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1 [The Military Commission was called to order at 1035,
2 19 February 2014.]

3 MJ [COL POHL]: Commission is called to order. All
4 parties again present that were present when the commission
5 recessed. Defense, 197.

6 ADDC [MAJ HURLEY]: Sir, can you hear me okay?

7 MJ [COL POHL]: Sure.

8 ADDC [MAJ HURLEY]: I'm just getting over a cold, so if
9 there is anything I say that is garbled or incomplete, please
10 make sure to interrupt me.

11 MJ [COL POHL]: Okay.

12 ADDC [MAJ HURLEY]: Sir, the defense requests that you
13 dismiss all charges and specifications against the accused in
14 this case, Mr. al Nashiri, because of the unlawful command
15 influence that's been exerted by American public officials and
16 policymakers.

17 MJ [COL POHL]: Just to be clear so, and I know you know
18 this, we are going to use the term unlawful command influence
19 over and over again, but technically it is unlawful influence
20 under the Military Commissions Act. So the command part,
21 which is significant, sometimes plays no role in this statute.

22 ADDC [MAJ HURLEY]: Yes, sir.

23 MJ [COL POHL]: Go ahead.

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1 ADDC [MAJ HURLEY]: Sir, because I'm used to the
2 parlance ----

3 MJ [COL POHL]: If you drift into UCI, that's fine. I
4 want to start out by saying it is more expansive than the
5 mantle of authority requirement under military law. Go ahead.

6 ADDC [MAJ HURLEY]: Yes, sir. And, sir, another thing
7 at the outset, I'm new to this commission, new to practicing
8 before this particular commission. But I have seen in your
9 interactions with other counsel, that you are free -- or feel
10 free to interrupt as is the prerogative of the trial judge.
11 Obviously with an issue this important, with your being
12 recognized as the trial judge, the last sentinel against, a
13 last bulwark against use of unlawful influence or unlawful
14 command influence, I encourage interruptions at any time.

15 If there is any matter you have a question on that
16 I don't have an answer to, if I can be free to get that
17 information to you before you make these important decisions
18 in this case.

19 MJ [COL POHL]: Just to let you know, because there is
20 sometimes confusion. I ask questions to clarify. The
21 questions are not designed to indicate necessarily one way or
22 the other which way I'm leaning, although some counsel take it
23 that way. Go ahead, Major Hurley.

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1 ADDC [MAJ HURLEY]: Thank you, sir. Sir, I will start
2 with the point you just made, to reiterate it, that there is a
3 difference between the statutes, between Article 37 and the
4 statute that controls in this particular case. And as you
5 indicated, the statute that controls here is more expansive.
6 It talks about the influence of any person and also talks
7 about the influence of any person over the exercise of the
8 professional judgment or trial counsel -- of trial counsel or
9 defense counsel, and that is not something that is -- that is
10 included in Article 37 of the Uniform Code of Military
11 Justice.

12 And, sir, it is the position of the defense the
13 mere existence of the statute invalidates the government's
14 primary argument for denial of this motion, that is the
15 military commissions more insulated from UCI than routine
16 courts-martial. It is the defense's perspective that Congress
17 and the President apparently disagree or the law itself that
18 we are talking about would not exist. Sir, if I may have a
19 moment.

20 MJ [COL POHL]: Major Hurley, if you believe that
21 Congress passed this statute in 2006 and repassed it in 2009,
22 and many of your actions that you refer to, it is unlawful
23 influence predates the statute, and given your relief you are

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1 requesting, basically what you are telling me is what Congress
2 intended by passing the Military Commissions Act was, given
3 the remarks already made by the leadership, that they
4 basically were saying by adding this unlawful influence thing,
5 provision, we are telling you here is a whole statutory scheme
6 to set up military commissions, but because of these facts,
7 dismiss the charges anyway.

8 I mean, didn't they know when they passed the act
9 that these remarks had been made?

10 ADDC [MAJ HURLEY]: Sir, I'm sure they were aware that
11 these remarks had been made when they passed the act and that
12 they no doubt understood that if a case was referred that was
13 as publicly discussed as Mr. al Nashiri's case was that
14 eventually there would be a hearing just like the one we had
15 today to determine if any unlawful command influence, unlawful
16 influence existed, it is the position of the defense obviously
17 that unlawful influence existed at the time.

18 MJ [COL POHL]: At the time they passed the provision
19 the unlawful influence provision in 2006 ----

20 ADDC [MAJ HURLEY]: Yes, sir.

21 MJ [COL POHL]: ---- unlawful influence already existed,
22 therefore by passing the provision setting up a scheme to try,
23 by military commissions basically saying given the lay of the

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1 land this provision will make that impossible in certain
2 cases?

3 ADDC [MAJ HURLEY]: Yes, sir. I -- again I don't want
4 to speak for Congress. I have never been a member. But I can
5 imagine that what they wanted to have happen was here's a
6 problem that can exist that the -- whomever can affect the
7 fairness and the partiality of these proceedings here. So if
8 that is a possibility then we are going to forbid that
9 possibility from that point forward and certainly that point
10 backward, just given all the information that is out there.

