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1 [The R.M.C. 803 session was called to order at 1446,
2 17 October 2016.]

3 MJ [Col SPATH]: This commission is called to order. All
4 of the parties who were present before the recess are again
5 present. Defense Counsel, call your first witness.

6 LDC [MR. KAMMEN]: Your Honor, our first witness will be
7 Mr. Mark Toole. And for the record, we consulted with the
8 security people. It's no one's fault, but because of the way
9 which the rulings -- the timing of the rulings, the security
10 officer reminds us that the rule really provides that we're
11 supposed to get him the information three days before the
12 flight which, of course, was yesterday. We didn't even have
13 the information -- some of the information three days before
14 the flight.

15 So what apparently will happen is everybody but the
16 public will see the documents which, of course, does seem to
17 fly in the face of the vaunted transparency of the --

18 [Microphone button not pushed; no audio.]

19 I am pushing. Apparently not hard enough.

20 MJ [Col SPATH]: I appreciate that. And it is through no
21 one's fault. It is -- as in any bureaucracy, there are a lot
22 of rules and we're at the mercy of them.

23 So, Trial Counsel, if you would, let's get Mr. Toole

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1 up and swear him in, thanks.

2 LDC [MR. KAMMEN]: And, again, we have a continuing
3 objection to only trial counsel being allowed to swear
4 witnesses.

5 ATC [LT MORRIS]: Mr. Toole, good afternoon, can you hear
6 me.

7 WIT: Yes, I can. Thank you.

8 ATC [LT MORRIS]: Would you please raise your right hand.

9 MR. MARK W. TOOLE, civilian, was called as a witness for the
10 defense, was sworn, and testified as follows:

11 **DIRECT EXAMINATION**

12 Questions by the Assistant Trial Counsel [LT MORRIS]:

13 Q. You may have a seat.

14 A. Thank you.

15 Q. Would you please state your full name for the record
16 and give us the location of where you're testifying from.

17 A. My name is Mark Toole. And I'm testifying from the
18 Mark Center in Alexandria, Virginia.

19 Q. Would you spell your last name, please.

20 A. Yes, it's T-O-O-L-E, Tango, Oscar, Oscar, Lima, Echo.

21 ATC [LT MORRIS]: Thank you, sir. Your witness.

22 Questions by the Learned Defense Counsel [MR. KAMMEN]:

23 Q. Good afternoon, Mr. Toole.

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1 A. Good afternoon, sir.

2 Q. What is your present occupation?

3 A. I am the deputy legal advisor at the Office of the
4 Convening Authority for Office of Military Commissions.

5 Q. How long have you been employed in that capacity?

6 A. I have been here since August 11 of 2014. So a
7 little over two years.

8 Q. And have you always held this same position as the
9 deputy legal advisor? For the -- I mean, since August of
10 2014?

11 A. Yes. But for a period of time, I was the acting
12 legal advisor as well.

13 Q. And when were you the acting legal advisor?

14 A. I think it was from October -- sometime in -- I think
15 the end of October of 2014, maybe the beginning of November,
16 until on or about, I think, March 4 of 2015.

17 Q. So what were your duties as the acting legal advisor?

18 A. They were basically to advise the convening authority
19 on matters, legal matters related to military commissions.

20 Q. Are you a lawyer?

21 A. Yes, sir.

22 Q. Could you just briefly describe your -- where did you
23 go to law school and briefly describe your career as a lawyer.

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1 A. Yes, sir. I went to Western New England University
2 School of Law and from there entered the Army as an Army judge
3 advocate. Served as an Army judge advocate for over 27 years.
4 During the course of my time, went to the Army grad course,
5 which is a degree-awarding institution, got an LL.M. in
6 military law from the Army Judge Advocate School in
7 Charlottesville. Also was sent by the Army to get another
8 LL.M. in the concentration of constitutional law from
9 Georgetown University. And that's the extent of my legal
10 education and my career in the Army.

11 Q. Okay. Have you, during your legal education or your
12 career, been apprised of the obligation of lawyers to follow
13 orders of various courts or commissions?

14 A. Yes, sir.

15 Q. What is your understanding of that obligation?

16 A. That with any order issued by someone with the
17 authority to issue the order, my duty and obligation is to
18 obey it.

19 Q. Okay. Is there any caveats to that? Do you only
20 obey the parts you like as opposed to ----

21 A. I think -- no, sir. I think the only caveat, as long
22 as the order is legal and not immoral, I think that's the
23 language regarding the order.

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1 Q. Sure. Now, coming back to your duties as the acting
2 legal advisor. My understanding, though, is one of the duties
3 of the legal advisor for the Office of the Convening Authority
4 is to provide, if you will, the -- within the bureaucracy, the
5 rating for the chief prosecution -- prosecutor; is that
6 correct? Do you supervise, technically, the chief prosecutor?

7 A. No, sir. By regulation, if the chief prosecutor is a
8 general officer, the chief prosecutor is supervised by the
9 deputy general counsel for legal counsel.

10 Q. Okay. And is that your supervisor as well?

11 A. Technically, yes, sir, I think it was.

12 Q. All right. So both you and the prosecutor have the
13 same supervising person. If the prosecutor is not a general
14 officer, would you then be his supervisor?

15 A. I think that's how the regulation is structured, yes.

16 Q. Okay. And so when -- just this one other question,
17 because it certainly bears on ----

18 A. Okay.

19 Q. ---- the overall tenor in this -- in the offices of
20 the convening authority. Do you consult with the Office of
21 the General Counsel regarding supervisory duties of the office
22 of the prosecutor; is there any consultation?

23 A. No, sir.

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1 Q. Okay. Now, as part of your duties as the legal
2 advisor, or acting legal advisor, did you have the
3 responsibility to hire or fire or supervise other legal
4 advisors who might be employed by the Office of the Convening
5 Authority?

6 A. Yes, sir.

7 Q. And how many other legal advisors during your tenure
8 from November 2014 to March of 2015 were there?

9 A. How many other legal advisors?

10 Q. Yes. To the best of your recollection.

11 A. I believe there were four.

12 Q. Okay. And who were they?

13 A. While I was the acting legal advisor during that
14 period of time?

15 Q. Yes, sir. Yes.

16 A. Was Alyssa Adams and Trisha Lewis, Lieutenant Colonel
17 Patricia Lewis; captain Matt Ryan -- or Matt Rich; and
18 initially it was Lieutenant Commander Raghav Kotval and then
19 he was replaced by Commander Gill.

20 Q. Okay. Now, was Mr. Quinn, during your tenure from
21 August to March -- August of 2014 to March of 2015, was he
22 part of the legal advisor staff?

23 A. Mr. Quinn, from the time I got here until the time he

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1 left in October, was the legal advisor/chief of staff.

2 Q. All right. So when you started, Mr. Quinn was the
3 legal advisor; when he left in October of 2014, you became the
4 acting legal advisor; is that correct?

5 A. Yes. That's correct.

6 Q. Did you remain as the acting legal advisor until his
7 return in 2015?

8 A. No. No, I think certainly my tenure was impacted in
9 March of 2015.

10 Q. Fair enough. So you were not the -- at least --
11 well, let's just flesh it out.

12 In March of 2015, you were removed from the Nashiri
13 case. Did you then leave the employment of the Office of the
14 Convening Authority?

15 A. No, sir, I did not.

16 Q. All right. So after March of 2015, what was your
17 title within the Office of the Convening Authority?

18 A. After March of 2015 until Mr. Quinn arrived, I was
19 probably, you know, deputy legal advisor/acting legal advisor
20 for cases I had not been removed from.

21 Q. All right. So you were the legal advisor for
22 everything other than Nashiri?

23 A. Again, it's not something that I ----

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1 Q. Or were there other cases that you were removed from
2 as well?

3 A. No, that was the only one. But it's not something
4 that I had thought about actually. But I guess -- I guess I
5 was still the acting legal advisor for the other cases until
6 he arrived.

7 Q. Okay. And then after he arrived, then did he resume
8 the title as temporary legal advisor?

9 A. Yes.

10 Q. And then did you become his assistant for everything
11 but Nashiri?

12 A. I was clearly the deputy legal advisor for other
13 cases, yes.

14 Q. Okay. Now, just going back in time, up until October
15 of 2014 within the Office of the Convening Authority, were
16 there discussions regarding what became known as Change 1, the
17 order that was ultimately issued directing the military judges
18 presiding over the commissions would have to move to
19 Guantanamo Bay?

20 A. I'm sorry, the first part of your question?

21 Q. Sure.

22 Between August of 2014 and let's say January 1st of
23 2015, were there discussions in the Office of the Convening

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1 Authority regarding Change 1?

2 A. Yes, certainly there were.

3 Q. Okay ----

4 A. You know, the time period I'm not clear on. You've
5 given me a broad time period.

6 Q. Well, okay. Well, let me make it more specific.
7 Without respect to time period, did you participate in
8 discussions regarding Change 1?

9 ATC [LT MORRIS]: Your Honor, I'm going to lodge an
10 objection here in regards to relevance. This -- the stated
11 basis for this witness to be here is clearly laid out in
12 defense's motion of 032MM. For them to go back and revisit,
13 you know, what happened before Your Honor's order, which
14 clearly precluded Mr. Toole, I would be interested to hear the
15 relevance of that. But -- you know, if it's just simply a
16 background question, that's fine, but if defense counsel wants
17 to go into detail of Mr. Toole's involvement, then the
18 government has a standing objection to that.

