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1 [The R.M.C. 806 session was called to order at 1332,
2 26 February 2016.]

3 MJ [COL POHL]: The commission is called to order.
4 Trial Counsel, any changes?

5 CP [BG MARTINS]: No changes, Your Honor.

6 MJ [COL POHL]: Mr. Nevin, any changes?

7 LDC [MR. NEVIN]: No, Your Honor, no changes.

8 MJ [COL POHL]: Ms. Bormann?

9 LDC [MS. BORMANN]: No changes, Judge.

10 LDC [MR. HARRINGTON]: No changes for Mr. Binalshibh,
11 Judge.

12 DDC [Lt Col THOMAS]: No changes for Mr. al Baluchi.

13 LDC [MR. RUIZ]: No, Judge.

14 MJ [COL POHL]: All parties again are present that were
15 present when the commission recessed.

16 Defense? Mr. Ruiz.

17 LDC [MR. RUIZ]: Thank you, Judge.

18 The focus of this motion, and I'll do my best not to
19 bleed over into other facts, but some of the facts have some
20 overlapping nature, is AE 254WW (MAH), which was styled as a
21 defense motion for appropriate relief based on unlawful
22 influence directed at the military judge, and AE 031YY (MAH
23 Supp), which was a supplement, a factual supplement to that

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 motion, Judge.

2 Judge, the -- as you are well aware in your lengthy
3 military career, and as well as through the course of these
4 proceedings, the concept of unlawful influence is one that is
5 of a particular nature to the military justice system. In
6 regular court-martials, of course, that is referred to as
7 unlawful command influence. The Military Commissions Act has
8 taken the word "command" out and applies the unlawful
9 influence principle to any person who may attempt to influence
10 the judgment of the parties to the proceeding or any attempt
11 to influence as well the judicial -- the judiciary in the
12 performance of their functions, either towards findings and
13 sentencing, or any other action of the judiciary.

14 In this particular case, as we all well know by now,
15 one of the parties to this case initiated the legal challenges
16 to the female guard policies instituted by Joint Task Force
17 Guantanamo Bay, Cuba. In AE -- on November 28, 2014, the
18 prosecution responded to that initial challenge in that
19 initial motion.

20 In that response by the prosecution, for the first
21 time we heard a basis for a defense to these actions, that
22 there was an equal opportunity policy and that the challenge
23 brought by the defense would run afoul of such a policy.

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1 So this was the first time that there was, at least
2 the issue of equal opportunity, was raised; it was squarely
3 raised by the prosecution on November 28, 2014.

4 On January 7 of 2015, this military commission, after
5 having heard arguments and briefings of the parties, issued an
6 interim order, and that interim order precluded the use of
7 female guards under very narrow circumstances. And that's
8 something I think that has been lost in addressing that issue
9 and I think it is something that is important when you look at
10 the unlawful influence issue as well as the remedy that we
11 will ask you to implement regarding this particular issue.

12 That order was narrowly tailored. It was narrowly
13 tailored because it didn't apply to all of the detainees in
14 Camp VII, it did not apply to all of the HVDs in Camp VII. It
15 simply applied to the five men who were undergoing this
16 particular military justice proceeding, and only under
17 circumstances that when moves to attorney-client visits were
18 implemented or when moves to military commission proceedings
19 were implicated. And the only restriction that was placed on
20 Guantanamo Bay in detention operations was to be there was no
21 physical limitations in transportation. In other positions,
22 positions of authority or supervisory measures, there were no
23 other restrictions that were placed on the government or the

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1 facility in terms of how to use those female guards in
2 relation to other moves. For instance, moves have continued
3 to occur with female guards to medical appointments, to ICRC
4 appointments. So this order was implemented and narrowly
5 tailored on January 7, 2015.

6 On 23 January 2015, this commission, yourself,
7 notified the parties that you had received an inquiry and been
8 put on notice that an equal opportunity complaint violation
9 had been lodged against you and it was lodged against you
10 because of the ruling -- the interim ruling on 7 January 2015.
11 That is an important fact because it establishes that as the
12 sitting military judge in this military commission who had
13 issued this ruling that governed the conduct of the parties
14 and narrowly tailored the female guards during those
15 movements, you were put on notice that because of that order,
16 an equal opportunity complaint had been filed against you as
17 the judge who had issued those orders.

18 There was also a second judge, Judge Waits in the
19 Hadi al-Iraqi case, who was implicated. The timing of the
20 complaint came, I believe it was the first day of the hearings
21 on this female guard issue and that parallel case.

22 The reason that we think the timing is important,
23 even though it wasn't this particular case, it was a virtually

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 identical order, narrowly tailored, preventing movements of
2 the detainee in that case. And the complaint was filed, or at
3 least notified on the very date that it existed, and it was
4 the date that that judge was to take evidence in the Hadi
5 al-Iraqi case.

6 Judge, as you are well aware, and I won't go through
7 a lengthy recitation of the law on unlawful influences, it is
8 a well-established principle in military courts-martial, it is
9 a doctrine that has been expanded in military commissions. At
10 the heart of unlawful influence is the desire and the
11 recognition that the actual unlawful influence exerted on a
12 proceeding, whether it's on the defense counsel in that case,
13 the parties, or the judiciary, is something that is
14 intolerable. It has been described as the carcinoma of
15 military justice, it has been described as a cancer in other
16 case law, and it has been described as something that has to
17 be eradicated, not just in actuality, but also in the mere
18 appearance of impropriety. And we certainly have had some
19 discussions about those two concepts.

20 On two occasions I think you raised the point fairly,
21 that it matters what you are aware of, and in terms I would
22 say that matters certainly towards the actual unlawful
23 influence, meaning has the commission actually been unlawfully

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 influenced, will it be unlawfully influenced when you make the
2 determination in this motion. You have heard our legal
3 motions on the underlying motions.

4 What I think it is important to think about is that
5 the analysis doesn't stop now. Of course, we only have the
6 facts that we heard up to this point, and what I mean by that
7 is when you look at the unlawful evidence case law, you are
8 looking at cases that are looking back in time when the issue
9 has been addressed, when the issue has been resolved, when
10 there has been a finding or a sentence on the case, and then
11 there has been an appeal.

12 In this particular instance, we have an interim
13 ruling. Presumably at some point we will either have the
14 extension of that ruling or we will have the ruling be
15 overturned and we will have a regime where we will go back to
16 where we were where JTF can conduct business as usual.

17 I think it is at that point and it is looking forward
18 that you must make the legal analysis in this case as to what
19 an objective observer, fully informed of all facts, would
20 believe to be either actual unlawful influence or appearance
21 of unlawful influence.

22 The reason for that is you have got to look at the
23 moment you make your decision. Let's say that you decide that

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the -- that the motion, our interim order, will be removed.
2 At that point is where I would like to key in on the analysis
3 of what a fully informed observer would be apprised of at that
4 time and perhaps how that objective observer would look at
5 that issue. And in order to do that, I think we would simply
6 look at the facts that they will have.

7 They will know that on November 28, 2014 the
8 prosecution first raised the issue of equal opportunity
9 discrimination in one of their pleadings. They will know that
10 on January 7, 2015 you issued an interim order that cut
11 against their position. That on 23 January 2015 you were
12 informed that there was an equal opportunity complaint lodged
13 directly against you, again, first raised by the prosecution,
14 subsequently challenged against you.

15 We -- we made an effort to try and ascertain where
16 the complaint came from, who it came from, and Your Honor
17 heard us and you ruled against us and we accept that. But
18 because of that, we are not able to fill that gap, and so I
19 would only ask that that not be held against us either in the
20 analysis or in argument.

21 It is also true that this military commission has, on
22 a number of occasions, rejected the prosecution's request to
23 reconsider the ruling and to lift the ruling during pendency

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 of the proceedings. I think that is fair, part of the
2 analysis in terms of actual or apparent unlawful influence.
3 But if we go through the analysis of Your Honor making the
4 determination that the order will be lifted, JTF will operate
5 business as usual, a fully informed observer objectively also
6 know these facts, Judge. That is, subsequent to your ruling
7 there was on 27 October 2015 public statements that were made
8 by the Secretary of Defense, by numerous senators, by the
9 Chairman of the Joint Chiefs of Staff. They were public and
10 political in nature. They were directly aimed at the ruling
11 and at the order of this military judge.

12 One of the prosecutor's arguments in response is that
13 the Secretary of Defense did not really know he was referring
14 to a Guantanamo judge or words to that effect. That argument
15 I would ask you to reject. It fails to have any indicia of
16 credibility, especially because the subject of the proceedings
17 was the senator was inquiring or had just commented on her
18 visit to Guantanamo Bay, Cuba, where she indicated that she
19 had spoken to a number of female guards and they had explained
20 to her the current policy and the standing order for the
21 judge, and it was in response to that inquiry that the
22 Secretary of Defense responded with the word that we have used
23 here so many times, that this was an outrageous order -- or

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 actually he agreed as well that it was an outrageous state of
2 affairs. There was additional testimony throughout the
3 hearings that lawyers were working on it and were trying to
4 get it corrected.

5 That was on 27 October 2015. The very same day, the
6 public affairs officer for Joint Task Force Guantanamo Bay
7 indicated and issued a release that said that the complaint
8 would remain open until the conclusion of these proceedings.
9 Again, Judge, you and I have had the discussion about whether
10 you actually knew that, whether me bringing it to your
11 attention actually gave you information you didn't previously
12 have, and that is fair, but that doesn't change the fact that
13 in terms of the appearance issue, this is a fact that a fully
14 informed and objective observer would have in terms of how
15 this issue has developed.

16 If we are to assume, and if we are, Judge, to engage
17 in the analysis of what a fully informed person would have,
18 this is what they would also know if you lifted your order in
19 this case. They would know that this commission took
20 testimony in this matter over a course of a number of hearings
21 and where it was indisputable that no witness that came to the
22 stand under oath, the camp commander, the assistant watch
23 commander, the Joint Detention Group commander, none of them

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ever testified that there was a security violation for the
2 detention facility. None of them acknowledged that there was
3 any compromise either of the detainees' health and welfare in
4 the facility or the safety and security of that facility.

5 During some of the questioning, Judge, you asked a
6 question of one of the counsel. The question was, well,
7 should I hold that against -- should I hold that against them
8 that they were -- in fact, were able to perform without any
9 incident. And the fact is it's not a holding against, but it
10 is simply a matter of fact. That's what happened. Part of
11 your analysis is to determine if there is a legitimate
12 penological interest. Part of that includes whether the
13 facility itself can be run without threats to the safety
14 either of the personnel in the facility, or threat to the
15 safety and the welfare of the people they are detaining.

16 The undisputable state of the evidence is that there
17 has not been a security violation and the undisputable state
18 of the evidence is that there has been no effect -- at least
19 by these witnesses -- that there has been no effect on the
20 manner in which they detain these men.