11 Now, when they passed this law those statements
12 did exist, and again I imagine that they imagined an
13 adversarial process like courts-martial process with which I
14 am more familiar, and that we would have a hearing to
15 determine whether or not unlawful influence was exerted in
16 this particular case, and if so what an appropriate remedy
17 might be.

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

19 ADDC [MAJ HURLEY]: Sir, let's talk about these quotes
20 just so that we can -- we can all understand them
21 specifically. On 22 November 2002 then-President George W.
22 Bush said in response to a question about Mr. al Nashiri,
23 quote, we did bring justice to a killer. We are making

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1 progress on the war against terrorists and we are going to
2 hunt them down one at a time.

3 On 2 December 2002 the same President Bush said,
4 then-President Bush, "Recently we took a guy named al Nashiri
5 into custody. Until last month he was the top al Qaeda
6 operative, the top al Qaeda leader in gulf region. He was
7 plotting and planning. But today this much is certain, he
8 won't be executing any more attacks against the United States
9 and our friends like the attack he masterminded against the
10 USS COLE."

11 The following day he said, "The other day we
12 hauled in a guy named al Nashiri. That is not a household
13 name here in American, I can understand why some go blank when
14 they hear his name, but he was the al Qaeda mastermind of the
15 USS COLE, the plot that killed American soldiers. He is out
16 of action for the good of the world."

17 Now, sir, President Bush is a well-educated -- is
18 and was at the time, a well-educated and highly functioning
19 man with a coterie of lawyers assist him before he uttered a
20 word. He made a deliberate choice. He chose to say those
21 conclusory words to convict my client, Mr. al Nashiri, by
22 presidential fiat in the fall of 2002.

23 His language was not the normal language, the

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1 normal circumspect language that typically political leaders
2 use when they are talking about pending cases or cases that
3 could potentially be pending. It was -- it left absolutely no
4 room for doubt as to his thoughts, his opinions, someone who
5 is invested with a lot of information, what he thought about
6 this particular case. And his thinking was that guy,
7 Mr. al Nashiri, he is guilty.

8 Now, it is not the position of the defense, and
9 indeed, Your Honor, if you held us to a standard that we would
10 have to turn to a member in that box one day and say quick,
11 Mr. President, what did President Bush say that might have
12 some resemblance of bearing to this court-martial on
13 3 December 2002? The member is not going to be able to
14 quickly respond to that ----

15 MJ [COL POHL]: Is your motion, the current motion
16 before me focused on the members or focused on the referral
17 decision?

18 ADDC [MAJ HURLEY]: Sir, it is focused on the referral
19 decision, and also obviously it would also ultimately be
20 focused on the members.

21 MJ [COL POHL]: The reason why I ask you that question
22 is that the members issue can be -- well, is sometimes
23 addressed in the voir dire process.

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1 ADDC [MAJ HURLEY]: Yes, sir.

2 MJ [COL POHL]: But as I understand your motion, we are
3 not at that point. I understand why no unlawful influence is
4 a members issue, too. I got it. It is a witness issue a
5 members issue. But your primary focus right now on this
6 motion is the Convening Authority's decision to refer this
7 case at all and to refer it as a capital decision, and your
8 position is -- or as a capital case -- that the unlawful
9 influence permeated that decision?

10 ADDC [MAJ HURLEY]: Yes, sir, it is.

11 MJ [COL POHL]: Go ahead.

12 ADDC [MAJ HURLEY]: I'm sorry, I misspoke. Even if on
13 the day of referral of the charges we ask the Convening
14 Authority, rephrasing that portion of the argument, if we
15 asked the Convening Authority on that day, quick, what did
16 President Bush say on 3 December 2002? I doubt the Convening
17 Authority could have said, well, he said this that is relevant
18 to this particular case.

19 But it is all the statements leading up to that
20 particular decision, the entirety of those comments that
21 contributed to an unlawful influence that was exerted and that
22 resulted in the capital referral of this case.

23 And, sir, we would submit that not only do

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1 President Bush's remarks but the remarks of the other senior
2 leaders in Washington as well satisfy the defense's burden of
3 raising some evidence of UCI with respect to the convening
4 authority's decision and therefore, placing the burden on the
5 government of disproving unlawful influence beyond a
6 reasonable doubt, using the standard found in United States v.
7 Biagase, and I'm guessing as to the pronunciation of that
8 particular last name.

9 It is also the position of the defense that the
10 government cannot prove beyond a reasonable doubt that UCI
11 will not taint the proceedings and that thus the defense
12 deserves the relief it seeks, which is dismissal of charges
13 and specifications against Mr. al Nashiri.

14 Sir, at the outset -- I guess we are past the
15 outset. At this point in my argument I want to distinguish
16 between unlawful influence and unfair pretrial publicity. It
17 is an idea in the government's response they appear to have
18 conflated. With respect to unlawful pretrial publicity, an
19 accused, a military accused, is entitled to relief if the
20 publicity is prejudicial, the publicity is inflammatory, and
21 the publicity has saturated -- must have saturated the
22 community.