19 LDC [MR. KAMMEN]: No. We're not going into Mr. Toole's
20 involvement other than very generally. We are going, however,
21 to ask -- well, could the witness be excluded from this?

22 MJ [Col SPATH]: Yeah. Can we exclude the witness for a
23 moment? Is that easy or not? Apparently not that easy.

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1 All right. Mr. Kammen, I'm going to overrule the
2 objection at this point just for -- thank you. We've excluded
3 the witness for a moment.

4 Mr. Kammen.

5 LDC [MR. KAMMEN]: Yeah. Just very briefly, we just want
6 to know who else participated in those discussions. And
7 specifically what we're curious about is Mr. Quinn's
8 participation in those discussions. It's very limited.

9 MJ [Col SPATH]: Okay. Because the focus is post-order.

10 LDC [MR. KAMMEN]: Right. But again, who participated in
11 the discussions that led up to the order has some relevance to
12 the continuing UI, in our view.

13 MJ [Col SPATH]: Understand. Okay. Objection overruled.
14 Thank you.

15 And if we could, let's get the witness back up on the
16 screen.

17 All right. Mr. Toole, I overruled the objection.
18 I'm going to let Mr. Kammen ask the question again and you may
19 answer.

20 WIT: Thank you.

21 Questions by the Learned Defense Counsel [MR. KAMMEN]:

22 Q. And the question was: It's clear you participated in
23 discussions regarding Change 1; is that correct?

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1 A. Yes, sir.

2 Q. And would it be fair to say also that Mr. Quinn
3 during his tenure as legal advisor participated in discussions
4 regarding Change 1?

5 A. No, I don't believe that's fair to say.

6 Q. Okay. So what you're telling us is that all of the
7 discussions regarding Change 1 took place without the
8 knowledge of the legal advisor for the Office of the Convening
9 Authority; is that what you're telling us?

10 A. I think I'm telling you, sir, that -- I can't recall
11 exactly when General Ary arrived, but I think General Ary's
12 tenure and Mr. Quinn's tenure was very limited.

13 Q. Well, I'm -- sorry. Go ahead.

14 A. You may know the dates better than I recall but, you
15 know, I have no recollection of what you're addressing being
16 discussed during Mr. Quinn's tenure.

17 Q. Okay. So he had no knowledge -- your testimony is he
18 had no knowledge ----

19 ATC [LT MORRIS]: Objection. Asked and answered.

20 LDC [MR. KAMMEN]: Well, it's not.

21 MJ [Col SPATH]: Overruled.

22 Q. He had no knowledge of Change 1, Mr. Quinn?

23 A. I don't know, sir. But I don't recall ever having a

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1 discussion with Mr. Quinn, when he was here on that matter.

2 Q. And did you have any -- I'm sorry.

3 A. I'm sorry. No, you go ahead, sir.

4 Q. Did you have any discussions with Mr. Quinn after he
5 left concerning Change 1?

6 A. After he left?

7 Q. Yeah.

8 A. I did not.

9 Q. Okay. You ----

10 A. No.

11 Q. Did anyone else, to your knowledge?

12 A. I'm sorry?

13 Q. Did any other legal advisor, to your knowledge?

14 A. Not to my knowledge, no.

15 Q. Okay. All right.

16 Now, were you responsible for the -- well, okay. Let
17 me ask one other question. Did Mr. -- did Colonel Sheeran --
18 I may be mispronouncing his name, Sheeran, did he participate
19 in any of the decisions concerning Change 1?

20 A. That, I don't specifically recall if -- they weren't
21 really within his lane, per se, so I don't recall Colonel
22 Sheeran. It may have come up, frankly, but I don't recall him
23 having any kind of extensive discussions, no.

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1 Q. Well, I didn't ask about extensive discussions. I
2 asked about discussions, and ----

3 A. Uh-huh. I ----

4 ATC [LT MORRIS]: Objection. Is his question whether
5 Mr. Toole had discussions with Mr. Sheeran? Because if he's
6 asking whether Mr. Sheeran had discussions, clearly Mr. Toole
7 wouldn't have knowledge of that.

8 MJ [Col SPATH]: Lieutenant Morris, this is a motions
9 hearing. While I appreciate the objections -- I'm not saying
10 don't object. The constant objections to -- frankly, this is
11 an easy question. He wants know if there's communications
12 between these two people. He asked it, the witness indicated
13 not extensive, and he is following up on it to make sure that
14 he knows what the witness meant.

15 To rule on most of these, I have to hear the
16 testimony. This isn't the fact-finder as if we're in trial.
17 I mean, this is me trying to figure out whether or not UI
18 occurred after I issued the order. And I understand that.
19 That's all I'm trying to figure out. So your objection is
20 overruled.

21 You may proceed.

22 LDC [MR. KAMMEN]: Thank you.

23 Questions by the Learned Defense Counsel [MR. KAMMEN]:

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1 Q. Were there any discussions that you had with
2 Mr. Sheeran concerning Change 1 -- Colonel Sheeran concerning
3 Change 1?

4 A. I think so, yes.

5 Q. Okay. And would you just give us an overview of
6 those discussions?

7 A. You know, I'm reluctant to get into any kind of --
8 kind of privileged communications. I don't know, really,
9 the ----

10 Q. Well, let me interrupt you just to try and save you
11 the struggle. What you're saying is that there were
12 discussions that you regard those as perhaps some kind of
13 attorney-client privilege and or deliberative privilege and
14 you'd rather not get into the details. But they're
15 sufficiently detailed that, in your view, they would be
16 privileged; is that fair?

17 A. I think they're -- they're limited detail, but I
18 think they're sufficiently detailed that, yes, they would be
19 privileged.

20 Q. Okay. Well, if he's asserting a privilege, then
21 we'll move on at this time.

22 Now, were you -- were you responsible for hiring new
23 people as circumstances -- new legal advisors as circumstances

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1 became necessary?

2 A. I was -- I think I had a -- I think I had a say in
3 the process. And again, the one that -- that I have some
4 responsibility for was Lieutenant Commander Gill.

5 Q. Okay.

6 A. So I did -- I was aware of his interest in the
7 position, and then I did speak with him, and then I did make a
8 recommendation ultimately that he be brought aboard, yes.

9 Q. Okay. And so briefly, after you became aware of his
10 interest in the position, what did you do to vet him, to see
11 whether he would be a good fit and had an appropriate
12 background for this position?

13 A. I reviewed his resume and any other matters that he
14 had submitted, which were, I think, limited, and then I spoke
15 to him on the phone.

16 Q. Did you review any of his reference -- did you
17 discuss -- did you contact any of his references?

18 A. I did not.

19 Q. Did you contact any of his prior commanders?

20 A. I mean, I -- I did not, no.

21 Q. Okay. So in your view, an appropriate hiring would
22 be to look at a guy's resume, not check out whether anything
23 on there is accurate, and then talk to him on the phone? Is

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1 that what you're telling us?

2 A. Well, I was aware that he was a military officer, and
3 I assumed that everything he was telling me was true ----

4 Q. Okay.

5 A. ---- and ----

6 Q. Now, have you ever known in your 27 years or -- 27
7 years as an Army officer for a military officer to shade the
8 truth?

9 A. Not like him.

10 Q. Okay. I understand what you're saying, but that
11 wasn't my question. My question was, before you spoke to him,
12 did you ever -- had every military officer you had ever
13 encountered always told you the absolute, complete truth?

14 A. I -- you know, I see your point. And I -- I'm sure
15 that I've run across a couple that have stretched the truth,
16 but generally, I -- I don't believe many officers do that.

17 Q. No, and I'm inclined to agree with you. But my
18 question is -- so -- okay. So you accepted his resume at face
19 value, even though he had extensive military and civilian
20 experience; is that correct?

21 A. Yes, sir, and then just to follow up with our
22 conversation on the phone.

23 Q. Okay. And how long was that conversation?

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1 A. It wasn't -- it was probably about -- it was probably
2 about a half hour, 20 minutes to a half hour.

3 Q. All right. Could you just give us an overview of --
4 did you ask him any questions?

5 A. I did. I asked him about his resume a little bit. I
6 asked him, you know, generally was he comfortable with
7 criminal law. I asked him what he knew about military
8 commissions. I really was just feeling him out. I think I
9 probably asked him if he -- you know, what, you know, the
10 caliber of his writing experience was or research experience.
11 And I told him about the job and kind of the things that we
12 do.

13 Q. And did you ask for any writing samples?

14 A. I did not, no.

15 Q. Okay. So you just asked him whether he was a good
16 writer and good researcher?

17 A. I -- yeah. Yes, sir.

18 Q. Okay. All right. And, of course, I'm going to guess
19 he told you he really was?

20 A. Yeah, he sure did. Yes.

21 Q. Okay. Well -- and did he stress to you that one of
22 his strengths was a willingness to pay attention to details?

23 A. I don't recall that.

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1 Q. Okay. Now -- so then you recommended that he be
2 hired, and who did you make that recommendation to?

3 A. I think that I -- I don't know if -- I think
4 Mr. Quinn was gone at that time. I think I made the
5 recommendation perhaps to Colonel Sheeran and then, I think,
6 to Chief Harvey, who was the military rep for military
7 personnel in the office.

