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1 [The R.M.C. 803 session was called to order at 0902, 26 July
2 2016.]

3 MJ [COL POHL]: The commission is called to order.

4 Trial Counsel, any change since we recessed
5 yesterday?

6 CP [BG MARTINS]: Good morning, Your Honor. No change.

7 MJ [COL POHL]: Mr. Nevin?

8 LDC [MR. NEVIN]: No, change, Your Honor, and Mr. Mohammad
9 is present.

10 MJ [COL POHL]: Yeah, we'll note for the record that all
11 detainees except for Mr. Hawsawi are present.

12 Mr. Harrington?

13 LDC [MR. HARRINGTON]: No change.

14 MJ [COL POHL]: Mr. Connell?

15 LDC [MR. CONNELL]: No change.

16 MJ [COL POHL]: Mr. Ruiz?

17 LDC [MR. RUIZ]: No changes.

18 MJ [COL POHL]: And Ms. Bormann?

19 LDC [MS. BORMANN]: No change, Judge.

20 MJ [COL POHL]: Trial Counsel.

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

23 **DIRECT EXAMINATION**

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1 Questions by the Trial Counsel [MR. SWANN]:

2 Q. Major, I remind you that you are still under oath.

3 A. I understand.

4 Q. Did you have occasion to advise Mr. Hawsawi of his
5 right to attend this morning's proceedings?

6 A. I did.

7 Q. And what time did you do that?

8 A. I started to read the English version of the
9 advisement at 0605 hours.

10 Q. All right. Did you read it the same way you have
11 read it every time that you have read it, using the English
12 form and the Arabic form?

13 A. Yes. I read the entire English form to him, he
14 followed along with the Arabic form. He filled out the top
15 portion of the Arabic form. I then had the translator read
16 the Arabic form to him. He signed the document, dated the
17 document, and then I signed and dated it. I asked him if he
18 had any questions, he said he did not.

19 Q. All right. Do you believe he understood his right to
20 attend this morning?

21 A. I do.

22 Q. And do you believe he voluntarily waived his right?

23 A. I do.

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1 TC [MR. SWANN]: All right. I have nothing further, Your
2 Honor.

3 MJ [COL POHL]: Mr. Ruiz, any questions?

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

5 MJ [COL POHL]: Okay. Thank you. You are excused.

6 WIT: Thanks, Judge.

7 **[The witness was excused.]**

8 MJ [COL POHL]: I want to address a couple of issues that
9 came up yesterday, just to clarify them.

10 When we talked about the schedule for next year, and
11 this is just a thought that I want the government to consider,
12 is that currently there are three commission cases going on.
13 There may very well come a time when one of them actually goes
14 to trial. Currently, there's one courtroom. And I don't need
15 an answer today, I've raised this issue before, but it's my
16 understanding that currently all three use this courtroom.

17 There may -- there is going to come a time where a
18 decision is going to have to be made of prioritizing and
19 whether or not the other courtroom, AV-34, would be available
20 or some other option. But I just point out to the government
21 again, which I've done before, is that if you only have one
22 courtroom, only one proceeding can go along.

23 At least in my personal view, I can't speak for other

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1 judges, is that a case in trial will take priority over a case
2 in pretrial proceedings, particularly since all of these cases
3 involve the members. Again, just a thought to give the
4 government a chance to consider it before we wait a year from
5 now and have to address the potential conflict of schedules.

6 CP [BG MARTINS]: Thank you, Your Honor. You set the
7 schedule, we will do everything we can to honor it. And if
8 you want to move forward, we'll find out how to do it, and you
9 will have a courtroom to do it in.

10 MJ [COL POHL]: Okay. Fine.

11 Mr. Connell.

12 LDC [MR. CONNELL]: Sir.

13 MJ [COL POHL]: You're going to have to come up on this
14 one. I went back and reread my order on 036K and also looked
15 at 703(c)(3)(C), I think we talked about.

16 LDC [MR. CONNELL]: Yes, sir.

17 MJ [COL POHL]: Okay. I just don't want to leave you with
18 the impression -- perhaps a misimpression. The line you
19 quoted out of 036K where it says, "Commission agrees that
20 703(c)(3) does not grant the government the right to a
21 preliminary determination to determine the materiality after
22 the VTC witnesses or otherwise." In front of that is a line,
23 two lines, where the defense will -- "Consequently, the

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1 defense will give notice and information to the government so
2 the request of the witnesses can be brought to the United
3 States Naval Station Guantanamo Bay, Cuba, or to a video
4 teleconferencing site."

5 LDC [MR. CONNELL]: Yes.

6 MJ [COL POHL]: The reason I raise this issue is I went
7 back to look at 703(c)(3), and when you looked at it, the
8 first part, 703(c), talks about witnesses for the government,
9 the second part talks about witnesses for the defense, and the
10 third provision is the one that talks about VTCs.

11 LDC [MR. CONNELL]: Yes, sir.

12 MJ [COL POHL]: But when you read the entire (c)(3), it
13 says "If the opposing party objects to such a request" -- and
14 I'm saying this is a request for a VTC ----

15 LDC [MR. CONNELL]: Yes.

16 MJ [COL POHL]: ---- "the military judge shall resolve the
17 matter by balancing all probative factors, including but not
18 limited to the need of either party for personal appearance of
19 the witness, the remote and unique situation of the forum, and
20 the logistical difficulties in obtaining the presence of the
21 witness." Okay.

22 Now, you read that as a stand-alone provision not
23 connected to (1) and (2).

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1 LDC [MR. CONNELL]: But -- yes, and the reason is, it's
2 structured so differently. There are a couple of important
3 differences in the structure. One of those we mentioned
4 yesterday is that it is equally applicable to both sides.
5 It's not the government and the defense, it's the opposing
6 party.

7 The second is the request structure is written much
8 differently than it is with respect to -- with respect to (c).
9 In (c) -- excuse me, in 703(c)(2)(A), for a request, "The
10 defense shall submit to the trial counsel a written list of
11 witnesses whose production by the government the defense
12 requests." The -- it doesn't make structural sense for that
13 to be talking about the same process as (c)(3), because (c)(3)
14 says, upon request of either party, the military judge may
15 act. And so ----

16 MJ [COL POHL]: No, but it says the military judge may
17 permit a witness to testify from a remote location by VTC.

18 LDC [MR. CONNELL]: Yes. Well, I shortened that to act,
19 but yes, that's certainly what it says.

20 MJ [COL POHL]: Okay. And so ----

21 LDC [MR. CONNELL]: And so the request in (c), according
22 to the rule, not -- not according to your 036C, because I know
23 what you ruled, you ruled we have to give notice to the

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1 government, and that is what we did. But according to the
2 rule, that request should be to the military commission, and
3 not to the -- not to the prosecution. Because either party
4 can make such a request, and the opposing party can object.

5 MJ [COL POHL]: I just wanted to make it clear that
6 there's another way to read that.

7 LDC [MR. CONNELL]: And what is that, sir?

8 MJ [COL POHL]: And the way is that the witness request
9 has to satisfy -- I know you object to it, we've gone through
10 this -- 703(c)(2), then if either side wants a witness to come
11 by VTC, that triggers (c)(3). And (c)(3) only addresses not
12 witness production but appearing by VTC.

13 LDC [MR. CONNELL]: So the -- sure, one could read it that
14 way. I think that that reading does some violence to the text
15 of the rule which is set up so differently from -- how would
16 it make any sense, for example, if for -- upon the request of
17 either party, the prosecution could -- we don't produce
18 witnesses for the prosecution, right? The prosecution under
19 this system allegedly produces witnesses for the defense. But
20 why would the prosecution be bound by a rule which is
21 structurally similar for both sides?

22 MJ [COL POHL]: Because -- because, for example, the
23 government says, I want to propose a witness by VTC, and the

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1 defense opposes it.

2 LDC [MR. CONNELL]: Right. But there are plenty of times
3 that we could oppose the VTC part, but we don't get to oppose
4 their witnesses.

5 MJ [COL POHL]: Yeah.

6 LDC [MR. CONNELL]: They get to oppose our witnesses, and
7 they always do. We don't get to oppose their witnesses.

8 MJ [COL POHL]: But if they were to propose -- they still
9 have a relevant and necessity component to their witnesses.

10 LDC [MR. CONNELL]: Not under this rule, sir. They get to
11 make their own relevance and necessity determination. That's
12 what (c)(1) says.

13 MJ [COL POHL]: They consider ----

14 LDC [MR. CONNELL]: That's what (c)(1) says.

15 MJ [COL POHL]: But there's a relative necessity component
16 of it. I've got that. And if they present irrelevant and
17 unnecessary witnesses and waste the court's time, then they
18 won't be heard. I mean, let's say for example -- I mean, if
19 the government proposes a witness and the defense opposes it
20 ahead of time, we'd do the same analysis. I understand it's
21 not as easy because of all of the witnesses that have got to
22 be produced by the government one way or the other. But if
23 they start presenting irrelevant witnesses, then we'll address

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1 it at the time. I mean, they still have got to be relevant.

2 LDC [MR. CONNELL]: Well, you know, answers have to be
3 relevant in general, right? Most of this is a
4 question-by-question analysis. Normally you ask the question,
5 there might be an objection of relevance from either side, the
6 judge rules on the relevance or not. But the structure of the
7 rule for (c)(1), in 703(c)(1), is that the prosecution gets to
8 make its own consideration. The trial counsel shall obtain
9 the presence of witnesses whose testimony the trial counsel
10 considers relevant and necessary.

11 So the relevance and necessity -- necessary
12 determination for production, not for testimony, right? You
13 get to decide the scope of a person's testimony, but they, the
14 prosecution, has unfettered discretion over who they consider
15 in their professional judgment to be relevant and necessary.

16 Which brings us back to (c)(3). It is not difficult
17 to imagine a situation where a witness is sitting in our
18 office in Rosslyn in front of a military VTC and ready to
19 testify when the judge allows and requires no intervention by
20 the prosecution whatsoever. In that situation, it makes --
21 there is no reason, practical or rule-based, why the -- we
22 would have to ask the prosecution to go and get the witness
23 and take them to a VTC site. Sometimes we can provide the VTC

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1 site. We have a VTC site. We have VTCs with Guantanamo all
2 the time. And (c)(3) recognizes that possibility, because
3 it -- either party may make a request, and that request goes
4 not to the opposing party but to the judge, and then the
5 opposing party can object.