21 The fully informed objective observer would also know
22 that it is undisputed that a number of these men made the
23 decision when female guards were put in a contact position not

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 to attend attorney-client meetings and that the impact of
2 those decisions have continued to affect the attorney-client
3 relationship. I think Ms. Bormann, when she has the
4 opportunity to talk, will talk about the severe impact on her
5 case, which has, I think, at least in part, led to multiple
6 days of litigation on the health of her relationship with
7 Mr. Bin'Attash, which can't be divorced from this policy. 39
8 visits in her case. In our case Mr. al Hawsawi also refused
9 to visit and meet with us on those occasions.

10 And, Judge, let me tell you that since 2009, in
11 meeting with Mr. al Hawsawi, this has never been an issue.
12 This is not a delay tactic, it is not an ongoing jihad ----

13 MJ [COL POHL]: Mr. Ruiz, are you arguing 254Y now?

14 LDC [MR. RUIZ]: No, sir. Part of what you have to
15 determine, and if I refer you back to the ruling which you
16 issued in 254XXXX, the language that you keyed in that ruling
17 was on the disinterested observer objectively fully aware of
18 all of the facts looking at this situation, whether they
19 believe there would be unlawful influence. Right? So you
20 have to look at what that person would know.

21 Part of what that person would know is the state of
22 this record. Part of what that person would know was the
23 evidence that was developed on both sides of the equation that

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 then led to the analysis that you ultimately make. In order
2 to do that, I want to illustrate what they would know. That's
3 the testimony. I think we are presuming that they would know
4 that because it has been made public by newspapers, it has
5 been talked about publicly as well. And when someone looks at
6 this issue, they are going to have to look at it and say when
7 Judge Pohl made that decision, and let's assume you decide to
8 lift the order, they are going to look at that, again, if we
9 are looking at the appearance of unlawful influence, and say
10 did he do that because it was the right legal analysis? And
11 then in looking at the right legal analysis, they will have to
12 look at the evidence that's come forth. Or in the face of an
13 insurmountable, and I think very strong record, that there has
14 been really no compromise of facility in terms of any arguable
15 penological interest and the impact on the legitimate
16 exercise, for instance, of the attorney-client privilege,
17 statutory or constitutional, how did he arrive at that
18 conclusion, what are the facts, and that's what I want to key
19 in.

20 I don't want to relitigate 254Y, but I think in this
21 analysis it's important to at least highlight again what that
22 disinterested observer would be looking at. And, again, those
23 are the facts that have been borne out, that have been made

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 public, that would be part of the analysis of someone looking
2 at this and saying, did he make that call because it was the
3 right call? And judge, this is not to impugn your character
4 or your integrity, that is not what this is all about. The
5 appearance of unlawful influence is divorced from any such
6 judgment, and I know that you can be up on the bench and say I
7 will absolutely not be influenced, and that's fine. I will
8 take you at your word, but that's not really the question when
9 it comes to apparent or actual -- apparent unlawful influence.
10 The question is when you look at the situation, a member of
11 the public looks at all these facts, looks at the evidence
12 that was borne out, looks at the difference in competing
13 evidence that's been made available to the judiciary, it's is
14 there an appearance that there was ultimately an appearance on
15 the judiciary's review.

16 I will try to do it as efficiently as I can, but I
17 know it's important. Another fact that they will know for a
18 fact. The officer -- not officer in charge, the
19 noncommissioned officer, senior noncommissioned officer for
20 the transportation group testified that she was aware that
21 there is the existence of a memorandum that is specifically in
22 place so that females are not disadvantaged in their fitness
23 reports or their evaluations. So presumably that is something

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 that they will also be aware.

2 In circumstances where members of our military and
3 women are by virtue of a situation that is outside of their
4 control put in an extraordinary circumstance where they could
5 not perform the same duties as men, there is a mechanism
6 administratively in place, and we know this from testimony, by
7 which they will not be disadvantaged in terms of their career
8 progression, in terms of their reports and their evaluations.
9 That's on the record, and that must be weighed in analyzing
10 the impact of your ruling.

11 It is also important to understand that while we have
12 an admirable goal of bringing women -- an equal opportunity
13 for women, the materiality traditionally, Judge, has been an
14 institution that discriminates against women when it is
15 necessary because of mission requirements -- and by
16 "discrimination," I mean not overt discrimination, but in
17 terms of the sense of women in combat or lack of combat, where
18 there are reasons or policy reasons by the policy-makers why
19 there are determinations that men are more suited to do that
20 job. That is traditionally something that has been a part of
21 our culture and I say "ours" because, as you know, I am also a
22 military service member, and one we seek to eradicate.

23 But the question then becomes, Judge, I think you

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 asked it, is that a legitimate penological interest, is that a
2 legitimate interest when it comes to a detention facility, and
3 then you have the distinction between pretrial detainees and
4 post-conviction detainees.

5 When you are looking at penological interests, you
6 are talking about deterrence, you are talking about
7 punishment. In those instances you are talking about
8 rehabilitation. If we are going to have a social discussion
9 about whether gender equality is a valid and legitimate
10 interest in any organization, the answer to that I think is
11 yes. Certainly from a man who has multiple daughters, my
12 answer would be an affirmative yes. That is a valid
13 societally legitimate interest, but that's not what this
14 question is about, and that's what I think has to take place
15 in your ruling.

16 There was testimony also that will guide your
17 analysis in ultimately determining how to strike the
18 appropriate balance in the unlawful influence equation, the
19 gender coercion was used as a technique against a Guantanamo
20 detainee and that it is a real concern, not something that was
21 orchestrated or created by attorneys.

22 So, Judge, you had -- I think I answered your first
23 question that you made previously. I think it is relevant to

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the UI analysis in looking ultimately at what you will
2 balance.

3 MJ [COL POHL]: I don't disagree it's not relevant, this
4 is conflated, but I am saying if I heard the argument earlier
5 in 254Y, I can remember it when I am deciding the UI portion
6 of it.

7 LDC [MR. RUIZ]: Sure. I guess the point I should make
8 is, and then really the reason I keyed on this was actually
9 based on your ruling in 254XXXX where it seemed like there was
10 an emphasis on what -- obviously, there needs to be an
11 emphasis on it because it is the standard, what an objective
12 disinterested observer fully informed, and the "fully
13 informed" was emphasized in your ruling. And so in thinking
14 about that, I thought that makes a lot of sense. What
15 would -- at the end of the day when you make this ruling,
16 would a fully informed observer be fully informed of, and it
17 is these facts.

18 And my argument to you is if you were to rule to lift
19 this, this order, a fully informed objective observer looking
20 at all these facts in the state of this record, in the state
21 of this testimony, coupled with the legal standard, would say,
22 and I think have a reasonable concern about what motivated the
23 ruling. And, again, that's not a -- that's not a personal

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 impugning of your character, that's simply what unlawful
2 influence is supposed to prevent. It is that appearance, it
3 is that doubt in the face of the evidence.

4 The -- I think I answered the question about
5 legitimate penological interests.

6 So, Judge, when you -- to try to make sure I frame it
7 in terms of the unlawful influence, today, where we sit, with
8 an interim order, I would submit to you that to make a showing
9 of actual unlawful influence would be very difficult, if not
10 impossible, based on the record that exists before us.

11 I think we would agree that the issue ultimately will
12 be the appearance issue, and that issue, I think, should be
13 analyzed at the point in which you make your ruling, and
14 that's why we have asked for the relief that we have asked for
15 ultimately.

16 If you recall in our first supplement, we asked that
17 you recuse yourself from consideration of just this issue, and
18 the reason I did that was because I thought, well, you are
19 aware that there is a complaint against you, you are aware
20 that -- in a ruling that you have issued, you are aware that
21 there are administrative remedies and punishments that go
22 along with that. In fairness, you are also aware that you are
23 a retired judge recalled back to active duty, and not to say

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 anything, but I would assume you are not looking to promote,
2 Judge, or I am not sure if that is even administratively
3 possible. So that's fair; it's fair that you would consider
4 that as well.

5 Ultimately I think the issue then goes to the
6 appearance issue, and that's why I think you have to look at
7 it when the ruling -- when the ruling comes out in this case.

8 We have moved on from the recusal request, I think as
9 you are well aware, Judge, and the remedy then stands as we
10 believe you should affirm the interim order and make it a
11 permanent order exactly as it has been tailored.

12 You have, I think in that seconding prong, whether we
13 can respect the detainees' legitimate and sincerely held
14 beliefs, which I think has been conceded and stipulated
15 essentially to in terms of the religious belief in light of
16 legitimate penological interests, what we are asking you to do
17 is to make that interim order a permanent order. We don't
18 think you need to change anything about it because it is
19 narrowly tailored. It only applies to these men and only
20 applies in situations where it directly impacts the
21 proceedings as it stands.

22 So on behalf of Mr. al Hawsawi, what I am asking you
23 to do is simply to keep the status quo, to keep the order in

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UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 place. And we think that that is a fair and appropriate
2 balancing of all of the equities in this case, Judge.

3 Thank you.

4 MJ [COL POHL]: Thank you, Mr. Ruiz.

5 Any other defense counsel want to be heard on the UI
6 issue? Major Seeger.

7 DC [MAJ SEEGER]: Good afternoon, Your Honor.

8 MJ [COL POHL]: Good afternoon.

9 DC [MAJ SEEGER]: Your Honor, to the classic statement
10 about unlawful command influence being the mortal enemy of
11 military justice, I would in a moment adjust a few similar
12 words from Colonel Patricia A. Ham's 2006 Army Lawyer article
13 on this subject.

14 As you know, every year The Army Lawyer, a periodical
15 publication of the Army and Judge Advocate General's Corps
16 publishes an article reviewing notable cases and developments
17 in UCI over the preceding year. This is notable because it
18 shows what a pervasive or at least recurring problem UCI is in
19 the military justice system.

20 Historians sometimes observe that in studying a past
21 society, one can look at its penal prohibitions and get a
22 sense of the kind of activity that was actually going on. I
23 suggest we can apply this observation to the military justice

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 system. We prohibit unlawful command influences so
2 vigorously, because the system is uniquely susceptible to it,
3 and it happens so regularly, that we can publish yearly round
4 up of UCI cases and developments.

5 Because UCI, or at any rate the temptation to it is
6 so pervasive, military lawyers are taught to prevent it, to
7 recognize it, to stop it when it starts, and to help the
8 leaders they advise to cure, remediate and cleanse the record
9 when they go too far, as they not infrequently do.

10 That's what makes it so surprising that the
11 statements we are discussing were made at all and that they
12 have been allowed to stand apparently unremedied for so long.
13 If they have been remedied or corrected, I should welcome that
14 information.

