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1 [The R.M.C. 803 session was called to order at 1303,
2 17 October 2016.]

3 MJ [Col SPATH]: This commission is called to order.

4 Trial Counsel, Mr. Miller, would you please account
5 for the government representatives and then make announcements
6 as to the transmission of the proceedings.

7 TC [MR. MILLER]: Good afternoon, Your Honor. Thank you.
8 I have been detailed to the military commissions by the Office
9 of the Chief Prosecutor. I am a member of the United States
10 Department of Justice. I'm qualified under the Rules for
11 Military Commission, Rule 502(d), and I have been previously
12 sworn in accordance with Rule 807. I have not acted in any
13 manner which might have tended to disqualify me from these
14 proceedings. These proceedings are being transmitted via CCTV
15 to two remote locations in accordance with your order of 2012
16 January.

17 Present for the prosecution also, Your Honor, all
18 members detailed by General Martins' detailing memo, AE 338B
19 dated 13 January, 2016. They are all present here today with
20 the exception of Lieutenant Colonel Winston McMillen. Those
21 persons are Brigadier General Mark Martins, Lieutenant Paul
22 Morris. Lieutenant John Cantil, Lieutenant Cherie Jolly, all
23 of the United States Navy. And that would be our

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1 announcements to start the proceedings, Your Honor.

2 MJ [Col SPATH]: Thank you, Mr. Miller.

3 Mr. Kammen, I understand you have a new member of the
4 defense team here.

5 LDC [MR. KAMMEN]: Pleased to introduce to the commission
6 Ms. Rosa Eliades, who I will tell you has been sworn, but if
7 you would take care of the ----

8 MJ [Col SPATH]: I heard your pronunciation. I want to
9 make sure it's correct. It's Ms. Eliades?

10 ADC [MS. ELIADES]: That's correct.

11 MJ [Col SPATH]: If you would go through your detail.

12 ADC [MS. ELIADES]: I'm Rosa Eliades. I have been
13 detailed to the military commissions by the Chief Defense
14 Counsel of the military commissions. I am qualified under the
15 Rules for Military Commission 502(d) and I have been
16 previously sworn -- 807 -- and I'm learning to use the mic --
17 and I have not acted in any way which would tend to disqualify
18 me from these proceedings.

19 MJ [Col SPATH]: All right, thank you very much.

20 Mr. al Nashiri, do you want to include Ms. Eliades as part of
21 your defense team.

22 [The accused indicated a positive response with a
23 thumb's up.]

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1 MJ [Col SPATH]: Yes, thank you. I'm going to go through
2 now with you your right to be present and waive your right to
3 be present if you want to.

4 You have the right to be present during all sessions
5 of the commission. If you request to absent yourself from any
6 session, such absence must be voluntary and of your own free
7 will. Your voluntary absence from any session of the
8 commission is an unequivocal waiver of the right to be present
9 during the session. Your absence from any session may
10 negatively affect the presentation of the defense in this
11 case. Your failure to meet with and cooperate with the
12 defense counsel may also negatively affect the presentation of
13 your case.

14 In certain circumstances, your presence at a session
15 may be compelled regardless of your personal desire to be
16 present. Regardless of your voluntary waiver to attend a
17 particular session of a commission, you have the right to, at
18 any time, decide to attend any subsequent session. If you
19 decide not to attend the morning session but wish to attend
20 the afternoon session, you must notify the guard force of your
21 desires. Assuming there's enough time to arrange
22 transportation, you will be allowed to attend the afternoon
23 session. You will be informed of the time and date of each

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1 commission session prior to the session to afford you the
2 opportunity to decide whether you wish to attend.

3 Do you understand what I have explained to you?

4 [The accused indicated a positive response with a
5 thumb's up.]

6 MJ [Co1 SPATH]: That's a positive response. Thank you.

7 Additionally, in the past, you have indicated you
8 don't desire for breaks to accommodate prayer times. Is that
9 still your desire, not to take a break?

10 [The accused indicated a positive response with a
11 thumb's up.]

12 MJ [Co1 SPATH]: That's a positive response as well.
13 Thank you.

14 I have a number of matters to cover, just some
15 administrative matters. But I think the first thing I wanted
16 to check is the status of Mr. Gill. I just wanted to see if
17 he's available and where we're at with that. So let me ask
18 you, Mr. Miller.

19 TC [MR. MILLER]: Your Honor, Mr. Gill was served with a
20 subpoena, was provided with travel funds, but has indicated --
21 and has not appeared, and will not appear, apparently. And we
22 have filed that ex parte request for an arrest warrant to take
23 him into custody.

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1 MJ [Col SPATH]: We'll talk about that, Mr. Kammen, in a
2 minute.

3 I saw through e-mail -- I didn't see the request yet,
4 somebody from the trial judiciary team just mentioned that
5 there was notice that an ex parte request was coming for a
6 writ of attachment or a warrant of attachment or something
7 like that. Is that accurate?

8 TC [MR. MILLER]: That is accurate, Your Honor. I believe
9 it has been filed so it should be on your desk shortly.

10 MJ [Col SPATH]: Let me ask, why ex parte just for the
11 attachment warrant?

12 TC [MR. MILLER]: Because the production of the witness is
13 the government's and the government's alone. We're
14 responsible for producing this particular individual. Counsel
15 for the defendant does not represent Mr. Gill. As such, he's
16 really the other party in this. And should he seek to quash
17 it, he can take whatever appropriate measures he believes are
18 necessary. But because it is a -- the responsibility solely
19 of us, I don't believe that the defense has a, to use a common
20 phrase, dog in this particular fight.

21 MJ [Col SPATH]: All right. Let me hear from the defense
22 briefly and then we'll talk some more, I'm sure.

23 LDC [MR. KAMMEN]: Well, I agree, surprisingly, with the

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1 prosecutor that we don't necessarily have a dog in this fight,
2 but we certainly have the right to know what's going on. So
3 the notion that this request would be filed ex parte is -- we
4 just don't think that's appropriate and we think we should
5 have been included.

6 I think his representation, however, is -- is
7 incorrect. General Martins apparently received, because it
8 was also communicated to us, a letter that -- from Mr. Gill
9 that -- and I'll read from it, it says, "To the extent that
10 the same may be necessary under applicable law, if at all,
11 this correspondence is intended by me to be a request for
12 relief pursuant to R.M.C. 703(e) to (f) from an unlawful
13 extrajudicial -- extrajurisdictional and otherwise invalid
14 subpoena."

15 So, I mean, I think we are at something that -- we
16 don't have a dog in this particular fight. We want Mr. Gill
17 here, I mean, so -- but I think one of the outstanding issues
18 that has been sort of floating around for the last four years
19 is what are the rules here, and what is the power of the
20 commission. And I think one of the things Mr. Gill raises --
21 and seems that he has a lawyer. He refers to a lawyer, a
22 lawyer in this -- and, again, I don't know. But one of the
23 things that seems to be an issue is the government has

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1 subpoenaed him to -- has subpoenaed him to the Mark Center as
2 opposed to a place that would be more convenient, but with
3 other witnesses they haven't done that.

