: It is not necessarily the discovery
9 process. It is what the Bowser court said should be a good
10 default, depending on the lay of the land.

11 CP [BG MARTINS]: Depending on the lay of the land.
12 There's an important qualification there.

13 MJ [Col SPATH]: So here's the question for here.
14 Appearance has got to be a concern for everybody involved with
15 this process. It's been long, ongoing. We've had a UI
16 ruling, whether you agree with it or not, that indicated some
17 concern with behavior from the convening authority, and I'm
18 not the only one who's issued rulings such as this throughout
19 this long process. So my question ----

20 CP [BG MARTINS]: Okay. You're referring to in camera,
21 you would review it.

22 MJ [Col SPATH]: Correct.

23 CP [BG MARTINS]: But I mean, where is the privilege

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1 protected if he gets what he wants, which is a fishing
2 expedition here, make no mistake. He's got only potential
3 suspicions involved. And I would quote his own brief at page
4 eight, the kind of ex parte communications potentially at
5 issue here. So ----

6 MJ [Col SPATH]: Well, we see that -- I mean, we see that
7 in trial practice constantly, and that is we -- and this is
8 totally out of the UI issue. It is focused on mental health
9 for a moment, because that's cutting edge at the moment, as we
10 deal with the new privilege, or the old privilege now being
11 reinforced in all of our minds.

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

19 CP [BG MARTINS]: I understand, Your Honor, and ----

20 MJ [Col SPATH]: And here -- so I want to switch from the
21 factual, getting ready for trial and the mental health world,
22 and I want to focus on the spectre of UI is more than a
23 spectre in this case. We found, again, whether anyone agrees

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1 with it or not, an appearance issue. And so when a spectre is
2 raised ----

3 CP [BG MARTINS]: I'm sorry, wait a minute. Yeah, so what
4 appearance issue do you have with regard to how the
5 C.M.C.R. -- yeah, I think you're jumping a few steps, Your
6 Honor.

7 MJ [Col SPATH]: I might be. I'm trying to figure out,
8 again, if there's communication with a person making an
9 appellate decision that's ex parte, and you put that in
10 connection with all of the other issues we have dealt with in
11 this case related specifically to UI, does it rise to the
12 level where I should at least put the public confidence at
13 ease? That's the question.

14 CP [BG MARTINS]: Yeah, but it involves you now seeking
15 the e-mails involving U.S.C.M.C.R. personnel ----

16 MJ [Col SPATH]: And ----

17 CP [BG MARTINS]: ---- so that's your threshold now for
18 going into -- it also raises the spectre, disappointed
19 litigant goes to a judge he may think, which I don't believe
20 is disappointed in the higher court, rummaging through
21 e-mails. I mean, it raises spectres of all kinds of things if
22 you go there.

23 MJ [Col SPATH]: Sure.

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1 CP [BG MARTINS]: So, Your Honor, I'm asking you to focus
2 on the rules here. We've cited what we think are the rules in
3 the brief. Pennsylvania v. Ritchie says we've done our due
4 diligence. It's not material to any -- and we are cognizant
5 of the unlawful influence issues in the case. It's not
6 material to the preparation of the defense or any cognizable
7 claim here. And that -- that's what Pennsylvania v. Ritchie
8 means in our system.

9 You know, casual tour through the history of learned
10 counsel's professional interactions aside, the authorities say
11 that really ought to be accorded respect and be given --
12 that's the final answer, unless some -- something pops up that
13 causes you to think.

14 You don't have that here. The hypotheticals you were
15 raising, those are there. That's how our system is to work;
16 to not have this military commission then diving in to lots of
17 areas. That in camera review is something that you have as a
18 remedy and a relief that can often deal with certain matters,
19 but we don't believe it's appropriate here. You've got the
20 ability to rule on these discovery matters. We oppose it. We
21 think this is very clearly just speculation, wild allegations
22 by a disappointed litigant, and that we should move on.

23 Subject to any further questions.

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1 MJ [Col SPATH]: No. Thank you, General Martins.

