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1 [The R.M.C. 803 session was called to order at 1727,
2 7 September 2016.]

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

6 **CROSS-EXAMINATION CONTINUED**

7 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

8 Q. Mr. Gill, we left off talking about the cited reasons
9 of concern by Colonel Sheeran, and why we are -- can you hear
10 me okay?

11 A. The audio is broken up. I can't understand a word
12 that you are saying.

13 Q. Test, test, one, two. Can you hear me okay,
14 Mr. Gill?

15 A. Yes. Now I can, thank you.

16 Q. We had left off, Mr. Gill, talking about the reasons
17 cited by Colonel Sheeran for sending you back to the Navy. I
18 want to continue with those.

19 While you -- after you had been in the office with
20 Mr. Quinn and Colonel Sheeran, Colonel Sheeran accompanied you
21 back to the Navy Yard, correct?

22 A. Yes.

23 Q. And when you got to the Navy Yard and he had asked

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1 you, are you sure you put everything that you were supposed to
2 on your SF-86, correct?

3 A. Oh, yeah. He asked me that a number of times.

4 Q. Now, when we talked on 22 August, I asked you about a
5 reckless driving ticket that you received on March 12th of
6 2015; do you recall that?

7 A. Yes, I do.

8 LDC [MR. KAMMEN]: I'm confused by this.

9 MJ [Col SPATH]: The form of the question, Counsel. If
10 the reckless driving thing was supposed to be on the SF-86 and
11 it wasn't, you need to ask him about it. His statements to
12 you in your interview are hearsay unless it's a prior
13 inconsistent statement or a statement of some sort of ----

14 ATC [LT MORRIS]: My intent was just to refresh his
15 memory. I will go specifically to ----

16 MJ [Col SPATH]: Please do because he hasn't said he
17 forgot yet.

18 LDC [MR. KAMMEN]: Excuse me, if they're going to use a
19 statement to refresh, we have to -- [Microphone interference,
20 indecipherable audio].

21 MJ [Col SPATH]: I disagree. If you're going to use a
22 statement to refresh his recollection, you do have to show
23 counsel. All's you need to do is ask the question. Don't

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1 worry about where his memory comes from, just ask about the
2 incident.

3 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

4 Q. Did you include the 12 March 2015 reckless driving
5 ticket on your SF-86 submitted on 14 April of 2015?

6 A. No. Because at that time there was no need to based
7 on my knowledge of the situation.

8 Q. That you did not need to submit a misdemeanor on the
9 SF-86?

10 A. Yes, that's why I -- yeah, because at the time I had
11 no understanding that driving 20 miles over the speed limit
12 was considered a crime by the Commonwealth of Virginia.

13 Q. By ----

14 A. Um -- I'm sorry?

15 Q. By 29 April when you had appeared in court, you
16 clearly had an understanding that that was a misdemeanor,
17 correct?

18 LDC [MR. KAMMEN]: Excuse me, but that's after he filled
19 out the SF-86, which makes it unfair. It's absolutely
20 improper.

21 MJ [Col SPATH]: I understand.

22 ATC [LT MORRIS]: Defense counsel ----

23 MJ [Col SPATH]: All right. Trial Counsel.

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1 WIT: I think if I can just provide an answer, Judge.

2 MJ [Col SPATH]: Hang on, Mr. Gill. Unfortunately, we all
3 have to work within the Military Rules of Evidence, the
4 Commission Rules of Evidence, which are similar, and the
5 Federal Rules of Evidence that they're based on.

6 Trial Counsel, the court on the 29th of April is
7 after he filled out the SF-86. You can talk -- again, if
8 you're asking him about what he put on the SF-86 which is not
9 truthful, I understand that, that is classic impeachment, but
10 you do need to phrase your questions correctly. Understand
11 that.

12 ATC [LT MORRIS]: As well as the assumption is you don't
13 have an ongoing obligation to update or correct information on
14 your SF-86.

15 MJ [Col SPATH]: Is that where you are heading with this?

16 ATC [LT MORRIS]: Yes, sir.

17 MJ [Col SPATH]: So ask him about his understanding if he
18 has to update the information and continue from there.

19 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

20 Q. Did you have an understanding that you needed to
21 update information on your SF-86 if you had filled it out
22 incorrectly?

23 A. Well, at the time my state of mind was I just got

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1 fired and removed from my position and was removed from active
2 duty and I didn't care what that SF-86 said and could care
3 less if I had to update it and it was irrelevant and didn't
4 matter at that point.

5 Q. Your TS security clearance is still pending today,
6 correct? You still have not received anything on that,
7 correct?

8 A. I call two, three times a month and I speak to the
9 assistant security officer at Naval Operational Support
10 Center, Norfolk, Virginia, a man by the name of Mr. Mullen,
11 and I am -- continuously am told that my investigation is --
12 remains open.

13 Q. And in that time ----

14 A. As most are because they're running well over a year
15 apparently as the norm right now.

16 Q. Mr. Gill, what is the file that is in front of you?

17 A. This is -- this is a copy of the Virginia uniform
18 citation that I got for that speeding ticket.

19 MJ [Col SPATH]: All right. Mr. Gill, I need you to close
20 that folder and not reference it without letting us know what
21 you're doing.