6 If the witnesses that I were talking about -- that we
7 talked about in 424C, were sitting in our office in Rosslyn,
8 then there would be no need for government -- a motion to
9 compel the government. We could proceed simply under
10 703(c)(3). Why would I have to -- the government doesn't have
11 to act. Why would I have to compel them to act?

12 MJ [COL POHL]: Well ----

13 LDC [MR. CONNELL]: And, in fact, sir ----

14 MJ [COL POHL]: In military practice, let me just -- that
15 if the trial counsel -- if the defense wants to produce a
16 witness at their own risk, they have that option.

17 LDC [MR. CONNELL]: Sure.

18 MJ [COL POHL]: Okay. And the government usually -- they
19 object. They have an opportunity -- it's usually a discovery
20 issue more than anything else. A witness comes in the
21 government doesn't know about, the witness testifies. The
22 government may or may not be given an opportunity for recess
23 to prepare their cross. But that's at your peril.

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: But that's kind of -- but what I'm saying
3 is that's a witness production issue. The question is whether
4 this rule is a witness production rule or simply a VTC rule.

5 LDC [MR. CONNELL]: Right.

6 MJ [COL POHL]: Because there is no comparable position in
7 the Manual for Courts-Martial.

8 LDC [MR. CONNELL]: Right. I agree with your construction
9 of it. That's why I'm saying this is not a question of
10 producing witnesses; this is a question of -- well, in a sense
11 it is a question of producing witnesses ----

12 MJ [COL POHL]: But I'm saying if you want to use ----

13 LDC [MR. CONNELL]: ---- if the witness has -- if we have
14 to use government VTC. That was exactly the request that the
15 government brought up in 036E, is that they wanted to reach
16 out and assert control over voluntary defense witnesses where
17 we needed no government involvement at all.

18 You know, we can put people with the consent of the
19 convening authority on the flight down here, and if we can
20 produce them and have them walk in, you know, off the street,
21 if you will, just like would happen in a court-martial, then
22 we can do that without government intervention.

23 This rule, (c)(3), recognizes the same process for

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1 VTC. If we don't need to compel the government to do
2 something, then we can just call the witness and you make
3 determinations, you know, you rule on the witness like you
4 would normally.

5 MJ [COL POHL]: Can you do a VTC without government
6 involvement?

7 LDC [MR. CONNELL]: Yes. I mean, someone has to ----

8 MJ [COL POHL]: Really?

9 LDC [MR. CONNELL]: If by government -- you mean
10 prosecution or do you mean U.S. Government?

11 MJ [COL POHL]: Well ----

12 LDC [MR. CONNELL]: I mean, it's U.S. Government
13 equipment, but we can do it without the prosecution involved.

14 MJ [COL POHL]: Well, for some purposes you see the
15 government as the big G, responsible for everything.

16 LDC [MR. CONNELL]: Sure.

17 MJ [COL POHL]: Other purposes, sometimes one argues --
18 and I'm not saying -- this is just the nature of
19 litigation ----

20 LDC [MR. CONNELL]: Sure.

21 MJ [COL POHL]: ---- for other purposes, you break the
22 government up. So for these purposes, you're saying the
23 government is the prosecution team, not the AV folks in the

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1 back room setting up the VTCs?

2 LDC [MR. CONNELL]: Right.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: I mean, the AV folks -- is this
5 courtroom under the control of the prosecution? No, it's
6 under the judge, of course.

7 MJ [COL POHL]: Well, yeah, but I'm saying they're all
8 paid for by the United States Government, as I am, too. I got
9 that.

10 LDC [MR. CONNELL]: As I am, too. I mean, we're all --
11 you know, that's part of the problem around here.

12 MJ [COL POHL]: Okay. I just wanted to raise that to you
13 so there's no surprise if this may turn out a different way,
14 that's all.

15 LDC [MR. CONNELL]: You mean I might lose?

16 MJ [COL POHL]: No, don't run off. I have another
17 question for you, and it deals with a 161 issue. Do you
18 recall what that is?

19 LDC [MR. CONNELL]: 161, the 506?

20 MJ [COL POHL]: Yeah, the 302s.

21 LDC [MR. CONNELL]: Yes, the 302s and whether they have to
22 be a ----

23 MJ [COL POHL]: Now, we were looking at it, and has there

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1 been any movement on that? I thought you may have gotten
2 some ----

3 LDC [MR. CONNELL]: Okay. The movement is -- and you're
4 going to have to give me just a second. The government
5 produced -- and I explained this at the last hearing. The
6 government produced a second set of 302s with lesser
7 redactions. They're not unredacted, but they have lesser
8 redactions, in fact, many, many fewer redactions than the
9 original set had.

10 There are a number of other unclassified documents,
11 pieces of -- amounts of discovery that have not been through
12 the 506 process, and if -- you know, after the break, I can
13 check my notes, and I can tell you exactly what those are, if
14 you don't mind.

15 MJ [COL POHL]: I'm saying but do you need -- is there any
16 status update that would be helpful to me before I issue a
17 ruling on it?

18 LDC [MR. CONNELL]: There has been no movement since the
19 last time we discussed this topic.

20 MJ [COL POHL]: Okay. Okay. Thank you.

21 LDC [MR. CONNELL]: I also did a little homework, Your
22 Honor, and there were two questions that you asked me
23 yesterday that I did not have answers for that I would like to

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1 give those answers, if you don't mind.

2 MJ [COL POHL]: Go ahead.

3 LDC [MR. CONNELL]: The first question in respect to
4 AE 251 was you asked me the effect of the Patriot Act
5 extension on the statute of limitations on war crimes, and I
6 did not have 18 U.S.C. 3286 the extension statute at hand.

7 3282, when in civilian court, established a five-year
8 statute of limitations for the vast majority of crimes,
9 including all noncapital war crimes, brought under the War
10 Crimes Act of 1996. Section 3286 which is the extension, it's
11 18 U.S.C. 3286, the extension statute that the government
12 referenced yesterday extends the statute of limitations for
13 eight crimes, eight specific crimes.

14 2332b is a new crime established by the Patriot Act
15 of transnational terrorism; there are three statutes,
16 18 U.S.C. 112, 18 U.S.C. 3352(e), and 18 U.S.C. 1751(e), which
17 deal with attacks on officials; there is 18 U.S.C. 1361, which
18 is damage to government property; and then three other crimes,
19 49 U.S.C., 46, 504, 505, and 506, which deal with aircraft
20 crimes.

21 All of these are civilian crimes. These -- none of
22 these are war crimes. This statute had no effect whatsoever
23 on the statute of limitations which was applicable to the War

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1 Crimes Act in 1996 and is still applicable to the War Crimes
2 Act today.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: The second question that the military
5 commission asked me was the effect of a customary
6 international law norm against statute of limitations in war
7 crimes. I don't know why I forgot the answer to this, I put
8 it down to GTMO-brain, because we briefed this fully in
9 AE 251B. And the ICRC does consider the nonapplicability of
10 statute of limitations to be a customary international law
11 rule.

12 We concede -- we concede that the United States is
13 bound by customary international law where there is no
14 contrary domestic law. That is the force of the government's
15 argument. I could not agree more with that position. Where
16 there is no contrary domestic law, customary international law
17 governs.

18 In fact, in my long what the military commission
19 called dissertation on international law at the last hearing,
20 one of the principles that I noted was the second in time
21 rule, having to do with whether -- where there's a
22 pre-existing principle, then -- and there's a subsequent act,
23 that second in time rule governs.

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1 However, in this particular situation, domestic law
2 is directly contrary to customary international law and, thus,
3 controls. The United States has been a persistent objector to
4 the idea that war crimes do not have a statute of limitations.
5 The United States has not signed, and this is in the briefs,
6 the convention on the nonapplicability of statute of
7 limitations, which only has 55 signatories anyway, or the Rome
8 Statute, participating in the International Criminal Court,
9 which does not have a statute of limitations for war crimes.

10 In 1996, in direct contravention of the customary
11 international law rule against the statute of limitations in
12 war crimes, the Congress passed the War Crimes Act of 1996 and
13 the -- to which 3282, the five-year statute of limitations,
14 directly applies. The United States has abrogated and has
15 directly contrary domestic law on the question of
16 applicability of the statute of limitations to war crimes.

17 MJ [COL POHL]: Thank you.

18 Ms. Tarin, do you want to add anything to this
19 discussion.

20 ATC [MS. TARIN]: Yes, Your Honor.

21 MJ [COL POHL]: Okay.

22 ATC [MS. TARIN]: With regard to Section 3286, yes, that
23 statute extended the statute of limitations with respect to

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1 offenses related to terrorism, including the offenses that are
2 at issue here, because it extended the offenses for --
3 offenses related to destruction of aircraft, an offense that
4 is regarding Charge III, and also extended the offense for
5 destruction or injury to property within the territorial
6 jurisdiction of the United States, and that would refer to
7 Charge V.

8 Also, the government was not relying or saying that
9 customary international law binds the United States, but
10 simply that Section 950t was consistent with customary
11 international law.

12 And finally, you asked me yesterday if there was
13 anything that I could point to to show you that there was no
14 statute of limitations at the time that Article 21 applied,
15 and this court can refer to the military commission in
16 United States v. al Nashiri, Appellate Exhibits 291C, 296C,
17 297C and 299C, where the military commission ruled there that
18 there was no statute of limitations at that time that would
19 have governed these offenses. Thank you.

20 MJ [COL POHL]: Ms. Tarin, just so I'm clear, you refer to
21 the Nashiri rulings?

22 ATC [MS. TARIN]: Yes.

23 MJ [COL POHL]: Who was the judge that issued those?

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1 ATC [MS. TARIN]: Judge Spath.

2 MJ [COL POHL]: Okay. Thank you. I just don't like
3 myself being quoted back to me as the authority.

4 Mr. Harrington, you wanted to say something?

5 LDC [MR. HARRINGTON]: Something else, Judge.

6 LDC [MR. CONNELL]: Just one last comment, Your Honor.

7 MJ [COL POHL]: Is it the last comment?

8 LDC [MR. CONNELL]: You mean of the day?

9 MJ [COL POHL]: No, on this issue?

10 LDC [MR. CONNELL]: Yes, the last comment on this topic.

11 MJ [COL POHL]: Go ahead.

12 LDC [MR. CONNELL]: The government is exactly right about
13 the eight-year extension for these civil crimes, none of which
14 are charged in this case. These are all war crimes that --
15 and none of these are affecting an aircraft in violation of
16 the law of war, transnational terrorism in violation of the
17 law of war. If the United States had chosen to charge these
18 men with these offenses in the United States, they would have
19 had the benefit of an eight-year statute of limitations and
20 could have done so until 2009.