2 CP [BG MARTINS]: Thanks.

3 MJ [Col SPATH]: Mr. Kammen, you've got the last word.

4 LDC [MR. KAMMEN]: I am honestly stunned. I am a -- we
5 are disappointed litigants, absolutely, but we've lost before.

6 MJ [Col SPATH]: We being you all, the defense.

7 LDC [MR. KAMMEN]: Absolutely.

8 MJ [Col SPATH]: I am not disappointed or ----

9 LDC [MR. KAMMEN]: No, I'm talking about us.

10 MJ [Col SPATH]: ---- anything with the appellate court's
11 decision.

12 LDC [MR. KAMMEN]: No. He's just saying these are just
13 sour grapes. He's saying it's a fishing expedition.
14 Absolutely. But here was the -- here is when the hook was
15 cast. We sent them a discovery motion saying send us all of
16 your ex parte communications because, based on what we have
17 seen, it seemed -- it just felt like there were ex parte
18 communications. Quite candidly, we expected a response
19 of, there were none. Because that's the response lawyers give
20 because there shouldn't be any. And the response instead was
21 this sophistry of, oh, your request is overbroad. Which made
22 it very clear there were ex parte communications, which have
23 become clear from their response, which are absolutely clear

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1 from General Martins' statements. And ex parte communications
2 with a court is highly irregular.

3 The whole structure of all of this supposed system
4 that I'm not supposed to say is, you know -- talks about these
5 procedures are designed to avoid ex parte communications to
6 observe procedural matters are handled efficiently.

7 In commission, yeah, we complain about their ex parte
8 filings, but at least they tell us about them. We get a thing
9 that says the government has filed an ex parte communication.
10 It doesn't happen in secret. And the one -- and I don't want
11 to get off on the other but, you know, the one time has
12 happened in secret, it's a big deal.

13 This is a big deal, Your Honor. Because he is
14 sitting here saying, yeah, we had ex parte communications and
15 we don't want anyone to see them. We don't even want you to
16 see them. That's huge. I've never seen a lawyer say that
17 before. And I'll bet nobody associated with any of these
18 teams or any of the 9/11 would ever have heard a prosecutor
19 say, yeah, I had ex parte communications and I don't want you
20 to see them. That's the highly irregular what's occurred
21 here.

22 There is no presumption -- you know, think about it,
23 Your Honor. You file an appeal. The court sets a briefing

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1 schedule. Maybe in this circumstance, you know, if you're
2 going to schedule oral argument please don't schedule it this
3 week because I'm supposed to be on vacation. There's nothing
4 benign -- you know, that's completely benign.

5 What kind of administrative communications can a
6 prosecutor be having with an appellate court that are -- are
7 benign? What kind of administrative communications could I --
8 ex parte communications could I be having with an appellate
9 court that are benign? Because there's just not that much
10 behind the scenes stuff to an appeal. It's just -- that's
11 just not the way it works. So we know this is highly
12 irregular.

13 Now, you know, again, this -- absolutely do we
14 understand and we're all -- you know, that the C.M.C.R. wanted
15 to get the case over. True. But what you had here, which
16 made it peculiar, was a government filing a -- I mean, and
17 I -- I'm not going to go through all of it, but they filed
18 sort of a long supplemental brief that changed their theory.
19 And when they sort of alluded to it, their response was, we
20 understand the defense will want more time. And then when it
21 came down to wanting more time, their position was, we oppose
22 it.

23 Now, maybe they just had a change of heart. But

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1 wouldn't it be a different situation if somehow there was an
2 e-mail from somebody to somebody saying, we need to move this
3 along? That would put that in a completely different light.

4 We filed motions to recuse the judges because there
5 was -- and still is, and Dalmazzi demonstrates that there is a
6 serious question of the lawfulness of their appointments.
7 Now, you know, suppose -- and again, it's speculative, but
8 supposing that's what these e-mails are about. That would be
9 a really big deal.

10 One of the things that happened in this case that's
11 so peculiar is -- and, again, it may be benign, but we've got
12 to know. You've got to know. The world has got to know. We
13 can't just hide here. Judge King's name is on an opinion that
14 was issued after he had left the court. Now, that's pretty
15 irregular.