4 So one of the things that I think we have to begin to
5 establish is does -- is it only the responsibility of the
6 prosecution to produce witnesses wherever they think is
7 appropriate? Because that really gives them an awful lot of
8 leverage to harass people. And I'm not suggesting that is or
9 isn't happening in this case, but I do think we have to -- we
10 can't be cavalier and gloss over what Mr. Gill has prepared
11 and filed, because it does appear to have super -- at least to
12 me, apparently, some merit, and I don't think we can just
13 dismiss it out of hand.

14 So, I mean, I think that's probably the thing that we
15 have to address first. And I'll be honest, I'm not -- I
16 certainly don't represent Mr. Gill. By the same token, as an
17 officer of the court, this is there and I -- he does appear to
18 raise some significant issues.

19 MJ [Col SPATH]: Mr. Miller.

20 TC [MR. MILLER]: Briefly, Your Honor. We have attached a
21 copy of that letter to our request so that the court may
22 consider it. And I would also point the court to the prior
23 order in AE 184(b), and which I guess would be the law of the

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1 case, which indicates that the commission does have authority
2 to bring these witnesses in the manner, I think, in which we
3 are trying to do this. But we are trying to take whatever
4 means we can to get this witness here so counsel, who have
5 indicated that they would like to continue their -- finish
6 their redirect of him, or undertake their redirect of him, we
7 are taking all reasonable measures we can.

8 Thank you, sir.

9 MJ [Col SPATH]: All right. Thank you. More very soon on
10 that.

11 LDC [MR. KAMMEN]: Only -- what I would propose, and it's
12 just thinking out loud, is to the extent we can, we deal with
13 Mr. Gill's issues. And again, I'm -- I don't represent him,
14 but ----

15 MJ [Col SPATH]: Oh, no, I think we do have to deal with
16 that one early. My first was, was he here or not, because I
17 had heard kind of conflicting rumors.

18 LDC [MR. KAMMEN]: And then if the court denies his
19 motion, before we start arresting people, I think that ought
20 to be communicated to Mr. Gill that his request for relief has
21 been denied and at that point, ideally, he would then say okay
22 and then go to wherever you tell him to be.

23 MJ [Col SPATH]: Ideally he would. That was what he

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1 indicated last time.

2 TC [MR. MILLER]: Again, that's between Mr. Gill, the
3 government, and the court.

4 MJ [Col SPATH]: Absolutely. Here's some of the -- I want
5 to kind of go through, I think, where we are on all of the
6 issues because I think that will help us figure out what we're
7 going to cover, if anything, over the next two and a half
8 days. Part is the concern, rightfully, that this court has --
9 commission, regarding ex parte filings.

10 I recognize them -- more than recognize them for
11 classified filings and I more than recognize the defense has
12 taken advantage of it, as they're entitled to do under the
13 rules. But there's no reason that the defense doesn't see
14 either the warrant of attachment or subpoena or whatever
15 format we're using to attempt to compel a witness.

16 It is an area that we need to figure out because we
17 will likely have some of these issues if and when we have a
18 hearing in this case on the facts. I have a feeling some of
19 the witnesses are going to run into these same issues. It's
20 just a guess, but I think it's an educated guess. But there's
21 no reason to file ex parte with the court on something as
22 mundane, frankly, as a warrant of attachment or a writ of
23 attachment. So we'll get the filing in, but if you all don't,

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1 I'm going to share it with the defense.

2 I recognize the defense does not at all have the
3 ability to respond to it necessarily. I mean, we will in
4 court discuss it and I more than recognize that the defense
5 doesn't represent Mr. Gill.

6 TC [MR. MILLER]: Actually, I had requested that a
7 courtesy copy be brought to defense counsel. It wasn't. My
8 apologies to them. It wasn't our intent to hide it from
9 them ----

10 MJ [Col SPATH]: I didn't think so.

11 [MR. MILLER]: ---- it was to not make them a party to.

12 MJ [Col SPATH]: I didn't think so. I took it as you are
13 all fighting this battle because you wanted to continue to get
14 Mr. Gill here and the defense doesn't necessarily represent
15 his interests at this point. I understand. I also know they
16 have been involved in the discussion.

17 We started late today to give the defense counsel an
18 opportunity to meet with their client. And we've done that a
19 couple of times, and I don't mind doing it. I -- again,
20 assuming at some point we're here for lengthier periods of
21 time and we're here having a hearing, you all will be in place
22 and in a place where you can meet with your client, hopefully,
23 more regularly. So if you all can take advantage of those

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1 opportunities. What I don't want to do is impact too much.
2 This week, not a big deal. Even last time, not a big deal.
3 More than -- understand, we have, frankly, enough work for
4 maybe two and a half days, maybe not quite that much. So
5 today made perfect sense, and apparently the meeting happened
6 and that's good.

7 LDC [MR. KAMMEN]: Ms. Eliades didn't receive her
8 clearance until Thursday so she couldn't ----

9 MJ [Col SPATH]: I figured it was close in time based on
10 where we're at.

11 The other area I want to watch is the Rule 7
12 compliance issues. Again, we just need to be cautious. We
13 have to get information in three days in advance to allow the
14 security reviews that have to go on before we can display them
15 in court or display them to the public when we can. The
16 lengthier those are, the more helpful it is to get them in
17 longer than three days in advance. That just -- again, I
18 recognize the rules. There's nothing I can do about the
19 rules. And how I may or may not feel about particular rules
20 doesn't matter because it's not my job to have much of a
21 feeling about them.

22 It's just, when you can do it, let's get the
23 information in sooner. That helps us. Because what we want

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1 to do is make sure we can go through a meaningful cross,
2 meaningful redirect and, where we can, let the public see what
3 we're displaying because it's important that they can see it
4 where they can, of course. When you all have those things,
5 let's work to get through that process. Again, it's not my
6 process, but it is the process.

7 The notice I sent out, I mentioned in the docketing
8 order any motions that we briefed are certainly ripe for
9 argument and I hope to get through some of those, even if it
10 wasn't necessarily listed on the docketing order that I sent
11 out. And I do that because witness unavailability can affect
12 things. And all of a sudden, something we planned to deal
13 with first up we can't deal with because of a witness who's
14 not here or something like that. And so what I want to do is
15 make sure we're using our time on the record wisely. So that
16 white space sometimes comes in handy and we can fill it in
17 with other motions that are fully briefed.

18 So here's where I think we are on some motions and
19 where I think we can have some discussion and we'll go from
20 there. For those of you observing last time, if you were
21 here, we did not have an 802 session before we started. So
22 this is kind of what the 802 session would be like but we'll
23 just do it here on the record with both parties and the court

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1 reporters. So we have got Appellate Exhibit 332X, and those
2 are witnesses. Where we're at with that is Mr. Gill was, of
3 course, scheduled and the government has made some efforts to
4 have him attend to finish his testimony and we need to work
5 through that.