22 WIT: I was going to refresh my recollection to explain
23 why I didn't understand that ----

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1 MJ [Col SPATH]: I understand.

2 WIT: ---- that going 20 ----

3 MJ [Col SPATH]: You are reasonably bright about the rules
4 of evidence as well because you're an attorney, and so I know
5 you know ----

6 WIT: I'm trying to help the prosecutor, Judge.

7 MJ [Col SPATH]: Please don't.

8 WIT: I can't help him?

9 MJ [Col SPATH]: Please don't.

10 WIT: Okay.

11 MJ [Col SPATH]: Just try to bear with the question, and
12 we'll figure out the road ahead with regard to redirect and
13 the like. And I do appreciate that. I really am just trying
14 to follow the rules that are given to us, again, the Federal
15 Rules of Evidence that they're ultimately based on, as we all
16 know.

17 Trial Counsel, you may proceed.

18 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

19 Q. Since you were returned to the Navy, have you updated
20 your SF-86 to include this 12 March reckless driving incident?

21 LDC [MR. KAMMEN]: Objection, irrelevant at this point.
22 What he has done today is absolutely irrelevant.

23 MJ [Col SPATH]: Overruled.

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1 WIT: I'll happily answer the question.

2 MJ [Col SPATH]: You may.

3 WIT: There's no need to because I went to court as I told
4 my then, I guess, my commander at that time when I was sent
5 TDY for a day to the Navy Yard, Captain Errol Henriquez,
6 JAG Corps U.S. Navy was the -- I guess he was the OIC
7 of Code 67 at the Navy Yard, OJAG. What I told him, I went to
8 court and I fought the ticket and I ultimately was given
9 a speeding violation. I paid a fine of, I don't know, what
10 was it, 160 bucks or something.

11 MJ [Col SPATH]: Please stay out of the folder.

12 WIT: Sorry, Judge, I'm ----

13 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

14 Q. On your SF-86, the guidance is to put anything, a
15 ticket to appear in court in a criminal proceeding against
16 you, of anything over \$300; is that what you're stating
17 because it was \$300, you didn't need to put it?

18 A. No, that's what you're stating. I'm not stating
19 that, that's what you're stating.

20 Q. Did you know that you were to put tickets or
21 misdemeanors to appear for items that were more than \$300?

22 A. I followed the directions on the SF-86, and the
23 directions said do not include traffic infractions for

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1 penalties greater than \$300. I was issued a ticket that had
2 three boxes on it. One box said general court traffic, that
3 box was checked. The next box said, general court criminal,
4 that box was not checked. The next box said, juvenile court,
5 that was not checked.

6 So the citation that I was issued by the Commonwealth
7 of Virginia trooper that caught me in the speed trap on I395
8 handed me a ticket that said it was a traffic infraction. It
9 did further say -- it referenced a section of the Virginia
10 statutes. I then looked that up on the Virginia state
11 website, and pulled up that specific statutory reference.

12 It does not say, and the judge can probably take
13 judicial notice of this if he wanted to, that when you look on
14 the Commonwealth of Virginia's official Virginia statutes
15 website, when you look that up, it does not say that it is a
16 crime of any kind. It simply says, and I'm paraphrasing,
17 anyone who drives over -- 20 miles over the speed limit in the
18 Commonwealth of Virginia is guilty of -- or has committed an
19 act of -- they phrase it reckless driving. And that's it.
20 And it goes on, it says there's a penalty of \$250.

21 So when I read the official Commonwealth of Virginia
22 publication statutory reference that appeared on my ticket
23 that said it was a traffic citation, there was no reference to

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1 this being a criminal offense and the amount of the penalty
2 said \$250 so it did not apply to the question that was asked.

3 So I checked it ----

4 Q. Because it was less than \$300?

5 A. And it was not a crime according to what the statute
6 said and what my ticket said. It didn't say anything about it
7 being a crime.

8 Q. So you didn't update it. Okay, Mr. Gill.

9 A. There's no need to update it, sir, I just told you
10 that.

11 Q. Thank you, Mr. Gill. I'm going to ask a follow-up
12 question. On 30 April 2015, you received another reckless
13 driving ticket; isn't that correct?

14 A. What's the date now?

15 Q. 30 April of 2015, two weeks after you received this
16 first reckless driving ticket, the same date that you e-mailed
17 General Martins; isn't that correct?

18 A. Yeah, that was my lucky day. I also got a parking
19 ticket on the Navy Yard that day and it was my birthday.

20 Q. And you appeared in court on 14 August of 2015 and
21 the fine for that was \$500; isn't that correct?

22 A. Well, yeah. And if you wanted to hear the facts, or
23 you just want to like make me say yes, I lied on the

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1 SF-86 ----

2 Q. I hear that as a yes. And we'll allow, Mr. Gill, the
3 judge to reach those conclusions. We're just trying to elicit
4 the facts here.