16 Again, I don't know, but, you know, one of the
17 things, and Lieutenant Commander Pollio points this out, to
18 her credit, that may be sort of conceding it's not material to
19 the defense, I mean, it's not in the sense I was thinking of a
20 defense, but she points out part of our obligation, especially
21 in light of the D.C. Circuit, is to make a robust challenge to
22 this process. That's part of our marching orders from the
23 D.C. Circuit.

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1 And the D.C. -- if there was something untoward going
2 on in the C.M.C.R. that undoes the presumption of regularity,
3 that needs to be documented, and that needs to be documented
4 now, especially in the context of a death penalty case.
5 Especially in the context of a death penalty case in which
6 essentially the charges that are at issue in the Limburg
7 appeal are so significant, because you heard him this morning,
8 oh, the boat's operation and all of that stuff, so this
9 appeal -- fine.

10 We've all lost appeals before, but I have to tell
11 you, I've never lost an appeal where I found out otherwise
12 that the other guy was communicating back-door with the court.
13 That's unprecedented. And I would be absolutely committing
14 malpractice if we didn't do this and have this discussion.

15 Now, you know, UI can lead to unfair adjudications.
16 I mean, so it's UI, but it also is the integrity of the
17 system. Somebody has got to protect the integrity of the
18 system. And one of the things that, you know, we were talking
19 about earlier are the structural challenges, you know,
20 Williams v. Pennsylvania. And you're saying, well, yeah, but
21 maybe that doesn't apply here because, you know, it's a
22 different situation. Well, we got to know what the rules are
23 and what, in this hybrid system, is tolerated.

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1 Now, you know, it's very clear. I mean, you know,
2 obviously our position is, well, let's skip the middleman and
3 let us see them. And I would be as -- if there is nothing to
4 these, I will be happy to come in next time and publicly say
5 absolutely there is nothing to those. It was absolutely
6 benign.

7 But if you don't want to do that -- I mean, I can't
8 imagine a privilege. I don't know of any privilege that
9 attaches to ex parte communications with the court. I don't
10 know any privilege that attaches to any presumption of
11 regularity when an attorney communicates ex parte with a court
12 that would fall under Obama v. Latif. That is the presumption
13 of irregularity when attorneys communicate improperly ex parte
14 with courts.

15 This is not like what's been occurring here, where
16 we're put on notice that something different happened there,
17 and that is highly irregular, and that's why bar
18 association -- that's why state bars have rules against it,
19 that's why the military has rules against it. This is not
20 Obama v. Latif at all.

21 At a minimum, we ask that you order production in
22 camera, to you. If you're unwilling to do that, we ask that
23 you order them produced for the record under seal so that they

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1 remain in the record for future review.

2 This is not a small thing. But we would ask at a
3 minimum that you review them to take away the taint, the stink
4 of these ex parte communications. Because that's what it is,
5 Your Honor. This is a stink, and it's a stink that permeates
6 this process.

7 Excuse me. Am I interrupting you?

8 It's a stink that permeates this process.

9 TC [MR. MILLER]: Excuse me, Counsel. You were talking
10 the entire time when we were.

11 MJ [Col SPATH]: All right. Let's not debate. You all
12 were very quiet. I'm sorry if I disturbed you. You may
13 proceed.

14 LDC [MR. KAMMEN]: It's a stink that absolutely infects
15 the C.M.C.R. We got to put it to the light of day. And so if
16 you don't want us to see them initially, that's fine. But at
17 a minimum, you've got to look at them. Thank you.

18 CP [BG MARTINS]: Your Honor, might I have a chance to
19 respond to that?

20 MJ [Col SPATH]: You may. I'll give Mr. Kammen the last
21 word because he has the burden. But you may absolutely ask
22 for ----

23 CP [BG MARTINS]: In fact, I'll be asking for -- oh, he

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1 can have the last word.