21 In here, they have never chosen to charge these
22 offenses. They have chosen to proceed on war crimes instead,
23 which is governed by 3282 and the UCMJ. That's my last

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1 comment on the topic.

2 MJ [COL POHL]: Okay. Thank you. Mr. Harrington, you
3 wanted to say something on another issue.

4 LDC [MR. HARRINGTON]: Yes, Your Honor.

5 MJ [COL POHL]: Go ahead.

6 LDC [MR. HARRINGTON]: Judge, this is just to give the
7 court some notice of a possible problem lurking for the next
8 hearing which we hope to avoid, but we filed a notice
9 yesterday under AE 004K, and it relates to our having detailed
10 military counsel. At the end of September, Major Alaina
11 Wichner will be leaving the Army and transitioning to a
12 civilian position with our team, but we will not have a
13 detailed military counsel at that time. Now, that's two and a
14 half months away, we realize that.

15 MJ [COL POHL]: Why don't you have a detailed military
16 counsel?

17 LDC [MR. HARRINGTON]: Because of security clearance,
18 Judge. We have somebody selected. The process is in place.
19 He has been waiting 14 months now for his security clearance.
20 We are probably going to end up with an order of protection
21 against us for harassing the people who grant security
22 clearance.

23 MJ [COL POHL]: Okay. Has he done his -- does he have his

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1 TOPM -- OPM background review, the TS?

2 LDC [MR. HARRINGTON]: They have not completed it, Judge,
3 even at this point. So I'm just bringing it to the court's
4 attention.

5 MJ [COL POHL]: I got it.

6 LDC [MR. HARRINGTON]: We're doing everything we can to
7 avoid that and hopefully this issue will not come up, but ----

8 MJ [COL POHL]: Okay. Thank you.

9 LDC [MR. HARRINGTON]: The second thing, Judge, is at the
10 802 conference, the inquiry was made about going ahead on the
11 witness on 152. And since the 802 conference, we have
12 received a decision from the convening authority declining to
13 grant immunity to that witness.

14 We will be filing with the court a request for
15 immunity. Obviously the court will take that up in due
16 course. And we're also -- we're working on a third
17 alternative that, even if the court were to deny that, which
18 we hope the court won't, but even if the court would deny
19 that, we will be able to produce that witness anyways. We are
20 working with the witness's attorneys about that, but I just
21 wanted the court to be aware of what was going on there.

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

23 LDC [MR. HARRINGTON]: Lastly, Judge, with respect to 152,

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1 you know that this problem is ongoing, obviously, and it has
2 not abated, and the fact that nothing has been said here is --
3 does not mean that it has abated. The week before last, we
4 had an incident between Mr. Binalshibh and assistant watch
5 commander -- or, I'm sorry, the watch commander and the SJA
6 which escalated into a more serious situation, but it arose
7 from the same underlying situation. And one of the triggers
8 for that is mail delivery where Mr. Binalshibh is attempting
9 to sleep during the day because he's unable to sleep at night.

10 And I have spoken with the assistant SJA who
11 testifies with respect to the witnesses' excusals, and we have
12 worked out, I think, an alternative procedure which will help
13 to alleviate that situation. He asked me if I could just put
14 it on the record because it will make it easier to go back and
15 change the SOP that relates to this. And it's a simple thing,
16 Judge. Just that my client will put a legal bin outside his
17 door, his mail will be left in there for that SJA to pick up,
18 and they will deliver his mail to that bin.

19 MJ [COL POHL]: Well, if you are working with the
20 confinement facility on something like this and you agreed to
21 an alternate procedure, it seems to me that alleviates the
22 problem. I really don't have a role in that. If you want me
23 to say that sounds like a good idea to me if it makes the

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1 problem going away ----

2 LDC [MR. HARRINGTON]: Right.

3 MJ [COL POHL]: I'm not sure what you want me to do.

4 LDC [MR. HARRINGTON]: I'm not even asking for your
5 sanction of it, Judge.

6 MJ [COL POHL]: Okay.

7 LDC [MR. HARRINGTON]: We agreed we'd put something on the
8 record because it makes it easier in terms of facilitating
9 that change in procedure.

10 MJ [COL POHL]: Okay.

11 LDC [MR. HARRINGTON]: But, Judge, I just want you to
12 understand that this problem has not abated, it still goes on
13 and it cries out for relief. And we hope that ultimately
14 that's what the court is going to grant us with respect to
15 this. Thank you.

16 MJ [COL POHL]: Okay. Thank you.

17 I believe that covers all old business. And that
18 brings us to an issue that I thought may have been resolved,
19 162.

20 LDC [MR. CONNELL]: Yes, sir.

21 Sir, in 162, the defense moved to compel a copy of
22 the nondisclosure agreement -- or a generic copy of the
23 nondisclosure agreement of the privilege team. And 162B

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1 issued on 2 October 2014, the military commission granted that
2 motion and the government has not complied.

3 I bring this up in the manner of status check.

4 MJ [COL POHL]: Okay.

5 LDC [MR. CONNELL]: I have nothing else to say about it.

6 MJ [COL POHL]: Trial Counsel, did you get the order.

7 MTC [MR. TRIVETT]: Yes, sir. And I actually thought we
8 had complied with an e-mail. Unfortunately, I don't have
9 access to my e-mail account that I sent it. It was over a
10 year ago. If not, we'll certainly provide it immediately.

11 MJ [COL POHL]: Okay. If -- there's your status.

12 LDC [MR. CONNELL]: Thank you.

13 MJ [COL POHL]: 182.

14 LDC [MR. CONNELL]: Your Honor, this is also just a matter
15 of providing status to the military commission. In 182K, the
16 military commission ordered a return of the laptops to their
17 2010 functionality. The government is technically out of
18 compliance with that as we document in 182M because there is
19 no CD read/write capability. And specifically on 8 March of
20 2016, we submitted a CD/DVD reader to JTF at our own expense
21 which was rejected two days later.

22 However, I'm not asking for any relief at this time.

23 The prosecution and the Chief Defense Counsel and the defense

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1 teams are working on an agreement for new laptops. That
2 agreement is in a forward state of preparation. I am -- it's
3 on my desk right now, but I'm a little otherwise occupied at
4 the time. Right now, I owe the prosecution a chop which I
5 will have to them shortly. So I ask that we defer this issue
6 to October.

7 MJ [COL POHL]: On both 162 and 182, I'm going to consider
8 them resolved unless you raise them back to me, okay?

9 LDC [MR. CONNELL]: 162, I completely understand. 182 is
10 currently in a state of -- the most recent pleading on it is
11 182M where we object to the government's description of the
12 status, but I understand what the military commission is
13 telling me.

14 MJ [COL POHL]: But you're telling me you're working it
15 out.

16 LDC [MR. CONNELL]: We're working it out.

17 MJ [COL POHL]: If it doesn't work out, let me know.

18 343H?

19 LDC [MR. CONNELL]: 343 has two pending motions in it, two
20 requests for relief that have not been ruled upon by the
21 military commission. One of those is 343F, one of those is
22 343H. I'm going to -- my comments will apply to both of them,
23 although Mr. Bin'Attash is the moving party on 343H and may

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1 have some different views on it that they wish to state.

2 The facts underlying 343 bear summary. On 1 October
3 of 2014, Major General Ary became the convening authority and
4 prepared a report reviewing the efficiency and the
5 effectiveness of the military judges. He testified about
6 that. A copy of the executive summary of that is already
7 found in the record of 343. He testified about his review of
8 effectiveness and efficiency at 343, the base motion,
9 Attachment C, the unofficial/unauthenticated transcript of the
10 al Nashiri case at 5598. He said that he made individual
11 assessments of each judge, he got a total of all of the cases,
12 and he broke them out by judge.

13 That -- a spreadsheet reflecting that assessment, is
14 found in 343H, Attachment B. The pages aren't numbered, but
15 it's -- you can clearly see the spreadsheet, which is -- has
16 been placed in the record.

17 On 9 December of 2014, the convening authority
18 lobbied the Deputy Secretary of Defense to issue assignment
19 orders to Guantanamo for the judges, quote, to accelerate the
20 pace of litigation. At that time in the base motion of 343,
21 we argued three bases for relief: Actual unlawful influence,
22 apparent unlawful influence, and the independence and
23 impartiality of the trial judiciary.

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1 On 25 February of 2015, the -- in AE 343C, the
2 military commission denied a request for witnesses, it denied
3 a request for oral argument, and it found that the defendant
4 had met its burden of showing at least apparent UI and shifted
5 that to the government.

6 He found that at least an appearance of unlawful
7 attempt to pressure the military judge had taken place, and
8 the underlying order, RTMC Change 1, was rescinded a day later
9 on 26 February 2015. And one day after that, on 27 February
10 2015, the military commission issued 343E, ruling that the
11 prejudice had been cured.

12 On March 2 of 2015, a separate judge in the
13 al Nashiri case also found apparent UI -- slowing down --
14 which is found at attachment F to 343, and subsequent to that,
15 we filed the motions which are at issue here. On 10 March
16 2015, we filed 343F asking for additional relief of the
17 disqualification of Major General Ary and his legal advisors,
18 similar to the relief which had been granted in the Nashiri
19 case.

20 On 21 March of 2015, Major General Ary resigned.
21 It's my understanding that some of the legal advisor staff
22 remain to this day.

23 On 30 March 2015, Mr. Bin'Attash filed 343H, which

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1 essentially seeks a very similar relief.

2 The question in this case is whether the appearance
3 of unlawful influence persists because some of the
4 participants in the unlawful influence continue to exercise
5 authority over the military commissions.

6 In the testimony and the attachments which were --
7 which are in Attachment B to 343, the transcript of testimony
8 from the Nashiri case, Major General Ary made clear that he
9 worked closely with his advisors who were involved in the
10 lobbying effort to the Deputy Secretary of Defense.

11 At unauthenticated transcript 5612 to 5613, he
12 discusses the group discussion that he had with his legal
13 advisors and the advice that he received from his legal
14 advisors.