5 A. Your Honor, I'm being facetious and I apologize.

6 Q. Mr. Gill, your fine was \$500 and you did not include
7 that on your SF-86, correct?

8 LDC [MR. KAMMEN]: Excuse me, Your Honor, if we're talking
9 about the not include it on the SF-86 prior to it ever
10 occurring, it strikes me as being irrelevant. If he didn't
11 include it, that's not a lie.

12 ATC [LT MORRIS]: I'll focus the question, Your Honor.

13 MJ [Col SPATH]: All right.

14 LDC [MR. KAMMEN]: So it doesn't go to dishonesty. We're
15 now just getting into character assassination and for no -- I
16 understand their purpose, but it's not advancing the search
17 for the truth about -- and the issue here ----

18 ATC [LT MORRIS]: I'd object, Your Honor, to this long
19 objection. If he has a basis for the objection, please
20 provide it.

21 MJ [Col SPATH]: Counsel, this is what happens when we go
22 late at night and this is why I don't do it in my day job.

23 This is exactly what happens.

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1 I understand your objection, Mr. Kammen. If the
2 argument from trial counsel, in good faith, is that there's an
3 obligation to update the SF-86, which I don't have yet, and
4 you don't have yet, they -- he has a requirement to update it.
5 Arguably not updating it is a false statement. That's it.
6 And so do you have the SF-86 in front of you?

7 LDC [MR. KAMMEN]: [Microphone interference,
8 indecipherable audio.]

9 MJ [Col SPATH]: You do not. I don't even have a single
10 SF-86 in front of me at this moment.

11 ATC [LT MORRIS]: If I may, Your Honor, it is attached to
12 the government's motion in 332Y ----

13 MJ [Col SPATH]: Thank you.

14 ATC [LT MORRIS]: ---- both Your Honor and ----

15 MJ [Col SPATH]: I'm going to pull it up right now. So
16 Mr. Kammen has it, good, and I'm pulling up the copy here as
17 we speak. I know why it was attached now. That's helpful for
18 impeachment. I understand where the impeachment is going.

19 LDC [MR. KAMMEN]: I'm glad one of us does because ----

20 MJ [Col SPATH]: You do, too. You do, too. The argument
21 that the witness has specific incidents of untruthfulness lead
22 to whether or not he has a character for untruthfulness.

23 Again, I'm not commenting on whether you do, Mr. Gill. I know

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1 you know that, I just merely understand what the intent is.

2 WIT: I get it, Judge, I get it.

3 MJ [Col SPATH]: I know.

4 LDC [MR. KAMMEN]: If I may, Your Honor, just so we're all
5 clear, we didn't get the opportunity to try and prove that
6 these are not untrue.

7 MJ [Col SPATH]: As I said, the rules of evidence don't
8 change depending on who's asking questions.

9 LDC [MR. KAMMEN]: So if we have to call other witnesses
10 to prove the truthfulness of what he has said, we have the
11 right to do that.

12 MJ [Col SPATH]: I -- you are correct, and that is likely
13 going to extend -- here's what I have figured out. I was
14 wondering what we might do in October. I have a good idea
15 what we'll be doing in October. It will be cleaning up the
16 rest of 332, because I don't think we're going to get
17 resolution on that in the near future. That doesn't mean we
18 can't finish up with what we can get right now. And you will
19 have an opportunity to redirect, whatever that opportunity, in
20 fairness, should be.

21 All right, Mr. Gill, I know we're going to try to
22 work through the rest of this cross and then talk about kind
23 of the road ahead. But please bear with us. I know it's been

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1 a long experience.

2 Trial Counsel, you may continue.

3 ATC [LT MORRIS]: I'll move on, Your Honor.

4 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

5 Q. From roughly, Mr. Gill, 2004 to 2016, you were
6 involved in approximately, that I know of, eight personal
7 civil litigations in which you allege yourself as the victim;
8 isn't that correct?

9 A. No, victim would be a criminal case. I have never
10 alleged myself to be a victim, that I know of, and I have been
11 involved in less than eight civil actions. So no, you're
12 wrong.

13 Q. In 2004, after you served on active duty, you were
14 hired by the Navy as a civilian in Florida, and ----

15 A. Yep.

16 Q. ---- you thought it would be for a period of two
17 years, but they let you go a lot sooner than that, and based
18 on them letting you go, you sued the Navy for \$1 million, you
19 and your wife, for emotional distress in federal court; isn't
20 that correct?

21 A. They breached the contract and I had an attorney who
22 encouraged me to file that litigation so I did.

23 Q. You lost that, and then you filed an appeal on that

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1 in 2006; isn't that correct?

