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1 [The R.M.C. 803 session was called to order at 0945,  
2 16 February 2018.]

3 MJ [Col SPATH]: Commission is called to order. All of  
4 the parties who were present yesterday are again present, and  
5 General Martins has rejoined us. Mr. Nashiri is not here.

6 Trial Counsel, do you have somebody to address that?

7 TC [MR. MILLER]: We do, Your Honor, and Colonel Wells  
8 will be handling that matter.

9 MJ [Col SPATH]: Proceed.

10 MAJOR, U.S. ARMY, was called as a witness for the prosecution,  
11 was reminded of his oath, and testified as follows:

12 **DIRECT EXAMINATION**

13 Questions by the Managing Assistant Trial Counsel [COL WELLS]:

14 Q. Major, good morning. You've appeared before the  
15 commission before. You're under oath still.

16 A. I understand.

17 Q. Did you have an opportunity to meet with the accused  
18 this morning?

19 A. I did meet with him this morning. Actually, I met  
20 with him last night to advise him that we would be in an open  
21 session today, and I delivered a letter that Lieutenant Piette  
22 had written last night. But I did meet with him this morning  
23 to remind him that he did have a commission this morning at

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1 9:30.

2 Q. And then what did he say in response?

3 A. When I asked him if he wanted to come -- he was  
4 asleep when I got there. I asked him if he wanted to come to  
5 the commission. He asked if we had the van or the bus. I  
6 told him we would have the van, and he kind of paused and  
7 thought, and said, "Then I'm just going to stay here today."  
8 And I said, "Okay."

9 And I again asked him if he wanted me to then read  
10 the statement of understanding to him in English as he  
11 followed along in Arabic the way we've done before, and he  
12 said, "Yes, thank you. That's fine." And that's what we did.  
13 I read the entire two pages to him in English as he followed  
14 along with the Arabic version. And then I asked him if he had  
15 any questions, and he indicated he didn't have any questions,  
16 and he signed the second page. He asked the linguist what the  
17 date was, and the linguist advised him it was the 16th.

18 Q. Before you is Appellate Exhibit 375K; it's three  
19 pages. Is that the same form you used to discuss with the  
20 accused about his appearance today?

21 A. This is the exact same form that I used this morning  
22 when I met with Mr. Nashiri.

23 Q. And on the second page, you've testified that that

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1 was his signature?

2 A. Yeah. So he signed the "ACCUSED" line in my presence  
3 and then dated it, and then I signed the "WITNESS" line and  
4 dated it.

5 Q. You had mentioned that he asked about the mode of  
6 transportation.

7 A. He did.

8 Q. Did you discuss with -- that further with him?

9 A. He didn't ask any other questions. And then he  
10 wanted to know whether we would be bringing the bus or  
11 bringing the van, and I advised that we'd be bringing the van.  
12 And that's when he just kind of paused, and he said, "Okay.  
13 I'm just" -- he goes, "I'm going to stay here today," and I  
14 said, "Okay." I asked him if he had any questions about  
15 anything, and he didn't indicate that he had any questions.

16 Q. Okay. With that discussion, did you form an opinion  
17 whether or not he was exercising his right not to be here  
18 voluntarily?

19 A. Yes. Because he signed the form -- he had no  
20 questions. He voluntarily signed the form. I believe he  
21 voluntarily waived his right to be here today. And then after  
22 he signed the form, I offered him a chance to go to legal  
23 meetings with his team, and he said he didn't want to go to

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1 the legal meetings either.

2 Q. And what about the discussion with the van versus the  
3 bus?

4 A. Again, he didn't ask any other questions other than  
5 that. He just said, "SJA, will they have the van or the bus  
6 today?" And I simply advised him that it would be the van,  
7 and he didn't have any follow-up questions.

8 MATC [COL WELLS]: Your Honor, I have no further  
9 questions.

10 MJ [Col SPATH]: Thanks.

11 Lieutenant Piette, any questions?

12 **CROSS-EXAMINATION**

13 **Questions by the Detailed Defense Counsel [LT PIETTE]:**

14 Q. Real quick, I want to make sure it's clear. It seems  
15 pretty clear, but just to make sure. He didn't make a  
16 decision about whether or not he was coming before he asked  
17 the question about the van, did he?