15 At unofficial/unauthenticated transcript, which is
16 Attachment B, page 5616 he -- and 5617, he discusses the
17 influence -- the consensus of his legal advisors in taking the
18 action and the recommendation that he did, except for one
19 person who decided -- argued that it was not a good idea to
20 order the military judges to do something to interfere with
21 their conduct of the case.

22 At least one of those legal advisors is still in
23 place, and there -- is involved in a number of decisions

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1 taking place in the military commissions. Those include
2 resource decisions for the defense and, for that matter, for
3 the trial judiciary.

4 It -- I do note one thing that came up after, this
5 was after this event. The convening authority reassigned --
6 you know, did something to military defense counsel that it
7 could not do to the trial judiciary, which is order them to
8 stop staying in East Caravella, which is where they had stayed
9 before, and ordered them instead to be moved to the
10 Containerized Housing Units. I understand that the legal
11 staff is involved in monetary awards, determining -- assessing
12 monetary awards for GS staff as well as coordinating moves and
13 office spaces. There is a wide variety of behind-the-scenes
14 influence that the legal advisors' office can influence, can
15 exert, and I suspect does exert.

16 Given that fact, the -- in order to have complete
17 relief from the prejudice which the military commission found
18 in 383C, the military commission should disqualify those
19 involved in the -- in the mistaken decision to order the
20 judges to Guantanamo.

21 MJ [COL POHL]: Who do you have by name that should be
22 disqualified?

23 LDC [MR. CONNELL]: The only person that I -- I don't have

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1 complete visibility on the military commissions -- excuse me,
2 on the Office of Military Commissions. I can read the -- if
3 the court will give me the court's indulgence.

4 At 343, attachment B, page 5576, Major General Ary
5 testified about Mark Toole, who was the acting legal advisor
6 at the time, Alyssa Adams, Lieutenant Colonel Patricia Lewis,
7 and Captain Matt Rich, and Commander Raghav, R-A-G-H-A-V,
8 Kotval, K-O-T-V-A-L. The only one of those who I am
9 personally familiar with still being at the convening
10 authority's office is Mr. Toole.

11 MJ [COL POHL]: Okay. I have no further questions.
12 Ms. Bormann, do you want to be heard on this one?

13 LDC [MS. BORMANN]: Judge, I'm not going to go over the
14 history here except to note a couple of things. Mr. Connell
15 is right. So beginning in October of 2014 with the assignment
16 of then Major General Ary as the convening authority, he began
17 a campaign of evaluating both the judges and the efficiency of
18 the commissions in direct violation of the Military
19 Commissions Act.

20 The result of that was that in January of 2015, then
21 Deputy Secretary of Defense issued a rule change that would
22 have required the judges hearing Guantanamo Bay cases to PCS,
23 that is, move to Guantanamo Bay. That stated purpose of that

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1 was to speed along trials, make them more efficient. And I'm
2 going to quote now from the campaign by then General -- by
3 General Ary, and that is to "position the judges for success,"
4 whatever that meant.

5 You moved quickly when we filed 343. You took a look
6 at it, you said, well, I don't need to hear oral argument, I
7 don't need any more evidence. There is at the very least the
8 appearance of unlawful influence and so I am abating until
9 it's rescinded. It was rescinded the next day.

10 In the meantime, on behalf of Mr. Bin'Attash, we
11 requested discovery -- the discovery underlying this case.
12 And that discovery consisted of a series of e-mails along with
13 the spreadsheet Mr. Connell talked about and e-mails that went
14 back and forth among the convening authority's staff, meaning
15 the people mentioned by Mr. Connell, that being Mr. Toole,
16 Alyssa Adams, Matthew Rich and somebody named -- I'm going to
17 butcher his name, but let's call him Mr. Kotval, K-O-T-V-A-L,
18 regarding the campaigning for this change.

19 Because you ruled expeditiously and found apparent
20 unlawful influence, you did not grant our request for that
21 discovery. Judge Spath later in the al Nashiri case did.
22 Consequently, in March of 2015, there was a hearing in the
23 al Nashiri case. During that hearing, it came to light that

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1 there had been a discussion, a lengthy discussion among the
2 convening authority's staff regarding this very issue before
3 Your Honor, the issue being attempting to unlawfully influence
4 the trial judges in Guantanamo Bay.

5 I'm going to direct Your Honor's attention to
6 AE 343H, page 40 of 96. It is an attachment. It is an e-mail
7 dated Friday, November 14, 2014, at 5:04:26. I have provided
8 a copy to the court reporter and to the court security
9 officer. This has already been made a matter of public record
10 in the case of United States v. al Nashiri and has
11 unclassified and been released to the public for well over a
12 year. Barring any objection from the court, I'd like to use
13 the document camera at this point.

14 MJ [COL POHL]: Go ahead.

15 LDC [MS. BORMANN]: Thank you. It's a two -- three-page,
16 actually, document, the first e-mail I want to address. And
17 it elucidates, I think, how interwoven the unlawful influence
18 was in the convening authority's office. So this is an e-mail
19 that involved all of the legal advisors, there's an MLA, sort
20 of general feed to them, along with specifically Alyssa Adams
21 and then Captain Matthew Rich. And it begins.

22 MJ [COL POHL]: Go ahead. You can put it on the big
23 screen.

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1 LDC [MS. BORMANN]: It begins with Commander Kotval laying
2 out the issues for the proposed rule change. This is, again,
3 in November of 2014. Like a good lawyer, he writes for his
4 boss the issue and then his concerns. He starts with the
5 statute. That statute is 10 U.S.C. 949b, and the relevant
6 portion of that that he refers to is that, "In the military
7 commissions, no person may attempt to coerce or by any
8 unauthorized means influence the action of a military
9 commission under this chapter or any member thereof, the
10 action of any convening, approving or reviewing
11 authority" ----

12 MJ [COL POHL]: Ms. Bormann. Ms. Bormann, you need to
13 move either the mic closer to you or you closer to the mic.

14 LDC [MS. BORMANN]: Sorry about that.

15 MJ [COL POHL]: No problem.

16 LDC [MS. BORMANN]: ---- "or the exercise of professional
17 judgment by trial counsel or defense counsel." Here,
18 obviously, the appropriate section is attempt to influence the
19 military commission.

20 His concern -- the issue is, his question to his
21 bosses, Mr. Toole and General Ary is, "Are we coercing or by
22 unauthorized means influencing the action of a judge? If not,
23 why are we intruding on what is not typically or traditionally

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1 a CA" -- that stands for convening authority's -- "rule. What
2 is the explanation for this action?"

3 The next issue he directs his bosses' attention to is
4 just below that. He cites to 10 U.S.C. 949e, which states
5 that, "The military judge and military commission under this
6 chapter may for reasonable cause grant a continuance for any
7 party for such time and as often as may appear to be just."
8 And the issue he raises to his bosses, Mr. Toole and the
9 convening authority, and Ms. Adams' attention is, "Trying to
10 speed up a trial or affecting his fairness, if for example,
11 the judge is less inclined to grant a continuance because it
12 means more time in Guantanamo, is that adverse to the
13 accused?"

14 And lastly, the issue brought to Mr. Toole and then
15 General Ary's attention was a cite to 10 U.S.C. 948j. That
16 statute provides that a military judge shall be detailed to
17 each military commission under its chapter and then talks
18 about how the Secretary of Defense shall prescribe
19 regulations. It also talks about the fact that a military
20 judge shall not have his other duties taken away.

21 The issue, "In light of 949j(a), have and will we
22 make regulatory changes in all necessary areas and does that
23 require notice and comment and regulatory action. In light of

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1 948j, can we make commissions the sole duty of judges? In
2 light of 948f, could it be argued that the spirit of the
3 statute is to separate the control of the judiciary and the
4 convening authority? See also 949b and 949e." This was the
5 first of three e-mails that day discussing this.

6 The following e-mail is found at AE 343H,
7 Attachment -- I believe it's F, page -- it's actually page 40
8 of 96 of the motion, and it is dated Friday, November 14, just
9 after that. And it consists of a conversation between and
10 among all of the convening authority legal advisors, Ms. Adams
11 and Captain Rich.

12 Starts with Commander Kotval, who says, "Actually, as
13 I think about this issue, one, would we need to put people on
14 notice because of the regulatory changes? Two, if so, would
15 that give the defense time to file motions? Three, if so, the
16 defense and the judges are aligned on this issue: A, the
17 defense don't want a speedy or speedier trial; B, the judges
18 don't want to move. Four, the defense would file motion after
19 motion saying the convening authority's real goal is to
20 influence the judiciary. The judges would rule on them."

21 Now, if that e-mail doesn't predict with exactitude
22 the problem with the actual unlawful influence in this case, I
23 don't know what does.

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1 Instead of heeding that warning by Commander Kotval,
2 the next e-mail is to Mr. Kotval directly from Alyssa Adams.
3 And in that one on the same day, November 14, found again at
4 AE 343H, this is pages 34, 35 and 36 out of 96 of that motion,
5 the -- bear with me here. This is a long one. In responding
6 to Commander Kotval's concern, Ms. Adams says the following,
7 and let's take it from the top: "Yes, he" -- meaning Major
8 General Ary, the convening authority -- "is influencing it" --
9 it meaning the judiciary -- "but is it unauthorized influence?
10 I think not." So Commander Kotval's concerns are thoroughly
11 dismissed.

12 Commander Kotval is not satisfied with that
13 dismissal. He maintains his concern that the rule change is
14 going to be construed as unlawful influence on the judiciary,
15 and he sends another e-mail. Ms. Adams replies, this can be
16 found at AE 343H, page 37 of 96. And here Ms. Adams -- oops.
17 I don't want to -- I love this thing -- Ms. Adams -- who I
18 still get it on this thing -- says to Mr. -- or to Commander
19 Kotval, who is expressing yet more concerns, "Already did that
20 and got a memo from Fred Taylor which will be included.
21 Enough e-mails now!" No more e-mails. Don't want to hear
22 anymore e-mails about that unlawful influence, Commander
23 Kotval. Let's see where it goes.

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1 The next thing that happens after Commander Kotval's
2 warnings go unheeded is that there is a meeting between Major
3 General Ary, the convening authority, and the Deputy Secretary
4 of Defense. That meeting resulted in yet another e-mail.
5 This e-mail is from Mr. Preston from the Office of General
6 Counsel for the Office of Secretary of Defense to the
7 convening authority and members of his staff and others dated
8 December 31, 2014; it is found at AE 343H, page 86 of 96.