23 Now, the defense concedes unlawful influence and

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1 unfair pretrial publicity are related ideas, but they are
2 distinct in this particular case.

3 Sir, if I may have a moment.

4 MJ [COL POHL]: Sure.

5 ADDC [MAJ HURLEY]: The best instance -- the best
6 description of the distinguishing ideas between unfair
7 pretrial publicity and unlawful command influence is in the
8 CAF case of US v. Simpson, which is at MJ 368.

9 We contend that if we filed this motion as an
10 unfair pretrial publicity case, we would likewise prevail.
11 That's not the way the defense filed it. We filed it as an
12 unlawful command influence case. Thank you.

13 MJ [COL POHL]: But the publicity remedy is, possible
14 remedies, change of venue, things like that, as opposed to the
15 remedy you are seeking here of unlawful influence, correct?

16 ADDC [MAJ HURLEY]: Yes, sir.

17 MJ [COL POHL]: The Simpson case had a great deal of
18 publicity in the Washington D.C. area, also a great deal of
19 congressional comments, for want of a better term. Again,
20 that is where the statutes differ because, as I recall, the
21 court's distinguishment between members of Congress, what they
22 said and not in the chain of command. Whereas, in this case,
23 do you see a distinction? Does that distinction still exist

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1 under the MCA?

2 ADDC [MAJ HURLEY]: No, sir, it does not.

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

4 ADDC [MAJ HURLEY]: Because it allows for any person.

5 Sir, if I may continue.

6 MJ [COL POHL]: Sure.

7 ADDC [MAJ HURLEY]: The sum evidence standard which I
8 just discussed with you has been defined in various ways by
9 the Court of Appeals for the Armed Forces. One of them, and
10 the best definition from the perspective of this defense
11 counsel, is the one found in United States v. Ayala at 43 MJ
12 296. I gave that citation, it was a case that wasn't briefed
13 in our original motion, and that language is, any evidence in
14 which a member may place confidence.

15 And, Your Honor, there is no need for us to rehash
16 all of the quotes that we included in our motion. But it is
17 the position of the defense, and it is obvious that the
18 remarks in this particular case more than satisfy the defense
19 burden in Biagase and Ayala. More than just what President
20 Bush said, those were explicit comments, they were explicit
21 and wide-ranging comments about all of the detainees here in
22 the Guantanamo Bay detention facility, and that obviously
23 includes my client, Mr. al Nashiri.

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1 Sir, just to reiterate, what President Bush said
2 and what all of those leaders said were positive statements
3 meant to compel a conclusion. Now, the defense -- I
4 apologize, the government has in its filing and you have even
5 asked me about the timing. There was -- there were these
6 comments that predated the 2006 piece of legislation, the 2009
7 piece of legislation. How could they necessarily affect this
8 particular trial or this particular commission?

9 And it is the position of the defense that the
10 routine reiteration of the guilt of these individuals is what
11 affected the convening authority's decision.

12 MJ [COL POHL]: Do remarks about other pending cases
13 impact on your particular relief?

14 ADDC [MAJ HURLEY]: Yes, sir, it does, when those other
15 pending cases -- when they associate with the words terrorist
16 and Guantanamo Bay, this person and other 9/11 conspirators I
17 would say.

18 MJ [COL POHL]: I understand. What I'm saying,
19 specifically in your brief there is references to comments by
20 people by name, particularly Khalid Shaikh Mohammed, who is
21 not your client.

22 ADDC [MAJ HURLEY]: Yes, sir.

23 MJ [COL POHL]: Does that -- would you say that has some

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1 spillover effect, or is that -- it has to be comments that
2 either directly or indirectly refer to your client.

3 ADDC [MAJ HURLEY]: Sir, we would say at first it does
4 have spillover effect. If you associate -- when Khalid Shaikh
5 Mohammed is discussed or reported on, almost invariably the
6 word terrorist will be used and the location of his detention.
7 Those -- the instances of those comments have a spillover
8 effect to Mr. al Nashiri and contributed to the unlawful
9 influence that was exerted in this case.

10 MJ [COL POHL]: Unlawful influence would apply, under
11 that analysis, to every case that is referred out of anybody
12 stationed -- stationed -- who are here at Guantanamo Bay as a
13 detainee.

14 ADDC [MAJ HURLEY]: Yes, sir, it would.

15 MJ [COL POHL]: Okay, go ahead.

16 ADDC [MAJ HURLEY]: Sir, just to reiterate the legal
17 burden, once we have put on some evidence, then the burden has
18 got to shift -- or the burden does shift to the defense to
19 indicate that either the predicate facts do not exist, that
20 unlawful command influence doesn't exist, or that any unlawful
21 command influence will not affect these proceedings.

22 Sir, you have heard probably more than once in
23 your career that unlawful influence or unlawful command

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1 influence is the moral enemy of military justice, and we
2 submit to you that the direct and specific comments made by
3 American policymakers are more than what you would typically
4 see in an unlawful command influence case under Article 37.
5 There are very specific comments, pointed comments at times,
6 with respect to these accused, and it leaves no room for doubt
7 in the mind of the Convening Authority what he was supposed to
8 do in this particular action.