2 LDC [MR. KAMMEN]: Is this somehow related to the ----

3 WIT: That case is still open, actually.

4 MJ [Col SPATH]: Hang on. Mr. Kammen, you object.

5 LDC [MR. KAMMEN]: Is that somehow related to the SF-86 or
6 are we now ----

7 MJ [Col SPATH]: I think we've moved on to something else.
8 What is the basis of your objection?

9 LDC [MR. KAMMEN]: The basis of our objection is ----

10 MJ [Col SPATH]: Relevance.

11 LDC [MR. KAMMEN]: ---- is relevance.

12 MJ [Col SPATH]: Trial Counsel, what's the relevance of a
13 history of civil litigation actions to this?

14 ATC [LT MORRIS]: And I can respond to that or lay a
15 foundation, but very clearly the SF-86 requires you to include
16 all of the civil litigation that you're involved with. On top
17 of that ----

18 MJ [Col SPATH]: So I understand ----

19 WIT: It's on there. It's on there.

20 MJ [Col SPATH]: Hang on. We'll get there.

21 So part of your argument is whether or not it goes to
22 truthfulness. Why else do you believe this is admissible?

23 ATC [LT MORRIS]: It also is a similar, eerily similar

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1 fact pattern to what we have here.

2 MJ [Col SPATH]: Understood. So you believe there's some
3 kind of bias that would explain the -- offer a different
4 explanation other than the whistle blowing or something akin
5 to it that the witness has discussed. Correct?

6 ATC [LT MORRIS]: That's correct, Your Honor.

7 MJ [Col SPATH]: I understand. Your objection is
8 overruled. You may proceed.

9 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

10 Q. And after that suit against the United States Navy,
11 you left -- you were in employment from 2003 to 2006 at a law
12 firm, you left on bad terms, departing ----

13 A. No, that's -- that's incorrect.

14 Q. Did you ----

15 A. I did a period of active duty. I stayed right at
16 that Navy office that they said they ran out of funding and
17 breached my contract as a civilian employee. And as an
18 accommodation, they said, we'll put you on active duty and you
19 can stay right at the same desk, we love your work so much.

20 Q. Mr. Gill, my question is not about your time with the
21 Navy, it's about your employment with a personal law firm from
22 2003 until 2006.

23 A. Right. And you skipped the job that I put on the

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1 SF-86 where it says I stayed at the very same desk in the very
2 same legal office for the Navy, but I put a uniform on instead
3 and did the same job.

4 Q. But from that job, from 2003 to 2006, you stated that
5 you had to report your boss to the state bar and the IRS?

6 A. I did.

7 Q. And in 2004 you sued Chrysler for breach of warranty?

8 A. I sure did. I bought a car that was in the repair
9 shop 38 times in six months that I owned it ----

10 Q. Thank you, Mr. Gill. We don't need the details.

11 A. What's the point of asking me? It was a breach ----

12 Q. I want to ask you another question, Mr. Gill.

13 A. On my car I had a breach of contract lawsuit claim.

14 I had a lemon law claim. I had a breach of contract on
15 my ----

16 Q. In 2007 you sued ----

17 A. ---- it's on my SF-86.

18 Q. Mr. Gill, there are translators as well. If we talk
19 over each other, it makes it significantly more difficult to
20 translate.

21 A. Your questions are significantly difficult to
22 translate into English.

23 Q. In 2007, you sued a church for breach of contract;

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1 isn't that correct?

2 A. I did what?

3 LDC [MR. KAMMEN]: Excuse me, Your Honor. Is the
4 government contending this is not on the SF-86?

5 MJ [Col SPATH]: The government has, I think, two
6 contentions that we've listed multiple times. And, again, I'm
7 going to assess it as soon as I read through the SF-86. One
8 is that there's a pattern of untruthfulness that they have --
9 and if it's on the SF-86, obviously, that will weigh against
10 them, right? It will weigh in your favor, for that argument.

11 Then the second part is that there is a pattern of
12 lawsuits that they are going to argue goes to bias, and would
13 cause a fact-finder to doubt the explanation for his departure
14 from the commissions.

15 Your contention or his contention is that he was
16 released as some kind of response to the complaints he was
17 filing. I've seen that evidence. And the government is
18 trying to give another explanation for the release and trying
19 to show bias.

20 And we know that the Supreme Court has said that
21 evidence of bias is widely admissible for that purpose. And
22 I'm not saying there is bias. I have to hear it and then
23 weigh it.

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1 LDC [MR. KAMMEN]: The fact that he sued Chrysler is not
2 evidence of bias in this case. That's number one. Number
3 two ----

4 MJ [Col SPATH]: It is arguably evidence of a litigious
5 personality that will feed into their theory as to what
6 occurred in the current declaratory request that he filed.
7 What weight to give that we'll deal with later.

8 LDC [MR. KAMMEN]: What does it have to do with whether or
9 not Mr. Toole was violating your order?

10 MJ [Col SPATH]: Nothing to do with whether or not
11 Mr. Toole violated my order. This has everything to do with
12 witness credibility and witness bias.

13 LDC [MR. KAMMEN]: [Microphone button not pushed; no
14 audio.]

15 MJ [Col SPATH]: Mr. Kammen, we can't hear you.
16 Mr. Kammen, push the button.

17 LDC [MR. KAMMEN]: Under Rule 608, it looks like they're
18 trying to prove character for untruthfulness by means of
19 extrinsic evidence which is absolutely prohibited.