9 And it says in pertinent part -- oh, this is almost
10 impossible to read, so bear with me. I'm going to take it off
11 the camera -- "When Vaughn Ary and I met with DSD" -- meaning
12 Deputy Secretary of Defense -- "DSD made clear he was prepared
13 to approve Vaughn's proposals and that the idea was to
14 coordinate with the services (TJAGs)" -- TJAGs meaning the
15 head of the various services JAG Corps -- "the head lawyer for
16 each service branch, and the command" -- the command being
17 SOUTHCOM and Guantanamo Bay -- "before seeking a formal Deputy
18 Secretary of Defense decision. Indeed, DSD effect gave
19 VOCO" -- meaning vocal approval -- "but the notion was still
20 to work it with the services and the command before confirming
21 final DSD approval. I gather from Vaughn" -- the convening
22 authority -- "who heard from JTF-GTMO, that SOUTHCOM has been
23 informed. The TJAGs have not yet been consulted. At this

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1 point, my understanding is that OGC" -- and some names -- "are
2 working with OMC," that meaning the convening authority staff,
3 "to put together a package for the command and the services
4 that will reflect the Deputy Secretary of Defense's support
5 and tentative approval of the proposal," proposal being
6 Rule 1.

7 When the convening authority received that from the
8 staff from the Office of General Counsel, he didn't write back
9 and say, okay, let's staff it with the TJAGs, the various
10 service branch heads, he said the following. "Mark" --
11 directed to Mark Toole, T-O-O-L-E -- "Mark, let's talk."

12 We don't know what that talk was about, but we do
13 know what happened next. What happened next is that the
14 Department -- the Deputy Secretary of Defense approved Rule 1
15 without it being staffed through the TJAG. It never got
16 staffed through the head lawyer for each military service
17 branch. And that's important, Judge, because the TJAGs
18 control their judiciary.

19 So in determining what judges were going to be taken
20 out of their traditional roles and forced to live in
21 Guantanamo Bay, the TJAGs were a bit concerned, and that's
22 reflected in the next series of e-mails.

23 On January 10, Office of General Counsel employee,

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1 that being a civilian, named Mr. Jason Foster, received an
2 e-mail from -- or wrote an e-mail, rather -- I'm sorry, strike
3 that -- received an e-mail from Ms. Karen Hecker, H-E-C-K-E-R,
4 also working with the Office of General Counsel, asking about
5 the rule change.

6 And let's take a look at that. That can be found at
7 AE 343H, page 94 of 96. The first e-mail, the one at the
8 bottom is simply one word from Ms. Hecker to Mr. Foster,
9 "Really?" And it cites the *Miami Herald* article about moving
10 the judges to Guantanamo and the rule change. Mr. Foster
11 writes, "I don't want to put too much in print, but yes, the
12 convening authority convinced the Deputy Secretary of Defense
13 to amend the trial regulation sans coordination to assign the
14 trial judges to make their OMC case their sole duty with
15 limited flexibility for the JAGs to assign additional duties
16 and to be stationed at the location of the trial."

17 This is an important little e-mail because nobody
18 wants to put anything in e-mails anymore because everybody
19 realizes there's a problem here.

20 The next e-mail coming from OGC, the Office of
21 General Counsel -- well, this has been blacked out, so I can't
22 mention the name -- deals with the take from SOUTHCOM on the
23 rule change, and it is dated -- let's see, I'm trying to make

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1 sure it's not also blacked out -- January 7 of 2015, the day
2 the rule change went into effect. It's in response to an
3 e-mail by the convening authority explaining the rule change
4 and that all of the judges in Guantanamo Bay were going to be
5 forced to live in Guantanamo Bay. And SOUTHCOM personnel
6 evinced the following, "Well, this might help get things
7 moving. PCS orders for commissions judges approved on 7
8 January 15 by DEPSECDEF." No concern there about unlawful
9 influence.

10 Lastly, Judge, I want to direct your attention to
11 AE 343H, page 92 of 96, another series of OGC e-mails
12 involving the failure of the convening authority to either --
13 well, the failure of the convening authority in so many, many
14 different ways, the failure of the entire convening
15 authority's office to pay attention to the law and not attempt
16 to unlawfully influence this judiciary, and the failure to
17 properly staff it, the failure to hide it from the TJAGs.

18 Here is -- here is how I would leave the commission
19 on what we should do here. It can be found at page 92 of 96.
20 It is an e-mail from Mr. Foster to Mr. Bennett and then back
21 to Mr. Foster and then finally from Mr. Bennett, so let's
22 start from the bottom.

23 This is from Mr. Foster to a variety of individuals.

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1 "All, in departure from the tradition, the Deputy Secretary of
2 Defense has acted on an uncoordinated package from the
3 convening authority authorizing and promulgating a change to
4 Chapter 6 of the trial regulation. Specifically, the DSD's
5 action sets forth that, upon assignment to preside over a
6 military commission upon referral, the work of the commission
7 becomes the exclusive duty of the trial judge, with some
8 limited TJAG approved exceptions, and that the trial judge
9 shall be stationed at the location of the commission. Happy
10 to talk further."

11 The response from Mr. Bennett is "That's interesting.
12 I assume they coordinated with you, right?"

13 That was followed by Mr. Foster saying, "Nope. It
14 was, 'unorthodox' to say the least."

15 And last, Judge ----

16 MJ [COL POHL]: I'm a little confused on that one, just to
17 clarify. When he says -- Mr. Foster apparently works for ----

18 LDC [MS. BORMANN]: OGC.

19 MJ [COL POHL]: ---- OGC. When he says was coordinated
20 with you, he says, nope, I'm assuming he meant him personally.
21 Because under a previous e-mail, Mr. Preston, I believe, was
22 the general counsel, did indicate that he had met with Mr. Ary
23 on this.

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1 LDC [MS. BORMANN]: Yes. My understanding is that
2 Mr. Foster was the person charged with coordinating with the
3 various service branches any changes through the military
4 commission to act. So that's why his coordination would have
5 been connected to the TJAG.

6 MJ [COL POHL]: Okay. Not with OGC?

7 LDC [MS. BORMANN]: Well, he worked with OGC, but that was
8 his little part of it.

9 MJ [COL POHL]: Appears there was a lot of OGC involvement
10 in this.

11 LDC [MS. BORMANN]: There was some OGC involvement,
12 absolutely. They also ignored the unlawful influence part.
13 But it's so interesting to watch this, because Mr. Bennett
14 then writes the following, which I had to ask Mr. Schwartz
15 about, "GTF00H," with an exclamation point, which I am told
16 means "Get the F out of here." And I think that pretty much
17 says exactly what this is, which is an entire attempt to
18 derail any judicial independence and tell the judiciary in one
19 fell rule swoop, two things: One, you're not moving fast
20 enough and we don't like it; and two, you're going to be
21 punished by having to pick up all of your belongings and
22 permanently reside on Guantanamo Bay until the cases are taken
23 care of.

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1 You issued your earlier ruling finding apparent
2 unlawful influence before you knew any of this because you
3 hadn't been provided any of the e-mails. Mr. Connell did a
4 good job of laying out the timing.

5 Judge Spath in the al Nashiri case had the knowledge
6 of how deeply this went into the convening authority's office
7 and how they ignored the law -- it was a conscious disregard
8 for the law -- attempted to cover up what they knew they were
9 disregarding, and promulgating it anyway. That, Judge,
10 screams for a remedy much different than the one that you
11 issued, which is why Judge Spath in the al Nashiri case
12 ordered that the people who were actively involved with the
13 commission of unlawful influence not have any ability to
14 further unlawfully influence this commission.

15 As I stand here right now, I cannot tell you whether
16 or not Commander Kotval or Captain Rich or Ms. Adams -- I
17 think Ms. Adams is still there, but I can tell you that
18 Mr. Toole is there. And how I can tell you that is because
19 he's intimately involved in every resourcing request we make,
20 he's intimately involved in the denial of dozens of resourcing
21 requests, and most recently, the interminable delay of
22 specific requests made by the Chief Defense Counsel on
23 providing additional learned counsel in this case that would

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1 help move this case forward.

2 So the very man who orchestrated -- the deputy of the
3 convening authority, the very man who orchestrated this rule
4 change, who had been advised that it was unlawful influence,
5 who then rather than put in e-mails his response to the
6 convening authority went and talked to the convening
7 authority, that man still runs the convening authority's
8 office. He's barred by Judge Spath from touching the al
9 Nashiri case, so instead, all of his energy can be focused on
10 our case.

11 MJ [COL POHL]: To be fair, he also could touch Hadi.

12 LDC [MS. BORMANN]: Well, yes. Maybe. I don't know.

13 MJ [COL POHL]: I don't know. I'm just saying.

14 LDC [MS. BORMANN]: That, I don't know. I'm unaware of
15 that. But I can tell you, we deal with him regularly and it
16 has been nothing but a problem. And so you have before you a
17 series of ex parte requests for resources that, because of the
18 very nature of what we're asking for, I can't go into at depth
19 in open session with the government here.

20 MJ [COL POHL]: But I know you get responses from Toole on
21 them.

22 LDC [MS. BORMANN]: Many of them.

23 MJ [COL POHL]: Yeah, I know the responses. I got it.

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1 LDC [MS. BORMANN]: We're asking that you disqualify those
2 members of the convening authority's office who are still
3 working in the convening authority's office from handling
4 anything on behalf of Mr. Bin'Attash.

5 MJ [COL POHL]: How far would this go down? Anybody
6 involved in this at all who didn't say no?

7 LDC [MS. BORMANN]: I think we named the five people.
8 That came from the very testimony that was elicited in front
9 of Judge Spath, but I would ask for a similar order to the one
10 Judge Spath gave.

11 The issue for us, though, is at this point, we get no
12 transparency on who is actually working in the convening
13 authority's office anymore. So as I stand here, I can't tell
14 you whether or not any of these individuals except for
15 Mr. Toole ----

16 MJ [COL POHL]: If I granted your relief, I could
17 simply -- you put the names down if they're still there; if
18 they're not there, that moots the issue.

19 LDC [MS. BORMANN]: Yes. That is exactly what I'm
20 requesting.

21 MJ [COL POHL]: I can take judicial notice that General
22 Ary is no longer the convening authority.

23 LDC [MS. BORMANN]: Well, yes. He resigned his commission

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1 forthwith because he was barred by Judge Spath from issuing
2 any decision making on the al Nashiri case, so they would have
3 had to appoint a second convening authority to handle the
4 matters on the al Nashiri case. And I think it was probably
5 some wise counsel given that that might not be the best way to
6 go forward.