8 Q. All right. So in order to be hired, did Mr. Gill
9 have to be, I guess, remobilized so that he became Lieutenant
10 Commander Gill?

11 A. Yes.

12 Q. Okay. And did you put that in motion?

13 A. I think I did, yes.

14 Q. Okay. And in doing that, did you have any
15 consultation with anybody in the Navy who might have worked
16 with him to determine, is this a good idea or not?

17 A. I personally had no consultation with anybody in the
18 Navy, no.

19 Q. Okay. Did anybody -- when you did this, did anyone
20 say, oh, wow, don't do this, this might be a mistake, you
21 might want to take a second look at this?

22 A. No. No, they didn't.

23 Q. Okay. And were there conversations where you would

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1 have expected somebody to have told you that it was a mistake
2 if they thought it was?

3 A. I -- I don't understand that.

4 Q. Well, if you -- I don't quite know how this process
5 works, but whatever conversations you had with the people
6 within the Navy, were they sufficiently detailed that had they
7 thought you were making a mistake, you would have expected
8 them to volunteer, you might want to rethink this?

9 A. I don't -- I don't know.

10 Q. Okay.

11 A. I -- I didn't have any conversations with anybody in
12 the Navy other than Chief Harvey, who was in the office.

13 Q. Okay. So it was Chief Harvey then who implemented
14 the remobilization?

15 A. I think so, yes.

16 Q. Okay. Now, Lieutenant Commander Gill began with the
17 convening authority on approximately -- sometime in early
18 January of 2015; is that correct?

19 A. That's correct.

20 Q. And do you recall the length of his orders?

21 A. I thought they were initially like ten months or so.

22 Q. And did there come a time between January -- early
23 January and early March -- how was his work, in your opinion?

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1 A. It -- it wasn't great, but I thought that -- I
2 thought that perhaps with some help from me or mentoring that
3 he could get better.

4 Q. Okay. So it wasn't great, and you wanted to help and
5 mentor him; is that correct? You wanted to take him under
6 your wing ----

7 A. No.

8 Q. ---- and support him?

9 A. Yeah. No, not necessarily take him under my wing,
10 but ----

11 Q. But you used the term mentor.

12 A. But I thought ----

13 Q. What do you mean by mentor?

14 A. I did. I mean like more detailed guidance, more
15 focus on, you know, product and expectations. I thought that,
16 under those circumstances, that perhaps he could become a
17 better contributor to the operation.

18 Q. Okay. So you wanted to give him more detailed
19 guidance and make sure he understood your expectations as a --
20 as of March 2015, correct?

21 A. Yes.

22 Q. Okay. Now, he certainly hadn't committed any acts of
23 misconduct by March of 2015, had he?

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1 A. Misconduct?

2 Q. Yeah.

3 A. No.

4 Q. Because had he committed misconduct, you wouldn't
5 have taken him under -- you wouldn't have wanted to mentor
6 him, would you have?

7 A. Yeah. That's true.

8 Q. Okay. Now, in fact, his work was sufficiently -- I
9 don't know what the right word is -- so in -- I guess run of
10 the mill, that part of your mentoring was to recommend that he
11 be extended and that his tour be longer than originally
12 contemplated; isn't that correct?

13 A. For two months, yes.

14 Q. Okay. And ----

15 A. But ----

16 Q. ---- you consulted -- you were consulted on that
17 request, were you not?

18 A. By him?

19 Q. Well, by him and by other people within the Office of
20 the Convening Authority, correct?

21 A. No. No. Just by ----

22 Q. Just by him?

23 A. Just by him.

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1 Q. He came to you and recommended -- and asked you to
2 support his request for an additional, at least, two months?

3 A. Not at least.

4 Q. I'm sorry.

5 A. Two.

6 Q. For two months?

7 A. For two months.

8 Q. Okay. So that his mobilization would be 365 days,
9 right?

10 A. Right.

11 Q. And you had -- you and he had a discussion about that
12 as to his reasons, correct?

13 A. Well, he -- he came, he asked, he wanted it.

14 Q. And you supported it; isn't that true?

15 A. Yes, that's true.

16 Q. Okay. And, in fact, your support was sufficient that
17 on March 6, Colonel Sheeran signed a document that extended --
18 allowed Lieutenant Commander Gill's mobilization to extend to
19 365 days; isn't that correct?

20 A. Yes, for two more months.

21 Q. Well, that's -- I understand he asked for it, but
22 that's not my question.

23 My question is, isn't it correct that after you

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1 recommended that be approved, Colonel Sheeran accepted your
2 recommendation and approved that extension; isn't that true?

3 A. He approved the extension for two more months, yes.

4 Q. And that approval occurred on March 6th, 2015; isn't
5 that correct?

6 A. Yes. A couple of days after the ruling that we're
7 here to discuss, yes.

8 Q. Okay. So after you got fired as the convening
9 authority -- as the legal advisor on Nashiri, you were
10 recommending that Mr. Gill be extended for additional time in
11 the Office of the Convening Authority, correct?

12 A. That is, yes, a fair characterization.

13 Q. And it is also a fair characterization that, as of
14 the time you made that recommendation, Mr. Gill had done
15 nothing that could be characterized as misconduct; isn't that
16 true?

17 A. Well -- well, by that time I -- I think he had
18 forgotten his uniform only one time. I think he had come in
19 late and come in to me and told me he had slept -- he had
20 overslept. I don't know when the issue with -- we had a late
21 start, and I -- I think this was -- this must have been after
22 where he sent me an e-mail saying that he meant to ask me the
23 previous day, but that he was -- that he had -- he was asking

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1 not to come in to work that day because he wanted to, I think,
2 renegotiate his car lease. I think that happened after the
3 4th -- or after the 6th. So to your question ----

4 Q. Well ----

5 A. ---- I think had he committed misconduct, misconduct,
6 you know, being the operative term, no, I don't think he had
7 committed misconduct.

8 Q. Okay. Thank you.

9 Now, as you said, on March 4th, Judge Spath issued
10 the order removing you and others as legal advisors on the
11 Nashiri case; is that correct?

12 A. Yes, sir.

13 Q. And that then left Lieutenant Commander Gill as the
14 only legal advisor left who could work on the Nashiri case; is
15 that true?

16 A. That left Lieutenant Commander Gill being an
17 assistant legal advisor, not the legal advisor, and the only
18 one who was not named in the ruling, yes.

19 Q. Okay. So the answer to my question is, and I
20 apologize, is that he was the only one who could work on the
21 Nashiri case, correct?

22 A. Yes, but ----

23 Q. Tell us about the "but." Because the fact is, you

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1 continued to have input with him, didn't you?

2 A. Well, I think that you're kind of getting to the
3 substance of your motion at this point. And in regards to
4 having input with him, the input that I have -- that I had was
5 pretty much limited, I think, in almost every respect, to the
6 day of the -- the day of the ruling where, you know, on that
7 day, you know, in reading the ruling, I -- my understanding of
8 the ruling being that, you know, we were disqualified from
9 making any -- taking part in any decisions or making any
10 recommendations regarding the case from that point forward.

11 At that point, I did call the Office of the General
12 Counsel to try to take steps to, you know, forward whatever we
13 had -- or whatever we had worked on up to that point to that
14 office.

15 Q. Let me interrupt you.

16 A. Okay.

17 Q. When you talked to the Office of the General Counsel,
18 the person you spoke with and the person you wanted to forward
19 material to was Jason Foster; isn't that correct?

20 A. Yes.

21 Q. All right. And did he agree that material could be
22 forwarded to him?

23 A. My understanding was that, yes, he did agree to that.

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1 Q. And let me interrupt. Did you advise Lieutenant
2 Commander Gill of that fact?

3 A. I did. And to get to your point, I think to get to
4 your initial question, you know, I thought that, you know,
5 because we were -- because we were disqualified and Commander
6 Gill -- Lieutenant Commander Gill was not, I still thought
7 that, you know, Lieutenant Commander Gill's work required
8 significant supervision. And so my thought was that
9 Lieutenant Commander Gill would act as essentially a POC from
10 the Office of the Convening Authority to get matters forwarded
11 to someone who could take action, since we no longer had a
12 convening authority and all of the legal advisors had actually
13 been ----

14 Q. Let me interrupt you.

15 A. Of course.

16 Q. Here's what I'm hearing and you tell me if I'm wrong.
17 You felt, as Lieutenant Commander Gill's supervisor,
18 that his work needed supervision, correct?

19 A. Yes.

20 Q. And that you regarded him as -- yourself as his
21 mentor and supervisor, correct?

22 A. Yes, but not ----

23 Q. No, no, just ----

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1 A. ---- not as far as Nashiri.

2 Q. Let's not smile. And you continued to give him
3 supervision about his work, didn't you?

4 A. I -- you know, I see your point, and ----

5 Q. No, I'd like an answer.

6 ATC [LT MORRIS]: Objection, Your Honor, and -- this is
7 not -- you know, what I'm asking is he -- has he been found to
8 be a hostile witness? Is this still direct examination? I'd
9 like to hear the answers as well as Your Honor does.