15 Anyway, Your Honor, the words from Colonel Ham's
16 article that I would add here are these: She wrote that
17 unlawful command influences is "the single most dangerous
18 assault on the fairness and the appearance of fairness of the
19 system."

20 Her paragraphs concludes, "Simply stated, unlawful
21 command influences turns military justice into an oxymoron."

22 As noted in the pleadings and by Mr. Ruiz, the
23 Military Commissions Act prohibits more expansively than the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 UCMJ prohibits unlawful command influence. The act prohibits
2 such influence regardless of source and thus provides greater
3 protection than the UCMJ.

4 Applying the historian's rule of thumb to which I
5 have referred, we might infer that Congress foresaw that the
6 temptation to improperly influence a military commission might
7 be even greater than the temptation to improperly influence
8 our more regularly constituted military justice system.

9 On the issue of female guards, Your Honor, unlawful
10 influence has been intentionally and brazenly injected into
11 this case by the Secretary of Defense, by General Dunford, by
12 General Kelly, by Senator Ayotte and others.

13 Regardless of whether you were initially aware of
14 them, their words affect the proceedings. They are directed
15 at you in the exercise of your sole discretion in the matter
16 of the interim order, AE 254JJ. The overall tenor of the
17 statements by these senior officials constitutes an express
18 position on your interim order, and that's not good.

19 No one, it seems, gave them the classic judge
20 advocate advice that if they must talk about the proceeding at
21 all, they should "talk process, not results." If they did
22 receive such advice, they didn't follow it.

23 Nor did these officials take any care in their public

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 pronouncements. To emphasize that whatever their feelings,
2 the independence of the judiciary must remain paramount.

3 Nor, to my knowledge, in the aftermath of their
4 comments, have they issued any remedial statements to cure the
5 harm. Their comments were simply wrong. An attack on the
6 independence of the military commission's trial judiciary and
7 it may be that they remain unmodified in the public record.

8 Every day such comments remain unretracted makes the
9 situation worse. And, again, if corrective follow-ups have
10 been issued, I would welcome that information.

11 In addition to the public comments of these
12 officials, you should also consider the visit of Senator
13 Ayotte to the Guantanamo Bay detention facilities in
14 October 2015 when it was known there would soon be testimony
15 on your interim order. As noted in Mr. Mohammad's supplement,
16 it seems extremely probable, it is a reasonable inference from
17 the circumstances that the trip was planned in conjunction
18 with the Department of Defense as a result of the fact that
19 the female guards issue was pending before this commission.

20 MJ [COL POHL]: Why did they wait ten months to do it,
21 then? You said there was some nefarious purpose to the CODEL
22 visit. The order was in October, the visit was in January.
23 Why did they wait until then?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DC [MAJ SEEGER]: Because, Your Honor, the testimony of
2 Sergeant Jinx was pending for later in October.

3 MJ [COL POHL]: And this was some type of plan by the
4 Department of Defense and Congress to influence me, is that
5 what you are saying?

6 DC [MAJ SEEGER]: I suggest, sir, that that is a
7 reasonable inference.

8 MJ [COL POHL]: That's a reasonable inference?

9 DC [MAJ SEEGER]: Yes, sir.

10 MJ [COL POHL]: Okay. I understand your position. Go
11 ahead.

12 DC [MAJ SEEGER]: We know that the delegation met with a
13 female guard who would testify on that issue in the near
14 future, Sergeant Jinx. Now, unlawful influence directed at
15 witnesses is another subspecies of unlawful influence. There
16 is a whiff of it here and it might have been more fully
17 investigated and explicitly alleged by the defense.
18 Nevertheless, Your Honor, you should consider the visit as
19 aggravating evidence of the unlawful influence directed at you
20 and at the independence of the trial judiciary.

21 Involving and implicating some of the same officials
22 who in words "impugned" your interim order, it makes even more
23 plain and brazen their intent and determination to influence

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1 you and these proceedings.

2 The visit points to such a determination, not only on
3 the part of Senator Ayotte and the other Guantanamo Bay
4 visitors, but also on the part of the DoD and JTF officials
5 who presumably facilitated the trip, gave the tours, set up
6 the meetings and offered the talking points.

7 To those officials, whoever they are, I think we can
8 fairly impute the following: We can impute knowledge of the
9 pending female guards issue and of the fact that a hearing was
10 imminent and the testimony would be taken.

11 We can impute access to military and civilian lawyers
12 who could and should have advised them the delegation to talk
13 process and not results and to say nothing that would derogate
14 from the independence of the trial judiciary, and we can
15 impute knowledge that they, just like you, are subordinate to
16 numerous officials who are outraged by your interim order.

17 Inviting your attention back to the principle that
18 the MCA offers greater protections against improper influence
19 than the UCMJ, I would offer this suggestion: Any set of
20 circumstances that would be found to constitute UCI under the
21 UCMJ would almost certainly, a fortiori, constitute unlawful
22 influences under the MCA. With that proposal in mind, please
23 picture a run-of-the-mill, plain vanilla court-martial of a

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1 regular American service member in which the military judge
2 has made an unpopular ruling. That ruling is then condemned
3 by the Secretary of Defense, by two four-star generals and by
4 a Senate delegation who come to the installation to conduct
5 rap sessions with government witnesses expected to testify in
6 an imminent hearing on the same issue. They also condemn the
7 judge's order as outrageous and as something that needs to be
8 fixed.

9 Your Honor, if unlawful influence would be found
10 there, it must on similar facts, a fortiori, be found here.
11 To conclude, the comments of these senior officials have
12 tainted these proceedings and brought into question the
13 independence of the military commission's trial judiciary.
14 With so many authorities improperly calling for you to go one
15 way, the only way to make it right is to go the other way. At
16 minimum, the terms of the interim order should not be removed
17 or weakened, rather, they should be made permanent. Can the
18 taint be removed? Will judicial independence be vindicated?
19 A watching world awaits your calling.

20 Having said that, Your Honor, please let me by way of
21 addendum try to meet two possible objections. You may say, as
22 I believe you have, that you didn't read or hear the comments
23 until they were brought to your attention by the defense

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1 counsel. The observer, through whose eyes we are to analyze
2 apparent unlawful influences is disinterested and objective
3 and well informed as to all the relevant facts and
4 circumstances.

5 It is appropriate for judges, like jurors, to
6 purposely avoid reading things, materials that might
7 improperly influence them, as it seems you have done.
8 However, our objective observer, I suggest, is entitled to
9 suppose that the object of the unlawful influence is also
10 reasonably informed as to the facts and circumstances.

11 Your Honor, I have heard that years ago, perhaps when
12 General Martins was a cadet on the Hudson or maybe decades
13 before that, it was one of the responsibilities of a West
14 Point plebe to be fully acquainted with the contents of that
15 morning's New York Times upon which he, back in those days,
16 would possibly be quizzed. This is the sort of acquaintance
17 with current events that West Point expects of cadets and that
18 a member of the public ----

19 MJ [COL POHL]: Just to be clear, I did not go to West
20 Point.

21 DC [MAJ SEEGER]: Nor did I, sir.

22 MJ [COL POHL]: Okay. Go ahead with your analogy.

23 DC [MAJ SEEGER]: But this is the sort of familiarity with

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1 current events that I suggest are fairly imputed to someone in
2 the system, even if they are very rightly trying to avoid
3 readings things that they shouldn't read.

4 Secondly, Your Honor, you might say to yourself and
5 to the world that your honor and your integrity immunize you
6 at any attempts against improper influence. Military judges
7 are presumed to have such honor and integrity, but that
8 presumption cannot be a sure bulwark against taint, and I say
9 that without impugning the honor and integrity, and let me
10 explain why. If it were such a sure bulwark, there could
11 never be a finding of apparent unlawful influence directed
12 against a military judge. But there are situations in which
13 the attempted and apparent unlawful influence is so outrageous
14 that it must be found and a remedy must be crafted.

15 I think it might be helpful to think about the kind
16 of knowledge that is imputed to our theoretical observer. As
17 I have said, he or she is disinterested and well informed as
18 to the relevant facts and circumstances.

19 But is anyone's honor and integrity a fact? I
20 propose that it's not. It's not a fact in such a way that
21 knowledge of it can simply be imputed to an observer as can
22 other relevant facts and circumstances.

23 You and I and the rest of us are in this room today

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1 not because our trustworthiness has become an adjudicated
2 fact, but because we have commissions and jobs and security
3 clearances, and in some cases read-ons granted to us because
4 the President has reposed special trust and confidence in us.
5 Honor and integrity are not facts which can be imputed as
6 knowledge, but they're relational, like the relationship
7 between an attorney and client, which also, as we've heard,
8 depends on trust.

9 So I would say to you, Your Honor, that even though
10 you didn't read or hear the comments of these senior officials
11 until they were brought to your attention by others, and even
12 though you know that you possess the honor and integrity not
13 to be influenced by their attempts to influence you, their
14 attempts to influence you are so outrageous that there is
15 apparent unlawful influence here, apparent unlawful influence
16 that demands a remedy, and that an appropriate remedy is to
17 make permanent your interim order.

18 Subject to your questions, sir.

19 MJ [COL POHL]: I have none. Thank you.

20 Mr. Nevin, anything?

21 LDC [MR. NEVIN]: Well, Your Honor, I, of all people, will
22 not attempt to speak to you about the law of unlawful
23 influence because you know I'm not in the military and never

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1 have been and haven't practiced here, but I'm just going to
2 stand up only to say this: That I read and know enough to
3 know that that the -- the law about appearance of -- of
4 unlawful influence, and I know you know about that as well,
5 and that the -- it's a question that's determined objectively
6 from the point of view of a reasonable member of the public.
7 And I can tell you that when your boss and others high in the
8 military and political hierarchy stand up and say that
9 something you have done is outrageous and needs to be fixed,
10 quote/unquote, the public -- a reasonable member of the public
11 is going to look at that and say, "The fix is in." And if
12 you, at this point, deny the motion, there is going to be a
13 general assumption that you have done it in response to the
14 influence and the pressure that was put on you by the people
15 who are above you.

16 And I was astonished -- I mean, I will tell you that
17 in -- in civilian life I have handled plenty of cases that
18 were of some degree of political interest or public concern,
19 this kind of thing. Political leaders in the places where I
20 have practiced would never make a remark about a case pending
21 before a federal judge. They wouldn't dream of doing that.
22 It wouldn't be tolerated. And you hear a kind of -- kind of a
23 deference and concern about that sort of thing, that -- that

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1 political leaders don't want to inject themselves into the
2 process for fear it's going to -- it's going to disrupt the
3 process. And so I was really astonished as -- I mean,
4 military members of my team expressed the same, but I was
5 astonished to hear the remarks that these military leaders
6 made. And I assumed that this is the perfect essence of
7 command influence, or at least its unlawful influence or at
8 least its appearance, and I think I speak in this for many
9 members of the public who would look at it this way. And I
10 offer you that as - specifically as a nonmilitary lawyer, and
11 ask that you -- and just as Major Seeger said, I think it
12 seems obvious, when you think about it logically, the only way
13 to dispel the specter of the influence is to grant the motion.
14 So that's what I ask you to do.