7 It's also not the best way to go forward to having a
8 man, Mr. Toole, and whomever else worked for him, people who
9 ignored very well-founded concerns about unlawful influence,
10 concerns that came to fruition, those people shouldn't be
11 working on this case either. And for those reasons, I'm
12 asking that you grant 343H, sir.

13 MJ [COL POHL]: Thank you. Anything further? Mr. Nevin?

14 LDC [MR. NEVIN]: No, thank you, Your Honor.

15 MJ [COL POHL]: Mr. Harrington?

16 LDC [MR. HARRINGTON]: Nothing further.

17 MJ [COL POHL]: And Mr. Ruiz?

18 LDC [MR. RUIZ]: Judge, the only thing I will add is I
19 know Commander Kotval is no longer in the convening
20 authority's office. He is in civilian capacity now and
21 working as a reservist.

22 MJ [COL POHL]: Okay. Thank you. Trial Counsel, do you
23 wish to be heard? Mr. Swann.

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1 TC [MR. SWANN]: Your Honor, if you get four lawyers
2 together, you probably are going to get five opinions. It's
3 clear here that they wrestled with an issue about whether it
4 constituted unlawful influence, and you decided that issue in
5 February of 2015. Now we're relitigating something that
6 occurred more than 15 months ago and now we're asking for an
7 additional relief based on a finding that another judge made
8 in another case.

9 There's no reason to revisit this. The apparent
10 unlawful influence that you found in this case, the prejudice
11 was taken care of when the convening authority -- excuse me,
12 when the Deputy SECDEF rescinded the regulation within one day
13 of what you ruled. That is a pretty clear sign that the
14 recognition of what they did probably didn't pass muster with
15 this court and probably never should have been before the
16 parties. However, you've taken care of that issue, and why
17 we're revisiting it 15 months or 16 months later doesn't make
18 any sense to me at all.

19 Now, I don't know what -- well, first of all, I don't
20 know who is in the convening authority's office. I have no
21 dealing with any of them. I doubt -- I take what Mr. Ruiz
22 said about at least one of them. I know that another is not
23 there because I saw her picture on a website the other day

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1 attending the Army War College.

2 The only person that might be left is Mr. Toole, but
3 there's just no indication that Mr. Toole has done anything
4 here that would cause you to say you can't work on this case.
5 That's just not apparent from the record that's before you.

6 So I leave you with this: This matter was resolved
7 15 months ago. You took care of it. This, at best, is a
8 motion for reconsideration. It should be denied. There are
9 no new facts, no new law, no intervening circumstances that
10 present themselves here.

11 MJ [COL POHL]: There's no new facts?

12 TC [MR. SWANN]: No, Your Honor. There are no new facts.
13 What additional facts do you have, other than a few e-mails
14 going back? And a bunch of lawyers are discussing something.
15 One thinks that it's not unlawful influence, another thinks it
16 is or it might be. You know, under that situation, some are
17 going to get it right and some are going to get it wrong. And
18 the only person that makes the call on this is you. You did
19 that. No further action on this case should be taken.

20 MJ [COL POHL]: Thank you, Mr. Swann. Anything further
21 from the defense? Mr. Connell.

22 LDC [MR. CONNELL]: Two points, Your Honor. The first is
23 with respect to timeliness. The government's primary argument

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1 seems to be that it is too late to address the issue. I will
2 note that ----

3 MJ [COL POHL]: Mr. Connell, I reject that argument out of
4 hand.

5 LDC [MR. CONNELL]: Thank you.

6 MJ [COL POHL]: Because just the nature of the litigation
7 here, sometimes things sit.

8 LDC [MR. CONNELL]: That said, the second point may also
9 not bear repeating, but I will repeat it anyway, which is,
10 that clearly there is no evidence justifying reconsideration,
11 which is, there was no visibility into the decision-making
12 process within the military -- the convening authority's
13 office at the time that you ruled in 343C and 343E.

14 We now know about the -- both from the testimony of
15 Major General Ary and from the e-mails about the interplay
16 within the convening authority's office, the continuing -- the
17 role of the legal advisors in committing the unlawful
18 influence -- thank you -- which we didn't know before.

19 MJ [COL POHL]: Let me ask you this, and I didn't address
20 it at the time: In order to disqualify the staff, would I
21 necessarily -- and, again, I know it's a moot point now --
22 have to first disqualify General Ary to be the convening
23 authority?

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1 LDC [MR. CONNELL]: Yes. That, in fact, was after
2 dismissal ----

3 MJ [COL POHL]: I know what Judge Spath did. I'm just
4 saying is ----

5 LDC [MR. CONNELL]: No, no, no. I wasn't going to talk
6 about Judge Spath after dismissal. That was the remedy we
7 asked for and the pleadings addressed Major General Ary
8 because he had not yet resigned as convening authority at the
9 time that the case -- the pleadings went forward. So yes, the
10 relief that we asked for after dismissal is disqualification
11 of Major General Ary and the legal advisor staff.

12 It is not crazy to think that that is not merely a
13 moot point. The current convening authority, this is his
14 second turn as convening authority. It is possible for a
15 person to resign as convening authority, have another person
16 come in, and then a prior convening authority come back.
17 That's the situation with Mr. Oostburg Sanz.

18 MJ [COL POHL]: But isn't the -- let me just focus on
19 General Ary. From the record that you provided, would it be
20 fair to say this may have been one of his agenda items when he
21 came in?

22 LDC [MR. CONNELL]: Yes, sir, that is a fair
23 characterization. In fact, the way he describes it is one of

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1 the first things I did there was evaluate the efficiency of
2 the military commission and the judges.

3 MJ [COL POHL]: Yeah, I saw the spreadsheet. What I'm
4 just saying -- I mean, this appears to be his agenda walking
5 through the door. If one were to conclude that, does it
6 really make much difference that some of his lawyers agreed
7 with him and some didn't?

8 LDC [MR. CONNELL]: Well, to be completely fair, I don't
9 think that the fact that some lawyers disagreed -- I mean,
10 dissent is proper. I don't think that that is the heart of
11 the problem. What the heart of the problem is that he was
12 assisted by his legal staff, whether it was consensus or
13 whether there was one dissenter or whatever ----

14 MJ [COL POHL]: You think this was so obviously unlawful
15 influence that any respectable lawyer would never
16 have supported this?

17 LDC [MR. CONNELL]: I won't say respectable, sir. I don't
18 cast disrespect on anybody.

19 MJ [COL POHL]: Let me -- I'll rephrase. But basically
20 when we disqualify an advisor to an advisor in this case,
21 because Ary was acting as an advisor to the DEPSECDEF, in
22 essence. And the decision-maker was Mr. Worth, and Mr. Ary
23 coordinates with some OGC. So you have ----

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1 LDC [MR. CONNELL]: Right.

2 MJ [COL POHL]: ---- so you have Mr. Preston's
3 fingerprints on it also.

4 LDC [MR. CONNELL]: Yes.

5 MJ [COL POHL]: And now we are going down and reaching
6 underneath the lawyers underneath there and you want me to
7 disqualify them because this was so obvious that ----

8 LDC [MR. CONNELL]: The disqualification is not by
9 implication, Your Honor. It's only people who were actively
10 involved.

11 MJ [COL POHL]: No, but what I'm saying is they gave their
12 legal opinion. You had some saying this is a good idea, you
13 had some saying this is -- it's designed to influence, but
14 it's not unauthorized, which is a very lawyer-like approach.

15 LDC [MR. CONNELL]: I can relate.

16 MJ [COL POHL]: Some say it's a bad idea. So anybody who
17 voted for this is a good idea should be disqualified,
18 should ----

19 LDC [MR. CONNELL]: This wasn't a vote. Mr. Toole, who we
20 are talking about, was the acting legal advisor at the time.
21 I understand now he's the deputy, but at the time he was the
22 acting legal advisor. He is the -- he is not, you know,
23 someone that tangentially related to this scheme. He was part

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1 of the core ----

2 MJ [COL POHL]: But let's back up, though. Let's back up.
3 We use the term convening authority, and in the normal use of
4 that term in the military, it's not necessarily a -- it's very
5 rarely, quite frankly, a lawyer. It's somebody else. But
6 General Ary was a legal advisor to the Commandant of the
7 Marine Corps.

8 LDC [MR. CONNELL]: Of course.

9 MJ [COL POHL]: So he is a -- he is not a nonlawyer making
10 a legal decision. He's a lawyer making a legal decision
11 based -- he can read a statute, I suspect, like any lawyer
12 can.

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

14 MJ [COL POHL]: Well, maybe he can't, but I just ----

15 LDC [MR. CONNELL]: No, I ----

16 MJ [COL POHL]: I won't go into it. You ----

17 LDC [MR. CONNELL]: I mean, I'm not trying to cast -- I
18 mean no disrespect. There was a serious breach of military
19 etiquette that took place here, not just etiquette but of a
20 statutory requirement. There were several participants in
21 that. One of them was Major General Ary, as you note, and one
22 of those was Mr. Toole. This is not a question of disrespect
23 or they can't read a statute or anything like that. This is

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1 their active participation in a scheme to influence; which
2 they more or less acknowledged the factual part of the
3 influence, the debate is whether it's legal or not.

4 MJ [COL POHL]: But General Ary had made a decision that
5 he could influence the pace of litigation by putting the
6 judges down at Guantanamo Bay.

7 LDC [MR. CONNELL]: Yes.

8 MJ [COL POHL]: Now, one might argue how that would really
9 move the litigation along, in the sense that ----

10 LDC [MR. CONNELL]: You made that exact point in 343.

11 MJ [COL POHL]: ---- is that I can't -- last time I
12 checked ----

13 LDC [MR. CONNELL]: Right.

14 MJ [COL POHL]: ---- other people need to be here for us
15 to do hearings.

16 LDC [MR. CONNELL]: That's right.

17 MJ [COL POHL]: And I think that came up at the Nashiri
18 hearing, too. So clearly it was an attempt to influence the
19 pace of play.

20 LDC [MR. CONNELL]: Right.

21 MJ [COL POHL]: There's no other reason for it. Okay.
22 And the question was, to quote, I believe, one of the
23 attorneys, was it an unauthorized influence? And we said yes,

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1 and -- at least I said yes and I think Judge Spath said yes.