9 If you think -- you know, sir, if you would like
10 to compare these to Baldwin, which is a case cited by the
11 defense, there was an OPD where Lieutenant Kelly Flinn's case
12 was discussed. Baldwin was herself a female accused officer
13 pending trial at the time of the OPD, and the commanding
14 general indicated that he felt like Lieutenant Flinn had
15 gotten over in how her case was disposed of by the Air Force.

16 And that OPD that occurred during the time of the
17 trial was said to be -- that OPD was said to have influence or
18 potentially have influence on the members in this case. And,
19 sir, these comments are more than comments about another case.

20 Now, the government cited Baldwin to indicate the
21 problem that we were talking about before, that is the
22 temporal relationship between the comments made by -- some of
23 these comments and the action taken by the Convening

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1 Authority. And we would submit to you, sir, that it's really
2 the opposite that you need to be focused on in this particular
3 inquiry, and that is these specific comments which are
4 unlawful influence, "Mr. al Nashiri did it. He is the COLE
5 bomber." There is no case that stands for the proposition
6 that that can be so far removed in time that it does not
7 unlawfully taint, unlawfully taint this process and the
8 convening authority's decision.

9 The words used by President Bush and his staff
10 were not inconsequential or small or needed to be tacked on or
11 assembled through the use of someone's brainpower. They were
12 quite blunt: Worst of the worst, terrorist, key al Qaeda
13 operative in the Persian Gulf, senior lieutenant for al Qaeda,
14 all of those used to describe Mr. al Nashiri. You have to
15 hand it to the Bush administration, when they unlawfully
16 influence a trial, they don't hold back.

17 After President Obama took office, he joins in the
18 discussion by consistently referring to everyone here in
19 Guantanamo Bay as terrorists, and that language was repeated
20 by others in Congress.

21 Now, the government's response, after you get past
22 the idea the very nature of the commissions means that it is
23 less accessible to unlawful influence, boils down to two

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1 things: One, President Bush's statements are so far in the
2 past they cannot amount to UCI, and, sir, we already dispensed
3 with that argument; two, even if there is UCI it can be cured
4 by voir dire. Sir, I will try my best to use the correct
5 French pronunciation, but old habits die hard.

6 As I indicated before, sir, there is no authority
7 and the government didn't cite any authority that unlawful
8 influence -- the unlawful influence that we are talking about
9 that happened in this particular case -- has a shelf life. Is
10 there a time where it goes bad, where we can say nope, we are
11 all fine here, there will not be any -- there is not any undue
12 influence over this trial by the repeated condemnations and
13 fiats made by those in -- those with power and those that are
14 senior leaders in the American government?

15 We submit that there is no such rule because there
16 shouldn't be any such rule because this case has to stop. You
17 can't get it both ways. You cannot brag on your
18 accomplishments as actual factual accomplishments and then
19 pretend that there is going to be some trial, some impartial
20 trial.

21 That is what was done in this particular case.
22 And the government -- I can't imagine I'm the first army
23 attorney to stand in front of you, sir, and say choices have

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1 consequences. I can't imagine I'm the hundredth. But they
2 do. Those individuals made choices and they have consequences
3 that are far reaching, reaching into February of 2014 and
4 reaching into this commission. And, sir, we ask -- we seek
5 that you see that for what it is and that you dismiss these,
6 all of these charges and their specifications.

7 MJ [COL POHL]: You've referred to it February of '14,
8 but your focus real is the referral decision in November of
9 2011.

10 ADDC [MAJ HURLEY]: November of 2011. Sir, if I may
11 cover just a couple more ideas?

12 MJ [COL POHL]: Sure.

13 ADDC [MAJ HURLEY]: The first of which is that not only
14 is it unlawful influence, but it is the appearance of unlawful
15 influence which needs to be dealt with. And we would submit
16 to you, sir, that that appearance exists in this particular
17 case and that appearance likewise demands that these charges
18 and specifications be dismissed with prejudice.

19 Sir, we would also submit to you that capital
20 cases are different by the nature -- and this case has been
21 referred capital -- by their very nature and they are
22 different, and what may fly and may go in other cases doesn't
23 go in this one. All the cases that are cited by both the

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1 prosecution and the defense, none of them are capital cases,
2 sir. And that what we are talking about in the influence that
3 was exerted over this process needs to be identified,
4 pondered, and needs to be eradicated from these proceedings.

5 MJ [COL POHL]: Were there specific -- although I read
6 all your briefs, I don't necessarily memorize them, so ----

7 ADDC [MAJ HURLEY]: Yes, sir. Go ahead.

8 MJ [COL POHL]: Well, is there any specific comments on
9 the punishment phase as opposed to just the characterization
10 of guilt?

11 ADDC [MAJ HURLEY]: Sir, there is no specific comments
12 as in he needs to be put to death. We wouldn't submit to
13 that.