15 MJ [COL POHL]: Thank you.

16 LDC [MR. NEVIN]: Thank you, sir.

17 MJ [COL POHL]: Mr. Harrington or Mr. Connell, do you wish
18 to be heard on this? And when I refer to the lead attorney,
19 that does not necessarily mean that that excludes the others.

20 DDC [Lt Col THOMAS]: Understood, sir, and we have the
21 same haircut.

22 MJ [COL POHL]: Mr. Harrington?

23 LDC [MR. HARRINGTON]: I come from the same world that

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1 Mr. Nevin does and I see a trend in this country where people
2 do attack judges even with pending cases and we see what's
3 going on now with the politicalization of an appointment to
4 the Supreme Court to Judge Scalia's -- to Scalia's part. But
5 I just want to make the comment that how horrible it is that
6 these leaders in the Department of Defense and in our Congress
7 have done, not just to you, but to this system -- to this
8 commission which is under attack by us, and by many other
9 people by putting you in this kind of a position, where they
10 are basically saying to you do something one way and then you
11 get the argument, well, the only way to show that I am
12 independent is to do it the other way, which is not part of
13 your duty. But they have put you in a position where you are
14 just damned if you do and damned if you don't, and whatever
15 decision you make is subject to criticism. And you have made
16 the comment before that you don't care, that you are not going
17 to pay attention to that, and certainly we hope that's the
18 case. But I just want to make the comment on the record that
19 what they have done is really deplorable regardless of what
20 decision you make in this case.

21 MJ [COL POHL]: Thank you, Mr. Harrington.

22 Lieutenant Colonel Thomas or Mr. Connell?

23 DDC [Lt Col THOMAS]: Your Honor, thank you. We adopt and

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1 join the arguments of our fellow counsel and we have nothing
2 to add.

3 MJ [COL POHL]: Thank you.

4 Trial Counsel, do you wish to be heard on 254Y and
5 then the unlawful influence issue? Mr. Swann.

6 TC [MR. SWANN]: Your Honor, over 14 years ago ----

7 MJ [COL POHL]: You can combine them if you want to.

8 TC [MR. SWANN]: I am going to, with a one-time
9 opportunity here.

10 Over 14 years ago, 19 supposedly devout men inspired
11 by their leaders and others flew planes into buildings and
12 into what is a "field of honor." They killed thousands.

13 Now, in a lame effort to drown out what are the
14 realities of September 11, the hundreds of heroes and tears
15 enough to fill an ocean, counsel now claim that something that
16 happened well over ten years ago is now a basis for denying
17 women, soldiers, a right to perform their job that they were
18 trained for.

19 Now, I have no issue with their sincerity in anything
20 they do. The bottom line up front for you, sir, is this: The
21 burden is on the defense to demonstrate that the policy of
22 using women to escort men to their legal meetings is not
23 rationally related to a legitimate governmental interest, and

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1 the defense has not met its heavy and substantial burden.

2 There are really only two questions in this
3 litigation. First, how are detainees transported and touched,
4 and second, whether women guards should touch.

5 You have the answers. You know where they are
6 touched and know that every touching is directly related to
7 valid force protection measures, reasons that are not trivial.

8 You also know that the camp rightfully believes for a
9 number of reasons that women are essential to running the
10 detention facility. Now, the leaders of this camp are the
11 best, and quite frankly, the only qualified ones to know how
12 to do their business.

13 You see, it's not enough to say that these escort
14 procedures violate U.S. law and treaties with barebones
15 allegations and then not cite a single case, not one, in all
16 of the more than 100 pleadings in which someone similarly
17 situated prevailed. It's not enough to say that death is
18 different so that the commission is to apply a different set
19 of rules. It's not enough to say that having self-professed
20 devout religious men being touched on the shoulder, the
21 forearm, the forehead so as to protect them from hitting their
22 head when entering the door to a van, the hand or ankles is a
23 substantial burden on the exercise of their religion. And

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1 it's certainly not enough to say, as we have heard often, that
2 having to be moved by women guards serves as, and let me get
3 the talking point correct, "profound trigger thrusting men
4 into having vivid memories that maltreatment will occur thus
5 recapitulating the prior mistreatment."

6 And finally, it is not enough to say that being
7 touched by female detention officials to whom a detainee is
8 not related is liable to lead to the risk of sin or that it is
9 intentionally being done to disrupt them and disrupt their
10 ability to defend themselves.

11 You see, all that begs belief that anything other
12 than a movement will occur and their fantasies are not a basis
13 in reality. In AE 25400 dated 22 January 2015 on page 1,
14 Mohammad's counsel write that the procedures subject their
15 client to, and I quote, "unwanted and unnecessary sexualized
16 touching by female guards."

17 Now, I'm going to characterize this as the "risk of
18 sin" argument. You see, the risk of sin arguments border on
19 the silly for in the world where most live, women are equal
20 and the women soldiers in this case are just as amenable to
21 moral perfection as the men seated to my left claim.

22 The only ones that think that touching here on the
23 shoulder, forearm, hand, and ankles, and occasionally on the

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1 forehead when entering that door to the van, are these men, at
2 least some of them.

3 Moreover, the evidence presented from witnesses they
4 called -- they called all the witnesses -- debunks the notion
5 the use of female guards was done to humiliate these men for
6 there is no evidence that anyone has been trying to invade or
7 pollute their self-determined spiritual circle. All of this
8 leads to but one conclusion, the defense has failed its
9 burden.

10 And while Colonel Williams, Ms. Bormann, Mr. Nevin
11 focus on there having been no lapses in security in the past,
12 this misses the point. It misses the obvious. In this
13 environment, there is no room for failure, and the camp's
14 capability, their adaptability proves a couple of things. It
15 knows its job. It followed this commission's interim order,
16 and leaders at every level managed to make it work, denying
17 some gender equality and having morale affected. That's
18 attributed to the leadership under trying times. You see,
19 anything can be done if you throw out all that is right.

20 It doesn't mean that it has to be done or legally
21 should be done with one hand tied behind your back. These are
22 the facts. These are the only facts in this case. You have
23 three declarations before you. You have testimony from four

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1 commanders, and the testimony from an exceptional
2 noncommissioned officer. And when leaders say that NCOs are
3 the backbone of the military, they must have had her in mind.

4 Sergeant Jinx, her testimony takes about four hours
5 and it begins at page 9106 of the unauthenticated record of
6 trial. Her testimony ends at page 9293, some 200 pages.

7 We learned that when moved, detainees are touched on
8 the arm and shoulder, and when applying cuffs and leg
9 restraints on the ankles and hands. All of this is to
10 maintain positive control. Several guards need to touch a
11 detainee on each move and that detainees sometimes are touched
12 on the forehead. The interim order has affected the camp
13 because of a lack of manning, meaning using everybody and it
14 has forced men to take on greater responsibilities and has
15 affected morale of others.

16 Then you have the Lieutenant Colonel from the
17 Massachusetts National Guard. Her testimony is in the morning
18 on 8 December and in the afternoon. The testimony runs from
19 pages 9340 all the way through 9545. Mr. Ryan's cross begins
20 at 9483. That is actually where you learn the most.

21 As a commander, she made a decision to rebalance her
22 assets as she was dealing with shortfalls. It was not a
23 policy change. She told us how in order to fill the

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1 deployment manning document, it took months, and the unit had
2 to pull soldiers from both men and women from four different
3 units to fill the requirements.

4 We learned that decisions were made based on
5 operational reasons after evaluating those qualified soldiers
6 she had available to her at the time. She stressed that using
7 women was an operational need and nothing more. Her decisions
8 ensured that all soldiers were performing duties commensurate
9 with their rank and training, and in particular, she dispelled
10 any notion that what was happening here was designed to
11 disrupt the detainees.

12 It was a staffing decision based on ensuring the
13 success of the mission. No hidden agenda. No angling for
14 anything. And when the defense tried to insinuate that she
15 was doing all this to seek favor and promotion, the defense
16 learned she had already been selected for promotion long
17 before any decision about using females came up.

18 We learned from her too that the decision -- that the
19 detainees who protested told her that their objections were
20 based on religious grounds and nothing else. Mr. Nevin's
21 constant lament that it causes past memories of other times is
22 not in this record. The evidence is that their only objection
23 made by those who were responsible for the camp was based on

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1 religious grounds, and this is the testimony of both former
2 commanders.

3 Then you had the testimony of the Major from Colorado
4 on the afternoon of 9 December, record 9584-9696, a little
5 over 100 pages. He told this commission that it took months
6 to fill the manning document; it required both men and women
7 volunteers. He explained how the interim order affected
8 operational readiness and said there were operational strains
9 and constraints through his time in command, and it affected
10 overall readiness, morale, unit cohesion, personal dignity and
11 while no one escaped, it was because all know their jobs far
12 too well for that to happen.

13 He provided evidence how imperative it is to rotate
14 the guard force to different positions to protect against
15 complacency and detainee manipulation of a specific guard.
16 Random assignments keep the detainee population from
17 anticipating composition. He and others were forced to adjust
18 and be flexible. His testimony regarding the impact of the
19 order is found at pages 9643 to '44. Male workload increased
20 pitting females against men. I witnessed the guard force
21 being defined by gender, not their ability to do their jobs,
22 and the gist is that during his time, the interim order was
23 morale decaying.

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1 Colonel Heath. Defense had plenty of opportunity to
2 talk to Colonel Heath and what they learned is that Colonel
3 Heath does not get involved in manning decisions. These
4 decisions are made at upper echelons of the Department of
5 Defense. He learned that there were no female guards in the
6 facility for a year, from 2013 to '14. The guards were there
7 before and after.

8 Prior to the interim order, women were not prohibited
9 from touching detainees. The only restrictions have been and
10 continue, are no frisks and no watching the detainees while
11 they are in their individual showers, restrictions that are
12 the same in all Department of Defense facilities. All guards
13 are trained to the same standards, have the same capabilities
14 according to their rank, function and role, and the testimony
15 is that if this order were to continue, higher ranking guards
16 would be forced to act below their rank in order to avoid
17 touching detainees. He noted that not just women were
18 affected, but men were sympathetic because they believed
19 females were being discriminated against, and to a lesser
20 extent some men were resentful, having to absorb tasks of
21 their female counterparts.

22 We also heard testimony from the current commander
23 who echoed those who preceded him.

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1 Then there are the questions that you asked. On
2 pages 9844 to 47, you learned how many soldiers are in an
3 escort team. You learned the rank structure. You learned
4 that there is no one below E-4 and that every team has at
5 least one noncommissioned officer, maybe two, who would be
6 receiving an efficiency report.