2 The question is what's the remedy.

3 LDC [MR. CONNELL]: Right.

4 MJ [COL POHL]: Judge Spath had his remedy and I have my
5 remedy.

6 LDC [MR. CONNELL]: Right.

7 MJ [COL POHL]: Which you now want me to expand to
8 include -- and again, General Ary is no longer an issue -- is
9 a trained attorney makes this legal decision and then now we
10 go below him and start disqualifying people that were part of
11 the discussion with him.

12 LDC [MR. CONNELL]: Yes, part of the implementation of the
13 unlawful influence, that's correct.

14 The distinction between -- we are not here saying --
15 this is not a raising of hands to vote about Judge Spath's
16 decision or your decision. It's there was a different factual
17 basis for the two decisions because of the timing of the
18 discovery from the -- from the prosecution because of the
19 testimony. There was simply a -- the military commission
20 acted with such expedition on this question at the time, the
21 full involvement of persons other than Major General Ary had
22 not come to light at the time.

23 MJ [COL POHL]: No, and understand -- and I'm -- you know,

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1 although Mr. Swann said there aren't any new facts, I
2 understand what the pleading here is. But let's go back and
3 review the bidding at the time. As I recall, obviously Change
4 1 said effective immediately, the judges move.

5 LDC [MR. CONNELL]: Yes, sir.

6 MJ [COL POHL]: So I'm not -- so sometimes there needs to
7 be an expeditious decision.

8 LDC [MR. CONNELL]: You made that point in 343C that this
9 was a question that had to be decided immediately, lest the
10 influence linger for a longer period of time, lest, you know,
11 wheels within the Department of Defense begin to turn. I can
12 understand plenty of reasons why the military commission would
13 act quickly. It just had the unintended consequence of all of
14 the facts had not come to light yet.

15 And so that's why I'm not criticizing the military
16 commission's decisions on the facts available to it at the
17 time, but it does justify reconsideration; and now that there
18 are additional facts, taking those facts into account.

19 And I do want to address the core issue that you are
20 actually getting to, which is there's a decider -- there was a
21 lobbyist, if you will, because that's clearly what happened
22 with Major General Ary, and he was assisted in that lobbying
23 by his legal advisors. He was the assistant -- and including

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1 the acting legal advisor at the time.

2 We are not asking to disqualify everyone in the
3 convening authority's office. We are not asking to have a new
4 convening authority structure set up. What we are asking is
5 those people who were revealed by the testimony and the
6 e-mails to have been actively involved should no longer be
7 actively involved in the decision-making about this case.

8 MJ [COL POHL]: I understand.

9 LDC [MR. CONNELL]: Thank you.

10 MJ [COL POHL]: Thank you.

11 Ms. Bormann, anything further?

12 LDC [MS. BORMANN]: Sir, I'm going to direct your
13 attention to the transcript from the al Nashiri case where
14 General Ary testified because that's where you will find
15 evidence of Mr. Toole's complicity in the rule change.

16 Mr. Toole at the time was the legal advisor for the
17 convening authority who took the position of the former legal
18 advisor, a gentleman by the name of Michael Quinn, early in
19 General Ary's appointment. So Mr. Toole worked hand in hand
20 with General Ary and sat -- according to the testimony
21 elicited before Judge Spath, sat in numerous meetings where
22 this was discussed and helped him to implement it. And we
23 know that not only from General Ary's testimony but also from

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1 the e-mail that I put up on the document camera earlier which
2 indicates that when General Ary had a question about how to
3 respond to the Deputy Secretary of Defense, staff at the OGC
4 staff level, on how to promulgate this thing, the first and
5 only person he reached out to was Mr. Toole.

6 This isn't about shaming anybody. It's not about
7 public humiliation. It's not about anything like that. It's
8 about maintaining the independence of the judiciary. You
9 can't possibly -- the world can't possibly look at this system
10 and say to itself, the chief deputy -- the deputy convening
11 authority currently, the guy who is making decisions about
12 resourcing, about ultimately if there's a request for leniency
13 on sentencing, the guy who is advising the convening authority
14 on everything important that comes to the convening
15 authority's office on this case, that guy should not be
16 trusted with making those decisions because that guy was
17 integral in a rule change that, I mean, everybody has to
18 concede attempted to unlawfully influence the military
19 commission.

20 And so the only way to put straight, to rectify that
21 perception and to make sure that the taint of that unlawful
22 influence no longer exists is to order that the people who
23 were in the decision-making position -- we're not talking

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1 about a paralegal, we're not talking about, you know, somebody
2 on some low-level thing, but the people who still work there
3 or who might work there again never be permitted to exercise
4 that type of influence again. And the only way you can do
5 that is to bar them from making decisions on this case.

6 MJ [COL POHL]: Thank you, Ms. Bormann.

7 Anything further from the defense? Apparently not.

8 Mr. Swann, any final word?

9 TC [MR. SWANN]: General Ary is no longer part of the
10 process. And if I misunderstand over 35 years of dealing with
11 the military justice system, there's one person who makes
12 decisions and provides the DEPSECDEF in this particular
13 instance with a decision brief, and it was General Ary, who
14 accepted responsibility.

15 Now, you pointed out that he spent -- what, he was
16 the Commandant of the Marine Corps, the Senior Judge Advocate
17 in the Marine Corps, and he made a decision that ultimately
18 you decided amounted to unlawful influence. But to sit here
19 and then start picking apart each and every one of the
20 individuals in that office and say that they are
21 decision-makers all the way down the list of a bunch of
22 lawyers who were offering their opinion of what they thought
23 was appropriate here, that's wrong.

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1 In this instance, General Ary resigned. No one else
2 need be told that they don't -- they can no longer participate
3 in this process. Thank you.

4 MJ [COL POHL]: Thank you. That brings us to 344, which
5 is kind of a variation on this theme. So we'll do 344, then
6 we'll take our morning break.

7 LDC [MR. CONNELL]: Sir, with respect to 344, the
8 variation on the theme is that there is a separate prohibition
9 in the Military Commission Act separate from the unlawful
10 influence provision which creates a special statutory form of
11 unlawful influence, and that is 10 United States Code 948j
12 subsection (f), which creates a separate express prohibition
13 on preparing or reviewing any report concerning the
14 effectiveness, fitness, or efficiency of a military judge.

15 The action memo which is found at Attachment B to 344
16 is clearly such a report on the effectiveness and the
17 efficiency of the military judges. The court has already
18 reflected that it saw the spreadsheet. These -- this
19 statutory provision acts to protect the independence of the
20 trial judiciary, which is required not just by American law,
21 but also under Common Article 3 of the Geneva Conventions as a
22 core part of a regularly constituted court.

23 MJ [COL POHL]: There's a comparable ----

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1 LDC [MR. CONNELL]: They are comparable.

2 MJ [COL POHL]: ---- provision in the UCMJ.

3 LDC [MR. CONNELL]: Yes, sir.

4 MJ [COL POHL]: 26(b).

5 LDC [MR. CONNELL]: Yes, sir, 26(b). Thank you.

6 MJ [COL POHL]: You're welcome.

7 LDC [MR. CONNELL]: Their preparing reports on subordinate
8 military judges is a classic threat to independence. There
9 are some briefs and some cases that I cited in the briefs from
10 the European Court of Human Rights, not because they're
11 precedential but because they're the only cases which deal
12 with this question of preparing reports on military judges.
13 In all three situations, there was a threat to the
14 independence of the -- and impartiality of the judges which
15 was determined.

16 The reason why this is distinct from 343 is that
17 nothing in your ruling in AE 343C or 343E stops this or the
18 next or the next after that convening authority from again
19 preparing or reviewing a report considering -- concerning the
20 effectiveness, fitness, or efficiency of the military judge.

21 MJ [COL POHL]: You don't think ----

22 LDC [MR. CONNELL]: The military court ----

23 MJ [COL POHL]: I mean, I look at the spreadsheet. I know

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1 it's by case. You don't think the convening authority can
2 maintain a spreadsheet of whatever he wants of when cases are
3 held and how much work is being done?

4 LDC [MR. CONNELL]: Well, I'm a big fan of spreadsheets,
5 Your Honor. I do think that the military -- the convening
6 authority can maintain spreadsheets, but that's not the sum
7 and substance of what happened here.

8 If I may, I have a document, it is Attachment B to
9 344. It's marked UNCLASSIFIED FOR PUBLIC RELEASE. May I
10 please have access to the document camera?

11 MJ [COL POHL]: Which attachment is it?

12 LDC [MR. CONNELL]: B, sir, titled "ACTION MEMO."

13 MJ [COL POHL]: Have you shown it to the court security
14 officer?

15 LDC [MR. CONNELL]: It is already marked. This is the
16 public version. May I approach?

17 MJ [COL POHL]: Yeah. Just show it to Mr. Lavender,
18 please. You wanted to display it, right, Mr. Nevin -- or
19 Mr. Connell?

20 LDC [MS. BORMANN]: Judge, just for the record, our
21 document screen back here is having difficulties, so we could
22 use some IT assistance.

23 MJ [COL POHL]: Okay. I'll tell you what, Ms. Bormann,

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1 we're going to recess for -- I'm going to give Mr. Nevin -- or
2 Mr. Connell a chance to get started, and then we're going to
3 take a midmorning break in about 15 minutes and we'll see if
4 we can address it then.

5 LDC [MR. CONNELL]: Sure.

6 LDC [MS. BORMANN]: Thank you.

7 LDC [MR. CONNELL]: I want to be clear, the reason I had
8 not shown it to the CISO or provided it in advance is that you
9 established a rule at a previous hearing is that if it was
10 from the website marked for UNCLASSIFIED/FOR PUBLIC RELEASE,
11 that we didn't have to submit it to the CISO.

12 MJ [COL POHL]: Sure. I just like to double-check.

13 LDC [MR. CONNELL]: Sure.

14 MJ [COL POHL]: Go ahead if something's on the website.

15 LDC [MR. CONNELL]: So we keep hearing. May I have
16 permission to display to the gallery?

17 So, sir, this is the action memorandum which was on
18 top of the package from Mr. Ary to Mr. Work, the Deputy
19 Secretary of Defense. And in it, he describes -- we've never
20 actually seen the complete, but in the second bullet point he
21 describes his assessment of this organization with the view to
22 implementing measures that will contribute to the efficient,
23 fair, and just administration. He describes his findings and

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1 conclusions in the executive summary attached at B.