2 Your Honor, I think I heard from counsel that if you
3 would see these and review them, these purely administrative
4 communications that we've reviewed and found not material to
5 any issue, that he would accept that as relief. Maybe not as
6 preferred relief. If he would do that public retraction thing
7 based on your representation, we'll give you the binder.
8 Right after this.

9 Maybe agreement is breaking out.

10 MJ [Col SPATH]: Let me see. Mr. Kammen.

11 LDC [MR. KAMMEN]: If you say that that's what you're
12 going to do, obviously that's preferable than secrecy. If you
13 tell us afterwards they're benign, we'll see where we're at
14 then. But, you know, sounds like it's more than a few, when
15 he talks about a binder. You know, and ----

16 MJ [Col SPATH]: I think his question is, if I review them
17 and determine they are purely administrative, and I make that
18 representation to you, are you going to accept that
19 representation, at least here, and make the retraction of kind
20 of your worst-case scenarios?

21 LDC [MR. KAMMEN]: Absolutely. I mean, if you ----

22 MJ [Col SPATH]: We have agreement. Then I don't need to
23 deal with this motion at the moment.

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1 You're going to provide them to me for an in camera
2 review, correct, General Martins?

3 CP [BG MARTINS]: I am. Let me just make clear the
4 breadth of the request for discovery was for all
5 communications from January 1, 2016, of the government. Okay.
6 So he was constantly discussing a certain type of
7 communication that does have a lot of focus of the law and the
8 practice of courts, but we also did point -- I want to just
9 correct some of the things that were said -- to regularity of
10 certain kinds of communications. And in fact, the rules of
11 your court, Your Honor, acknowledge there's a category of
12 administrative communication that can arise.

13 Thank you.

14 MJ [Col SPATH]: Absolutely. I'll look at them both for
15 the dates, I'll make sure they comply with your original
16 discovery request, Mr. Kammen, and yes, I'll review them. I
17 will not issue any release without us having an opportunity to
18 talk here. I will, if I decide there is no release, let you
19 know as quickly as I can.

20 Let's see if we can talk for a moment. We may be
21 able to ----

22 LDC [MR. KAMMEN]: I just want to clarify one thing.

23 MJ [Col SPATH]: Yes.

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1 LDC [MR. KAMMEN]: Whatever -- after they're produced,
2 they will remain as part of the record.

3 MJ [Col SPATH]: They will be a sealed exhibit in the
4 record of trial at a very minimum, correct.

5 LDC [MR. KAMMEN]: Okay.

6 MJ [Col SPATH]: If I review them, yes, they will be added
7 in.

8 LDC [MR. KAMMEN]: Okay.

9 MJ [Col SPATH]: Thank you, General Martins.

10 The -- let me talk about a few things. We may be in
11 a position to recess, because we've covered all of the AEs
12 that I planned to. I know we had a couple that were fully
13 briefed, 354 and 357, arguably. 357, I believe, is the
14 Dalmazzi issue. We'll take that up later. 354, I believe
15 that will be affected by ongoing discovery, or at least could
16 be, and so there's no need to argue that until we close
17 discovery.

18 For 332, whenever we get together again, we need to
19 move that to the very top of the decision. That's the alleged
20 unlawful influence and production issues, interrelated.

21 So here's what you will see from me; I indicated it
22 before. It's going to be a request for both sides to clearly
23 identify potential witnesses and evidence, if any. I also am

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1 likely going to have you put together a brief from the
2 defense, what evidence raises some evidence of UCI; and from
3 the government, why, at least at this point, given the
4 evidence presented, has no evidence or there is not some
5 evidence of UCI, because of course, part of any -- or UI,
6 sorry. Part of any UI determination always deals with if the
7 burden has shifted or not.

8 We'll put some dates on those. That way, when we
9 come back, we can clearly move through the UI hearing and deal
10 with any additional witnesses and evidence, and hopefully get
11 a ruling as promptly as occurred last time.