7 Now, all of this leads to the inevitable conclusion
8 that the policy here is in furtherance of at least two
9 governmental interests of running what is an exceptionally
10 well-run, world-class facility, perhaps the best in the
11 Department of Defense, staffed with some of the very best men
12 and women this country offers; and two, eliminating gender
13 discrimination.

14 So let me talk about the second governmental interest
15 first. The debate regarding the equality of the women guards
16 in this camp, their right to perform their duties, consistent
17 with their training ended when they raised their hand and
18 swore to defend the Constitution and obey the officers and
19 leaders over them.

20 So when they slipped the uniform of this nation on
21 for the first time, they expected -- no, they deserved to be
22 treated equally. Most of the women in this room who were
23 guards were not old enough to understand 9/11, but

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1 unfortunately do now.

2 Now, the commission rightfully determined it would
3 give the defense time to present its case and argument. That
4 is all this interim order did, and unfortunately along the
5 way, because of wounds self-inflicted, and in some other
6 instances not, this has taken 14 months to get to this point
7 in time.

8 Those who think otherwise about this interim order
9 are not well informed. We are done with evidence, we are done
10 with arguments, now is the time to deny their motion and
11 restore what is right. Anything less denies these women and
12 those who follow the ability to gain on-the-job experience.

13 Now, Mr. Nevin has pointed out that gender equality
14 is not some locked step state of mind, but it is. It is a
15 state of mind in the United States military.

16 Now, in Madyun v. Franzen, cited in our brief, it's a
17 1983 decision, the court had occasion to deal with a situation
18 closely aligned with ours. A Muslim inmate complained about a
19 pat down, something female guards here don't do, something
20 that the female guards do considerably less touching. The
21 court said that if women are not allowed to perform these
22 limited searches or can perform them only on women inmates,
23 the utility of women prison guards would be significantly

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1 diminished.

2 Now, Madyun argued that women can serve the prison
3 system in other capacities, not unlike what counsel do here,
4 but the court in Madyun says, again, this misses the point.
5 The state is obligated to avoid discrimination on the basis of
6 sex in the employment of guards. Our military is likewise
7 obligated. The court in Madyun was correct 32 years ago; it
8 is still right today.

9 Now, this commission has indicated that it intends to
10 review the challenges here under the test announced in
11 Turner v. Safley. The court has also indicated that it will
12 receive argument from Mr. Nevin and the others on the issue of
13 the applicability of the Eighth Amendment. I will address the
14 Eighth Amendment in a moment. But the same differential test
15 applied to Turner for the last 28 years has been extended by
16 the Supreme Court to pretrial detainees.

17 In Turner the Supreme Court explained that although
18 incarcerated individuals do not completely lose their rights,
19 problems associated with prison administration allow the
20 government to restrict those rights. Turner is actually a
21 case that gets to the Supreme Court because the Eighth Circuit
22 applied the "strict scrutiny" test of the Eighth Amendment.
23 The Supreme Court reversed the Eighth Circuit.

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1 Your Honor, I'm not going to go over the four Turner
2 factors in any detail. This court is well aware of those.
3 Let me just point out just a few things. There is a valid
4 connection between what the government wants to do in this
5 instance and there is a government justification for it.

6 Now, the defense has consistently and repeatedly
7 cited to the lack of prison resources and the need for the JTF
8 to submit a request for forces to the joint staff for
9 personnel, so now when the resources are here, they want to
10 tell the decision-makers, "Don't bother sending women, they
11 can't work here."

12 You see, any requirement that women guard may never
13 touch male detainees would prevent female service members from
14 serving as guards in escort positions, and limiting high-value
15 detainee guard force escorts to males only would limit
16 JTF-GTMO's manning flexibility due to the limited number of
17 personnel in the respective rank profile with the required
18 clearances needed to fill.

19 You have learned during this commission, and we know
20 that 17 percent of the military police corps are women, and it
21 is safe to say it's almost certain that over time more women
22 will be forming jobs as guards.

23 Now, I have said before that those who have testified

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1 are in the best position and the only qualified ones to know.
2 And say it is impossible for JTF-GTMO to operate a
3 well-functioning prison without utilizing female guards in the
4 guard force.

5 Let me go to the second Turner factor. And here I do
6 see some impact on the detainees. The defense thinks their
7 clients will stop coming to meetings. I hope not. I think
8 they should go to their meetings with their lawyers, but
9 detainees who forego visits with their attorneys can still
10 communicate with their counsel.

11 In our brief we have referenced the case of Hatim at
12 760 F.3d at 61, and in that case we learned that the Supreme
13 Court precedent teaches that alternative means of exercising
14 the claim to right need not be ideal, it only needs to be
15 available.

16 With respect to Turner 3, the third prong, whether
17 the accommodation of the right will have a ripple effect, an
18 impact on the rights of others on guards and other inmates and
19 on the allocation of prison resources.

20 Allowing the accused in this case to dictate which
21 guards escort them grants them a privilege not available to
22 our devout Muslim detainees. So how long is that going to
23 last before the word gets out? Would it eventually extend

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1 outside of Camp VII? The evidence is that it -- that already
2 there exists a strain on the guard force in this case. If
3 women cannot be used, what's going to happen then?

4 With respect to Turner 4, whether there are ready
5 alternatives, meaning an easy way to meet the policies' goal
6 that fully accommodates the prisoners' rights at a de minimis
7 cost, meaning trivial cost to valid penological interests.
8 And to be a ready alternative, the law tells us that it must
9 be an obvious regulatory alternative that fully accommodates
10 the asserted right while not imposing more than a trivial cost
11 to a valid management goal.

12 Sustaining operations, if the interim order is
13 allowed to stand, would require no female guards or restrict
14 their abilities to positions that required no physical
15 touching. This is more than de minimis.

16 Now, to date this commission has been mindful of
17 religious and cultural differences. We don't have hearings
18 during Ramadan. The detainees at one time asked not to come
19 to hearings on Fridays. The court denied that. And still I
20 look across the room here and I see four of the five detainees
21 here on a Friday. They made a choice to come today.

22 The commission entered its interim order until the
23 defense had opportunity to argue this issue free of conflict.

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1 I would simply point out that that time has passed and the
2 court should not grant these men an exemption or accommodation
3 from having females as part of their movement team.

4 Now, let me talk about the Eighth Amendment, and I'm
5 not an expert. I want to thank Mr. Nevin for informing me the
6 other day that this would be the gist of his argument. And I
7 would simply point out, and the court knows this, that the
8 Eighth Amendment prohibits cruel and unusual punishment.
9 Given the facts here, not the facts they want you to infer,
10 Mr. Nevin puts forth the claim that the act of a female guard
11 touching the accused by placing her hands on the wrist, feet,
12 shoulder and arm is somehow and in some way a wanton and
13 unnecessary infliction of pain, and in doing so, he is arguing
14 that this simple and innocent act is, in fact, a cruel and
15 unusual punishment.

16 Now, Your Honor, counsel's ----

17 LDC [MR. NEVIN]: Judge, I object to this argument. I
18 asked for permission to present you with an expert witness to
19 address this. So now Mr. Swann can argue that it is a de
20 minimis touching that couldn't possibly have this effect, and
21 I am not going to be able to stand up and point to a place in
22 the record to the contrary.

23 MJ [COL POHL]: The objection is overruled.

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1 Go ahead.

2 TC [MR. SWANN]: Your Honor, counsel's argument in this
3 regard is as inexplicable as it is unexplained. Borrowing
4 from the late, great Justice Scalia, he would say this
5 argument might be described as "pure applesauce." Even
6 assuming -- excuse me. An Eighth Amendment claim must satisfy
7 two tests. It must satisfy an objective test, it must be bad
8 enough to be cruel and unusual, unquestioned and a serious
9 deprivation of basic human needs constituting a deprivation of
10 minimal civilized measures of life's necessities. The
11 touching here does not pass the objective test.

12 With respect to the subjective test that requires
13 that prison officials have a certain state of mind, there is
14 no evidence that these individuals who run this camp are doing
15 anything other than providing humane conditions to these
16 individuals.

17 You see -- and I believe that Mr. Nevin made a point
18 about the Jordan v. Gardner case, but as I pointed out the
19 other day what the facts of that case are, and I am not going
20 to repeat those, you have got to remember what we are talking
21 about. We are not talking about female guards or male guards
22 for that matter grabbing the accused's genitalia or their
23 buttocks or conducting cavity searches. We are talking about

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1 a guard staff placing their hands on certain limited areas.
2 There is nothing sexual about what is occurring between the
3 guard staff and the accused in any way.

4 Mr. Nevin has also argued that because of their
5 previous experiences, that this issue is somehow different.
6 For that matter, he has argued everything is different in a
7 case where the death penalty is being sought. But if you
8 accept this argument, especially where no harm or injury has
9 been established, everything could be an Eighth Amendment
10 violation simply by claiming that's how they were treated at a
11 black site.

12 Your Honor, the Eighth Amendment means more than
13 that. It was meant to ensure that the courts and government
14 do not go beyond the norm in effectuating the punishment of
15 prisoners post-conviction. It was not meant to effectuate
16 gender discrimination as the defense would indirectly advocate
17 from here. This commission should reject the defense's
18 argument that a touching that we have been describing here is
19 anything other than to assure his detention and safety.

20 Let me go on to the E0 complaints, if I can, sir.

21 MJ [COL POHL]: Go ahead.

22 TC [MR. SWANN]: With respect to the E0 complaint, and
23 whether the E0 complaint constituted unlawful influence, our

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1 response to this motion is found at AE 254DDD dated
2 18 February 2015. Now, I'm not going to repeat the analytical
3 framework applicable to cases of unlawful influence. The
4 court is well aware of that.

5 Simply put, though, it requires the defense to show
6 facts which, if true, would constitute unlawful influence and
7 they must show that such evidence has a logical connection to
8 the court at issue in terms of potential to cause unfairness
9 in the proceedings.

10 The defense has failed to carry its burden of
11 offering some evidence. They have nothing, absolutely nothing
12 more than mere speculation. The defense has offered no facts,
13 other than an investigation was opened. The issue here, then,
14 is how can statements from unknown persons outside this
15 process influence this court or convince an un -- or convince
16 an uninformed objective observer that a mysterious document
17 appeared to influence the court.

18 Now, you invited voir dire, or at least extended the
19 offer and they declined. Your order was lawful, and as a
20 judicial act detailed by a properly detailed judge, the
21 defense admits as much on page 4 of their opening brief. And
22 again I would simply say that anyone looking at the order
23 would know that all the order did was to protect the defense's

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1 ability to make argument and present evidence.

2 People complain about judges and their rulings every
3 day of the week. Been there. But it is presumed that judges
4 are impartial. There is no evidence that your impartiality
5 can be questioned and a fully informed public, one willing to
6 consider everything, would not harbor a significant doubt
7 about the fairness of these proceedings.