2 The executive summary, and so this is b(2)(B),
3 provides a detailed breakdown of the -- of the results of his
4 spreadsheet, and says that at the first bullet point, that,
5 again "I conducted an assessment of the current situation and
6 future challenges facing the Office of Military Commissions.
7 Based on this assessment, I'm convinced that we must take
8 action to realign resources and better position the
9 commissions to achieve the efficient, fair and just
10 administration of ongoing future military commissions."

11 He describes in some detail the exact process, the
12 exact number of hours on -- and minutes on the record. He
13 describes the different -- the posture of the different cases,
14 and he gives his opinion of the amount of money which has been
15 spent in support of the commissions.

16 He goes on to describe the -- what he considers to be
17 the important revisions to establish the military commissions
18 as the exclusive judicial duty for military judges and to
19 designate the judges' place of duty as basically Guantanamo.

20 The -- this is not simply a matter of maintaining a
21 spreadsheet, which is perfectly allowable. This is, rather, a
22 matter of maintaining a spreadsheet with the intent of
23 reviewing the effectiveness, fitness and efficiency of

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1 military judges.

2 I have nothing further.

3 MJ [COL POHL]: So, your -- because the convening
4 authority prepared this; therefore, there's a threat that
5 another convening authority may do the same thing?

6 LDC [MR. CONNELL]: Well, there's not causality there.
7 What I am saying is that the -- if the next -- if a future
8 convening authority came along and wanted to say, here's what
9 I think of Judge Spath and here's what I think of Judge Pohl,
10 here's my numbers to back it up, nothing in 343C or 343E
11 remedies that situation or stops them from doing it.

12 MJ [COL POHL]: Let's assume for the sake of this
13 discussion your premise is accurate, that this constitutes a
14 report in violation of the statute.

15 LDC [MR. CONNELL]: Right.

16 MJ [COL POHL]: And the person who prepared it has been --
17 is no longer there.

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: So the new person comes in, in this case
20 it's Oostburg Sanz, who was the old person, but he's the new
21 person again.

22 LDC [MR. CONNELL]: Right.

23 MJ [COL POHL]: Who is not a full-time convening

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1 authority.

2 LDC [MR. CONNELL]: Understood, sir.

3 MJ [COL POHL]: I don't comment on the irony of full-time
4 judges are necessary but not a full-time convening authority,
5 I just put that to the side.

6 But he comes in. He's got the same statute, okay, in
7 front of him. He has that in front of him and there's no --
8 if he were to violate it -- I mean, you want me to say because
9 one person violated the statute, therefore, somebody else may
10 violate it; and because somebody else may violate it ----

11 LDC [MR. CONNELL]: No, sir, that's not it at all. What
12 I'm actually saying is you should dismiss the case for
13 violation of this statute.

14 MJ [COL POHL]: Okay.

15 LDC [MR. CONNELL]: That is the relief that we seek. What
16 I was explaining is why the -- you have not already addressed
17 this issue in 343C and 343E.

18 MJ [COL POHL]: No, I understand that. But I'm saying
19 is -- but isn't this a variation of the unlawful influence
20 theme?

21 LDC [MR. CONNELL]: Yes. It is a specific statutory form
22 of unlawful influence.

23 MJ [COL POHL]: Okay. So I would look to the unlawful

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1 influence remedies, one of which is dismissal?

2 LDC [MR. CONNELL]: Yes, that's right. I mean, it's -- as
3 you say, it's a little bit by analogy. I didn't find any
4 cases under the UCMJ addressing the comparable provision of
5 the UCMJ, they seem to sort of lump it all into unlawful
6 influence generally. But clearly that unlawful influence body
7 of law is what governs here.

8 MJ [COL POHL]: Okay. Okay. Thank you.

9 LDC [MR. CONNELL]: Thank you.

10 MJ [COL POHL]: Anything further from any of the defense
11 counsel on this issue? Ms. Bormann.

12 LDC [MS. BORMANN]: Judge, I have just one follow-up
13 comment on something that you said. You said you're not going
14 to comment on the necessity of making full-time judges living
15 in Guantanamo and a part-time convening authority.

16 I want to bring to your attention that with a
17 part-time convening authority, it means that Mr. Toole --
18 Mr. Toole's position as deputy takes on far more significance
19 that it would otherwise do. That means he runs that office
20 day to day. Thank you.

21 MJ [COL POHL]: Mr. Nevin? Mr. Harrington? Mr. Ruiz? No
22 from Mr. Nevin, Mr. Harrington. No from Mr. Ruiz.

23 Trial Counsel?

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1 TC [MR. SWANN]: Holding that the change to the regulation
2 created the appearance of unlawful influence by attempting to
3 accelerate the pace and usurp judicial discretion, thereby
4 compromising the independence, this commission found the
5 appearance of unlawful influence. So what do they want now?
6 They want to dismiss all charges.

7 But as this court recognized and case law recognizes
8 over and over again, dismissal is not appropriate when the
9 accused is no longer prejudiced when other remedial actions
10 have been taken. Remedies for unlawful influence are
11 fashioned to eradicate any taint of unlawful influence, not to
12 reward a party not entitled to relief.

13 No further action need be taken in this instance.
14 While we may disagree as to the meaning of what a report is
15 because what I think ----

16 MJ [COL POHL]: Let me ask that, Mr. Swann. Let's --
17 we're kind of jumping to remedies, which I did with
18 Mr. Connell, but I want to back up on the alleged wrong here.

19 Do you believe the action of General Ary, writ large,
20 so we've got this memo, we have got the spreadsheet and all of
21 that other data-collecting and disseminating activity on his
22 part, does that constitute a report in violation of the
23 statutory prohibition?

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1 TC [MR. SWANN]: No, Your Honor. When I think of a
2 report, I'm talking -- I'm thinking of a fitness report or
3 thinking of something along those lines. There's no question
4 that the convening authority cannot write a fitness report on
5 you. I have no idea who writes a fitness report on you. I
6 have no idea that if after you get past 30 years, if you even
7 get a fitness report.

8 MJ [COL POHL]: Well, just for your information, the
9 answer is no.

10 TC [MR. SWANN]: Well, I sort of suspected that, but I
11 appreciate that. No, I do not believe the report here. He
12 was evaluating an organization. And while he believed certain
13 things that he thought he could make happen might accelerate
14 the pace, I, too, have to agree with you. You don't get much
15 achieved if you only have a judge on island and nobody else.

16 So whatever went into that process, a lot of other
17 things went into the process as well. If he -- I think in
18 that same report, he talked about providing the judiciary with
19 more assets and other people with more assets. I don't
20 believe this report constitutes what is contained in 948j(f).

21 MJ [COL POHL]: You know, as a -- from your experience, I
22 think anybody who has been in the military understands that
23 efficiency reports are done by a relatively regularly -- a

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1 rigorous system of regulatory of who does what to whom, and
2 clearly this doesn't constitute that.

3 And in my particular situation, given my status as a
4 recall, like I said, I don't get efficiency reports. And so
5 quite frankly, I -- whether I did or not, I really don't care
6 what General Ary may think about how I run my trials. But
7 that's me.

8 But let's talk about the system at large. Let's say
9 rather than a retired recall, we have a normal -- rephrase
10 that, a nonretired recall military judge who may or may not be
11 reassigned in the judiciary in his appropriate service. I
12 mean, couldn't this be at least interpreted as trying to
13 influence that judge's prior assignment? Assuming that
14 General Ary was going to share this with the TJAGs ----

15 TC [MR. SWANN]: Well ----

16 MJ [COL POHL]: I mean -- I mean, I'm not saying it's an
17 informed opinion. I'm just saying his opinion is things are
18 going -- were going too slow. Again, I'm not going to say
19 it's an informed opinion, I really don't care what his opinion
20 is. But I'm saying if this sat on the desk and if this was
21 disseminated to the TJAGs who handled the judicial assignments
22 in the various services and they say, well, this guy can't get
23 this case done and maybe we'll move him out and get somebody

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1 faster in there, isn't that the implication? Couldn't that be
2 the implication from this action memo at least?

3 TC [MR. SWANN]: You can't consider the action memo
4 without considering what you did when you saw the action memo.
5 Anybody coming into the process would realize that a judge,
6 with what, 35 years plus on active duty made a decision that a
7 retired two-star was out of his lane when he made a
8 recommendation to the DEPSECDEF that had, quite frankly --
9 what did it live, for 50 days, if that? And then they had to
10 turn around and wipe the egg off their face and say, hey, that
11 was a bad call. Why did I get that kind of advise from
12 anyone? Well, they got bad advice.

13 I agree with you that, quite frankly, here somebody
14 wasn't giving any thought to the tertiary effects of what a
15 particular decision might bring about. And that tertiary
16 effect in this instance was, first, is the judge going to move
17 to Guantanamo? That's a factor in the air that nobody could
18 ask except for the judge. The next factor is, well, what's
19 the impact of you writing something like this down and then
20 turning around and then having to rescind it later on?

21 Listen, they're going to make recommendations about
22 organizations every day. That's what convening authorities
23 do, how best to staff, how best to think. Here's a -- here's

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1 a metric that says we've got some problems in this particular
2 area, but it has to be in their lane. You decided this wasn't
3 their lane, properly so. But you resolved it with the action
4 that you took and no further action need be taken in this
5 instance.

6 MJ [COL POHL]: Thank you. Mr. Connell, anything further?

7 LDC [MR. CONNELL]: Nothing further, Your Honor.

8 MJ [COL POHL]: Ms. Bormann, anything further?

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

10 MJ [COL POHL]: Okay. We're about to recess, and again,
11 we're going through things rather rapidly. The next on the
12 agenda is 373A, 091E, and I believe 018TT is just a portion of
13 it, the unclassified portion of it; is that correct?

14 ADC [MS. LACHELIER]: That's right, Judge, yeah.

15 MJ [COL POHL]: And when we get done with that, I believe
16 everybody has got the e-mail that came from Mr. Trivett
17 yesterday, and we'll go through those unless there's some
18 reason why we shouldn't. Additionally, I think the defense
19 provided four additional motions.

20 LDC [MR. CONNELL]: Yes, sir.

21 MJ [COL POHL]: Okay. And everybody has those. So just
22 kind of plan on that. That's the order of march. We will
23 recess for 15 minutes. Commission is in recess.

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1 [The R.M.C. 803 session recessed at 1049, 26 July 2016.]

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