10 LDC [MR. KAMMEN]: Clearly, he's an adverse witness.

11 MJ [Col SPATH]: Hold on. If I need assistance, I'll ask.

12 LDC [MR. KAMMEN]: Fine.

13 MJ [Col SPATH]: All right. Well, at least under the law,
14 I think we're safe that they have hostile interests and I
15 don't mind a cross-examination. And I can control the pace of
16 the questioning, so that doesn't worry me. So to that extent,
17 your objection is overruled. But he does get to answer the
18 questions and then you can follow up. And he was answering
19 the question. And a couple of times you've cut him off
20 because -- I recognize you have a point to make, and I'm
21 interested in hearing it, but you have to let the witness
22 answer the question and then you can follow up on it.

23 LDC [MR. KAMMEN]: Well ----

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1 MJ [Col SPATH]: You have to let the witness answer the
2 question.

3 LDC [MR. KAMMEN]: Well, but ----

4 MJ [Col SPATH]: So if you could finish where you were, if
5 you remember, Mr. Toole, and then we'll move forward.

6 LDC [MR. KAMMEN]: May I be heard very briefly?

7 MJ [Col SPATH]: Give me a moment. Do you remember
8 Mr. Toole? Do you remember the answer you were giving?

9 WIT: No, Your Honor, I'm not quite sure. I think I
10 was -- I think I was trying to recognize the point being made,
11 but I'd be happy to hear the question again.

12 MJ [Col SPATH]: And let me ask, because again, and I'm
13 going to give you an opportunity, but it's important for me to
14 get the information, of course, and get it right. When I
15 issued the order disqualifying yourself and then a number of
16 other people in the office, your supervisory responsibilities
17 remained in relation to Lieutenant Commander Gill; is that
18 accurate?

19 WIT: Yes, sir.

20 MJ [Col SPATH]: And for how long did those supervisory
21 responsibilities remain? From when I issued the order on 4
22 March, do you remember when they would have ended?

23 WIT: I think they would have ended when he left.

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1 MJ [Col SPATH]: All right. Mr. Kammen, you may proceed.

2 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

3 Q. And part of your supervisory responsibilities were
4 vetting his work; isn't that true?

5 A. You know, I -- I -- I do not believe -- right now, I
6 do not believe and I did not believe then that I had
7 supervisory responsibilities in regards to him and your case
8 and Nashiri.

9 Q. Okay.

10 A. When I was disqualified, I no longer had visibility
11 over, over any matters in regards to Nashiri. So in regards
12 to my supervisory, you know, responsibilities as to Lieutenant
13 Commander Gill, again, I had no visibility over what he did in
14 regards to that case after -- after I tried to pretty much do
15 a hand-off of any pending action from which we had in the
16 office but from which I had been disqualified.

17 Q. All right. So, for example, have you read Lieutenant
18 Commander Gill's testimony?

19 A. No, sir.

20 Q. Have you -- are you familiar with his testimony at
21 all?

22 A. No, sir.

23 Q. So when he testified that he complain -- well, let's

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1 try it another way.

2 Did there come a time afterwards where he complained
3 about your supervision to Colonel Sheeran? And specifically,
4 did he suggest to Colonel Sheeran that you were violating
5 Judge Spath's order?

6 A. I'm not sure what he told Colonel Sheeran. I did
7 hear after the fact that he did mention to Colonel Sheeran
8 that we were talking about or that we had talked about the
9 Nashiri case in front of him, yes, but I don't know
10 specifically what he told Colonel Sheeran.

11 Q. Well, did Colonel Sheeran consult with you about
12 Mr. Gill's accusations?

13 A. Colonel Sheeran did at some point afterwards -- I
14 don't know how soon after Colonel -- Lieutenant Commander went
15 to him, he did mention that Commander Gill had said that we
16 had been talking about Nashiri in front of him.

17 Q. Who is "we" that was talking about Nashiri in front
18 of Lieutenant Commander Gill?

19 A. I can only assume that he meant the other assistant
20 legal advisors and perhaps me.

21 Q. And was that true, that you were talking about the
22 Nashiri case in front of Lieutenant Commander Gill?

23 A. I -- I cannot definitively say that somebody didn't

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1 say something about Nashiri at some point in front of him. I
2 have very little recollection. I recollect -- I recollect
3 when the order about the MRI came out that somebody mentioned
4 that the MRI had been ordered. I don't know if -- I don't
5 know if somebody mentioned some other matter about Nashiri. I
6 don't recall. And I've struggled to recall what -- what he
7 could have been talking about, but ----

8 Q. Well, let me help you.

9 A. Okay.

10 Q. Let's see if we can refresh your recollection as to
11 what he might have been talking about.

12 Was it your policy to have meetings of all of the
13 legal advisors on Monday mornings?

14 A. It was.

15 Q. And did that occur in your office?

16 A. It did.

17 Q. And all the legal advisors -- you'd be behind your
18 desk and all of the legal advisors would be sitting on the
19 other side of your desk?

20 A. Yes, sir.

21 Q. And you would parcel out and make various assignments
22 to the legal officers of motions that were to be acted on,
23 matters that were to be acted on by the Office of the

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1 Convening Authority?

2 A. Not -- not exactly.

3 Q. Would you make assignments to the various -- delegate
4 assignments to the various people?

5 A. Not at that meeting, no.

6 Q. What did you do at that meeting then? Discuss the
7 weather?

8 A. Discuss the weather?

9 Q. What did you talk about if you weren't making
10 assignments?

11 A. We were -- we would discuss the requests that had
12 come in, they would have already been assigned. They would
13 get assigned when they came in. So we would, you know,
14 discuss those matters and basically, you know, make sure
15 everybody was -- was making progress with whatever they were
16 working on.

17 Q. All right. And were -- among the things that were
18 discussed in that meeting matters pertaining to the Nashiri
19 case?

20 A. No.

21 Q. Oh.

22 A. No.

23 Q. So then why -- so it's your testimony that you had

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1 separate meetings with -- or there were separate discussions
2 regarding the Nashiri case that never came up at those -- at
3 that -- Monday morning meetings?

4 A. You know, I have to apologize, because are you
5 Mr. Kammen?

6 Q. I am.

7 A. Okay. All right. Okay. Mr. Kammen, you know,
8 you -- there was one action that was in the office on the date
9 of the ruling, and that was an action from you which, you
10 know, we forwarded up in part because, you know, I think
11 you -- I think you characterized it as an emergency. And so
12 that was the one action. I don't think you submitted another
13 action for I don't know how much time after that.

14 Now, before the last session, I read your motion for
15 the first time, and I saw that you had attached an action to
16 that motion, I think you did, as one of the attachments. And
17 that was the first time I had ever seen that. I didn't -- I
18 don't know when that came in, but I don't think it came in
19 until, I don't know, like right before the CA came back. That
20 was -- so ----

21 Q. Excuse me, this is very interesting, but let's try
22 answering my question, which is, if you weren't -- is it your
23 testimony that in these Monday morning meetings after you were

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1 disqualified there were no Nashiri matters discussed?

2 A. I guess my testimony is there were no actions to
3 discuss ----

4 Q. There was nothing to discuss ----

5 A. ---- other ----

6 Q. ---- nothing about the Nashiri case required
7 discussion? Is that your testimony?

8 A. I don't know what in relation to the Nashiri case
9 would have required discussion. I don't -- I'm -- if you
10 could help me with that. You know, normally, I'm telling you
11 we would discuss actions that would come in. If you didn't
12 submit an action, then I'm not sure what I would have
13 discussed.

14 Now, I'm not telling you -- if you'll give me a
15 minute. I think in one of those Monday meetings, you know,
16 somebody may have mentioned the MRI. It may have occurred
17 there. But in -- in terms of -- there may have been
18 discussion, frankly, and okay, you know, we're disqualified.
19 But what steps more do we need to take to actually make it
20 clear that we're trying to scrupulously comply with this
21 order?

22 Q. Well, and -- didn't Mr. Gill essentially tell you the
23 steps he thought you should take to scrupulously comply with

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1 this order ----

2 A. That, I ----

3 Q. ---- correct?

4 A. I do not recall that, no.

5 Q. Okay. Well, in fact, he went to Colonel Sheeran, and
6 in -- in March, as we said, and complained that you weren't
7 scrupulously following the order, and you said that maybe
8 Sheeran talked to you about that; isn't that true?

9 A. I -- I don't know if that was in March or not.

10 Q. Okay. Well ----

11 A. But yes, I did say that, yes.

12 Q. And in fact, later on, after that first complaint to
13 Colonel Sheeran, there was a second complaint to Mr. Quinn
14 about your conduct; isn't that true?

15 A. That's my understanding, yes.

16 Q. Well, did Mr. Quinn speak with you about that?

17 A. He did.

18 Q. He did?

19 A. Yes.

20 Q. Okay. And what did he tell you? What did he tell
21 you about Mr. Gill's complaint?

22 A. He told me that Lieutenant Commander Gill had come to
23 him and said that we were talking about the Nashiri case. He

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1 told me that he had asked Lieutenant Commander Gill if he had
2 spoken to me about it and that Lieutenant Commander Gill had
3 said no. And that was pretty much the extent of it.

4 Q. Well, let's just make sure I understand what you're
5 saying. You understood that Mr. Gill -- Lieutenant Commander
6 Gill, went to Sheeran and complained about you, correct?