6 I have also ordered production of Mr. Toole and
7 Mr. Quinn, and it has been indicated to me that they're
8 available. So we should take up at least their testimony so
9 that we can get there.

10 You know the defense indicated they'd prefer to have
11 Mr. Gill first before those two witnesses, and I appreciate
12 that. If we have some indication that that will happen this
13 week, I'm amenable to it. If we have indication it's not
14 going to happen this week, Mr. Gill, I'm much more amenable to
15 taking testimony of Mr. Toole and Mr. Quinn and we can always
16 bring them back if something happens during the redirect and
17 recross of Mr. Gill to have them answer any follow-on
18 questions. But we have them available, apparently, we should
19 get their testimony in to the extent we can. So that's
20 another area I think we can get some work done this week.

21 Let me just ask, Mr. Miller, whoever is going to be
22 your representative, regarding Mr. Toole and Mr. Quinn, what's
23 their availability?

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1 TC [MR. MILLER]: They're available right now. They're at
2 the Mark Center awaiting to testify.

3 MJ [Col SPATH]: All right.

4 LDC [MR. KAMMEN]: Just so -- are they available all week?
5 I had understood from something ----

6 MJ [Col SPATH]: That was my indication; I think they're
7 available the whole time we're here.

8 TC [MR. MILLER]: They are, Your Honor.

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

10 We have also got AE 355. That has to do with another
11 unlawful influence motion. We're going to have some
12 discussion about the delivery of the contents of 335E, the
13 binder, and 335K, which was additional information that came
14 in filed to me.

15 LDC [MR. KAMMEN]: I'd also like to present orally some
16 additional information as well.

17 MJ [Col SPATH]: So that one is certainly something we can
18 discuss and figure out where we're at with that.

19 Appellate Exhibit 357, which isn't on the docket,
20 that's the motion to abate pending the Dalmazzi litigation.
21 That's another one I would be very interested in getting
22 argument on because it impacts so many things that are
23 outstanding. And in the response to the Limburg, there was

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1 lots of discussion about that. So that one is ready and we
2 should have some discussion of that.

3 And then Appellate Exhibits 361A and B, those are the
4 impacts of the C.M.C.R. decisions on the numerous motions and
5 rulings outstanding. I appreciate the efforts to do kind of a
6 joint filing, kind of a follow-on filing. Appreciated. And
7 again, I don't mind that each -- there's not agreement; at
8 least I have a document that shows me where everybody is so I
9 can work through. It makes some sense and it helps me to
10 figure out where to go with those outstanding issues.
11 Dalmazzi clearly impacts some of those according to the
12 defense. That's why I want to take up Dalmazzi and then
13 hopefully turn to that. So that's another area where I think
14 we'll get to over the next couple of days.

15 Appellate Exhibit 362 is not quite there yet. It's
16 not on the docket. The defense has the opportunity to file a
17 reply brief and that's what we're waiting on. But if you're
18 not going to file a reply brief, we may be able to discuss
19 that motion to compel.

20 LDC [MR. KAMMEN]: That's the motion concerning
21 Mr. Kleinman?

22 MJ [Col SPATH]: Yes.

23 LDC [MR. KAMMEN]: We're not going to file a reply brief.

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1 That can be addressed this week.

2 MJ [Col SPATH]: We've got Appellate Exhibit 359. There
3 we have a couple of issues. We have the briefing on the legal
4 issue of housing Mr. al Nashiri here during hearings. We also
5 have a pending motion to compel witnesses, and that hasn't
6 gone through the briefing cycle yet. So we'll probably be
7 able to frame the issue. Maybe we'll be able to have some
8 discussions, but we might not get 359 completely in the record
9 before we depart.

10 We have Appellate Exhibit 354, that's a motion to
11 abate. The defense has submitted a classified request there
12 for some witnesses and a closed hearing. What I'd like to do
13 is attempt to get at least some of that discussion on the
14 record, again, so we can figure out where we are with
15 witnesses to assist us. And if we can take any argument on
16 that motion, and I do have some questions on that one, and so
17 maybe we can make some headway there.

18 So those are the ones that I see that are most ripe
19 for our discussions the next two and a half days. The first
20 issue, I think, has to be -- yes, Mr. Kammen?

21 LDC [MR. KAMMEN]: We would suggest that 092 is also ripe
22 for discussion. I know the prosecution wanted to defer that
23 the last time, but I really do think that's something we need

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1 to discuss. It does need to be in closed session. I think it
2 really would be best to have that discussion now rather than
3 continuing to postpone it.

4 MJ [Col SPATH]: And we started some of that, I know, last
5 time. And maybe we can at least see where we're at -- if we
6 have a closed session, that may be the perfect time to take up
7 those two together. And we'll try to schedule that at a time
8 of day that makes sense for everybody towards the end of the
9 day.

10 So I guess the first issue then has to deal with
11 Mr. Gill. And the issue at hand is do I have the authority to
12 issue the warrant of attachment, and have you all complied
13 with the requirements both of the subpoena and, of course,
14 money to secure Mr. Gill's presence?

15 So Mr. Miller.

16 TC [MR. MILLER]: Your Honor, I believe under Rule 703,
17 you do have that authority. The money was tendered to him
18 and, in fact, he took possession of it, the check that was cut
19 for him, and he took the subpoena. At the time, I think as
20 indicated in the attached affidavit, he indicated that he was
21 going to contact General Martins and fight it. So we had an
22 indication early that he was not going to appear. And, in
23 fact, he sent a letter late last night, I believe, to General

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1 Martins regarding that.

2 CP [BG MARTINS]: Can I correct that, Counsel, real quick?

3 TC [MR. MILLER]: Yes.

4 CP [BG MARTINS]: He e-mailed it this morning. I
5 forwarded it at 8:00 a.m. to Mr. Sims and to defense. I just
6 want to confirm that you received that. I forwarded it, as he
7 requested, at 8:00 this morning.

8 MJ [Col SPATH]: I do not believe we have received it.

9 LDC [MR. KAMMEN]: We received it.

10 CP [BG MARTINS]: Did you receive the one that I sent,
11 Mr. Kammen? I forwarded his request at 8:00.

12 LDC [MR. KAMMEN]: Yes. Yes. We've received his request.

13 CP [BG MARTINS]: You received the one that I sent today.
14 Okay.

15 LDC [MR. KAMMEN]: Yes.

16 CP [BG MARTINS]: Mr. Sims was on the e-mail. It wasn't
17 last night, it ----

18 MJ [Col SPATH]: It was this morning, not last night.

19 TC [MR. MILLER]: Early this morning. [Microphone button
20 not pushed; no audio].

21 MJ [Col SPATH]: You may, if you -- if you could. We're
22 going to mark it. We might as well mark it as our next in
23 order.

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1 Make sure we use the microphones everybody. They're just
2 having an ex parte. Hang on. All right. We're going to mark
3 this as next in order for 332. Just give me a second to get
4 the number.