14 MJ [COL POHL]: But one of your possible remedies is if
15 not dismissal, is take the death penalty off the table?

16 ADDC [MAJ HURLEY]: Yes, sir.

17 MJ [COL POHL]: Is there a connection -- do you see a
18 connection between the unlawful influence and the capital
19 nature of the referral, not the referral itself?

20 ADDC [MAJ HURLEY]: Yes, sir, we do, the defense does.
21 Sir, the point that we would make -- again, sir, I apologize.

22 MJ [COL POHL]: No, take your time.

23 ADDC [MAJ HURLEY]: Thank you.

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1 The point that we would make is that there is a
2 euphemism used often by President Bush and even used by
3 President Obama, that an individual will be, has been brought
4 to justice. And it is the position of the defense that that
5 language, brought to justice, is essentially code for killed.
6 And if someone is going to be brought to justice, this killer
7 needs to be brought to justice, the defense submits that that
8 is a dog whistle for execution.

9 And, sir, finally, a dismissal is the only
10 remedy -- well, there are two remedies, obviously. There is
11 dismissal, and there is dismissing the capital referral.
12 Because of the consistent language, Guantanamo equals
13 terrorist equals killer equals al Nashiri, that consistent
14 language over the course of years requires the drastic remedy
15 of dismissal or the drastic remedy of dismissal of the capital
16 referral. No other -- no other remedy will cure this problem,
17 not extended voir dire, nothing.

18 There is a concern, and it is a legitimate one,
19 sir, that Mr. al Nashiri has been tried and convicted in the
20 court of public opinion, and that obviously has no place in
21 this commission or any court that prides itself on being ----

22 MJ [COL POHL]: Is that an unlawful influence argument
23 or is that a publicity argument? You said the court of public

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1 opinion. It sounds to me it is more like the publicity prong.

2 ADDC [MAJ HURLEY]: Sir, in that ----

3 MJ [COL POHL]: At the end of the day, any type of
4 high-profile case, public opinion may take a poll, people may
5 think the guy is guilty or not guilty. That's not
6 unusual ----

7 ADDC [MAJ HURLEY]: Yes, sir.

8 MJ [COL POHL]: ---- in any high-profile case against
9 media interest.

10 ADDC [MAJ HURLEY]: Sir, perhaps I chose those words
11 poorly.

12 MJ [COL POHL]: Okay.

13 ADDC [MAJ HURLEY]: Mr. al Nashiri has been tried and
14 convicted in the court of American policymakers. They
15 conveyed their verdict clearly, unequivocally, and now that
16 information, once conveyed, cannot be brought back. You
17 cannot call those words back, you cannot walk them back, as
18 they can with other things they say. This court should
19 dismiss these charges and specifications against
20 Mr. al Nashiri for unlawful command influence.

21 Sir, we were going back and forth -- one last
22 thing I want to add. Sir, we were going back and forth about
23 Congress and how Congress may have, if they knew that these

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1 statements had been made they included this unlawful command
2 influence statute in 2006 and 2009, did they mean to overturn
3 the possibility of these hearings. And, sir, it was -- just
4 one more thing we would like to add. Congress may have
5 assumed or thought that the 9/11 and COLE cases, the ones that
6 have been referred for trial may have been tried or were going
7 to be tried in an Article III court or federal court. Sir,
8 thank you.

9 MJ [COL POHL]: Thank you. Trial counsel.

10 Lieutenant Davis, right?

11 ATC [LT DAVIS]: Yes, sir.

12 MJ [COL POHL]: Good morning.

13 ATC [LT DAVIS]: Good morning. Your Honor, for the
14 defense to succeed on its claim of unlawful influence, they
15 must be able to demonstrate something more than command
16 influence, or if we want to use the parlance of statute,
17 influence in the air.

18 The defense simply cannot do that. Because as the
19 court in United States v. Calley said, in order for there to
20 be unlawful influence or UCI, that there must be -- that the
21 influence must have an object and an effect on that object.
22 And the defense has presented nothing to date, no evidence to
23 suggest that the Convening Authority was even aware of these

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1 statements that the defense has brought to light or that the
2 Convening Authority was influenced by any of the statements.

3 The defense has presented no evidence that any
4 witness, any member, anybody, any actor in this commission was
5 either aware of the statements or was influenced by them. So
6 in essence what the defense asked us to do is to speculate,
7 speculate that some statements made by high-ranking officials
8 have tainted this proceeding. And, Your Honor, as you are
9 well aware, when we are talking about these types of issues,
10 speculation does not equal unlawful influence.

11 Now, unlawful influence is indeed a significant
12 concern in the military justice context. However, in the
13 military commissions context, especially on the facts alleged
14 by the defense, that argument really is a square peg in a
15 round hole.