12 The other is, because I do like agreement, General
13 Martins, and I saw some today over an issue that was becoming
14 heated, and I appreciate it, you all are in a good position to
15 speak to one another about the impact of the CMCR's two
16 interlocutory decisions issued in the case on previous motions
17 and orders issued, if any, and then provide a document to the
18 commissions -- and, again, there will be an order coming out
19 with this -- but a document jointly filed, because I do want
20 you to talk -- indicating where we have agreement or
21 disagreement.

22 So here's some motions and previously issued orders
23 that I think are relevant to your discussion. They're all

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1 Appellate Exhibits: 48N, Nancy; 49F, Foxtrot; 168G; 241C;
2 248B; 248G; 248S. Then there are a series of motions I ruled
3 that were moot: 234; 235; 249 through 253; 254 and 255; 258
4 and 259; and then 298 through 301.

5 Nothing needs to be done today. What will happen,
6 we'll issue an order and then what I will get from you all is
7 a joint update from both sides where you all tell me where
8 you're in agreement on what needs to be done, you're in
9 disagreement, and here's what both sides think needs to be
10 done, or nothing needs to be done. And that probably is not
11 the answer for most of them, but we will see.

12 TC [MR. MILLER]: Your Honor.

13 MJ [Col SPATH]: Yes.

14 TC [MR. MILLER]: For clarification, you want a single
15 filing on that?

16 MJ [Col SPATH]: I do.

17 TC [MR. MILLER]: All right.

18 MJ [Col SPATH]: I do, that indicates that you all have
19 talked. And, again, if you disagree on every single input,
20 that's okay. It will be a single filing indicating you all
21 had a discussion and then disagreed on each and every one of
22 them, or agreed on every one of them, or some in-between is my
23 guess.

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1 TC [MR. MILLER]: So hopefully we'll be able to do that
2 collegially, but do you have a preference as to who does the
3 filing, so that we don't ----

4 MJ [Col SPATH]: I don't. I don't.

5 When I said 298 through 301, I meant 298 and then 300
6 and 301. Cross 299 off of your list.

7 That series of numbers in the first part I gave you,
8 the motions and orders, those may not lead to additional
9 comment, one would guess. But the ones I ruled as moot, we
10 may want argument on those, and that will give us some things
11 to do when we decide to come back.

12 The other thing you will see is a request to
13 identify -- again, we've discussed it multiple times, keep the
14 schedule the same or alter the schedule in a way that we use
15 our time down here wisely, but we get more done, and I've
16 given you some windows of dates. Understanding Defense
17 Counsel's nonavailability for the 24th and the 31st, but I've
18 already given you the dates. See if you can come to an
19 agreement. And, again, a single filing. This will all be in
20 our order, but a single file, we concur, here's our plan; we
21 don't concur, here are both plans. And we'll go from there.

22 And those are good discussions for you all to have
23 before you file anything with us. But, again, we owe you the

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1 product, giving you the schedule, to give us documents back
2 and information back. And then we'll get together at some
3 point, either in October, soon after October, and 332 likely
4 will be our first order of business.

5 So let me just check with both sides: Questions,
6 commentary or final comments?

7 TC [MR. MILLER]: Your Honor, Lieutenant Morris has a
8 matter he'd like to bring up with the court.

9 ATC [LT MORRIS]: Your Honor, this is just to clarify what
10 you had stated, and because, as you just shared, that 332 will
11 be next up, it would be helpful for the government in terms of
12 its obligations as, you know, UI is a unique issue, the
13 defense carries the initial burden. If the burden then
14 shifts, then the government must prove its case beyond a
15 reasonable doubt. Given that burden, which is down the road,
16 what I understood Your Honor to say is that you will be
17 soliciting a motion, because we have ----

18 MJ [Col SPATH]: Filing.

19 ATC [LT MORRIS]: A filing.

20 MJ [Col SPATH]: A filing.

21 ATC [LT MORRIS]: From both -- from the defense and then a
22 response from the government, because up to this point, as we
23 all know, we have heard from the -- this is a fully briefed

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1 motion.