5 [Conferred with courtroom personnel].

6 All right, Mr. Miller.

7 TC [MR. MILLER]: I believe -- I'm sorry. Thank you, Your
8 Honor.

9 I believe we were discussing the authority of the
10 court.

11 MJ [Col SPATH]: Yes.

12 TC [MR. MILLER]: And I believe I had pointed the court to
13 Rule 703(e)(2)(G) to issue a writ of attachment or a writ of
14 arrest for failure or neglect or refusal to appear. There has
15 to be a probable cause finding. The government has attached
16 to it an affidavit of Ms. Karen Loftus which sets forth in
17 some particularity the events that led up to that particular
18 refusal, included -- including the dispute that Mr. Gill had
19 with the government regarding payment for his previous
20 appearance before the court, which I think was a dispute over
21 approximately, I don't know, \$85 or -- 87 -- something in the
22 80s, \$80 -- between \$80 and \$90.

23 A copy of the subpoena is also attached. I think the

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1 affidavit of Ms. Loftus sets out with some particularity the
2 efforts that have been made by the government to secure his
3 appearance.

4 We have been in contact with him, and I think it's a
5 fair statement, from watching Mr. Gill testify, he's somewhat
6 litigious and not shy to speak his opinion.

7 MJ [Col SPATH]: No.

8 TC [MR. MILLER]: I think, as I indicated, the court
9 previously -- or the law of the case indicated that previously
10 was found in 180B, AE 180B, that you have the authority to
11 require people to testify by teleconference. So I think we
12 all agree that we cannot force somebody to come to the island.

13 MJ [Col SPATH]: No, I reviewed his testimony. He was
14 willing to come to the island when we departed last time, but
15 that's fine. He doesn't have to.

16 TC [MR. MILLER]: No, he doesn't. We do believe he has to
17 come through issuance of subpoena to testify via VTC.

18 I know the court was also interested in whether or
19 not we can move forward with the other witnesses regarding
20 whether or not -- because of what -- whether we could get
21 Mr. Gill here timely so that he could go first and then the
22 others could go second and third in whatever order counsel
23 would like to call them.

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1 The problem is that because, as I think I indicated,
2 he is litigious, he's going to fight this. I don't know how
3 he's going to fight it. I don't want to suggest to him how
4 he's going to fight it. I'm sure he has already thought that
5 through. So I think the likelihood that we would be able to
6 do that and get those witnesses done, I think -- I don't want
7 to say not likely, but not likely to happen.

8 So it would be our preference to move forward with
9 the other two witnesses today. I know that counsel would
10 rather have Mr. Gill go first, but it is redirect. So we've
11 seen the bulk of his testimony on direct, and he was a
12 substantial cross-examination witness also, so the court does
13 have a good roadmap, so to speak, on how we're moving forward
14 on him.

15 MJ [Col SPATH]: Can I ask, and this is not -- the rules
16 seem reasonably clear to me about the ability to move somebody
17 to a VTC location. So it's just a question of, is there a
18 reason that we're opposed to -- he seems to indicate if he
19 could travel down the road to a secure VTC location, he would
20 be more amenable. Is there a reason behind the government's
21 need to have him go to the Mark Center?

22 TC [MR. MILLER]: The Mark Center is the one place where
23 we can do this easily. It's not -- having been in the United

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1 States Attorney's office for a number of years, setting up
2 these sorts of VTCs is not an easy thing. They don't --
3 the -- the IT components or whatever, the technology doesn't
4 necessarily talk from the Department of Justice to the
5 Department of State to the Department of Defense. It's not
6 necessarily an easy thing to do.

7 You know, we have explored that. It is our
8 preference that he come. He agreed to do it. And the problem
9 with making suggestions to him is -- we've tried to work with
10 him on various ways to satisfy his needs and his desires, and
11 he sort of fights at each step of the way. So it would be our
12 preference, at least at this juncture, to maintain the Mark
13 Center as the place; although, you know, we would explore
14 other avenues if the court ordered.

15 MJ [Col SPATH]: I like to stay in my lane.

16 TC [MR. MILLER]: I understand, Judge.

17 MJ [Col SPATH]: It was just a question about, as I was
18 kind of reading through of number of things that he posits in
19 his letter ----

20 TC [MR. MILLER]: Fair enough.

21 MJ [Col SPATH]: ---- and it appears to me you all are
22 thinking through that.

23 TC [MR. MILLER]: We are.

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1 MJ [Col SPATH]: As I would expect. And he was on notice.

2 TC [MR. MILLER]: Thank you.

3 MJ [Col SPATH]: I recognize, Mr. Kammen, you don't have a
4 position officially -- I mean, representing him -- but do you
5 have any comments you want to make?

6 LDC [MR. KAMMEN]: First, this is your lane because Rule
7 70 -- I think 70 ----

8 MJ [Col SPATH]: 703(e)?

9 LDC [MR. KAMMEN]: ---- (f) gives you the authority to --
10 when there is a request for relief on the grounds that
11 compliance is unreasonable or oppressive, the convening
12 authority or, after referral, the military judge may direct
13 that the subpoena be modified or withdrawn if appropriate.

14 So you clearly do have the authority to say it is
15 oppressive to have him go to the Mark Center when there are
16 probably Department of Defense facilities, I suspect, in Rhode
17 Island that are more convenient to him. And so we would
18 suggest that this really is your lane.

19 And really our concern is broader than this. I mean,
20 we have two concerns. First, what seems to have been the
21 heart of the problem is that when Mr. Gill submitted his
22 request for payment, the -- whoever is responsible for this,
23 and I don't know if it's the prosecution or -- but if they're

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1 responsible for witnesses, I assume that's where the trail
2 goes, at least in his view, was quite unreasonable in
3 accepting his view. It looks like they were really quite
4 unreasonable in terms of processing his expense request.
5 Apparently, according to him, because he didn't submit a
6 receipt for \$3 in tolls, they denied the whole request. Then
7 he resubmitted it. Somehow they didn't like his signature so
8 they made him resubmit it again.

9 So at least to him, and, you know, I -- you know,
10 again, we weren't there, he felt -- and based after the
11 cross-examination, I can understand why he would feel this
12 way, that there was a certain amount of harassment going on.
13 And so part of our concern, of course, is when only one side
14 has a role in this -- and I understand this is the rules, but
15 when only one side has a role in this, and unlike in federal
16 court, for example, where the Marshals Service, which is
17 theoretically neutral, has responsibility, the possibility for
18 a litigant that wants to harass the other side's witnesses is
19 there.

20 And that, of course, brings us to the location of
21 testimony, because that's really the overarching issue here.
22 If the rule is going to be everybody, prosecution witnesses,
23 defense witnesses, everybody has to go to the Mark Center, so

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1 be it. But that is -- if there's going to be a rule, it's got
2 to be a rule that applies for everybody. And that hasn't been
3 the suggestion -- that hasn't been what has happened in this
4 case.