8 Now, our response to the UI motion regarding the word
9 "outrageous" attributed to the Secretary of Defense, General
10 Dunford and General Kelly, who is no longer in the military,
11 he is now retired, is at AE 254AAA. Again, there is no
12 unlawful influence here.

13 The heart of the claim is that the Secretary of
14 Defense expressed hostility, undermining the appearance of
15 independent of the tribunal, and the entire exchange takes
16 between one and three minutes in congressional testimony.

17 I would say this much. Smart people say uninformed
18 things. Neither General Dunford or Kelly are in your chain of
19 command. Neither is the Secretary of Defense. The secretary
20 thought that the interim order was by a federal judge
21 expressly or implicitly testified that this matter was in
22 litigation and being handled by lawyers.

23 MJ [COL POHL]: So it would be okay if it was a federal

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1 judge?

2 TC [MR. SWANN]: Sorry, sir?

3 MJ [COL POHL]: The remarks would be appropriate if it was
4 a federal judge?

5 TC [MR. SWANN]: I am not saying these remarks are
6 appropriate at all. They shouldn't have been made.

7 MJ [COL POHL]: Okay.

8 TC [MR. SWANN]: They should not have been made, but they
9 really weren't for you to make a decision in this case. They
10 were directed at simply addressing a Senator's question and
11 they were armed with a couple of things. One, the Secretary
12 has to speak on behalf of the entire force and has to say
13 that, yes, we are going to be applying equality across both of
14 the genders in our force.

15 But I would say here that you have no actual
16 influence and our analysis of this is at pages 9 to 13 of
17 AE 254AAA, and I would simply point out the following: We
18 know that when forced or faced with what it believes are
19 intrusions into this process, and I'm talking about an earlier
20 instance with respect to a regulation that, quite frankly, may
21 have required you to move to Guantanamo Bay, Cuba, you acted
22 and the Secretary acted. You did what you were supposed to do
23 and they turned around and obeyed you in terms of making

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1 things right.

2 This order has been in place now for 14 months. The
3 government, on a couple of occasions, has asked you to lift
4 the interim order. Again, you ruled against us and you did
5 what you believed was right. These statements were made in
6 October and we are here in February. You did what you
7 believed was right.

8 MJ [COL POHL]: Has there been any retraction or
9 explanation in the Secretary of Defense's offices or the
10 Chairman's office?

11 TC [MR. SWANN]: No, Your Honor, there has not.

12 MJ [COL POHL]: Doesn't that happen sometimes when
13 intemperate remarks are made?

14 TC [MR. SWANN]: It does, Your Honor.

15 MJ [COL POHL]: Go ahead.

16 TC [MR. SWANN]: We would say that these statements were a
17 one-time attempt to answer a Senator's question and nothing
18 more. The motion regarding the unlawful influence in this
19 instance should be denied.

20 Subject to your questions.

21 MJ [COL POHL]: I have none. Thank you, Mr. Swann.

22 Defense, do you have any rebuttal? Mr. Nevin.

23 LDC [MR. NEVIN]: Thank you, Your Honor. I have to say

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1 Mr. Swann's trivialization of the tenets of one of the great
2 religions of the earth is almost breathtaking. I mean, to
3 say -- to stand here and refer to something that the religion
4 forbids as being trivial and being something that doesn't
5 deserve your attention or our attention flies right in the
6 face of -- of all of the evidence that was presented to you.
7 It flies right in the face of JTF-GTMO's own SOPs in which --
8 their own binding SOPs, in which they said it's not
9 appropriate, don't do it.

10 It flies right in the face of four or five or six
11 years of continuous practice at Camp VII, followed by guard
12 force after guard force after guard force, as if there were
13 never a policy at any time in the United States military of
14 gender equality, of treating women equally, as if that is just
15 something that popped up in 2014 out of the blue. And now
16 suddenly everything has to move out of the way for counsel's
17 remarks are just disparaging of the religious practices of
18 Mr. Mohammad and the other defendants with nothing, nothing at
19 all to suggest that they can't be accommodated.

20 On the contrary, a lot of flowery language about
21 women raising their hands and expecting to be able to step in
22 and serve their country equally with men, but there is no --
23 no quarrel about them not being able to go into homes to

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1 search them in the Middle East. They are trained to that
2 effect. No comment about them not being able to make eye
3 contact with men when they go to the Middle East, that that's
4 not appropriate, even though they raised their right hands and
5 put their lives on the line. And good on them for doing so.
6 Don't get me wrong either.

7 But I'm just saying, look, the idea that -- that --
8 the idea that gender equality somehow has all come to live on
9 the question of whether a detainee, because of his religion,
10 who doesn't want to be touched, has to be touched anyway, that
11 gender equality comes down to that? If you want to see --
12 look around for something that's not in the record, that's
13 certainly not in the record.

14 So you have the argument that as counsel put it,
15 something that happened well over ten years ago could possibly
16 be having an effect like this, and the suggestion was it
17 couldn't possibly be having that effect. And that's when I
18 tendered my objection, and I understand the military
19 commission overruled it, and I understand the military
20 commission has already reprimanded me about referring to
21 potential testimony.

22 MJ [COL POHL]: I wouldn't consider it a reprimand.

23 LDC [MR. NEVIN]: Okay.

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1 MJ [COL POHL]: I don't reprimand counsel as a general
2 rule. It was just guidance.

3 LDC [MR. NEVIN]: I appreciate that, Your Honor. Thank
4 you. And the military commission did provide me guidance, and
5 I'm not going to go back and go to a place that the military
6 commission guided me away from.

7 But I do feel like it's somewhat unequal treatment.
8 I -- I believe, and alleged in good faith, and I believe our
9 pleadings allege, and it is to some extent a matter of common
10 sense, because I would direct you back to it -- to the example
11 I used of the child being beaten by the book. I mean, in some
12 ways it's an experience that we all have had at one time or
13 another in our lives that some people, because of their
14 history and their experience, react to things in a different
15 way. And there is not -- maybe there is not anything magical
16 or particularly scientific about it. Maybe it is just a
17 matter of common sense.

18 MJ [COL POHL]: Isn't that somewhat the situation you had
19 in Jordan?

20 LDC [MR. NEVIN]: Yes, I think that's true, although there
21 was expert testimony in Jordan, but ----

22 MJ [COL POHL]: That's before me from the Jordan ----

23 LDC [MR. NEVIN]: That is before you, it is. I think that

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1 this -- that the reason -- and so, of course, now that you
2 have mentioned that, I am reminded that when counsel makes his
3 sort of dramatic statement that there is no cite to a single
4 case in which a similarly situated person prevailed, I thought
5 wow, what about Jordan that I have been talking about
6 constantly for the last four or five days. And I know counsel
7 makes an effort to distinguish Jordan, but let me say that
8 none of these cases -- you go back and look through these
9 cases, and I had a list of them that I was looking at last
10 night, Florence v. Board of Chosen Freeholders and Turner and
11 Bell and Block v. Rutherford and Hudson v. Palmer, Johnson
12 v. California, you go in and you look through these cases and
13 you can look through these cases for a long time before you
14 will find anybody who was tortured for three and a half years
15 by the United States Government, and I know the prosecution
16 gets tired of hearing it, and I get tired of the fact that
17 it's necessary to keep reminding everyone of it, but that is a
18 harm, those years of torture are harm that were inflicted by
19 the United States Government, the same United States
20 Government that now engages in this policy of for the first
21 time in years of having women lay hands on these detainees
22 against their will, and none of these cases have that
23 situation, none of these cases deal with a child being struck

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1 with a book or a dog being kicked by a man with a hat or a
2 beard, all of these experiences we know that shape the way
3 that people and animals and -- across the board sentient
4 beings respond to past events none of them present a situation
5 like this. Three and a half years in the black sites in
6 Mr. Mohammad's case.

7 Counsel touched on this idea of the risk of sin,
8 that -- the objection to this being the risk of sin, and
9 seized on our remark in 254, our reference in 25400 to
10 sexualized touching. Let me be clear about that.

11 The sexualized touching that's at issue here is what
12 took place in the black sites. The touching that is sought to
13 be inflicted on these men at Camp VII recapitulates that, it
14 brings it back up. It causes those feelings to occur again.
15 But it is not the idea that because a female guard lays hands
16 on a detainee, that those two are now going to have some kind
17 of a sexual experiences, and it is the recapitulation of the
18 torture that I have -- that I have referred to throughout
19 these remarks.

20 The recitation of the evidence that came in -- the
21 testimony that came in from the members of the guard force who
22 were here, I waited for Mr. Swann to deal with the very clear
23 indication that there was zero impact from your interim order.

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1 And we do this thing, both sides have done this, I suppose I
2 would have to confess of saying because you lived with
3 something for a while, you must not have any objection to it.
4 And yet this is one that it's very clear from the testimony
5 that there -- and this is testimony that was elicited a half
6 dozen different ways and I had a slide on this and other
7 counsel have spoken to it, but very clear testimony that this
8 had no impact on the operation of the guard force, and how
9 could it? We heard testimony about the number of guards who
10 are in Camp VII and we know the number of detainees who are
11 there -- who are there, and there are multiple guards, I will
12 say, I won't be any more specific than that in this setting,
13 but there are multiple guards per detainee.

14 There was also a suggestion that there is some
15 objection to women as such, and we have made this remark -- or
16 this statement again and again and again. There are female
17 watch commanders. There was a female camp commander. There
18 are female tier supervisors, there are females throughout the
19 guard force, and there is no objection to their presence, to
20 interacting with them, to dealing with them, to respecting
21 their authority. There is none of that, none of that from
22 Mr. Mohammad, and we have made that very clear.

23 The objection is to being touched, and that objection

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1 flows out of the fact that there is a religious prohibition.
2 It's a religious prohibition that the government is well aware
3 of, and -- and that is the basis of our complaint.

4 Now, finally, counsel refers to the Eighth Amendment,
5 and finds it inexplicable and unexplained I believe is what he
6 said, and that unexplained remark touches again on my -- my
7 reference to the arguments we have made about the impact of
8 the prior torture. We did make an attempt to explain that,
9 and the proposition that this cannot constitute cruel and
10 unusual punishment. And on two occasions I have laid out in
11 fairly clear detail, I believe, exactly why an intention to
12 punish can be inferred here on the one hand, and in any event,
13 why there is an unreasonable and unnecessary infliction of
14 pain, and I heard no discussion of that. And I appreciate
15 Mr. Swann conceding that he is not an expert on the Eighth
16 Amendment, I don't know that I am either, but I certainly know
17 the argument that I made to you.

18 I understand its structure. I went so far as to put
19 it on writing -- put it in writing and put it up on the
20 screen, and Mr. Swann didn't even address -- didn't even
21 bother to go through it and point out where it was wrong, and
22 I take it that amounts essentially to a concession that that
23 analysis is correct and can't be refuted.