20 MJ [Col SPATH]: Correct.

21 LDC [MR. KAMMEN]: And so we object.

22 MJ [Col SPATH]: And they haven't. What they have done is
23 asked him what is on and not on the SF-86, and that's it.

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1 LDC [MR. KAMMEN]: The questions are now, didn't you file
2 a lawsuit, not whether it's not on the ----

3 MJ [Col SPATH]: We have switched from 608 to 608 with a
4 (c) bias. They are attempting to demonstrate a different
5 issue. Not character. Now they're trying to show bias.
6 They're trying to show that his explanation for his departure
7 from the commissions is not accurate, and part of that is a
8 personality, this litigious personality that demonstrates his
9 bias.

10 LDC [MR. KAMMEN]: That's the kind of character that ----

11 MJ [Col SPATH]: That's the kind of extrinsic ----

12 LDC [MR. KAMMEN]: ---- that you're not allowed to show by
13 extrinsic evidence.

14 MJ [Col SPATH]: That's the kind of bias that you can show
15 by extrinsic evidence. 608(c) bias allows its extrinsic
16 evidence. Again, I didn't -- I didn't write these. I try to
17 interpret them. And I'm not suggesting what weight I'm giving
18 it. I'm suggesting I understand it. It is the crucible,
19 whether effective or not, of cross-examination. It is not a
20 pleasant experience for many, many, many people.

21 What I would like to do is get through it so I engage
22 in the fact-finding responsibilities of assessing somebody's
23 credibility which won't happen for a while because we're going

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1 to have an opportunity for redirect, however long that takes,
2 again.

3 Trial Counsel. Objection overruled. You may
4 proceed.

5 Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:

6 Q. Mr. Gill, continuing, in 2012, you sued Navy Federal
7 Credit Union, after filing bankruptcy, that you sued them for
8 violation of your Servicemember Civil Relief Act; isn't that
9 correct?

10 A. That's correct. And they -- we won that case and
11 they paid me \$35,000 for their violation of ----

12 Q. Thank you for that, Mr. Gill.

13 A. ---- of the Soldiers and Sailors Relief Act, correct.

14 Q. In 2013 you sued your own auto insurance company
15 under your own policy; isn't that correct?

16 A. Yeah, uninsured motorist coverage, that's right. I
17 was rear-ended by a guy who had \$10,000 in coverage. My car
18 was worth more than \$10,000 let alone my back injury.

19 Q. Thank you, Mr. Gill. You know, really the question
20 calls for ----

21 A. That's what uninsured motorist is, when someone hits
22 you in a car that does not have enough insurance, you look to
23 your uninsured carrier because you pay a premium for that

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1 coverage. That's how it works.

2 MJ [Col SPATH]: Mr. Gill, again, you recognize
3 cross-examination. When the question is a fair yes or no
4 question, such as did you file the lawsuit, if the answer is
5 yes, you say yes.

6 WIT: Yes.

7 MJ [Col SPATH]: Mr. Kammen will have an opportunity to
8 follow up if he thinks is it's worthwhile, and he may well be
9 entitled to discovery on these issues in order to
10 rehabilitate. Part of this, I know this, nobody likes to be
11 forced to answer yes or no questions, especially attorneys,
12 but those last few were fair yes or no questions. I've
13 already ruled on it. Trial Counsel, you may proceed.

14 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

15 Q. In 2013, you began divorce proceedings with your
16 wife, which has been ongoing legally for the last at least
17 three years; isn't that correct?

18 A. It's on my SF-86, isn't it? Yes.

19 Q. In 2016, you entered into two federal lawsuits, again
20 one suing the United States and one suing the Commonwealth of
21 Massachusetts, correct?

22 LDC [MR. KAMMEN]: I think it's ----

23 MJ [Col SPATH]: Asked and answered.

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1 WIT: Yeah.

2 MJ [Col SPATH]: Asked and answered, sustained.

3 WIT: Couldn't be on my SF-86 because it happened a year
4 later, year and a half.

5 MJ [Col SPATH]: Mr. Gill, the question was asked and
6 answered. The objection was sustained. Thank you.

7 WIT: I'm sorry, Your Honor.

8 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

9 Q. Mr. Gill, you stated you had to go back tonight
10 because you have state -- you're running for state senate. To
11 the Enterprise newspaper there in Massachusetts, in a question
12 of your civic involvement, did you say, "I have prosecuted
13 terrorists on foreign shores so folks here at home can enjoy
14 their everyday civic activities"?

15 A. Absolutely. Yes, I did.

16 Q. In what ----

17 A. Serving under General Martins, I did.

18 Q. In what capacity were you prosecuting in Afghanistan?

19 A. Well, you know, you say the word prosecution ----

20 Q. You said the word, Mr. Gill.

21 A. ---- so that the voters will understand. I had to --

22 I had 300 words in a column that I had to write, and so I

23 administratively prosecuted due process as a recorder in

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1 detainee review boards in Afghanistan under General Martins.

2 Q. Having served in that role, Mr. Gill, isn't it
3 accurate that that is an administrative hearing in which you
4 are a recorder, neutral, unbiassed, have no prosecutorial
5 functions whatsoever, correct?