5 The most notable exception, of course, was Dr. 97,
6 this was before your time, but who testified at some
7 considerable length in a very adversarial cross-examination,
8 without any complaint by the government, from some military
9 installation. My memory is El Paso, but I'm -- I could be
10 wrong on that. And because that's where he was and because
11 the government, you know, wanted to get to the issue, which is
12 to their credit, nobody made him fly to D.C. It was like,
13 we'll get this done, and they set -- they managed to set it up
14 and it worked quite well.

15 So I understand that it may be easier but, you know,
16 easy is -- it would be easier to have this at the brig in
17 Charleston, South Carolina, or Leavenworth, Kansas. So
18 nobody's -- the fact that -- easy is not relevant as long as
19 we're here.

20 And so, you know, Mr. Gill raised -- some of his
21 issues are technical, but they do seem to have some merit.
22 Because to look at the subpoena, it does tell him to appear
23 and it looks -- it can be read as a deposition subpoena or a

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1 military commissions subpoena. It is unclear.

2 And then I guess the other question is this, and
3 again, the subpoena says that failure to appear may result in
4 you being taken into custody and brought before the military
5 commission. Well, what does that mean? Does that -- I mean,
6 does that mean you're brought to the Mark Center and then you
7 have to testify ----

8 TC [MR. MILLER]: I don't mean to interrupt, but aren't
9 these arguments that Mr. Gill should be making?

10 MJ [Col SPATH]: Again, what I'm looking for, because I'm
11 going to either issue a warrant of attachment, I believe for
12 the first time in this case, having reviewed the record here
13 pretty closely -- I have no idea what they have done in other
14 cases, but I have a feeling we haven't done a lot of them.

15 LDC [MR. KAMMEN]: I'm going to guess none.

16 MJ [Col SPATH]: So I'm always interested in trying to
17 figure the law out. I do not take this as representing
18 Mr. Gill.

19 LDC [MR. KAMMEN]: No, absolutely not.

20 MJ [Col SPATH]: I am after -- I want to get the call
21 right because I concur with you, Mr. Miller. He's likely to
22 fight it and I'm likely to see my name in lights in yet
23 another appeal somewhere, and that's okay. That's the risk of

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1 the game. I just want to make sure I understand it as I go
2 forth, that's all.

3 LDC [MR. KAMMEN]: The other thing ----

4 TC [MR. MILLER]: Thank you, Judge.

5 LDC [MR. KAMMEN]: The other thing, again these are just
6 issues, I don't know what they mean. Frankly, I haven't
7 thought about them.

8 The other thing -- you know, Mr. Miller was kind
9 enough to let us take a quick look at his ex parte request,
10 which I assumed would be a couple of pages, but it looks like
11 it's a rather substantial pleading. And while I don't know
12 that we have a dog in that fight, I do think that we should
13 have the right to see the pleading and have the -- and the
14 attachments and have the opportunity to review them to make
15 sure at least that they are complete and that the commission
16 is getting a complete record.

17 So I think our position is it would seem to me that
18 Mr. Gill's -- if he has a lawyer, and it's unclear, but at a
19 minimum, his lawyer should have the opportunity to make the
20 arguments, or he should have the opportunity if he's
21 representing himself pro se to make the arguments that he is
22 making. If the commission rejects that, then it would seem to
23 me that, you know, once a motion to quash is -- or motion for

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1 relief is denied, at that point the witness then, you know,
2 really does have a choice. You either come and give the
3 testimony or you don't come, and then if you get arrested,
4 it's on you.

5 But I think we've skipped over the hearing part on
6 his request for relief. So I mean, I think that's where we
7 are, and we would like the opportunity to review whatever they
8 filed ex parte.

9 And the other thing that I think we are just going to
10 have to confront is does only the prosecution get to decide
11 where people testify. And that is really a huge issue to us,
12 because the opportunity for -- you know, if you make a guy --
13 if you make the defense witnesses who are in California go to
14 the Mark Center and you make the prosecution witnesses who are
15 in Florida go to the U.S. Attorneys office, then all of a
16 sudden you have a very different playing field. So I think we
17 really do have to confront what this is.

18 And frankly, the notion, yeah, it would be more
19 convenient, sure, but they've got plenty of Department of
20 Defense facilities in the New England states, and I'm sure
21 they can set it up. And I'm sure if you order them to set it
22 up, they will.

23 TC [MR. MILLER]: Briefly, Your Honor.

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1 MJ [Col SPATH]: Absolutely.

2 TC [MR. MILLER]: Very briefly. I agree fully with
3 Mr. Kammen that he should get copies of these and we will make
4 sure that he does.

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

6 TC [MR. MILLER]: I thought one had been given and I
7 didn't follow up on that, so I apologize.

8 As to the harassment of witnesses, it serves the
9 government no purpose to do that. I can assure Mr. Kammen
10 that we are not doing that. We will not do that. That kind
11 of -- going down that road is just fraught with danger and
12 it's not ethical. It won't happen.

13 As to the issue regarding the voucher that's set
14 forth, the circumstances, at least from the government's
15 perspective, as to what occurred is set forth in the affidavit
16 of Ms. Loftus. I'd ask the court to -- I'm sure the court
17 will review that in the affidavit.

18 And lastly, I think General Martins can speak to the
19 notion of why we used the Mark Center. So if the court would
20 indulge us and just allow him to give our perspective why we
21 use it.

22 MJ [Col SPATH]: I will. I have a couple of questions
23 about it, so ----

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

2 MJ [Col SPATH]: General Martins.

3 CP [BG MARTINS]: As I received the request from Mr. Gill
4 this morning and forwarded it, I do -- would hope to get some
5 confirmation on the e-mail that I sent. I sent it precisely
6 at 8:00, and that was his request. So it had some of the
7 background. It signalled that we would perhaps be proceeding
8 down a warrant of attachment route, and brought that to your
9 attention and info copied the defense as a courtesy.

10 The VTC Suite where the witness has been subpoenaed
11 to -- and directed to proceed to is relatively new. So these
12 examples counsel is citing, defense counsel is citing, are --
13 took place before there was a state-of-the-art suite that
14 allowed for adversarial proceedings. And the intent is to
15 fully support compulsory process for prosecution and defense
16 and to ensure that, if called, even though we can't get
17 someone here, that the confrontation right that's in the
18 statute will be vindicated.

19 So there's an opportunity for simultaneous document
20 examination ----

21 MJ [Col SPATH]: I was going to ask ----

22 CP [BG MARTINS]: There are requirements, Your Honor.

23 MJ [Col SPATH]: ---- exchange.

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1 CP [BG MARTINS]: There are standards and requirements.
2 There was litigation in this over Rule 26 in the federal
3 courts. So a lot of attention has gone into something that
4 would support it.

5 Before that was present, there was a -- an attempt to
6 try to get quality VTC bridges before your time. Some of them
7 worked, some of them didn't work so well. And for the benefit
8 of the process, the right of confrontation, and all of these
9 needs to support, ultimately in the most adversarial setting,
10 a crucible of cross-examination, that is what causes the
11 government to seek now to bring everybody to this suite.