7 A. Yes.

8 Q. And then Mr. Quinn came to you and told you about the
9 complaints, right?

10 A. You're conflating the two, I think.

11 Q. Mr. Gill went to Mr. Quinn and complained about you,
12 true?

13 A. Right. Yes.

14 Q. Quinn came to you to tell you that Gill had
15 complained about you, correct?

16 A. Correct, yes.

17 Q. And he told you about what he -- he told you the
18 substance of the complaints, right?

19 A. Yes.

20 Q. Okay. And were the substance of the complaints, in
21 your opinion, correct?

22 A. No.

23 Q. Okay. So you said no, this isn't correct, or words

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1 to that effect?

2 A. I said -- yes, yes, words to that effect.

3 Q. Okay. Now, one of the complaints was that you still
4 had access -- that the Office of the Convening Authority had a
5 tracker in which various items could be tracked and accessed;
6 isn't that correct?

7 A. The legal advisor section had a -- what we call a
8 tracker, yes.

9 Q. And one of the recommendations that Mr. Gill wanted
10 to employ was that that tracker -- that the Nashiri case be
11 segregated out of that tracker into a separate tracker so that
12 you wouldn't have access -- you and the other disqualified
13 people wouldn't have access to it; isn't that correct?

14 A. I -- I have no recollection of Lieutenant Commander
15 Gill ever suggesting that.

16 Q. Really. Isn't it a fact that in April after he left,
17 that's exactly what the convening authority ordered done?

18 A. You're exactly wrong.

19 Q. Okay. We'll examine that.

20 A. No, well, I can tell you.

21 MJ [Col SPATH]: Please do. I'm listening.

22 WIT: I'm sorry.

23 MJ [Col SPATH]: That's okay. I know the video ----

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1 A. But ----

2 Q. So who did order ----

3 MJ [Col SPATH]: Let him finish.

4 A. I think you're misstating your motion. And this has
5 to do -- in some respects it's true, but I don't recall the
6 details. I don't recall when we actually created a separate
7 tracker for Nashiri actions, but I think the convening
8 authority -- I mean, the convening authority came back well
9 before Lieutenant Commander Gill left. And you characterized
10 it and you said, you know, after Lieutenant Commander Gill
11 left, the convening authority changed the tracker. The
12 convening authority -- it either was changed right before the
13 convening authority got back or it was changed as soon as he
14 got back.

15 And I think that's actually the way you characterized
16 it in your motion, but I -- but I don't know if it happened
17 right before that or he actually -- or that it happened when
18 he came back.

19 Q. I appreciate you correcting me, and you're right. It
20 was changed at the request and the insistence of Lieutenant
21 Commander Gill; isn't that true?

22 A. You keep saying that, sir, and I -- I can't agree
23 with that because I don't -- I don't -- I don't believe that's

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1 true.

2 Q. Okay.

3 So it just was changed on its own accord?

4 A. No.

5 Q. Okay.

6 A. No. We were -- we were, you know, trying to
7 determine -- again, the initial step was taken on the 4th when
8 we determined we needed to segregate ourselves from all
9 Nashiri actions. That never changed. But there were other
10 steps that could have been taken. You're highlighting the
11 tracker and, you know, that may have come up in one of those
12 morning -- those discussions that we had in our meeting. I
13 don't recall Lieutenant Commander Gill being the one who
14 promoted that idea. I do not.

15 Q. Whether he promoted the idea or not, one of his
16 complaints to Mr. Quinn or Colonel Sheeran was that it hadn't
17 been implemented for a while and that you still had access to
18 it; isn't that correct?

19 A. I don't know what he told to Mr. Quinn or Colonel
20 Sheeran.

21 Q. Because they never shared it with you?

22 A. They never discussed that with me, no, sir.

23 Q. Okay. Well, what ----

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1 A. Again ----

2 Q. What did they tell you his complaints about you were?

3 Let's try and pin this down.

4 A. That -- right.

5 Q. What did Mr. -- let's start with Mr. Quinn or

6 Mr. Sheeran -- Colonel Sheeran first, because that was the

7 March complaint.

8 What did Colonel Sheeran tell you Mr. Gill's

9 complaint about your behavior was?

10 A. He said that Lieutenant Commander Gill said that we

11 were talking about the Nashiri case in front of him.

12 Q. Okay. And he felt that that was an effort to

13 influence his behavior, correct?

14 A. You say I had ----

15 Q. No.

16 A. ---- to influence his behavior.

17 Q. Strike -- let me make the question clear for you.

18 You understood that Lieutenant Commander Gill felt

19 that the people talking about the Nashiri case in front of him

20 was an effort by you, as his supervisor, to influence his

21 actions in the Nashiri case; isn't that correct? That's what

22 he -- that's what he told ----

23 A. That's what -- that's what he told you.

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1 Q. No, that's what he told Colonel Sheeran.

2 A. No.

3 MJ [Col SPATH]: The witness doesn't know that. The
4 witness has made clear twice what the conversation with
5 Mr. Sheeran was and the complaint. Both times he has
6 testified Colonel Sheeran said his -- the complaint he
7 received is that they were talking about the case in front of
8 Lieutenant Commander Gill.

9 That's what the witness has said so far ----

10 LDC [MR. KAMMEN]: Right.

11 MJ [Col SPATH]: ---- was presented to him from Colonel
12 Sheeran.

13 LDC [MR. KAMMEN]: And I think we have the right to
14 challenge that.

15 MJ [Col SPATH]: You can challenge it. But when you say
16 it in a manner, that is what was presented to Colonel Sheeran,
17 the witness doesn't know. He wasn't there for that
18 conversation. The witness only knows what he was told by
19 Colonel Sheeran. You can certainly challenge it, but ----

20 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

21 Q. And was it true that you were talking about the
22 Nashiri case in front of Lieutenant Commander Gill?

23 A. Again, sir, I -- there were no extensive discussions

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1 about the Nashiri case in front of Lieutenant Commander Gill.
2 If, in fact, there were a couple of instances where a comment
3 was made, I'm not denying that, you know, somebody didn't at
4 one point mention something. I am confident that at some
5 point somebody mentioned that the MRI order had come down, but
6 I'm -- but I'm suggesting to you that, again, I don't know --
7 we weren't a -- I don't know what actions were -- would have
8 been pending in that case after that first one that was sent
9 up.

10 Q. Well, let's turn to the MRI order.

11 A. Yes, sir.

12 Q. You were aware -- you became aware at some point that
13 Judge Spath ordered that the convening authority arrange for
14 Mr. al Nashiri to have an MRI; is that correct?

15 A. I was aware that -- that the order had been issued.
16 I, to this day, have no idea about the scope of the order. I
17 have never read the order. That pretty much was the extent of
18 the discussion.

19 Q. Well, and did you have a discussion about that order
20 with, I believe it was either Colonel Sheeran or Mr. Quinn in
21 one of their offices?

22 A. No. No.

23 Q. And so let me put the question to you squarely. Was

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1 there a time you were in the office of either Colonel Sheeran
2 or Mr. Quinn where Mr. -- Lieutenant Commander Gill came in to
3 talk about that and he was excluded -- or -- from the
4 conversation where you wouldn't -- where you guys were talking
5 about it and excluded him from the conversation?

6 A. I think, again, the day the -- that ruling came down,
7 I recall that day for a couple of reasons. And not to be -- I
8 don't know the right word -- snippy or anything, but I recall
9 it for one reason, because that was the second day -- at least
10 the second day that Commander Gill had forgotten his uniform.

11 But I do recall him coming in to Mr. Quinn's office,
12 and I was present, and saying something about the order.
13 There was no -- there was no discussion, you know, regarding
14 that order in front of me. There was nothing -- there was no
15 conversation for him to be excluded from. In that instance
16 and in subsequent instances, I was not privy to discussions
17 regarding Nashiri matters.

18 Q. Okay. Now, at some point Mr. Gill wanted the Nashiri
19 matters password protected and you opposed that; isn't that
20 correct?

21 A. No. I -- you know, I had no idea he was claiming
22 that he was the impetus of that step. But I think you're
23 referring to a determination, again, another step to ensure

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1 that we had no involvement, that a separate folder on the
2 shared drive would be set up and all disqualified individuals
3 in the legal advisor section would not have access to that --
4 to that folder.

5 Q. Well, and that was originally what was known as the
6 scout's honor program, where you would all promise not to have
7 access to that; and then subsequently it was changed to become
8 password protected; isn't that true?

9 A. I have -- I have no idea what you're talking about
10 when you mention scout's honor program. There was a -- there
11 was a separate folder set up. There was, you know -- there
12 was no -- there was no opportunity to object and no one would
13 have objected if offered the opportunity. That was another
14 step. There was another step that was taken to create a
15 separate folder on all filings by -- by you and the Nashiri
16 team from which we were also excluded. And in those
17 instances, that was done as just kind of a progressive step
18 towards, you know, ensuring that we didn't have access to
19 those matters.

20 But, no, as far as scout's honor, I have not -- I
21 have not heard that before and that's not accurate.

22 Q. Now, so as Mr. Gill's supervisor then, from your
23 perspective, everything was going swimmingly. You guys were

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1 disqualified, he was -- he was the legal advisor for the
2 Nashiri case, and everything, from your perspective, was going
3 very smoothly, other than he was making these unwarranted
4 complaints about you; is that true?

5 A. No. No. I didn't think it was going smoothly.

6 Q. Well, what was going -- what was not going smoothly
7 other than he was complaining about you in ways that you
8 didn't like?