2 MJ [Col SPATH]: Yes.

3 ATC [LT MORRIS]: We've heard from the defense's sole
4 source for its allegation. He's undergone cross-examination.
5 And so the evidence that this commission has solicited thus
6 far should put them in a good place to make a showing of how
7 those allegations -- you know, we've heard from them say
8 that ----

9 MJ [Col SPATH]: That's why I want to see where we believe
10 we are now, and if the defense feels that they need more to
11 carry their burden and what it is, based on what we've --
12 occurred so far.

13 ATC [LT MORRIS]: But my understanding would be that would
14 be a motion to compel. But in regards to the underlying
15 allegation that they would have a burden to connect, you know,
16 what we've heard to how it impacts or influences this
17 commission, and then we would ----

18 MJ [Col SPATH]: How. Correct.

19 ATC [LT MORRIS]: ---- then we would have an opportunity
20 to respond.

21 MJ [Col SPATH]: Of some evidence of unlawful influence
22 has been raised.

23 ATC [LT MORRIS]: Of some evidence, and then based on your

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1 ruling we would have a clear understanding whether that is
2 shifted, and then the government would, in fact, if Your Honor
3 found that the burden had shifted, prepare for the October
4 hearing, you know, with a robust witness and factual, you
5 know, provision for Your Honor.

6 MJ [Col SPATH]: I think we're close, Lieutenant Morris.
7 I don't think we're in complete agreement in what we're doing
8 yet. We haven't given the defense the opportunity yet to do
9 the redirect and also to request what they've indicated are
10 maybe some follow-on documents and the like.

11 LDC [MR. KAMMEN]: And now follow-on witnesses also.

12 MJ [Col SPATH]: Understand. And follow-on witnesses. I
13 should have said evidence, and that's correct. And I said I
14 would do that, and I will. What I'm looking for is an idea of
15 where the parties believe we are at this stage, because there
16 were documents attached already that have evidence. I'm not
17 suggesting evidence of UI or not, just evidence, information,
18 and we've had witness testimony; not complete, but some.

19 And as I did the last time, and it is not required
20 under the rules, when I believe the burden had shifted, I told
21 you all. And I hope that you prefer that as opposed to the
22 way it works so often, which is, until the ruling comes out,
23 you don't know if the burden shifted and if you're supposed to

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1 be responding, you know, with evidence beyond a reasonable
2 doubt. You understand the field in which you're playing.

3 If we're at a point now where I can say, defense,
4 you're there; government, over to you, there are -- other
5 evidence and witnesses become for the time fairly irrelevant,
6 right, because now the burden is over to you. If we're at a
7 point where it is, I don't think it's there yet -- if I can --
8 I'm not suggesting I can make the call yet, either. I'm just
9 saying this will be helpful to me, because if I can give you
10 additional guidance to make your jobs easier, I'll do that.

11 And so I'm interested to see at this point where we
12 have filed motions. It has been at least briefed fully and
13 we've heard some testimony. I'd like to see if the parties
14 believe we've even gotten to that first hurdle yet. I know
15 you all don't think so. If they think so, what specific
16 evidence presented to me is some evidence of UI, apparent or
17 actual. And then in response to that, why you all disagree
18 with that. I'm confident you will. Why you disagree with
19 that.

20 Maybe the defense filing will be, we don't think
21 we're there yet. We don't think we're there yet. We need
22 more. I want to see where the parties believe they are.
23 Because again, if I can give you guidance, I will. Even

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1 though I'm not required to, I will, because I think it makes
2 it a cleaner presentation for UI, because it's complicated.

3 ATC [LT MORRIS]: I understand. I think I understand what
4 Your Honor is presenting as the way forward. But really, what
5 we have here is we have the defense, you know, with an ability
6 to make an allegation. You know, they've already done that,
7 and then to, you know, seek an additional -- in a sense,
8 additional ruling within it, and then make further allegations
9 based on soliciting or fishing for additional information, and
10 what, you know, as ----

11 MJ [Col SPATH]: I'm happy to do this, Lieutenant Morris.
12 I'm happy to let the defense put in their full request for all
13 of the witnesses and the evidence that they believe they're
14 entitled to, rule on that, and let them just keep going to see
15 if they could -- what I'm just trying to -- if it's not
16 helpful, I won't do it.