6 LDC [MR. KAMMEN]: Objection, argumentative.

7 MJ [Col SPATH]: To the form of the question, sustained.

8 Trial Counsel, you may proceed down this line, but
9 rephrase the question.

10 **Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:**

11 Q. Isn't a recorder at a detainee review board in
12 Afghanistan an administrative hearing in which you appear as a
13 neutral recorder?

14 A. I don't know that to be true, no.

15 Q. And so you're stating that when you are recorder at a
16 detainee review board, you had additional prosecutorial duties
17 and responsibilities?

18 A. I guess you're hung up on the word "prosecutorial."

19 Q. Well, it has meaning.

20 A. It's an oversimplification of a complex, legal,
21 highly specific scenario that is written so that Joe Six Pack
22 who reads the paper can get an idea of what you did in 300
23 words or less.

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1 Q. I think Joe Six Pack can understand what a prosecutor
2 is and defense is.

3 MJ [Col SPATH]: Sustained.

4 Questions by the ASSISTANT TRIAL COUNSEL [LT MORRIS]:

5 Q. But you stand behind that statement?

6 MJ [Col SPATH]: Sustained. The question is
7 argumentative.

8 WIT: You know what you believe, sir.

9 MJ [Col SPATH]: Mr. Gill, stop.

10 WIT: Yes, sir.

11 MJ [Col SPATH]: 608(b) is clear for untruthfulness,
12 again, for what it is worth, a specific act of untruthfulness.
13 I understand it came from a newspaper column and we certainly
14 understand why he believes he said it. I will figure out the
15 rest of it regarding credibility. Thank you.

16 ATC [LT MORRIS]: I have nothing further, Your Honor.

17 MJ [Col SPATH]: All right.

18 So let me ask first, with regard to the witness, and
19 maybe the answer is -- I don't think it's going to be you
20 don't have redirect, that's not the answer.

21 LDC [MR. KAMMEN]: Of course not.

22 MJ [Col SPATH]: You believe you are entitled to some
23 additional documents or discovery.

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1 LDC [MR. KAMMEN]: Absolutely.

2 MJ [Col SPATH]: And you want to make sure that the
3 witness is available by VTC in the same manner that he was
4 available for the government.

5 LDC [MR. KAMMEN]: Yes, but we certainly don't want him
6 put in the position where he's unable to deal with his other
7 things.

8 MJ [Col SPATH]: Concur. Concur.

9 LDC [MR. KAMMEN]: Absolutely.

10 MJ [Col SPATH]: All right. Then let me talk to Mr. Gill
11 about availability.

12 LDC [MR. KAMMEN]: Fine.

13 MJ [Col SPATH]: Mr. Gill, in that regard, it probably is
14 difficult right now to tell me your availability as we move
15 towards October, but just give me a moment. Right now, we
16 have a session from 17 to 21 October of 2016. I am curious if
17 currently you have some kind of paid vacation, paid travel or
18 something like that.

19 WIT: Judge, I'm self-employed, I have no pay. So -- oh,
20 yeah, actually, I think that's my divorce trial, I think.
21 What's the date again, sir?

22 MJ [Col SPATH]: 17 through 21 October.

23 WIT: My calendar shows nothing going on. I don't know if

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1 that will remain that way, but so be it.

2 MJ [Col SPATH]: Understand. So here, let me ask you a
3 couple of things. I'm going to have the trial and defense
4 counsel work to secure your availability by VTC sometime in
5 that period of time, likely earlier in the week than later.
6 But I'll let them talk to you rather than us do it here, since
7 we have parties who have interests in this, and I'm not one of
8 them.

9 The other piece of that is I do appreciate your
10 testimony. I know it's been a while.

11 WIT: I'm happy to keep going, Judge, I don't care. I'll
12 keep going all ----

13 MJ [Col SPATH]: I knew you would. I would keep going.
14 It's more of the logistics here and it is ensuring that the
15 defense counsel has an opportunity to prepare for his redirect
16 examination. And frankly, there's some other issues with
17 regard to some other witnesses that are going to have to be
18 readdressed that will take a little bit of time.

19 Our time here will be well used the next couple of
20 days, I'm confident. We have more matters to take up that
21 we're going to continue to work through.

22 I need to give you a standard order. You've heard it
23 before. But I need you not to discuss your testimony until we

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1 finish your testimony, with anybody, except the prosecutors
2 and defense teams. They may well talk to you some more before
3 you come back, but I don't want you to talk to anyone else
4 about your testimony in this case until you finish. Does that
5 order make ----

6 WIT: Yes, sir.

7 MJ [Col SPATH]: Do you understand it?

8 WIT: I do, yes, I get it. I will do what you just said,
9 Judge.

10 MJ [Col SPATH]: All right. And if there is an issue that
11 comes up, because here -- here's the scenario I can envision:
12 You're in the middle of obviously a campaign of some sort. If
13 a situation comes up where you believe it is necessary to
14 discuss your testimony, get in touch with the trial counsel
15 and defense teams, they will get in touch with the judiciary,
16 and we will figure it out. And they will be responsive to you
17 and I will be responsive to those requests. Because what I
18 don't want to do is cause you any personal hardship.