18 A. I don't know what he was thinking before he asked the  
19 question, obviously, but he did ask whether we were going to  
20 bring the van which he rode in on Monday when he came to the  
21 commission, or if we were going to have the bus available.  
22 And I simply advised him that we would have the van available.

23 Q. Okay. He didn't tell you a decision before he asked

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1 the question about the van?

2 A. Correct.

3 Q. Okay. Then the only question that he did ask you was  
4 about the van or the bus?

5 A. That's the only question he had.

6 Q. And it was after that that he then made his decision  
7 whether to come or not?

8 A. That's -- right after we had that discussion, that's  
9 when he paused, and then he just simply said, "I want to stay  
10 here today."

11 Q. Okay.

12 A. Or something to that effect, obviously.

13 Q. I know you can't get into his mind, but to the extent  
14 that you can form an opinion on it, would you say that his  
15 decision was based on the mode of transportation?

16 A. I don't know. Obviously, when we just had the bus --  
17 there were oftentimes he wouldn't come to the commissions  
18 regardless of the mode of transportation when we just had the  
19 bus, so I don't know how much that factors into his  
20 decision-making process.

21 DDC [LT PIETTE]: Thank you. I have no further questions.

22 MJ [Col SPATH]: Colonel Wells, anything else?

23 DDC [LT PIETTE]: Actually ----

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1 MJ [Col SPATH]: Hang on.

2 DDC [LT PIETTE]: I don't know if this is the time for me  
3 to make the point, but -- I don't know how much this will  
4 factor into your decision on the voluntariness. I think it's  
5 clear that his decision, while voluntary, was certainly based  
6 on the mode of transportation. I just want to make sure  
7 that's on the record. I don't know what can be done about  
8 that now, but the court can certainly expect further pleadings  
9 on that soon.

10 MJ [Col SPATH]: You read -- you read my mind on a  
11 suggested way, road ahead if this continues. Thank you.

12 Colonel Wells.

13 MATC [COL WELLS]: I don't have any questions. I would  
14 like to approach the witness to ----

15 MJ [Col SPATH]: Hand that to the court reporters. Please  
16 hand it to me after you give it to the court reporters.  
17 Thanks.

18 Let me just take a look.

19 [Pause.]

20 MJ [Col SPATH]: I don't have any questions. As always,  
21 thanks for your testimony.

22 WIT: Thanks, Judge.

23 [The witness was excused.]

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1 MJ [Col SPATH]: All right. I do find the absence is  
2 voluntary and knowing. There's the form that is read and then  
3 signed, so there's certainly an acknowledgment of the rights.  
4 And there's nothing written on this one, unlike the one we saw  
5 on Monday, which was a little different for the first time,  
6 about the mode of transportation.

7 I do believe the mode of transportation likely  
8 factors into a voluntary, knowing decision to absent yourself  
9 from the commissions. I would encourage, to the extent  
10 possible, after all of this, to file pleadings to deal with  
11 that. That's the right road ahead as we try to figure out  
12 what to do -- to do with this.

13 I don't have a lot to say. One is in relation to  
14 this alleged intrusion issue. I mentioned yesterday that --  
15 in the morning, that after I had made the best effort I could  
16 to shed some sunlight on what is classified, both sides  
17 approached my CISO to see if he would assist, because it was  
18 my CISO who went to work with the OCAs to get things, to the  
19 extent possible, reviewed, so I could read them to the public,  
20 because the public has an interest in this. That was my goal.

21 And as I said yesterday when both sides approached my  
22 CISO and said can you help, of course he called me and said,  
23 "Is this something I can do?" And I said, "Please, to the

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1 extent you can, assist."

2           In the theme I have said, I think, for four years, no  
3 good deed goes unpunished. The defense gave him some things  
4 to see if he could get declassified. The government objected  
5 to it last night and said, "That's not the full story.  
6 Lieutenant Piette needs to submit more."