12 For the commission's information, for instance, one
13 of the witnesses today has come from Corpus Christi, Texas.
14 And has been given expenses to defray it. In Mr. Gill's case,
15 he was given a cashier's check. So the issues relating to
16 payment should not be present on this occasion and -- and was
17 directed. So we strongly would oppose that.

18 We do proffer that it is equal. Our rules are the
19 same as courts-martial, in the sense that we couldn't force
20 somebody to go to Germany for a court-martial, we have the
21 same sorts of rules. And we're prepared to go wherever you
22 want to go with regard to the types of legal challenges that
23 could be made to it, and why we believe strongly that under

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1 the U.S. v. Bennett case that is cited in the Regulation for
2 Trial, that this is lawful. It is also constitutional within
3 the meaning of our statute and the constitutional provisions
4 that apply.

5 So we would move that the commission consider not
6 only Mr. Gill's request but also the warrant of attachment
7 application that we're providing you as well as the, we
8 believe, thorough probable cause justification that's with
9 that.

10 May I have a moment, Your Honor?

11 MJ [Col SPATH]: You may. I was going to ask a question,
12 so maybe this will help, because I don't know which one of you
13 wants to answer it. It just has to do with the arguments from
14 Mr. Gill about the nontechnical compliance in the warrant
15 itself. For lack of a better word, what he alleges are
16 mistakes or areas of ambiguity. Is there any merit to those
17 contentions and how do I look at those?

18 CP [BG MARTINS]: We don't believe, Your Honor, and we
19 believe his absence is supportive of probable cause that his
20 absence is without excuse or justification, and believe that
21 he -- that there's probable cause to produce him. Understand,
22 defense witness. We're seeking to comply with your order that
23 he be presented for an opportunity for redirect. So he's not

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1 our witness. We're simply trying to vindicate the compulsory
2 process right of the accused here.

3 A moment, Your Honor?

4 MJ [Col SPATH]: You may.

5 CP [BG MARTINS]: Your Honor, counsel has one more thing.

6 TC [MR. MILLER]: Thank you. I think, Your Honor,
7 Mr. Kammen mentioned the technical objections, and I think
8 what we're speaking of ----

9 MJ [Col SPATH]: Well, no, he in his discussion; but mine
10 was ----

11 TC [MR. MILLER]: No, I understand.

12 MJ [Col SPATH]: ---- reviewing what Mr. Gill had to say.

13 TC [MR. MILLER]: I didn't mean it in a pejorative way,
14 but I think that's the issue of which the court is speaking.
15 I think if we're talking about the failure to cross out
16 "designated to take your deposition" in parens and then in
17 parens, "the military commission," I think Mr. Gill was fully
18 aware of what was going -- this was not a subpoena that he
19 received cold about a proceeding of which he was unaware where
20 there might be some uncertainty as to what was expected of him
21 or where he was to appear. He understood fully what was going
22 on. He's a lawyer. He understands the technical -- given
23 these circumstances and given his legal training, I think

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1 doesn't necessarily carry the day here.

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

3 Mr. Kammen.

4 LDC [MR. KAMMEN]: I am a civilian, so I guess I'm
5 confused, but I had always thought that courts-martial were
6 extraordinarily adversarial proceedings. So when the
7 prosecution says that only by having people appear in -- at
8 the Mark Center, that's the only vindication and that what
9 apparently works in courts-martial all over the military isn't
10 adequate, I have to say that that's -- I'm pretty skeptical of
11 that.

12 But again, if the rule -- and if what we're going to
13 have is everyone goes to the Mark Center, okay. I don't want
14 to point out, because we -- you know, this is the most
15 wasteful thing imaginable, but apparently the Government, big
16 G, or prosecution thinks it's an appropriate use of resources
17 to fly, I guess, Mr. Quinn from Corpus Christi to
18 Washington, D.C., have him spend three or four days in a
19 hotel, or however long it takes until we have his testimony,
20 and fly him home, as opposed to perhaps going to the U.S.
21 Attorney's office in Corpus Christi or San Antonio, Texas,
22 where there's numerous military bases, and perhaps driving a
23 few hundred miles, now, that's fine.

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1 But on at least one motion we're going to be hearing
2 about, the government's going to be complaining about the
3 money, and so that's -- you know, I just think that, you know,
4 if we don't care about the money, that's fine. And if the
5 rule is everybody goes to the Mark Center, so be it. But I
6 don't want to come down here, you know, six months from now or
7 a year from now when we're in really adversarial stuff and
8 where, all of a sudden, people aren't having to go to the Mark
9 Center because it's inconvenient.

10 Now, Mr. Gill -- you know, I don't know about the
11 technicalities. I mean, that's on him. But, you know, I
12 think it's pretty clear he would go to some place close. And
13 so it does seem to me, rather than -- and they say, okay,
14 they're vindicating our right, they're vindicating our right
15 to essentially have a guy arrested, brought to D.C. under who
16 knows what circumstances. Are they going to hold him in a
17 cell overnight? I mean, what are they going to do?

18 And then, of course, how -- if he's litigious now,
19 how is he going to be as a witness? You know, we have an
20 interest in a witness who is rested, who is, you know, in a
21 position to give testimony, you know, clear-headed.

22 Now, I understand this is his doing, and I'm -- you
23 know, that's on him. By the same token, if there is a middle

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1 ground, it seems to me that before we start arresting people,
2 that's a preferable situation. And again, we are really
3 concerned about what this is going to look like. They say
4 they're not going to use deadly force. Okay. Great. Glad
5 we're not going to kill him over this.

6 MJ [Col SPATH]: Well, I mean, we do these in courts -- I
7 mean, in courts-martial. We have issued warrants.

8 LDC [MR. KAMMEN]: Yeah. I understand.

9 MJ [Col SPATH]: I mean, that part happens all the time.
10 I'd like to think the people who execute the warrant of
11 attachment, assuming that it will be the marshals, know what
12 to do.

13 LDC [MR. KAMMEN]: My experience has been that sometimes
14 the marshals say, okay, you're -- you know, we hold you in --
15 you know, the -- I don't know if it would be Alexandria or
16 where they'd hold him in federal custody until he appeared.
17 Sometimes they may do it differently, I have no idea. But
18 again, when there is a middle ground -- if this were the --
19 for example, if we were in court in Virginia, he would have to
20 come to court. Everyone would have to come to court. But
21 given the fact that there's VTC locations all over the
22 country, and certainly plenty of VTC locations way closer than
23 Virginia, I don't know that that's a particularly unreasonable

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1 request. If you think all his other requests are ridiculous,
2 I still think that one is not.

3 MJ [Col SPATH]: Let me ask, General Martins, the -- it
4 has more to do with my understanding. We're in a SCIF here.
5 Obviously it is TS-capable, that's why we're here. We know
6 that. My belief is that any facility we use has to have the
7 same clearance requirements. So I -- I remember Dr. 97
8 testifying from another location. I didn't pay much mind of
9 the location, but if it was El Paso, it was probably
10 Fort Bliss, so I assume they do have a secure facility. I
11 just don't remember. Am I right?