9 A. You know, early on in the process I -- you know,
10 after the order and we had sent matters up, I went to him,
11 either that afternoon or the next day, and he told me that he
12 had sent matters up or he had sent an e-mail to you and that
13 he had -- he didn't know what to call himself. And I thought
14 he was joking. And he said that he called himself legal
15 advisor pro tempore for United States v. Nashiri. And I said
16 okay that -- okay. I thought it was a joke.

17 Then I thought about it, and I realized he wasn't
18 joking. So I went back to him and I said, you know, Stephen,
19 you're not a legal advisor. You're not a legal advisor for
20 this case. That's a significant responsibility for which you
21 have to be designated by, under the regulation, the deputy --
22 the general counsel, the DoD general counsel. So you're not
23 legal advisor pro tempore. What you are, and you did mention

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1 this in your brief, in your motion, but it was out of context,
2 you are a facilitator. Your role is to get actions into the
3 hands of someone who can take action on them, and so from that
4 perspective I don't think he ever -- I don't think he
5 understood what I was saying.

6 Q. He's not the only one. So let me ask a few other
7 questions.

8 As the legal advisor, is your job to provide guidance
9 to the convening authority on legal issues?

10 A. As the legal advisor, as the legal advisor, that is
11 your job, yes.

12 Q. Okay. Okay. And the deputy legal advisors, I
13 assume, are to provide information and input to the legal
14 advisors, correct?

15 A. That is true.

16 Q. And the legal advisor in the Nashiri -- in -- after
17 March of 2015 -- you were the -- was who?

18 A. That's an excellent question.

19 Q. Well, there was none; isn't that correct?

20 A. Well, until Mr. Quinn came back and ----

21 Q. And that was in -- in April, correct?

22 A. That was in April, yes.

23 Q. So from March until April, when a lot of these things

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1 were occurring, the only person who could provide guidance was
2 Mr. Gill; isn't that correct?

3 A. Provide guidance to who?

4 Q. Well, that was supposed to be Mr. Foster; isn't that
5 true?

6 A. Well, then he wouldn't be -- you know, Mr. Foster was
7 not the convening authority. My question, Mr. Kammen, is who
8 was the convening authority that you're providing advice to?

9 Q. And so in your mind then, since there was, at least
10 in your view, no one to provide guidance to, he was a
11 facilitator, right?

12 A. He was getting actions to someone who could
13 potentially act on them if need be.

14 Q. And who was that?

15 A. Well, I guess that -- that's -- that's a big
16 question. Potentially -- no, sir, that is a legal issue.
17 Potentially it could have been the Secretary of Defense.

18 Q. Right. Just as Mr. Gill said. And, of course, he
19 didn't want to be bothering the -- you wouldn't have wanted
20 him to be bothering the Secretary of Defense with things
21 like my request for hours, would you? That wouldn't be
22 appropriate.

23 A. You know ----

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1 Q. Please answer the -- please, this is a simple
2 question. You wouldn't want the Secretary of Defense bothered
3 with these kinds of issues, would you?

4 A. You made a very serious request.

5 Q. Please.

6 A. You made what you characterize ----

7 Q. Please answer the -- this is simple. You wouldn't
8 want the Secretary -- you wouldn't have wanted Lieutenant
9 Commander Gill going to the Secretary of Defense about these
10 issues, would you have?

11 A. Certainly not Lieutenant Commander Gill. But you
12 made a very serious request. You characterized it, I think,
13 as an emergency request. I had -- at the point that I had the
14 action, I had to take you seriously. I had to believe that
15 what you were saying and what you were asking was accurate.

16 If you recall from your request, you had indicated
17 that you were potentially going to file a motion to abate. Do
18 you recall that?

19 Q. Sir, we'll get to my recollections at some future
20 time. Do you understand my question remains the same.

21 A. I understand ----

22 Q. And we're going to stay here until you answer my
23 question, which is, did you want Lieutenant Commander Gill

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1 going to the Secretary of Defense?

2 A. I think -- I don't know if you're listening to what
3 I'm -- what I'm -- what I'm saying. I -- again, Lieutenant
4 Commander Gill was to get actions, particularly that one, into
5 the hands of someone who could take action on it, if
6 necessary.

7 You had filed a matter in which you said you were
8 potentially going to move to abate if you didn't get, you
9 know, what you were asking for. I took that very seriously.
10 I hope you would imagine that it would be taken very seriously
11 or you would not have filed that request.

12 Q. So my question is -- so my question is, did you take
13 it seriously after March 4th, 2015?

14 A. That was why it was forwarded up, yes.

15 Q. And was it you that forwarded it up?

16 A. No. I think you know that Lieutenant Commander Gill
17 forwarded it up because I thought that he was the only one who
18 could possibly be a POC for any -- for that action or for any
19 future actions.

20 Q. Right.

21 A. We weren't going to see any more actions that came in
22 from you in this particular case.

23 Q. Now -- so I want to come back to this issue. In

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1 March, I'm unclear, did you, as his supervisor, think he was
2 doing an adequate job other than making these complaints
3 against you?

4 A. No. I thought he was doing a poor job ----

5 Q. Okay.

6 A. ---- frankly.

7 Q. And he -- since there was nothing for him to do,
8 according to you, because there was no Nashiri matters, is it
9 your testimony he was doing a poor job in other duties?

10 A. He was -- he was working on a non-Nashiri matter, at
11 least one non-Nashiri matter.

12 Q. So he was doing, in your view, a poor job?

13 A. Yes, sir.

14 Q. Right. Okay. And was any of his poor job -- did any
15 of his poor job amount to misconduct in March of -- in March
16 of 2015?

17 A. I don't know -- I think it -- I think -- I don't know
18 at what point it occurred, but then a couple things occurred.
19 One was there was an action that he was working on that he
20 forwarded to me for review, and I made some substantial edits
21 on it. I can't remember the details, but they were more than
22 you would hand-write in the margin and send back. And because
23 they were more than that, I went on the computer where I could

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1 access the file and I made changes to the document and then
2 saved them and told him -- and then went and told him, here's
3 the -- I gave him the matter back, the package back, and told
4 him that I had made the changes and just to review them and --
5 you know, if you agree, then, you know, we can talk about it.

6 And so the next day, I think it was, it was the next
7 day -- at some point, he gave me the package back and I read
8 the document and it had none of the changes that I had made.
9 And I asked him about it. And he said, well, you -- you know,
10 you never gave them to me. And I explained that we had talked
11 the day before and that I had made them on the 0: drive, and
12 saved them there and then told him about that. And he
13 insisted that they were never on the 0: drive.

14 And so while he was there, in Word you can look at
15 your recent documents, and so I looked, and the document was
16 saved on the 0: drive. But when you -- but you couldn't
17 access it because it was gone. He -- he -- this was towards
18 the end of that day, and he -- he looked very glum, as he
19 often did, and there was no real further discussion on that
20 matter.

21 But the next day, he came to me that morning and said
22 that he had accidentally -- he believed that he had
23 accidentally deleted the matter that I had put on the 0: drive

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1 and that -- and he said, and I recall this distinctly, he said
2 that he had been having problems with his Word program, which
3 now, I think, is fairly ironic, but that's -- that is what he
4 said. So that ----

5 Q. Okay.

6 A. ---- that was very odd. And that was only one
7 instance.

8 Q. Again ----

9 A. But that was remarkably -- you know, I'm not doing
10 the context justice. It was an odd exchange and I still don't
11 understand it.

12 Q. Okay. Well, I appreciate that, and that's been
13 interesting, but the question was, has he committed -- did he
14 in March of -- by March of 2015, had he committed what you
15 would characterize as acts of misconduct?

16 A. I don't recall when he came in late one morning and
17 told me he had gotten a speeding ticket, which was -- which
18 turned out to be reckless driving, for which you have a
19 mandatory appearance. I don't recall when he did that. I --
20 he did tell me about that when he came in.

21 And then shortly thereafter, I asked him, you know,
22 just offhandedly, are you going to pay the speeding ticket?
23 And he told me that, no, he was going to fight it; that the

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1 road where he got it was not marked with the speed limit and
2 the police officer had been around a curve, and consequently,
3 he was going to fight his -- that speeding ticket. So ----

4 Q. As a lawyer, is it an act of misconduct to fight a
5 speeding ticket?

6 A. No. But it wasn't a speeding ticket, it was a
7 reckless driving citation.

8 Q. Well -- and would it be an act of misconduct to
9 fight, to contest an accusation as serious as reckless
10 driving?

11 A. You're asking me if it would be misconduct to fight
12 that?

13 Q. Yes.

14 A. Well, that wasn't your original question.

15 Q. Yes. My original question, which I'm still trying to
16 get an answer to ----

17 A. Well, did you ask me ----

18 Q. ---- by March of 2000 -- by March of 2015, had
19 Mr. Gill -- you were his supervisor, and had he committed any
20 acts of misconduct?

21 A. He had shown up by that time -- or actually into
22 early April ----

23 Q. No, I'm talking about by -- let me be precise.

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1 A. Okay.

2 Q. Prior to March the 23rd, 2015, had Lieutenant
3 Commander Gill committed any acts of misconduct?

4 A. I don't know when I found out that he had not
5 completed his SF-86.

6 Q. Okay.

7 A. I don't know when that exactly happened, when I found
8 that out, but it was around that time.

9 Q. And is it an act of misconduct to be dilatory in
10 completing an SF-86? I understand you'd like it done, but the
11 question is, is it an act of misconduct?