7           I'm out. We're out of the business. My CISO is not  
8 helping. So the defense counsel, unfortunately, you're going  
9 to have to work through the government in the normal process  
10 of declassification, and you all can get things declassified.  
11 I've asked you for five months, I'm asking you again, to the  
12 extent possible, declassify matters surrounding the alleged  
13 intrusion.

14           I keep getting asked what. I would declassify all of  
15 it. That's what. I keep saying it. So I'll say it again.  
16 But we're out of the business. The e-mail back from the  
17 government had to do with we're objecting to the process.  
18 There's no process. It was a favor. And so now it's not a  
19 favor. My CISO is not doing it. So work through the process.  
20 Good luck. Because in five months nothing got declassified.

21           And here we are. Over the last five months -- yes,  
22 my frustration with the defense has been apparent. I said it  
23 yesterday and I'll continue to say it. I believe it's

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1 demonstrated lawlessness on their side; they don't follow  
2 orders; they don't follow direction; they don't obey  
3 commission regulations, or rules, or subpoenas, as we saw.

4           And I keep getting asked for more and more findings.  
5 I don't know what more findings to make. The record  
6 conclude -- the record contains findings. You don't have to  
7 put it on paper. We make this process as cumbersome as we  
8 can. I don't know why. I have said on the record, multiple  
9 times, I've entered findings of fact. They've been in  
10 writing, they've been verbal, they've been communicated.  
11 They're there. They're there.

12           I held a general officer in contempt. That should  
13 have stood out. And it's ongoing. And I said yesterday, I'm  
14 not oblivious to Colonel Aaron's, frankly, contemptuous  
15 behavior the first time he appeared before me when I asked him  
16 to come up here; when he scoffed at my authority and said I  
17 don't know what -- how you can make me. Well, that's the  
18 theme over here, frankly. But I'm not going to waste time on  
19 another contempt proceeding if ultimately I have determined it  
20 incorrectly. That's why we have appellate courts. And so I  
21 am waiting and continue to wait.

22           Frankly, I've been -- I've been in courts for 26  
23 years. I've been involved in courts-martial. I was very

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1 lucky in the Air Force to be involved in courts throughout my  
2 career, unlike so many advocates. I know a lot of them come  
3 in to do that and they don't get to. I've never seen a judge  
4 advocate show up in Class B's time after time. I'm not  
5 oblivious; I know what that says. What little respect you  
6 have for the commission is obvious. A short-sleeve shirt, no  
7 tie, no coat; I get it. That's the message. That's been the  
8 message from the defense for five months. And it's well  
9 received. I got it. I've heard you.

10 But I'm not going to waste time. I'm not going to  
11 get in the mud. I mentioned the Hassan case the other day,  
12 right, that judge got in the mud all about whether or not we  
13 should shave the beard, and of course ended up having to  
14 recuse himself. Because when you get in the mud, you get  
15 dirty. It doesn't work.

16 And I'm not saying I never have in my 26 years. I've  
17 come close to it here occasionally, getting dragged into it,  
18 into debates, or what I really said or what's going on. It's  
19 easy to do because we're all human. I know we all like to  
20 think that judges aren't human, too, but we are, and I know  
21 that.

22 And I tell my staff all the time, we can't get in the  
23 mud. You have to, have to, have to stay above the fray and

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1 try to navigate the rules. Not about me. I'll tell you, it  
2 was a sleepless night. The -- I laid out kind of what I  
3 thought my options were yesterday. I thought about them again  
4 last night. I thought about them overnight. I wrote and  
5 rewrote what I was going to do. I went to the gym. I thought  
6 maybe the treadmill would either calm me down -- which it has,  
7 of course. Give me more -- more reflection. It did. And I  
8 went back and looked again, and looked again.

9           Yesterday's remark by Mr. Koffsky was incredibly  
10 telling, wasn't it? "The devil is in the details." The  
11 details are pretty straightforward. I mean let's keep in mind  
12 that a witness who is the principal deputy to the general  
13 counsel wears three or four hats, all acting or whatever, very  
14 serious positions, said apparently that there's a bar rule I'm  
15 unaware of, and that is you can disobey court orders if you  
16 don't think they're ethical.