16 Now, why is that? It is in part because this
17 mantle of command authority doesn't exist. And I take the
18 court's point that the statute doesn't necessarily require
19 command authority, and perhaps we want to substitute
20 leadership authority, because I think the purpose in expanding
21 the statute was really just to recognize that the Convening
22 Authority in the military commissions context was likely to be
23 a civilian, so it wouldn't just be people ----

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1 MJ [COL POHL]: So you want me to read into the statute
2 when it says unlawful influence, you want me to read some type
3 of adjective in there ----

4 ATC [LT DAVIS]: Yes, Your Honor.

5 MJ [COL POHL]: ---- that Congress didn't write and that
6 is how you interpret statutes?

7 ATC [LT DAVIS]: I think Congress intended ----

8 MJ [COL POHL]: They could have said unlawful command
9 influence. They could have said unlawful influence by the
10 executive branch, by the congressional branch -- I doubt they
11 would have said that, because that would be on themselves.
12 They could have limited it in some way if they chose, but they
13 chose not to. They knew the context of the political
14 landscape at the time. So don't we take the statute as its
15 plain meaning of what they wrote?

16 ATC [LT DAVIS]: I think you can take it as the plain
17 meaning as Your Honor has indicated. The word, however, that
18 doesn't change is "influence." And it's the role of the
19 Convening Authority that really does impact whether there can
20 be influence in this case.

21 Now, in your traditional court-martial context
22 where the Convening Authority is a member of the chain of
23 command, that Convening Authority can be affected, can be

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1 impacted by his military superiors. Because of the structure
2 as has been put in place by the commissions, the Convening
3 Authority, a civilian outside of the chain of command, is not
4 subject to those differences in rank so that ----

5 MJ [COL POHL]: Who appoints the Convening Authority?

6 ATC [LT DAVIS]: The Secretary of Defense.

7 MJ [COL POHL]: Okay, who works directly for the
8 president. And you say that once that appointment is done for
9 three years, or whatever it is, he is now launched on his own
10 and any umbilical cord back to the Secretary of Defense is
11 cut, and therefore anything said by the Secretary of Defense,
12 the President of the United States, members of Congress has no
13 impact on him because he is out there by himself?

14 ATC [LT DAVIS]: It is not that there is no impact, but
15 the impact is certainly a great deal different. When you have
16 a military superior that can actually order you, and if you
17 violate those orders you can be subject to the UCMJ, certainly
18 a different situation when you have a civilian outside ----

19 MJ [COL POHL]: You would agree that most of the
20 military unlawful influence don't necessarily call for
21 ordering subordinates, a lot of it deals with climate, a lot
22 deals with briefs by officers to their subordinates, and
23 things like that, it's not ordering a result, it's setting a

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1 climate of presumption of guilt, quite frankly?

2 ATC [LT DAVIS]: Yes, Your Honor. Yes, Your Honor, I do
3 agree with that statement.

4 MJ [COL POHL]: Go ahead.

5 ATC [LT DAVIS]: Because of this role, however, outside
6 of the military chain of command, it is really no surprise
7 that the defense has not been able to present any evidence
8 that the Convening Authority actually has been influenced in
9 this case. As I indicated before, there is no evidence that
10 the Convening Authority was aware of the statements and there
11 is no evidence that the Convening Authority took any action or
12 that there was any effect from the statements that are being
13 discussed by the defense.

14 Now, the other difference being convening
15 authorities in the military context, they have the ability to
16 assert influence downhill. And, again, this is a significant
17 difference. This is why the defense argument really is a
18 square peg in a round hole. The Convening Authority as a
19 civilian has no ability to impact witnesses, has no ability to
20 impact members. This Convening Authority is completely
21 different than what you find ----

22 MJ [COL POHL]: Doesn't the Convening Authority pick the
23 members?

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1 ATC [LT DAVIS]: No, I think -- I think that's a slight
2 exaggeration.

3 MJ [COL POHL]: Oh, really?

4 ATC [LT DAVIS]: Yes, Your Honor.

5 MJ [COL POHL]: No, just -- I know it is kind of a side
6 issue here, but the Convening Authority doesn't pick the
7 members?

8 ATC [LT DAVIS]: No, the members that will actually sit
9 will be selected by the counsel in this case. Now the
10 potential ----

11 MJ [COL POHL]: Now, you are quibbling with me there
12 lieutenant, but I got it.

13 ATC [LT DAVIS]: I think it is an important point.

14 MJ [COL POHL]: No, the bottom line is you get a pool of
15 members selected by the Convening Authority, then they may be
16 culled by the voir dire process, but the basic pool is the
17 Convening Authority selection. And the only thing the
18 defense, from their viewpoint, can cull is from these ones
19 already selected by the Convening Authority. Now, the ones
20 that finally sit, I know they go through voir dire and
21 challenge, I got that. But again to say that they are
22 selected by the counsel, I would find is not
23 necessarily correct. Go ahead.

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1 ATC [LT DAVIS]: Yes, Your Honor. The concern, however,
2 from an unlawful influence standpoint is that the members or
3 the witnesses would feel like their decisions are guided by
4 this influence from the Convening Authority, which is a
5 separate ----

6 MJ [COL POHL]: But is the argument -- and again we are
7 a little ahead of ourselves, but since you mentioned it, the
8 argument is not necessarily the Convening Authority, as I
9 understand it, is the one exerting the unlawful influence.
10 The argument in the brief is that the unlawful influence being
11 asserted by the President of the United States, times two,
12 members of Congress onto the Convening Authority, and then I
13 suspect therefore the source of the unlawful influence is not
14 the Convening Authority in this case, at least as I understand
15 the brief, it's others outside there who are in the chain of
16 command of witness -- military witnesses and the members
17 obviously.