19 What I want to do is make sure we get your full
20 testimony, and the defense has the opportunity to engage in
21 meaningful rehabilitation if they feel they need to. And what
22 I heard from Mr. Kammen is that answer is yes.

23 LDC [MR. KAMMEN]: Well, first, we want to -- there's a

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1 number of -- quite a lot of discovery we want.

2 MJ [Col SPATH]: And at least the discussion about that.

3 LDC [MR. KAMMEN]: And we also have to revisit the issue
4 of the witnesses.

5 MJ [Col SPATH]: Yes. Understand.

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

7 MJ [Col SPATH]: So Mr. Gill, again, I thank you for ----

8 LDC [MR. KAMMEN]: May I just ask one other ----

9 MJ [Col SPATH]: Yes.

10 LDC [MR. KAMMEN]: Mr. Gill, would it be more convenient
11 for you to testify by VTC from the Boston area as opposed to
12 being forced to come to Washington, D.C., or would you prefer
13 to go to Washington, D.C.?

14 WIT: Well, I initially had made -- I was told that we
15 were going to do this out of the War College in Newport, Rhode
16 Island, in Naval Station Newport, and the very next day I was
17 told, no, it was going to be in D.C. I had already tried to
18 make these arrangements and thought it was A-okay and the rug
19 was pulled out from under me the next day.

20 MJ [Col SPATH]: I don't know if it's going to be A-okay
21 and I recognize there are constraints with VTCs and where we
22 are and the parties are going to work on that.

23 WIT: At that point in time, I'd be happy to come down to

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1 GTMO. I mean, I haven't been there in a while. I'd be happy
2 to come back. I couldn't do it this time.

3 MJ [Col SPATH]: I'll leave that to counsel to talk about.
4 Certainly in-person testimony makes it easier in many respects
5 for sure. So I'm going to leave that to counsel. We can do
6 that off the record, not that we're going to save many pages
7 on this record.

8 So Mr. Gill, I really -- I mean it, thank you for
9 your testimony tonight. I appreciate your time and attention
10 and we will be in touch with you through counsel reasonably
11 soon.

12 WIT: Judge, I apologize for being a bit irascible.

13 MJ [Col SPATH]: You were not the first or the last who
14 will be in this process. Thank you.

15 WIT: Thank you.

16 MJ [Col SPATH]: All right, Mr. Kammen, we're going to
17 deal with it tomorrow. I know we're going to work through it.
18 It'll give you some time to go through your notes of the
19 cross-examination. To the extent you all can talk to each
20 other about issues you believe have been fairly raised for
21 discovery, hopefully, you can do some of that, and it will be
22 agreeable, and I won't have to get involved.

23 If it isn't, I know you will not hesitate to let me

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1 know the areas of dispute.

2 LDC [MR. KAMMEN]: Yes.

3 MJ [Col SPATH]: And I will help with those where I
4 should, or deny those where I should.

5 LDC [MR. KAMMEN]: I do want to say that the last bit of
6 questions about the deal in Afghanistan I think,
7 unfortunately, may end up making General Martins a witness
8 if ----

9 MJ [Col SPATH]: I -- I am not going to rule on it.

10 LDC [MR. KAMMEN]: I understand.

11 MJ [Col SPATH]: I don't have a motion. I will just say
12 it appears to me that it was a newspaper article I haven't
13 seen yet. I don't know if it's attached to that motion. It
14 isn't. My guess is it's in his role as a budding politician,
15 and he made statements that trial counsel believe are a bit of
16 an exaggeration.

17 LDC [MR. KAMMEN]: And it would seem to me that since he
18 was working for General Martins, that General Martins could
19 testify, yes, it was an exaggeration or no, it wasn't. But
20 here's my concern, and then we'll break -- I gather we're
21 going to break.

22 Sort of indicative, and we saw this before the
23 18-month recess and we're seeing it again, the prosecutors

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1 think that when words come out of their mouth, that means it's
2 true and that means it's proven. And yet -- you know, so
3 their attitude is, well, we say these things and so therefore
4 you have to take them as gospel, as opposed to we need to
5 present witnesses.

6 And so they have said essentially the innuendo, and
7 I'm using the Afghanistan thing, is what you said in the
8 statement is absolutely not true. He says it is.

9 For them to complete the impeachment, given that
10 they've gone down this road, they have to present some
11 evidence that it's not true.

12 MJ [Col SPATH]: There are examples of what you're saying,
13 frankly, on both sides, where I have lots of proffers of
14 information, things today like McVeigh's defense team was made
15 up of ----

16 LDC [MR. KAMMEN]: Sure.

17 MJ [Col SPATH]: ---- many, many lawyers. You know what,
18 common sense tells me it was made up of more than two. But we
19 all engage in that in the courtroom.