12 CP [BG MARTINS]: Well, Your Honor, to back up, now we're
13 litigating why we're using this type of witness testimony,
14 but ----

15 MJ [Col SPATH]: I mean, he is going to testify, I
16 believe, regarding -- I mean, we're going to work on this
17 because he said he would come. And if we don't have the
18 ability to force his attendance by VTC, the commissions really
19 do have no authority. So we're going to figure out how to do
20 that and let them fight out -- not you, Mr. Gill and
21 company -- go fight all they want in whatever manner he wants
22 to go fight because he is bringing this upon himself. Because
23 he sat right here and said to everybody watching, I'll be

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1 there, knowing it was going to be the Mark Center. I'll even
2 come down to Guantanamo. Everybody can change their mind, but
3 the compulsory process piece is easier.

4 My only question has to do with the one witness on an
5 issue that is not going before the court members yet. And
6 while it may or may not be confrontational when we
7 cross-examine -- recross-examine him and redirect, am I
8 correct that it has to be a facility that has the same
9 clearance ability?

10 CP [BG MARTINS]: Your Honor, it does not. If I can
11 direct you to the rule that helps us here. It's 703(c)(3).
12 And this is what is at work and why I think counsel's comments
13 have muddied the water a little bit here. The -- you are the
14 one who can approve testimony by a remote location. If both
15 parties agree, we're in a different world, because a defense
16 counsel -- a defendant can say I'm approving that for the
17 purpose here, I'm not going to challenge it, I'm not going to
18 lodge constitutional objections, I'm not going to lodge
19 confrontation objections. That puts you in a different world.

20 If you're in a situation where one of the parties
21 says no -- and frankly, we may say no, because we anticipate
22 the objection later because the testimony wasn't supported by
23 the technology. You know, you get to a key portion, you're

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1 confronting somebody and then, you know, you get a blackout or
2 you can't show a document. So there are standards here that
3 ought to play into that three-pronged analysis that you're
4 required to do under the balancing, balance all probative
5 factors including but not limited to the need of either party
6 for personal appearance of the witness.

7 So need is crucial here. And you can determine the
8 issue is quite collateral, it's not, you know, fundamental to
9 the merits and so forth. The remote and unique situation of
10 the forum, we have that, and the logistical difficulties in
11 obtaining the presence of the witness physically here. So the
12 need of the party for personal appearance is a big, big
13 factor. It could result, particularly if both parties agree,
14 we'll let that witness testify from somewhere else, and
15 everybody going in understanding the limitations on the video
16 teleconference, but with you in particular weighing all of
17 that.

18 So there are circumstances in which remote location
19 could be pre-approved as something other than where we
20 strongly urge the commission to do this witness, in light of
21 the sharply adversarial nature of the testimony to date, and
22 that ought to be the default setting. And that before you
23 ever make a decision like this, we get a chance to explain how

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1 difficult it might be to just sort of, well, we'll just have
2 him show up at a conference room somewhere in some fort. It
3 really doesn't work that way and we have to be ready for an
4 adversarial process.

5 So the previous examples are essentially inapposite
6 counsel raises. Thank you.

7 LDC [MR. KAMMEN]: Let me just ask what rule General
8 Martins just cited to.

9 MJ [Col SPATH]: He was citing 703(c)3.

10 LDC [MR. KAMMEN]: That's -- I don't know that we read
11 this rule quite the way he does, but that's a different issue.

12 MJ [Col SPATH]: Well, it has to do with production of
13 witnesses, and I realize -- as you read up above, it has to do
14 with on the merits or interlocutory questions, and this
15 clearly being one of the interlocutory questions.

16 LDC [MR. KAMMEN]: Right, but we ----

17 MJ [Col SPATH]: I'm just trying to work through -- again,
18 I appreciate everybody assisting with this. I'm trying to
19 work through it. I have given you a pretty good idea of where
20 we're heading. It's a matter of where we're going to require
21 him to be.

22 LDC [MR. KAMMEN]: Because what I just heard at a minimum
23 is this, and it's absolutely my concern, because what I just

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1 heard is the default setting should be the Mark Center unless
2 they choose it should be somewhere else.

3 MJ [Col SPATH]: That is not what I heard, but -- what I
4 heard is you all might agree on a particular witness and you
5 two might come to me and say, we've talked and we've agreed
6 that for this witness they can show up in some conference room
7 that has a VTC capability because of the nature of the
8 testimony, it's not particularly combative, it's not going to
9 be a difficult cross, we don't need technology. That's what I
10 heard.

11 What I heard is the default position is the Mark
12 Center, but maybe you all at one point, because you talk more,
13 and you talk and you come up with an agreement and you say,
14 for this witness, we'll just do it from this conference room
15 and I should not get in the way of that. And I concur with
16 that.

17 LDC [MR. KAMMEN]: Sure. Maybe I misunderstood.

18 MJ [Col SPATH]: That is what I heard, and General Martins
19 is nodding his head. That's what -- okay. That's what I
20 heard.

21 LDC [MR. KAMMEN]: Okay. Because -- okay. Then, I mean,
22 I ----

23 MJ [Col SPATH]: So I think we have much agreement on

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1 witnesses going forward. The question for me being, I'll look
2 at this rule and then, of course, as you cited me to (c) --
3 I'm sorry, (e) -- let me get there -- (e)(2)(F) and (G), which
4 also deal with these issues. So I appreciate it.

5 LDC [MR. KAMMEN]: Yeah, I mean, I guess -- I still
6 haven't heard anything other than if there's no security
7 issues, and I don't know that there's anything in Mr. Gill's
8 redirect that would be classified.

9 MJ [Col SPATH]: No, I don't think there will be. I think
10 the issue is the number of documents that we plan to show
11 Mr. Gill and the difficulty if you don't have a facility that
12 is set to demonstrate -- deal with documents like that.

13 LDC [MR. KAMMEN]: That's fair. And if there's no place
14 like that at -- I don't know if the War College is in Rhode
15 Island or the Naval Justice Training Center, if they don't
16 have this, which I don't know, then sure. But again, these --
17 it just seems to me that what we have here is the default
18 setting is the Mark Center without any real consideration of
19 anything else.

20 And certainly, given his request, you know, I agree
21 with you, he said he would be here. But then apparently after
22 he felt he got -- and as I understand it, he wanted to be
23 activated -- the only way he could come to Guantanamo Bay was

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1 to be returned to active duty and that couldn't happen and
2 whatever.

3 So, you know, again I -- our concern going forward is
4 just have a clear understanding really of what the rules are
5 going to be and to what extent they're really going to apply
6 to both sides equally.

7 MJ [Col SPATH]: All right. This one will be reasonably
8 straightforward. I'll work to get rulings done. I know the
9 trial judiciary likes it when I just rule from up here so that
10 they can catch up to me.