18 ATC [LT DAVIS]: Yes, Your Honor. As I understand the
19 defense argument it is more of a question of the statements
20 from high-ranking officials as opposed to statements or some
21 kind of influence that is coming from the Convening Authority.
22 The government brings that up simply to point out again how
23 different -- how unlikely it is that you would have an

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1 unlawful -- an unlawful influence situation in the military
2 commissions context.

3 And I think it's important -- again, if we are
4 talking about the influence that these high ranking officials
5 are having on members, potentially, or witnesses, again, there
6 is no evidence that has been presented that any member is
7 aware of any of these statements. In fact, the defense
8 acknowledged in their argument that if you ask a member did
9 you hear President Bush say this on a particular date, that
10 they are not going to remember. And if they aren't even aware
11 of those statements, certainly they can't be affected by them.

12 And I think if you do take a look at -- and the
13 defense brought up a couple of cases of traditional unlawful
14 command influence, you really see the distinction, the
15 difference between those types of situations and what we have
16 here. And I will just go through a couple of cases very, very
17 briefly, but I think it really draws that contrast.

18 For example, when you talk about United States v.
19 Lewis 63 MJ 405, that was a case where the Staff Judge
20 Advocate conspired with the trial counsel to have the military
21 judge recuse herself. I mean, there you really have this
22 direct impact from a superior, from a leadership position that
23 is having a direct impact on a court-martial proceeding.

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1 The other landmark case that we always refer to,
2 because it sets the standard for unlawful command influence,
3 United States v. Biagase, 50 MJ 143. In that case a
4 confession of an accused was Xeroxed and disseminated
5 throughout the command, it was brought up at formations.
6 Everybody was aware that this particular accused had, in fact,
7 confessed, making it unlikely therefore that he would get a
8 fair trial.

9 Again, you have the direct actions by leadership
10 made directly to persons who were aware of those statements.
11 And so it is certainly arguable in those situations that would
12 have an effect. The members or the potential members or
13 witnesses or potential witnesses have -- are aware, actually
14 there is evidence that they are aware. Those documents have
15 actually been disseminated directly to those persons.

16 United States v. Harvey, 64 MJ 13, that's the case
17 where the Convening Authority during closing argument actually
18 comes into the courtroom, a Convening Authority that had a
19 very close relationship with a senior member in that case.
20 Again, you really see the intimacy where the Convening
21 Authority being located directly on a military installation,
22 the members and the witnesses knowing who that person is, that
23 really direct kind of influence that is being exerted. And

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1 frankly, Your Honor, that is just not what is going on in this
2 case.

3 And if we do want to talk about it -- the defense
4 kind of went back and forth as to whether this was an issue of
5 the Convening Authority being influenced or the members, but
6 to the extent that this is an issue regarding just the
7 Convening Authority, United States v. Gerlich, G-E-R-L-I-C-H,
8 45 MJ 309, again really shows the contrast here. In that case
9 the Convening Authority sent a case, a fairly serious case to
10 an Article 15, to a nonjudicial punishment type situation.

11 His superior officer then e-mailed him or sent
12 some kind of communication directly to him to suggest that he
13 might want to reevaluate that. Certainly raised issues
14 completely different than the situation that we have here
15 where there again is no evidence that the Convening Authority
16 was impacted or received any kind of communication from higher
17 ranking officials or the Convening Authority was even aware of
18 the statements that the defense has brought up.

19 Now, I do want to address specifically some of the
20 statements that were made that the defense alleged raises this
21 issue of unlawful influence. I think it's important to ----

22 MJ [COL POHL]: Just to be clear for purposes of the
23 motion you have no objection, I'm assuming, to consider the

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1 statements attached to the defense briefs as actually having
2 been made?

3 ATC [LT DAVIS]: That's correct, Your Honor.

4 MJ [COL POHL]: You don't want to call all these people
5 as witnesses?

6 ATC [LT DAVIS]: No, sir.

7 MJ [COL POHL]: I didn't think so. Go ahead.

8 ATC [LT DAVIS]: Since 2002 -- I think around 2002 is
9 when the defense, it is the first statements that the defense
10 has put before the commission. Since 2002 there are only nine
11 statements that were made that actually reference -- nine to
12 ten statements that reference either the accused by name or
13 the USS COLE in general, nine statements in now 12 years.

14 There have been no statements, no reference at all
15 to this particular case since referral in 2011. In fact,
16 there has been no reference to this case or the accused by any
17 of these high-ranking officials since over three and a half
18 years ago. That's important because when you take a look at
19 what the Biagase standard is, it is facts which, if true,
20 could be unlawful influence and then that that influence has a
21 logical connection to the proceedings.

22 Well, when you have that amount of time that
23 passes, when you have statements that were made before

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1 referral or before charges were even sworn, you simply can't
2 have that logical connection.