20 LDC [MR. KAMMEN]: No, I ----

21 MJ [Col SPATH]: Afghanistan is a bad example because the
22 follow-up to the impeachment is did you say it in the article?
23 Yes. Which he said yes. So that resolves whether or not it

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1 was said, and then he explained context, which is he was on
2 the detainee review boards.

3 So lots of ways to resolve what those are, judicial
4 notice being easy. But he explained what they were in
5 cross-examination, and you can follow up in redirect, to fill
6 out his answer as to what detainee review boards are.

7 That is the smaller of ----

8 LDC [MR. KAMMEN]: No, I was just using that as an example
9 of ----

10 MJ [Col SPATH]: But I do not take the proffers as gospel.
11 When somebody says, a witness said X to you and the witness
12 says that's not true, I don't assume the witness said X.

13 LDC [MR. KAMMEN]: And we are more than happy, Your Honor,
14 on the 348 and 350 to present evidence regarding the size of
15 capital teams in cases smaller than this, in federal court.

16 And so if there is a question or if the government
17 challenges this, we are more than happy to present additional
18 evidence.

19 MJ [Col SPATH]: Understand. That has little -- yes, but
20 now let's focus in on 332. My offer to you is, of course, the
21 commissions rules of evidence and the military rules of
22 evidence apply equally to both sides. You have an opportunity
23 to rehabilitate if you need to and then have a discussion

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1 about any discovery that you believe is outstanding.

2 LDC [MR. KAMMEN]: The one thing that I know that we'll be
3 asking for, and we might as well get it out there now, is the
4 prosecutors' notes, notation, or memorandum of the statement
5 they claim he made on 11 May, and the statement he made on 22
6 August. I think that was -- and there was maybe another
7 statement that they referred to that they claim he made. I
8 don't think the government is allowed to, number one, refer to
9 a statement and not show it to him, claim he has been
10 impeached, and then not provide us with the -- at least the
11 relevant portions of the statement, including the context, so
12 that we can see if it's a prior inconsistent statement or not.

13 And so ----

14 MJ [Col SPATH]: Each of those will be very factually
15 dependent. If they use it -- you know, I mean, if they use it
16 to refresh recollection, which they didn't, that's different.
17 If they use it as a prior inconsistent statement and the
18 witness accepts it and says, I made the statement, then ----

19 LDC [MR. KAMMEN]: We don't have the witness.

20 MJ [Col SPATH]: ---- we can bring the paralegal in to say
21 he made the statement for the limited purpose of a prior
22 inconsistent statement.

23 LDC [MR. KAMMEN]: But we still have the right to the

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1 statement.

2 MJ [Col SPATH]: You don't necessarily have the right to
3 the contents that are written in the prosecutor's notes.

4 LDC [MR. KAMMEN]: If he cross-examines from them, he
5 does.

6 MJ [Col SPATH]: It depends on the answer. Anyway, we're
7 not going to debate all the rules. If it's a prior consistent
8 statement and it is material, then it's Brady material and
9 they have to turn it over. Or if there's significant
10 impeachment on one of their witnesses, then they have to turn
11 it over to you. I again presume good faith by every single
12 attorney who stands in front of me until we have evidence to
13 suggest otherwise.

14 So tomorrow we're going to take argument up initially
15 on 348. That was the one outstanding with regard to Commander
16 Mizer, and we're in a position to argue that, so we'll do that
17 because we still need to work on 348 and 350 as your primary
18 motions. We'll kind of discuss 332 and where we can go with
19 that so we can shape the battlefield for us as we move forward
20 into the next hearing session, and then we'll take up the
21 arguments or evidence on the other outstanding unclassified
22 motions with an eye really towards tomorrow afternoon doing
23 the classified 505 hearings to resolve whether or not we're

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1 going to have classified hearings the last day.

2 That's ultimately still part of the plan. Today
3 demonstrates how plans don't survive first contact, as always,
4 and so we'll see ----

5 LDC [MR. KAMMEN]: One final thing.

6 MJ [Col SPATH]: ---- tomorrow. Yes.

7 LDC [MR. KAMMEN]: Mr. al Nashiri would like to meet with
8 the defense team and General Martins again in the morning.
9 Could we start at 9:30? -- General Baker.

10 MJ [Col SPATH]: I knew who you meant.

11 LDC [MR. KAMMEN]: Could we start at 9:30 so we could
12 commence that ideally about 8:00 and ----

13 MJ [Col SPATH]: I was going to suggest a 9:00 start time,
14 so 9:30, frankly, is reasonable, especially given the hours we
15 have been in here and to give everybody time to get back here
16 tomorrow. 9:30 start time. I'll see you then.

17 Trial Counsel, anything else we can take up tonight,
18 given the battle order tomorrow?

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

21 MJ [Col SPATH]: All right. No, thank you very much.

22 Mr. Kammen, anything else, understanding where we're
23 going to go tomorrow?

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1 LDC [MR. KAMMEN]: No.

2 MJ [Col SPATH]: All right. I'll see you all tomorrow
3 morning. The court -- the commission is in recess.

4 [The R.M.C. 803 session recessed at 1808, 7 September 2016.]

5 [END OF PAGE]

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