11 But first with the ex parte filing, I do not want to
12 accept an ex parte filing regarding a motion to issue this
13 warrant of attachment. The defense is going to get to see it.
14 They should get to see it. It is -- it should be open to
15 anybody who wants to see it and it shouldn't be ex parte,
16 because that does not bring light to the process. That makes
17 it look like there's something not to share and that's not
18 the case. We all know where we are with Mr. Gill. We'll mark
19 your filing. It's not going to be ex parte, so we'll deal
20 with that.

21 The other piece is the writ of attachment. I'm going
22 to sign it. Findings to follow. But we were quite clear.
23 And I understand how the Mark Center has assisted, just from

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1 reviewing the record and the number of VTC issues that
2 occurred in the past before I got here and how many times VTCs
3 cut out or were unavailable, which tells me that communication
4 here can be a challenge. And since we've had witnesses
5 testify from the Mark Center, they have been almost seamless.
6 Almost seamless. Including the ability to show documents.
7 And in the case of Mr. Gill, there's going to be a lot of
8 documents; and that process is painful enough when you do it
9 by VTC, incredibly painful.

10 And this issue we need to resolve anyway here at the
11 commissions, because we're going to have these issues come up
12 as we head towards trial with any number of witnesses. And so
13 if that is part of the appellate fight, if Mr. Gill wants to
14 take it on, then he can do so. Maybe he will just comply, I
15 don't know. But we'll get that signed.

16 I do agree that it is not going to happen quickly
17 enough, unless all of a sudden he hears that I've signed this,
18 and he says I'll testify and I'll make my way down there.
19 Otherwise, it's not going to happen quickly enough for us to
20 deal with it this week.

21 So what I would like to do is take the testimony of
22 the two witnesses who are available so that we have them on
23 the record. And the same deal: If Mr. Gill changes the

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1 landscape, those two witness also come back to answer any
2 questions we need to. If what we hear in redirect and recross
3 alters the landscape, we will have those two witnesses
4 available again if we need them.

5 I'm not suggesting what he says will change the
6 landscape, but because we're taking them out of order of
7 finalizing Mr. Gill's testimony, if something happens, we'll
8 have them come back and finish and answer any outstanding
9 questions. Again, I'm not saying that's what will happen,
10 maybe it won't. But -- so that's where we're at.

11 Mr. Kammen, in regard to the two witnesses, do you
12 have any preference as to which of the two is first? They're
13 your witnesses.

14 LDC [MR. KAMMEN]: Mr. Toole would be our preference.

15 MJ [Col SPATH]: And it is my understanding that Mr. Toole
16 will be available when we pull up the VTC?

17 TC [MR. MILLER]: Yes, Your Honor. For the record, I'm
18 going to hand a copy -- a full copy with the affidavits and
19 the attachments to Mr. Kammen. I'd also point out, I
20 understand the court does not want these things to be filed
21 ex parte in the future. We did not file it under seal so, as
22 far as transparency is concerned, it's a public document.

23 MJ [Col SPATH]: Perfect. Thank you. Let's not --

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1 they're not helpful to be ex parte. I wouldn't do that in a
2 courts-martial and there's no reason to do that here.

3 TC [MR. MILLER]: I understand, Your Honor. Thank you.

4 MJ [Col SPATH]: Thank you. What I would like to do then
5 is get Mr. Toole's testimony. It's just a bit after 2:00.
6 Let's see where we get with him today. I want to reserve a
7 piece of time at the end of the day to argue the Dalmazzi
8 issue. I plan to spend some time on that tonight. So I'm
9 hoping we save some time.

10 LDC [MR. KAMMEN]: Can we perhaps do that in the morning?

11 MJ [Col SPATH]: We -- yes, that will work. We can do
12 that first thing in the morning tomorrow. I want to spend
13 some time with that, because if I can give you all where
14 that's going, that will help you in all of the issues with
15 Limburg that are outstanding. So I want to do that for you.

16 So my proposal is we'll take a ten-minute recess and
17 let you all get the witness available and then we'll come in
18 and hear the testimony of Mr. Toole.

19 Mr. Kammen.

20 LDC [MR. KAMMEN]: I just have one administrative -- you
21 entered the order, I think it was last week in the middle of
22 the week, about -- regarding Mr. Toole -- essentially granting
23 Mr. Toole and ----

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1 MJ [Col SPATH]: Mr. Toole and Mr. Quinn.

2 LDC [MR. KAMMEN]: We haven't -- I'm not sure to what
3 extent documents need to go to the security officer. We
4 haven't done that because we just didn't have the time. Now,
5 they're all documents that have been produced by the
6 prosecution. I don't see any reason to believe any of them
7 contain anything or even come close to being classified. But
8 there could be quite a lot of documents and I just -- I
9 understand the rule is three days, I don't think we had three
10 days.

11 MJ [Col SPATH]: I understand.

12 TC [MR. MILLER]: Lieutenant Morris can answer that.

13 MJ [Col SPATH]: Let's do that. It all relates to
14 Mr. Toole, at least at the moment.

15 Lieutenant Morris.

16 ATC [LT MORRIS]: I would ask, Your Honor, do you need any
17 information from the government on that? We have produced, in
18 Your Honor's order, I think it was in 00, asking us to produce
19 the information by Thursday. We did so.

20 And as to the rule of three days, obviously that's
21 out of our control. And that is, you know, for everyone's
22 protection. And so we are standing by if you have any
23 questions.

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1 MJ [Col SPATH]: I don't. What I'm going to do, we're
2 going to make it a 15-minute break and I'm going to let you
3 all talk. The security officer is here. Last time we had
4 some documents we displayed without being able to display them
5 to the public. We were able to display them to the witness so
6 maybe that's the road ahead. Let's figure out if we can get
7 the testimony of Mr. Toole. That would be helpful, since he's
8 waiting. And if we can finish with him, we can start with
9 Mr. Quinn. And tomorrow we'll take up the Dalmazzi issue
10 early, along with some others.

11 Mr. Kammen, we can discuss the denial of those
12 witnesses at some point this week, too, so you can make the
13 record on that. Because when I granted Mr. Toole and
14 Mr. Quinn, I denied a number of witnesses, at least at that
15 point, and we'll cover that, too.

16 LDC [MR. KAMMEN]: Yes, including one that the government
17 had already agreed to ----

18 MJ [Col SPATH]: I understand.

19 LDC [MR. KAMMEN]: ---- which is again kind of troubling.
20 I don't fault anybody, but the government absolutely complied
21 with the order of production on Thursday. But if you have a
22 three-day rule, there's simply no way for us to meet that, and
23 so ----

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1 MJ [Col SPATH]: I understand. I don't have any other
2 questions. Thank you, Lieutenant Morris.

3 Let's take 15 minutes. If there's any issue with
4 getting the witness on, let me know. I'll see you then.
5 Court's in recess.

6 [The R.M.C. 803 session recessed at 1413, 17 October 2016.]

7 [END OF PAGE]

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