17 ATC [LT MORRIS]: I understand. The government's only
18 position is this has been ongoing from May of 2015. They've
19 had an opportunity to put in a request for discovery, an
20 opportunity to put in a request for witnesses ----

21 MJ [Col SPATH]: They did.

22 ATC [LT MORRIS]: ---- and we argued those and we -- and
23 we ruled on the motion to compel witnesses. And as Your Honor

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1 astutely ----

2 MJ [Col SPATH]: We did. Lieutenant Morris, based on what
3 I heard from Mr. Gill, I'm interested in hearing more. I
4 can't be more clear than that. And it was based in large part
5 on the cross-examination of Mr. Gill. That opened the door to
6 other witnesses and other evidence, I think, based on the
7 cross-examination. It is what it is. We all pick trial
8 strategies, but I am at least interested in hearing where we
9 are on 332.

10 If we don't like that plan, then I will wait.
11 Defense, you can file a motion to produce other witnesses and
12 evidence you think is reasonable at this point, and the why.
13 I'll rule on that. And we'll let the defense put on as robust
14 evidence as is appropriate under the rules to see if we get to
15 some evidence of UCI. That seems to be your proposal.

16 ATC [LT MORRIS]: That the defense, as they've had that
17 opportunity to date, what -- what the government is only
18 unclear on is that they've had access to their sole witness.
19 They've have access to present, you know, some sort of nexus
20 between their sole witness and how it has in any way
21 unlawfully influenced this case.

22 MJ [Col SPATH]: I just gave you that opportunity. I said
23 right now I'll have them file something where they connect the

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1 dots, and I'll have you all respond to it and tell me why the
2 dots weren't connected. And if at that point I can say you
3 have not met your burden yet, now I'd like to see what
4 additional evidence and witnesses you need, defense, that will
5 be step two, which will happen before we get here.

6 ATC [LT MORRIS]: Before we get here. Okay. So it's
7 expedited. I'm trying ----

8 MJ [Col SPATH]: Yeah. If the answer is, I don't think
9 you've gotten there yet, what else do you think will get you
10 there, defense counsel, because they have the opportunity to
11 try to get to that hurdle, then we'll see what they would then
12 present.

13 If I can already say the burden has shifted to you,
14 don't you want to know that?

15 ATC [LT MORRIS]: Certainly. And it was ----

16 MJ [Col SPATH]: I'm not suggesting it has. I'm not -- I
17 haven't thought about it at all. Truly. I haven't thought
18 about it. I was too busy working on 350, frankly, and trying
19 to work through 333. I'm trying to find a way that makes the
20 most sense for both sides to have a grasp of where they are on
21 a unique issue, which is the shifting burden.

22 ATC [LT MORRIS]: And the government, you know, more than
23 anyone, wants to clear this up and move on. But what we're

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1 trying to avoid is last-minute, you know, requests, you know,
2 as happened last time and we have rulings in terms of, you
3 know, bring witnesses, and Your Honor gave us a ruling that
4 was very clear and requiring the defense to at least reach he
5 a small threshold of providing a nexus.

6 MJ [Col SPATH]: I did.

7 ATC [LT MORRIS]: And Your Honor said that that did not
8 happen. And so I guess the government seeking clarification
9 was why it was that a cross-examination caused that to be
10 reopened. I understand that, you know, it may provide clarity
11 for it. We're just trying to avoid getting back on the record
12 next time and have things that are unruled on. So an
13 expedited schedule or having that done beforehand is the
14 government's preferred way forward.

15 MJ [Col SPATH]: And mine, too. What I'd like to do when
16 we come down here, we know exactly what witnesses are going to
17 be lined up and what evidence, if additional is going to be
18 offered. This process seemed to me to make sense and it seems
19 like we are in agreement now.

20 ATC [LT MORRIS]: Thank you for the clarification, Your
21 Honor.

22 MJ [Col SPATH]: You're welcome, Lieutenant Morris. No
23 worries.

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