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1 Your Honor, thank you for hearing me out about that.

2 Now, I made the point and meant to make the point,
3 and counsel reminds me that, again, we are talking about a
4 tiny percentage of the moves that your interim order affects,
5 and I have asked you to expand your interim order to include
6 all movements within the camp. But as it stands now, we are
7 talking about a small percentage of the moves that are made,
8 and a small -- less than all of the -- less than all of the
9 detainees, because not all object. But I will say, I heard
10 counsel refer as well to the idea of what happens next,
11 that -- what will be the next request that's made, and this --
12 this echoed in Colonel Heath's statement to the same effect,
13 that it's not maybe so much this, but it's what are we going
14 to do next? What will our next demand be? Well, I mean, this
15 is litigation, capital litigation at that. Let me be the
16 first to announce there will be additional demands, but I --
17 there is nothing to suggest that we are going to demand
18 that -- that only that Catholic or no Catholic guards may
19 touch Mr. Mohammad or something silly like that, and
20 military ----

21 MJ [COL POHL]: Mr. Nevin, you say "each demand, each
22 motion is decided on its own merit."

23 LDC [MR. NEVIN]: Yes, sir.

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1 MJ [COL POHL]: So if there are further ones you want,
2 wish to raise, however this one is ruled on, pluses or minus,
3 that's the way -- I mean ----

4 LDC [MR. NEVIN]: I understand that, Your Honor.

5 MJ [COL POHL]: ---- that's the way the process works.

6 LDC [MR. NEVIN]: Finally, I wanted just to speak to the
7 remarks about the -- that Mr. Swann made about the Secretary
8 of Defense's -- about the Secretary of Defense's remarks about
9 the interim order. I believe they were directed at you. I
10 think you are a federal judge. After all, he didn't say
11 United States District Court Judge or say something that would
12 have limited his remarks only in their application to the
13 federal bench as opposed to the military commission, first.
14 And second, his remarks, just as the military commission
15 pointed out, have not been retracted or taken down or walked
16 back or anything of that sort. The point is that someone,
17 some judge issued the order about female guards and that is
18 the person -- call it federal judge or anything else -- that
19 is the person -- you are the person to whom those remarks were
20 addressed. There is no doubt about that.

21 And so the -- this highly strained reading of the
22 remarks that they somehow were not directed to you is somehow
23 completely contradicted by the records. And I appreciate your

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1 hearing me out, and if you have questions, I will try to
2 answer them.

3 MJ [COL POHL]: I don't, Mr. Nevin.

4 LDC [MR. NEVIN]: Thank you, Your Honor.

5 MJ [COL POHL]: Ms. Bormann.

6 LDC [MS. BORMANN]: Thank you. First a correction, and I
7 was surprised it came from Mr. Swann. You are in fact in the
8 chain of command of the Secretary of Defense pursuant to
9 Regulation for Trial by Military Commission Rule 6-1.b, the
10 Chief Trial Judge, which you are, will be selected from the
11 pool of military judges by the Secretary of Defense or his
12 designee. So I just wanted to correct Mr. Swann with that.

13 MJ [COL POHL]: I understand that's the appointment of the
14 position.

15 LDC [MS. BORMANN]: Right.

16 MJ [COL POHL]: After that there is no -- I mean, when you
17 think about the chain of command, you normally think about a
18 continuing chain of command type relationship. I agree he is
19 the designee, he has authority to appoint the Chief Trial
20 Judge, but that is the scope of his operational control over
21 the Chief Trial Judge.

22 LDC [MS. BORMANN]: Well, I would say to you that if the
23 SecDef or his designee can choose the trial judge, Chief Trial

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1 Judge, the SecDef or his designee can unchoose the Chief Trial
2 Judge as well.

3 MJ [COL POHL]: If that issue comes up, we will address it
4 when it does.

5 LDC [MS. BORMANN]: We are talking about appearance ----

6 MJ [COL POHL]: I understand what you are saying.

7 LDC [MS. BORMANN]: We are talking about appearance of
8 unlawful influence, that's exactly the point.

9 The only thing I want to address is this. For
10 goodness sake, I am about as big a proponent of gender
11 equality and treatment of women as you can possibly imagine,
12 but to say you, the Army, needs to have their enlisted guards
13 put hands on my client in order to effect that is to ignore
14 reality, because the Army, or if the Navy eventually takes
15 over Camp VII again, really believed that, then they would
16 also be requiring their female soldiers to watch these men in
17 showers and to do groin searches and to do the other things
18 that the men are required to do. And I heard Mr. Swann say
19 that it pits men against women.

20 Now, I'm not in the military nor have I been, but
21 every man in my family has been and I have now worked for four
22 and a half years with military enlisted and officers, and I
23 have to tell you I find that hard to believe. People do their

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1 jobs. If men are pitted against women based on just being --
2 you know, not being able to lay a hand, maybe that's the wrong
3 reason. Maybe they are pitted against each other because they
4 couldn't watch -- somebody had to watch somebody in a shower.
5 I mean, the Army makes decisions that are gender-based besides
6 this one. This one just happens to affect my client in a
7 particularized, horrific fashion. And so when you are
8 determining whether or not there is any negative impact on the
9 camp, you have to apply common sense. They already
10 discriminate based on gender when assigning tasks. The
11 government, though, here, for whatever reason, has drawn an
12 arbitrary line, and I -- I urge you not to follow that line.

13 MJ [COL POHL]: Thank you.

14 Mr. Harrington?

15 LDC [MR. HARRINGTON]: Judge, I think you have made it
16 clear that your authority with respect to this issue generates
17 from the attorney-client privilege in the court proceedings
18 and you -- I know Mr. Nevin asked you to pass the -- move the
19 order beyond that, but you have never indicated that you
20 would, and I think that's important here in terms of the
21 framework of this argument. And it doesn't matter that in
22 other moves that you don't feel that you have control over
23 with that these men have the Hobson's choice and may choose to

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1 have to surrender their religious belief to go someplace else,
2 that doesn't mean it's any less of a problem. It's still a
3 problem. There is no question about that; it's just that
4 there is no place that they can go for relief.

5 MJ [COL POHL]: Can't they go to habeas for conditions of
6 confinement?

7 LDC [MR. HARRINGTON]: Not the way the law is right now,
8 Judge.

9 MJ [COL POHL]: I don't do habeas. I thought I would
10 throw it out to you because I see some habeas cases,
11 particularly there was one out of the D.C. Circuit dealing
12 with the -- it was groin searches, but that was heard in
13 federal district court.

14 LDC [MR. HARRINGTON]: There is very limited remedies with
15 respect to that.

16 MJ [COL POHL]: I don't want to go too far down that road.

17 LDC [MR. HARRINGTON]: And that would be the remedy that
18 they have.

19 Your Honor, Mr. Swann's argument is he, again, tries
20 to take it back to the de minimis, that this is just minor
21 touching. I would like to -- Judge, I grew up in a house with
22 Irish-born Catholic parents and I can tell you that not a
23 scrap of meat passed my lips until I was an adult because that

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1 was a tenet of the Catholic Church.

2 MJ [COL POHL]: I am assuming you are talking about on
3 Fridays?

4 LDC [MR. HARRINGTON]: Yes. We did eat meat on other
5 days. Every other day I should say. Overcooked, I should
6 say.

7 MJ [COL POHL]: We are Irish. Go ahead.

8 LDC [MR. HARRINGTON]: That's the only way to eat it,
9 Judge.

10 But the point of it, Judge, is I never understood it
11 as a kid and at one point in time I asked my mother why is
12 this, and the fact that I asked her the question was
13 heartbreaking to her; not the reason behind it didn't matter,
14 but the fact that I would ask it. And the only reason I bring
15 it up is that was a firm, fixed religious belief, which she
16 had trouble -- she struggled with even when the Catholic
17 Church said you could eat meat. So the fact that this is
18 minor touching by somebody of these men, it's connected to
19 their faith, and it doesn't matter whether we agree with the
20 reasons behind it or whatever, it's connected, it's a
21 religious belief, and we are not here to make that kind of a
22 judgment.

23 Judge, one other comment I would make is that

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1 Mr. Swann made a very impassioned argument about the women
2 raising their hand and agreeing to defend the Constitution and
3 they are going to go and be treated like everybody else.
4 Well, part of the Constitution for a military person or
5 anybody else who takes an oath to the Constitution is to obey
6 things like a decision from you or an order, especially for a
7 military person. If you make an order with respect to this
8 case like you did in your interim order, that's part of their
9 chain of command and that's what the military people do is
10 obey lawful orders; and if you make an order, that's where
11 they are and so be it.

12 Thank you.

13 MJ [COL POHL]: Thank you, Mr. Harrington. Colonel
14 Thomas -- I'm sorry. Major [sic] Williams has stood up.
15 Colonel Thomas, do you have anything that you wish to add?

16 DDC [Lt Col THOMAS]: No thank you, Your Honor.

17 MJ [COL POHL]: All right. Colonel Williams.

18 ADDC [LTCOL WILLIAMS]: Judge, just briefly, again I want
19 to reiterate that this is not a gender-equality issue and this
20 is not a discrimination-against-women issue. Mr. Swann got up
21 and indicated what he thought a woman should expect when she
22 slips on the uniform, and I can tell you with certainty that
23 the women interrogators who came to Guantanamo Bay probably

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1 never expected that they would be required to perform mock lap
2 dances or put their bra or thong on a detainee's head. What
3 women do expect and what the guard force here can expect and
4 should expect is that their chain of command is going to
5 support any decision that Your Honor makes regarding what is
6 appropriate in this case for Mr. al Hawsawi and the four other
7 accused.

8 Mr. al Hawsawi is not asking that no women be
9 permitted in Camp VII, he is not saying that women cannot
10 serve in the guard and escort force. They do. They presently
11 do. They proudly serve in that capacity. The only thing that
12 we are asking is that they not be required to touch
13 Mr. al Hawsawi or the four other men in this case when they
14 come to their legal meetings and when they are brought before
15 this commission.

16 As Mr. Swann pointed out, there are other duties that
17 female guards are asked not to do. They don't observe
18 detainees, any detainees, not just the men in this room, while
19 they are showering and they don't frisk them down. Is this
20 discriminatory? No, it's not discriminatory.

21 In our society, in our EEO laws it is acceptable
22 sometimes to say in certain instances that women are not going
23 to do a certain job or that men are not going to do a certain

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1 job. In this case we are not asking you to restrict female
2 guards from serving in JTF-GTMO, from serving in the Joint
3 Detention Group and from being in Camp VII. We are not asking
4 you to say that they can't be part of the escort team or part
5 of the guard forces. We are simply asking that of the five --
6 five out of the 14 HVDs, the men in this room, that you keep
7 your interim order in place and say that when they are being
8 moved for the purposes of legal meetings and to come before
9 this commission, so as not to be against their religious and
10 cultural views, that women are not used.