17           I went and looked last night. I went and reread the  
18 New York ones, because I was surprised by that. And clearly  
19 he was, too, because I asked him to give me the rule, and then  
20 it became, well, it depends on the question and what the order  
21 is. So then, of course, I gave him the hypothetical -- it's  
22 pretty simple -- subpoenas, rightfully served, as the  
23 government has indicated, on two DoD civilians. That

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1 hypothetical doesn't seem very hard to me. Subpoenas  
2 rightfully served on two DoD civilians that they ignored. And  
3 the answer was the devil's in the details. Remarkable. Which  
4 tells you how infected the process is and how far it goes  
5 within the Department of Defense that owns the process. And  
6 again, you all can have opinions about whether or not DoD  
7 should own the process. I've said it before, go vote. I  
8 mean, I've got nothing there. But that's what he said  
9 yesterday, right? A duty to violate orders, an ethical duty.

10           So again, like I said, I went and read my bar rules.  
11 I was shocked. What I have found again in mine is what I have  
12 found in everybody's who is here, is the ethical duty to  
13 zealously represent your client, and -- again, 1.16(d) seems  
14 pretty standard. It's in the Model Rules. Law students know  
15 it, and it's in every state that matters to this proceeding.  
16 I haven't looked at all 50 states; looked at mine.

17           But even if good cause is shown -- it doesn't even  
18 say to who, right? Even if good cause is shown, if a tribunal  
19 orders you to continue, you will continue. So even if you  
20 feel you have an ethical conflict, even if you've demonstrated  
21 it, good cause shown, you've convinced somebody I have good  
22 cause, your bar rules say too bad if you're ordered to keep  
23 going. Got to keep going.

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1           Because there's lots of reasons for that, right?  
2 What if we're on the eve of trial? What if we've invested  
3 seven years and 1.8 million dollars in your representation?  
4 What if? What if? I mean, you can think of all the  
5 hypotheticals.

6           What I think is happening is that Mr. Koffsky is  
7 conflating military orders with orders from a tribunal or  
8 military court. That's what I think is happening, and it's  
9 easy to do because DoD owns this process. So it's -- you  
10 could conflate those. I don't think it's correct. But I hope  
11 cool minds reflect on what my orders have been. I'm not  
12 ordering the Third Reich to engage in genocide. This isn't My  
13 Lai, or My Lai.

14           You know what this is? Comply with subpoenas; comply  
15 with your bar rules. And as the chief defense counsel, you  
16 are responsible to ensure that people who work for you obey  
17 the orders of the commission. Those are the extent of my  
18 orders. Not war crimes, people.

19           It's just stunning where we have come. And if you do  
20 conflate them, if you want to go out and look at military  
21 orders -- just again, for the people here who are unfamiliar  
22 with our process, you can defy a military order that you think  
23 is illegal. Illegal, by the way. However, if you go look at

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1 Article 92 of the UCMJ, the discussion about it and then the  
2 case law that follows, orders are presumed to be lawful. You  
3 violate them at your own risk, and commanders have broad  
4 discretion in giving those orders.

5           Because can you imagine what the Department of  
6 Defense would look like if we just violated orders willy-nilly  
7 as we went through the process? It would be quite a sight the  
8 next time we actually have an armed conflict that we are  
9 fighting, which we are, by the way. Imagine what it would be  
10 like out there on the battlefield. Because we've seen what it  
11 would be like here in the commissions. Frankly, by the  
12 Military Commission Defense Office and their representatives.

13           Courts and tribunals require adherence to the law, we  
14 know that. They're different than military orders. As the  
15 General Baker issue unfolded, everybody in here knows the  
16 right process, and people back there, if they think about it,  
17 will know it right away.

18           I issue many orders in a court that people disagree  
19 with. And so what people do in that circumstance is they  
20 either ask for a continuance so they can go file a writ, and  
21 we see that with our special victims counsel, we see that from  
22 defense counsel, and frankly even from the government  
23 occasionally, if it's not an Article 62 kind of appeal, right?

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1 They ask, can we have time so we can go to a superior court  
2 and file an emergency writ. And then my answer to them is yes  
3 or no, and I've given different answers on different  
4 occasions.