12 A. You know, you initially asked me at one point in our
13 discussion what I talked to him about during my first phone
14 call with him. And one of the things I talked to him about --
15 you're shaking your head, sir, but ----

16 Q. Yeah, because I'm just trying to get a simple answer
17 to a simple question.

18 Is it an act of misconduct to be dilatory -- I
19 understand -- to not file an SF-86? I'm talking about
20 misconduct. I'm talking about professional misconduct here.

21 A. Right. And he's a military officer.

22 Q. Right.

23 A. So -- so ----

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1 Q. And I'm talking about military misconduct sufficient
2 to fire somebody.

3 A. Oh.

4 Q. Is that an act of misconduct?

5 A. One of the things that I talked to him about during
6 that first phone conversation was that to -- to do the work,
7 you had to have TS/SCI. And I told him -- because this is
8 what was told to me during the first time that I was talked to
9 about this position, that you -- you know, you -- you have to
10 fill out the SF-86, and that has to be done very quickly
11 because I think, you know, and -- about the length of time
12 that it takes to do the clearance process.

13 So when I found out that he had not done the SF-86 --
14 now, you characterize it as dilatory and minimize it. It is
15 a -- that was a shock. Because not only had I talked to him
16 initially before he even came on about that very thing, and
17 had operated under the assumption the whole time he was there
18 that he had done it and that his clearance process was
19 underway, I'm confident that he was told when he in-processed
20 that he needed to do it, because I think that's part of the
21 in-processing.

22 So you characterize this as dilatory. I think it's
23 far more significant than that.

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1 Q. Okay. So you would characterize it as misconduct,
2 right?

3 A. I -- I think it was a serious matter. I don't ----

4 Q. Okay.

5 A. ---- I don't know -- if I had to figure out what do I
6 charge him with, you know, as far as misconduct, if that's
7 what I -- if that's what why you're asking is it a chargeable
8 offense, I don't know. You know, I'm a civilian. Do I have
9 the authority to give him such an order, and if he doesn't
10 obey it -- I don't know. I was -- I was ----

11 Q. Let me ask you this: Prior to March 23rd, 2015, you
12 reported to Colonel Sheeran, right? He was the chief of
13 staff -- deputy chief of staff ----

14 A. Yes.

15 Q. ---- right? He was your boss?

16 A. Right.

17 Q. Right? So if there was an issue where Lieutenant
18 Commander Gill was committing misconduct sufficient that you
19 guys wanted to fire him, you two would have talked about it;
20 isn't that true?

21 A. Well, he told me about the SF-86.

22 Q. Well, I -- so this was from Colonel Sheeran?

23 A. That's how I found out about it.

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1 Q. Okay. So was that the only misconduct you talked
2 about with Colonel Sheeran in March or was there other?

3 A. Well, in March ----

4 Q. Because isn't it true that by March 23rd, you guys
5 had made a decision that Mr. Gill was going to be fired; isn't
6 that true?

7 A. No. I ----

8 Q. No?

9 A. I -- no.

10 Q. Okay.

11 A. That's not true.

12 Q. Have you seen Colonel Sheeran's letter of March
13 23rd -- actually ----

14 A. I don't know.

15 MJ [Col SPATH]: We can do that. Do you know what
16 Appellate Exhibit that is from?

17 LDC [MR. KAMMEN]: I can find out.

18 MJ [Col SPATH]: Let's find out. And I think Lieutenant
19 Morris ----

20 LDC [MR. KAMMEN]: It is from 332EE. No, I'm sorry.
21 332FF.

22 MJ [Col SPATH]: All right. Thank you. And I say that
23 only because there was some discussion about people being able

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1 to see it. That's already, I think, up on the website ----

2 LDC [MR. KAMMEN]: Right. It is ----

3 MJ [Col SPATH]: Excuse me. I'm still speaking.

4 LDC [MR. KAMMEN]: I'm sorry.

5 MJ [Col SPATH]: That's already up on the website, that
6 was some transparency; however, we can't display it publicly
7 like that. So if you will put it there.

8 LDC [MR. KAMMEN]: Yes.

9 MJ [Col SPATH]: For the people here, if you would
10 transmit that to the witness, and just to me.

11 LDC [MR. KAMMEN]: Okay.

12 MJ [Col SPATH]: Lieutenant Morris, if you want to see it,
13 you can go take a look as well or ----

14 LDC [MR. KAMMEN]: It's in one of your productions. I
15 believe it's FF. I'm sorry, it's 00.

16 MJ [Col SPATH]: 00?

17 LDC [MR. KAMMEN]: Yes.

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

19 LDC [MR. KAMMEN]: For the record, it bears Bates number
20 00149448.

21 MJ [Col SPATH]: Thank you.

22 Just to me and to the witness.

23 LDC [MR. KAMMEN]: It says AE -- our record says AE 33200

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1 discovery. I could be wrong. You guys produced it to us.

2 I ----

3 MJ [Col SPATH]: Mr. Toole, just bear with us. We're just
4 trying to figure out where the document comes from.

5 LDC [MR. KAMMEN]: It's from their production this week.

6 WIT: Yes, sir.

7 MJ [Col SPATH]: I'm trying to help identify it. This is
8 not anyone's fault. I just want to take a moment and make
9 sure we know where it comes from.

10 LDC [MR. KAMMEN]: That's fine.

11 MJ [Col SPATH]: It will just help later when people want
12 to see it, they can go find it. All right. Was it 00? Is
13 that an accurate -- hang on.

14 ATC [LT MORRIS]: No, sir. It's in production 145
15 provided to defense in response to 00 that was given to them
16 last Thursday.

17 MJ [Col SPATH]: I understand. So it has not been marked
18 yet as an exhibit?

19 ATC [LT MORRIS]: That's correct, sir.

20 MJ [Col SPATH]: All right. So our next one is 332RR.
21 Mark that. Then this will be on the web after it goes through
22 security review. Thank you.

23 I think if you put it there, there we go.

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1 LDC [MR. KAMMEN]: Okay. Now, is the witness -- can he
2 hear us?

3 MJ [Col SPATH]: Yes.

4 WIT: Yes, sir.

5 Questions by the Learned Defense Counsel [MR. KAMMEN]:

6 Q. Okay. Would you please read 332RR silently to
7 yourself and then tell us when you've had the chance to read
8 it and understand it.

9 A. Yes, sir. I've read it.

10 Q. Okay. Could you tell us, please, what misconduct you
11 guys had decided Lieutenant Commander Gill had committed other
12 than complaining about you that was -- that was sufficient
13 that you were going to fire him by March 23rd, 2015? What had
14 he done?

15 A. I have never seen this before.

16 Q. Oh.

17 A. And -- but I will -- I will say I believe it's
18 misdated. I've never -- I've never seen this before, even
19 with the correct date. But to my knowledge, you know, I don't
20 think this happened until late April.

21 Q. Well, so are you telling us that by March of 2015,
22 you had never had any discussions with respect to -- with
23 Colonel Sheeran regarding firing Mr. Gill?

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1 A. I had no idea it was even possible to do that. I
2 will say that I had conversations with Colonel Sheeran about
3 my dissatisfaction with his duty performance.

4 Q. Right.

5 A. But, no.

6 Q. And part of your dissatisfaction with his duty
7 performance was the fact that he kept complaining about you
8 interfering with the Nashiri case; isn't that true?

9 A. No.

10 ATC [LT MORRIS]: Is it -- I'm sorry to interrupt. But is
11 it possible for clarity to, under the rule of completeness,
12 include the preceding page, which is an e-mail which says,
13 "see attached"? And this -- the attachment to Appellate
14 Exhibit 332RR, I think it's important under the rule of
15 completeness, because that e-mail is dated in April and these
16 are drafts going back and forth and that is the date ----

17 MJ [Col SPATH]: I see the e-mail.

18 LDC [MR. KAMMEN]: I don't know that it is.

19 MJ [Col SPATH]: That's why I need to see it. Let me see
20 the e-mail.

21 ATC [LT MORRIS]: Showing defense counsel. Preceding
22 page.

23 LDC [MR. KAMMEN]: That's the preceding page. I don't

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1 know that it's related.

2 MJ [Col SPATH]: I'll let you know in a minute how we're
3 going to mark it.

4 Trial Counsel, I'm not going to attach it yet because
5 on its face I recognize RTS is likely to return to service.
6 What I don't know if it's in relation to this or some other
7 document. So I want to keep 332RR clear and that's the letter
8 that we have right now.

9 In your redirect, you are welcome to show the other
10 exhibits and we can certainly mark those. But what I have
11 here, the two don't necessarily connect together.

12 ATC [LT MORRIS]: Yes, Your Honor. May I have those back
13 for the redirect?

14 MJ [Col SPATH]: You may.

15 LDC [MR. KAMMEN]: Redirect on who? Is ----

16 MJ [Col SPATH]: The witness.

17 LDC [MR. KAMMEN]: This ----

18 MJ [Col SPATH]: At some point, we're going to give
19 Lieutenant Morris a turn and Lieutenant Morris is probably
20 going to do some questions and I assume that he's going to
21 show him that document. I'm not marking it right now. 332RR
22 is your letter. You may proceed.