11 Mr. Swann also commented that Mr. al Hawsawi is here
12 on a Friday, which is quite unusual, but he came today because
13 this is a very important issue for him, Judge, and he knows
14 that your order will have consequences that will impact his
15 right to be here and his right to meet with counsel without
16 having to go against his religious tenets. So yes, he is
17 here. He needs to be able to know that he will have such
18 access to legal counsel to prepare in this capital case where
19 his very life is on the line.

20 I have great confidence that any future commander and
21 guard force will be able to accommodate Your Honor's orders of
22 not using females simply not to have close physical contact
23 with these five men in this commission.

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1 Thank you.

2 MJ [COL POHL]: Thank you. Mr. Swann, anything further?

3 LDC [MR. RUIZ]: Your Honor, I would like to address the
4 unlawful influence aspect.

5 MJ [COL POHL]: Okay. But when I said one rebuttal, I
6 meant one rebuttal. Go ahead.

7 LDC [MR. RUIZ]: This is one rebuttal by two different
8 people, Judge.

9 MJ [COL POHL]: Okay. Go ahead.

10 LDC [MR. RUIZ]: Judge, specifically as it relates to the
11 unlawful influence argument, not only was there not a
12 retraction then and never has there been a retraction, as I
13 indicated to you there was actually an affirmation of this
14 complaint and it was done by the public affairs officers for
15 Joint Task Force Guantanamo Bay, Cuba.

16 On 27 October 2015 that public affairs officers on
17 behalf of Joint Task Force Guantanamo Bay indicated that the
18 complaints, and I quote, "remain open pending a military
19 commissions hearing and a final order on that matter." That
20 statement has never been retracted. It remains out there in
21 the public consumption. It was reported publicly for the
22 general public and it's never been retracted.

23 I think a disinterested observer, objective, looking

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1 at all of the facts, and that particular fact in and of itself
2 would make a reasonable inference that what that means is that
3 the Joint Task Force Guantanamo Bay believes that keeping that
4 open until a final order issued somehow is holding the
5 commission's decision-making hostage or dangling it over your
6 head. It's a fact, it has been said and it hasn't been
7 retracted.

8 Mr. Swann said a number of things in relation to the
9 unlawful influence and, in the context of his argument,
10 characterized some of counsel's argument as a lame effort. I
11 would submit that such characterizations are beneath the
12 dignity of this court and the types of arguments that we
13 should bring in advocacy. While they may sound well in a
14 carefully prepared argument, it has no place in this court.

15 And I would also say that if we are talking and
16 engaging in talk of fantasies as Mr. Swann indicated, there
17 are a few of his own. One of them is that the complaint was
18 not directed at Your Honor. Clearly, as I think we have
19 indicated established by the record, the proceedings were by a
20 senator who had recently visited Guantanamo Bay, asked the
21 direct question about the order that a military judge had
22 issued here in Guantanamo Bay and the response was directed at
23 that issue.

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1 Not only that, but later that afternoon the same
2 senator held a press conference to affirm the point and to
3 indicate that all the allegations have been substantiated by
4 our Department of Defense in references to the equal
5 opportunity complaint. She called on the administration to be
6 verbal and to take a tough stance. This is all during the
7 course of a press conference subsequent to those hearings.

8 In response to a quick question you had about a
9 habeas and conditions of confinement, I will only tell you
10 that we have sought that remedy for Mr. al Hawsawi and the
11 court denied us jurisdiction based on the nature of how we
12 framed the conditions of confinement argument, so it is a very
13 difficult issue to overcome.

14 And, Judge, in closing, I would finally -- I want to
15 unjoin a comment by one of my counsel, very distinguished and
16 learned and who I hold in high regard, when Mr. Harrington
17 said he felt sorry that this happened to you, I want to
18 specifically unjoin from that. And what I would leave the
19 court with is this: Heavy is the head that wears the crown.
20 And in this case, not to compare you to a monarch, but yours
21 is the head that wears this crown, and -- I don't mean to make
22 light of that, but ----

23 MJ [COL POHL]: I understand your point.

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1 LDC [MR. RUIZ]: ---- but to say this, Judge: You have
2 the power, you have the authority and you have the duty, when
3 you formulate this ruling on the unlawful influence issue, to
4 eradicate these type of attempts to influence the conduct of
5 this commission, the conduct of this court. Enough is enough.
6 You have the power, the authority, and on this record you have
7 the means to make it very clear that this conduct is not
8 tolerated and it is in fact unlawful.

9 Thank you.

10 MJ [COL POHL]: I want to make sure that I didn't cause
11 confusion with the defense, and Mr. Ruiz basically pointed out
12 to me that this argument was divided up. And so although --
13 and so I didn't know -- I don't want to restrict somebody who
14 argued part of it who wanted to argue on this part of it, and
15 I guess that's probably only you, Major Seeger.

16 LDC [MS. BORMANN]: Judge, I addressed the unlawful
17 influence portion by pointing out the regulation.

18 MJ [COL POHL]: I thought so. Okay. Thank you. Okay.

19 Mr. Swann, last word.

20 TC [MR. SWANN]: Done.

21 MJ [COL POHL]: The commission is in recess until the next
22 session. I'm sorry.

23 CP [BG MARTINS]: Your Honor, we had two -- two notices we

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1 wanted to give the commission, one by me and one by
2 Mr. Groharing.

3 MJ [COL POHL]: Okay. The commission is not in recess.

4 CP [BG MARTINS]: Your Honor, this is just a brief notice
5 in connection with the military commission's expectation of
6 reviewing government discovery under the rubric of 397 and the
7 underlying motions. I want to notify the commission that the
8 prosecution has coordinated as necessary to provide the
9 military judge the unredacted OLC memos. These are the memos
10 Mr. Connell is seeking. We will do that in conjunction with
11 requests for substitutions under M.C.R.E. 505(f), and this
12 will be as to categories C and E of the ten-category construct
13 as well as other categories within that construct.

14 MJ [COL POHL]: Just so I am clear, we are talking about,
15 I believe, 112K, L and M, and I don't have them sitting in
16 front of me, and so you are going to give me totally
17 unredacted ----

18 CP [BG MARTINS]: You will see the unredacted ones as part
19 of our submissions with regard to the ten-category construct,
20 the appropriate ones. They will be the among the original
21 documents containing information we will be seeking a
22 substituted form for.

23 MJ [COL POHL]: When can I expect to have those?

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1 CP [BG MARTINS]: We are going to be laboring to try to do
2 the first of those as early as the 22nd of March, but it will
3 be before 30 September.

4 MJ [COL POHL]: 22 March is before 30 September. Thank
5 you.

6 Mr. Groharing.

7 TC [MR. GROHARING]: Very briefly, sir. You might recall
8 during the discussion on AE 195 I noted the Zero Dark Thirty
9 motion to compel, that information that I was going to confirm
10 which documents I did have access to, our office had access to
11 when we conducted our review. I was able to do that, but I
12 did confirm that the third document at issue, the ethics
13 investigation regarding the gifts, that was not among the
14 materials that we were able to review. So it was incorrect to
15 say that we have reviewed those and that they don't contain
16 any communications.

17 MJ [COL POHL]: Let me back up on that just so it's clear.
18 This is the -- correct me if I am wrong, you guys stay a
19 little better focused than me since there is one judge and a
20 lot of you, but this was the internal IG investigation of ----

21 TC [MR. GROHARING]: Yes, sir.

22 MJ [COL POHL]: ---- of receiving gifts from the Zero Dark
23 Thirty group?

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1 TC [MR. GROHARING]: Yes, dated 16 December 2013.

2 MJ [COL POHL]: You are saying you have not looked at it
3 yet?

4 TC [MR. GROHARING]: I have obtained access to it.
5 Subsequently I have looked at it briefly. I did note that
6 there were comments about communications, not necessarily
7 communications, but we will conduct a thorough review and
8 provide materials as appropriate.

9 MJ [COL POHL]: Provide a supplemental response back to
10 the defense on that specific issue even if the response says
11 we reviewed these things, you are not getting anything. So if
12 it is a negative response, tell them what it is, and we will
13 go from there. Okay?

14 TC [MR. GROHARING]: Yes, sir.

15 MJ [COL POHL]: Ms. Bormann.

16 LDC [MS. BORMANN]: Judge, earlier in the argument with
17 respect to AE 254Y, I attempted to file AE 254Y, either GGG or
18 HHHHH, I am not sure which. It was the declaration of Kathryn
19 Newell. You directed me to file it as a supplement so I am
20 prepared to do that and I will give a copy to the government.

21 TC [MR. RYAN]: Your Honor, I thought I heard you say you
22 could file a motion to have it considered.

23 MJ [COL POHL]: Stop. Stop. Stop. As she pointed out to

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1 me, it's a supplemental filing. So, Mr. Ryan, you will have
2 an opportunity to respond as to whether it should be
3 considered or not before I read it. Okay?

4 TC [MR. RYAN]: Thank you, sir.

5 LDC [MS. BORMANN]: Thank you, Judge.

6 LDC [MR. RUIZ]: Judge, just ----

7 MJ [COL POHL]: Mr. Ruiz.

8 LDC [MR. RUIZ]: I just want to bring a couple of motions
9 to your attention, if you could write those down for future
10 reference, we are asking you to consider for rulings that we
11 are waiting on.

12 MJ [COL POHL]: These are ex parte?

13 LDC [MR. RUIZ]: Yes, sir.

14 MJ [COL POHL]: Okay.

15 LDC [MR. RUIZ]: AE 410 (MAH).

16 MJ [COL POHL]: When did you file it?

17 LDC [MR. RUIZ]: I think last week, Judge. AE 109B.

18 MJ [COL POHL]: What was the second one, please?

19 LDC [MR. RUIZ]: AE 109B and AE 143H (MAH).

20 THE COURT: Got it.

21 LDC [MR. RUIZ]: These are all (MAH), even including the
22 109B.

23 MJ [COL POHL]: Just to be clear for the defense, is that

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1 if you think an ex parte motion has been sitting with me in my
2 office for a while, just let us know and we will take a look
3 at it. I mean, there is a lot of them and sometimes things
4 may or may not fall through the cracks. I hope they don't,
5 but -- and I keep a separate list of that, but you have
6 greater visibility on that than I do necessarily, so I have no
7 problem being nagged of, "Where is this answer, Judge? You've
8 had it for a month."

9 LDC [MR. RUIZ]: No problem nagging, Judge.

10 MJ [COL POHL]: You will nag me in a nice, respectful way,
11 just so that is clear. Okay. Good. That being said, the
12 commission is in recess.

13 [The R.M.C. 806 session recessed at 1536, 26 February 2016.]

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