5           When my answer is no, remarkably, counsel show up the  
6 next day and keep going forward. You know what they're also  
7 doing? Filing a writ. They're dual tracking, and they're off  
8 trying to get help from that appellate court to see if that  
9 court will stay the proceeding. And that has happened to some  
10 of the judges who work for me; the appellate court has stepped  
11 in and stopped them. Or, of course, I pause and I say, "Sure,  
12 go file your writ, I'll wait and see what they say. I'm  
13 interested," because I recognize the authority of appellate  
14 courts and courts that are superior to me.

15           We all saw what happened here. General Baker didn't  
16 do that. He simply defied the order and said I'm not doing  
17 it. And I believe, as the commission, I know why he wouldn't  
18 do that. Because if he went to an appellate court or a  
19 superior court about the issue at hand, who excuses counsel,  
20 and then what do you do in the face of excusing counsel with a  
21 tribunal that orders continued representation and a clear  
22 mandate in your bar rules, he would have lost. I don't know  
23 if that's cynical or not; I think it's reality.

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1           I also think it's why the civilians, the two DoD  
2 civilians have yet to file anything in federal court to stop  
3 the writs, as Mr. Kammen did moments after I indicated I might  
4 require his appearance at the Mark Center. And I believe that  
5 is because they don't mind being taken to the Mark Center to  
6 testify. It will empower the behavior that has been  
7 demonstrated by MCD0, and it will continue to undermine a  
8 process they signed up to work within. Not work for, work  
9 within. They all signed up to work within the rules that were  
10 given, and they knew what the rules were when they signed up  
11 for it, and they continue to ignore them.

12           And again, alls I've done is order people to follow  
13 the Regulations for the Military Commission, the Manual, the  
14 statute, their bar rules, and comply with properly issued  
15 subpoenas.

16           These last few months, I think we can all say, have  
17 demonstrated significant flaws within the commission process,  
18 particularly within the defense organization, and it  
19 demonstrates an organization intent on stopping the system,  
20 not working within the system that they signed up to work  
21 within. If you look at their employment contracts, if you  
22 look at their rules, if you look at the standards, if you look  
23 at the Regulations for Trial by Military Commission, they all

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1 agree they will follow them. And what they are doing is not,  
2 of course. What they're doing is engaging in revolution to  
3 the system. And they've demonstrated it completely,  
4 repeatedly, and publicly with little response, encouraging  
5 them to continue to demonstrate it repeatedly, publicly, and  
6 constantly.

7 I've got to tell you, after 26 years of service, it's  
8 shaken me more than I would have expected. I've spent 26  
9 years trying to adhere to the law. I'm sure I've made  
10 mistakes. I've spent 26 years believing that adherence to the  
11 law, whether I agree or disagree with it, absent the most  
12 extreme of circumstances, is required of the participants.  
13 It's what let me be both a prosecutor and a defense counsel.  
14 Because it's not that I agree with my clients, support my  
15 clients, agree with their life choices -- and this is clients  
16 on both sides, because we have clients on both sides -- it is  
17 because my ethical responsibilities are to my client, and it  
18 is what has allowed me to do that.

19 And so when I've disagreed with a judge, I have  
20 marched on, assessing all of the responses I might have, head  
21 for the appellate court, attempt to change the system with  
22 elected officials outside of the, like, everyday process, of  
23 course, and comply with the order. Frankly, it's what called

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1 me to criminal law all those years ago. It allowed me, as I  
2 said, to be both a defense counsel and a prosecutor, and  
3 follow the calling to be a judge. It's been the strength of  
4 our system for hundreds of years, and it demonstrates why our  
5 system is better.

6           Probably rose-colored glasses. Thought about that  
7 last night, too. I took a moment to clean them; they're not  
8 as rose-colored today. And it's been pretty shaken, and it  
9 might be time for me to retire, frankly. That decision I'll  
10 be making over the next week or two. I think it might be  
11 here, because I've never seen anything like it. I'll just  
12 ponder it as we go forward.

13           But, as for going forward, I talked yesterday about  
14 all the different options I have, and I weighed through them.  
15 We need action from somebody other than me, and we're not  
16 getting it. This morning's debacle, frankly, about working  
17 with the CISO shows it. We're going to continue to spin our  
18 wheels and go nowhere until somebody who owns the process  
19 looks in and does something.