23 Questions by the Learned Defense Counsel [MR. KAMMEN]:

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1 Q. Okay. I just want to make it clear, as I understood
2 you to say, look at it again, you had never seen 332RR before
3 today, correct?

4 A. It's no longer -- it's no longer up, but no, I had
5 not seen that before today.

6 Q. All right. So you wouldn't have any idea when that
7 was prepared or what -- how that came to be because you never
8 saw it, true?

9 A. Well, I assume it was done in April because, you
10 know, I -- I don't remember -- I mean, there was no thought
11 in -- to my knowledge in March of, you know, taking the action
12 that that memo outlines.

13 Q. Well, when did you guys decide that you were going to
14 get rid of Lieutenant Commander Gill?

15 A. I was informed it was going to happen. You know, it
16 wasn't a situation where I was consulted necessarily on, you
17 know -- you know, what do you think, Toole.

18 Q. Well, who told you it was going to -- who told you it
19 was going to happen? Colonel Sheeran?

20 A. I think in April it was Colonel Sheeran, yes.

21 Q. All right. And well -- since he's available,
22 although not available to us, we won't ask you what he said,
23 because that would be hearsay. But he told you that, in

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1 words, that he was going to fire Lieutenant Commander Gill,
2 correct?

3 A. Not him, no.

4 Q. Who was?

5 A. Mr. Quinn was back.

6 Q. Oh, Mr. Quinn was going to fire Lieutenant Commander
7 Gill. Okay.

8 And did you agree with that?

9 A. I did not object to that, no.

10 Q. No. That's not my question. Did you agree?

11 A. You know, it wasn't kind of a -- I wasn't in a
12 position to -- again, I -- I wasn't necessarily consulted as
13 to the wisdom of the decision. I could have objected, I
14 think. I don't know how effective it would have been under
15 the circumstances, but I did not object ----

16 Q. Okay.

17 A. ---- no.

18 Q. All right. So -- okay. Now, you were -- did you
19 participate in any discussions regarding the congressional
20 inquiry that allegedly was made concerning Lieutenant
21 Commander Gill?

22 A. I didn't participate in discussions about the
23 congressional inquiry. I knew of it, but no, I didn't

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1 participate in discussions on that as opposed to being aware
2 of the basis of that congressional complaint.

3 Q. Who were the architects of all of that? Sheeran and
4 Quinn?

5 A. I don't know what you mean by -- architects of all of
6 what?

7 Q. Well, who was spearheading the -- besides his wife,
8 who was responsible within the office for dealing with the
9 congressional inquiry? Colonel Sheeran?

10 A. Probably Colonel Sheeran, yeah, and Mr. Quinn. I
11 don't -- I don't know what the scope of the congressional
12 inquiry was.

13 Q. Did you ever know?

14 A. I -- I think I knew that there had been some contact
15 from a congressman's office, but I assumed that it related to
16 the matters raised by Mrs. Gill.

17 Q. Okay. Now, as his supervisor, when there was
18 misconduct, do you have responsibility to advise Lieutenant
19 Commander Gill of things he's done wrong and counsel with him?
20 Is that what a supervisor does?

21 A. What kind of misconduct?

22 Q. I don't know, whatever kind of misconduct he would
23 have done. If he were late, would you counsel with him and

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1 tell him to be on time?

2 A. Yes, if he was repeatedly late.

3 Q. And if he were habitually late, would you memorialize
4 that in some way, create a written record of things he did
5 wrong?

6 A. If he were habitually late, probably, yeah.

7 Q. Okay.

8 A. Yes.

9 Q. And did you, as his supervisor, create during his --
10 from January to when he left, create any written record
11 memorializing any acts of misconduct you thought he committed?
12 Is there anything in writing?

13 A. Well, what types of misconduct have I described to
14 you, do you think?

15 Q. Sir, my question is, as his supervisor, when he did
16 things that you might have thought were misconduct, did you
17 memorialize it? Did you put it in writing so that we would
18 know that, in fact, it occurred?

19 A. I did not make a written counseling statement of the
20 times that he forgot his uniform and did not turn around, like
21 any officer I knew, and go back and get it. I did not
22 memorialize the time -- at least one occasion that he showed
23 up late and told me that he had overslept. I did not

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1 memorialize the time that he sent me an e-mail and asked me to
2 take the rest of the day off. I did not memorialize the --
3 the matter related to the SF-86. I did not memorialize --
4 it's not misconduct, but the -- I don't know if you think
5 those things are misconduct, you think the SF-86 matter is
6 dilatory. I did not -- I did make notations on his work
7 product and things like that. But -- but to answer your
8 question, you know, ultimately, no, I didn't formally in
9 written form counsel him on those matters.

10 Q. Okay. Excuse me just a second.

11 [Pause.]

12 Q. I just want to revisit this whole notion of
13 facilitator. In your mind, Lieutenant Commander Gill was a
14 point of contact, correct?

15 A. Initially, yes, his role was to get matters into the
16 hands of somebody who could take action on them if need be.

17 Q. And his job, despite his title, was not to provide
18 legal advice, but to simply facilitate, to be a point of
19 contact, correct?

20 A. Again, initially he wasn't in a position to provide
21 legal advice.

22 Q. No ----

23 A. He was forwarding an action and then -- and any

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1 subsequent actions that you filed up to OGC. He was not, to
2 my knowledge, working on them.

3 Q. Okay. So you really didn't need him because anybody
4 who was not disqualified could be the facilitator, true?

5 A. No. I thought that, you know, I -- I did think -- I
6 obviously thought that somebody from the legal advisor section
7 who wasn't disqualified should fill that role.

8 Q. Even though they weren't giving legal advice, they
9 were just ----

10 A. Well, they -- I think, again -- I think there were
11 things as a lawyer they could probably do even in not
12 providing legal advice. I mean, I -- I think they could
13 recognize that, you know, maybe this is -- this is really hot,
14 I need to get this up to somebody really quick. And I don't
15 know if, you know -- I don't know -- I thought a lawyer would
16 be better able to be able to do something like that. I guess
17 that was my thinking. I ----

18 Q. So you wanted him to be a lawyer facilitator, right?

19 A. I thought that somebody who wasn't disqualified from
20 the legal advisor section should be able to, you know, forward
21 matters up and, if necessary, you know, communicate whatever
22 with any entity who could actually take action on those
23 matters.

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1 Q. And that was Mr. Foster, of course, for a while,
2 right?

3 A. You know, I don't -- I don't know if -- what he was
4 going to do. I don't know what Mr. Foster was going to do,
5 whether he was going to forward it up to the general counsel.
6 I don't know what was going to happen.

7 Q. Because you know ----

8 A. I didn't know what was going to happen.

9 Q. You never had any conversations with Mr. Foster, did
10 you?

11 A. You know I did.

12 Q. Oh, you did?

13 A. I told you I did.

14 Q. Okay. I misunderstood. So Mr. -- did there come a
15 point when Mr. Foster told you he didn't want anything to do
16 with this?

17 A. No. He never told me that.

18 Q. Okay. Did there come a point where you understood he
19 didn't want anything to do with it?

20 A. Yeah, Lieutenant Commander Gill told me that.

21 Q. Well, and did you have any reason to think on that
22 issue -- did you contact Mr. Foster and confirm that?

23 A. I did not.

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1 Q. Did you ----

2 A. Nope.

3 Q. You accepted what Lieutenant Commander Gill was
4 telling you?

5 A. I did, yes.

6 Q. And did it turn out to be true?

7 A. Did -- did ----

8 Q. What Lieutenant Commander Gill ----

9 A. I don't know what happened. I don't know what
10 happened to the actions that you submitted. I don't know if
11 it turned out to be true. I don't know what happened.

12 Q. Okay. Now, finally, at one point in the conversation
13 where you told Lieutenant Commander Gill he was a facilitator,
14 did you also use the term straw man?

15 A. No, I -- I never used that term.

16 Q. You've never -- of course, never used that term?

17 A. That's -- it's not even a term in my lexicon, no.

18 Q. Of course not, no.

19 A. Well, I don't know ----

20 Q. Like neither is misconduct. Thank you.

21 LDC [MR. KAMMEN]: I don't have any other questions.

22 MJ [Col SPATH]: Mr. Toole, hang on one second. Let me
23 just get an idea of how long the prosecution thinks their

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1 redirect is going to be. Bear with me for just a second.

2 Lieutenant Morris.

3 ATC [LT MORRIS]: Your Honor, I don't anticipate a lengthy
4 redirect -- or a cross-examination, Your Honor.

5 MJ [Col SPATH]: All right. Cross-examine. I know
6 we're -- and I said that.

7 So, Mr. Toole, are you comfortable that you can stay
8 for a bit longer with us tonight?

9 WIT: Yes, sir. Thank you. I am.

10 MJ [Col SPATH]: All right. Are there any time
11 limitations tonight that I need to worry about?

12 WIT: Not from me.

13 MJ [Col SPATH]: Okay. That's perfect. What we're going
14 to do is take ten minutes, give everyone in here a chance to
15 have a break, and then we'll come back in for cross and then
16 any redirect and recross. So bear with us. We'll be right
17 with you. The commission is in recess.

18 [The R.M.C. 803 session recessed at 1638, 17 October 2016.]

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