20           I've been thinking about how to resolve the apparent  
21 standstill while getting Mr. al Nashiri adequately resourced  
22 defense, which he had, consistent with what you see in the  
23 Military Commissions Act of 2009. I've reviewed all the

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1 pleadings again regarding Brigadier General Baker, Colonel  
2 Aaron, the prosecution's efforts, the testimony of  
3 Mr. Koffsky. I mean, I went through it all again to figure  
4 out where we are and what we could do to fix this.

5           Yesterday I listed kind of questions that we need  
6 answered, frankly, from a court superior to me. And again, I  
7 would have hoped we had started that process. Maybe we have  
8 and I haven't seen it, but I don't think so. There's a little  
9 bit of it in General Baker's filings in federal court, but not  
10 much. That's mostly focused on the contempt issue.

11           If General Baker's reading the statute correctly and  
12 the Manual correctly, he can excuse counsel at any time and  
13 we'll be right back here next time. Again, I don't believe he  
14 is. Doesn't matter.

15           We need somebody to tell us, is that really what that  
16 says, despite, obviously, every other court system in America  
17 thinking differently, despite the clear intent of when people  
18 make an appearance, despite the clear difference of learned  
19 counsel. Maybe I'm wrong, but nobody's asked anybody in any  
20 appellate court or court above me.

21           And then, of course, the other issue is learned  
22 counsel. Is Lieutenant Piette right, that he gets them all  
23 the time? Because that's what he thinks, right? He's said

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1 that over and over. Any questions? Nope, can't do it without  
2 learned counsel, even though I've ruled you don't get learned  
3 counsel. Nope.

4 Because again, the efficient administration of  
5 justice means we do this one time, not twice, if we can help  
6 it; and that everybody who has an interest doesn't travel down  
7 here for the next 25 years doing this. Because that's what we  
8 keep doing.

9 So hopefully somebody is going to take action. I am  
10 abating these proceedings indefinitely. I will tell you right  
11 now, the reason I'm not dismissing -- I debated it for  
12 hours -- I am not rewarding the defense for their clear  
13 misbehavior and misconduct. That would be the wrong answer.  
14 But I am abating these procedures -- these proceedings  
15 indefinitely until a superior court orders me to resume.

16 And whatever that looks like, either myself or my  
17 successor will pick it up and start going. If it is -- the  
18 superior court tells me next week, Spath, you abused your  
19 discretion, get to work, I'll get to work, or whoever takes my  
20 place. Hopefully the appellate court will give us some  
21 guidance. Maybe they'll say Lieutenant Piette, you're stuck.  
22 Colonel Spath got the law right, you don't get learned counsel  
23 if it's not practicable, and it's not practicable. Get to

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1 work. And then Lieutenant Piette can sit there and not ask  
2 questions from now until we finish the trial.

3 But that's where we're at. We're done until a  
4 superior court tells me to keep going. It can be CMCR. It  
5 can be the Washington -- or the District in D.C. They're all  
6 superior to me. But that's where we're at. We need action.  
7 We need somebody to look at this process. We need somebody to  
8 give us direction. I would suggest it sooner than later, but  
9 that's where we're at.

10 The March hearing, obviously, isn't going to happen,  
11 I don't think. Again, maybe I'm wrong. Maybe we'll have  
12 quick guidance from CMCR, and then we'll be here in March.

13 As I said, I follow the law. I follow orders. I  
14 don't just disobey them at will, scoff at the process; but we  
15 do have a situation where people are. They've demonstrated  
16 it, and we can't fix it without somebody getting involved.

17 I have great empathy to everybody involved; I really  
18 do. I mean that across the board, everybody. It's a lot of  
19 work, a lot of time, a lot of effort. It is -- it's not easy.

20 So that's what I meant when I said filings might not  
21 be particularly helpful for a little while, Lieutenant Piette.

22 We are in abatement. We're out. Thank you. We're  
23 in recess.

**UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT**

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1 [The R.M.C. 803 session recessed at 1013, 16 February 2018.]

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