3 MJ [COL POHL]: Going to Biagase framework which we are
4 using, okay, the first step is do the facts shift the burden.
5 Okay, there is no dispute about the facts -- I'm assuming
6 there is no dispute that these comments were made. So the
7 factual predicate, the government is not disputing the, that
8 part of the factual predicate.

9 But my question really goes -- because you have
10 obviously two options, but the option number one is have the
11 defense raised enough to shift the burden, and then if the
12 burden is shifted, you apply the other factors. Okay.

13 Is it your position that the burden hasn't shifted
14 and therefore the government has no burden to disprove
15 unlawful influence?

16 ATC [LT DAVIS]: Two points to that, Your Honor. In
17 order for the defense to raise this issue, it is not just that
18 there are the predicate facts, it is also ----

19 MJ [COL POHL]: I understand. I understand that.

20 ATC [LT DAVIS]: The second part is there has to be some
21 logical connection in terms of its ability to cause
22 unfairness.

23 MJ [COL POHL]: What is the standard of proof for that?

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1 ATC [LT DAVIS]: Some evidence, Your Honor.

2 MJ [COL POHL]: Okay, go ahead.

3 ATC [LT DAVIS]: So it is the government's position that
4 the defense has not -- has not raised some evidence of that
5 issue. For -- in order for there to be some evidence of that
6 issue, again, you have to show what was the object of the
7 influence and if there was actually an effect on it, on that
8 object.

9 Now, the defense has presented no evidence that
10 the Convening Authority was either aware of those statements
11 or was influenced at all by it. Again, all we have is
12 speculation by the defense that this influence necessarily
13 took place.

14 MJ [COL POHL]: So your view is they have not given me
15 some evidence to shift the burden, and accordingly the inquiry
16 just stops right there.

17 ATC [LT DAVIS]: That's correct, Your Honor.

18 MJ [COL POHL]: Okay.

19 ATC [LT DAVIS]: Now, taking a look at the specific
20 statements, looking at the two categories, first the
21 statements that were made during the Bush administration, it
22 is the government's position that these statements do not
23 constitute unlawful influence, whether we are talking about

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1 unlawful command influence or the type of unlawful influence
2 that we have here under the Military Commissions Act.

3 It is not just that there is influence. Influence
4 has to be unlawful. And the defense referred to United
5 States v. Simpson. And one of the conclusions of United
6 States v. Simpson was that for this, for the media impact or
7 for statements made through the media by high-ranking
8 officials, for that to constitute unlawful influence, that
9 politician, that leader has to deliberately orchestrate those
10 comments, deliberately orchestrating it with the intent of
11 affecting the proceedings in a particular case.

12 It is a factual impossibility ----

13 MJ [COL POHL]: Do you believe that Simpson stands for
14 the proposition that members of Congress would fall within the
15 UCI framework in a military context? Do you think the
16 comments by Senator Mikulski and others ----

17 ATC [LT DAVIS]: I think more to the issue the concerns
18 that are raised in Simpson were not just statements from
19 Congress.

20 MJ [COL POHL]: No, I understand that. I'm just simply
21 saying that I think what you just told me, and I just want to
22 understand it, in the Simpson context there were statements by
23 many people, Congress and other nonexecutive branch,

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1 nonchain-of-command people. Doesn't Simpson kind of stand for
2 the proposition that they don't have this mantle of authority
3 and, therefore, they are not really -- this Article 37 doesn't
4 real apply to them?

5 ATC [LT DAVIS]: I would agree with that conclusion.
6 Where I think the difference comes is when we are not talking
7 about that aspect of Simpson, but when we are talking about
8 high-ranking officials, including the Secretary of the Army
9 and the Army Chief of Staff, again the standard that Simpson
10 lays out is that their statements, in order to be unlawful
11 influence, have to be deliberately orchestrated to impact or
12 with the intent to impact a particular proceeding.

13 And when we are talking about the Bush
14 administration, it's a factual impossibility. In case ----

15 MJ [COL POHL]: Excuse me. In the Simpson case did the
16 court say there was no evidence, therefore, the burden didn't
17 shift, or that the burden shifted and the government disproved
18 it beyond a reasonable doubt as an impact on the case?

19 ATC [LT DAVIS]: In Simpson they kind of jumped to the
20 end. They found that the government had proven beyond a
21 reasonable doubt that there was no unlawful influence and
22 because they had found that there was no need to look at
23 whether the defense had raised it, kind of a different way of

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1 going about things but that's the context.

2 And if we are talking about Simpson, I think the
3 reason why the court in Simpson found that there was no
4 unlawful influence was because they found that the statements
5 of the officials were not made -- were not transmitted
6 directly to persons involved in the court-martial process,
7 just like we have here, statements ----

8 MJ [COL POHL]: How did the court arrive at that
9 conclusion? What facts did they have to arrive at that
10 conclusion?

11 ATC [LT DAVIS]: Certainly there had been more evidence
12 before -- before that court-martial than we have before these
13 proceedings.

14 MJ [COL POHL]: Okay, just -- I'm back to the
15 burden-shifting issue. You know, you are citing a lot of
16 cases there and, for example Simpson, you are right they get
17 to the conclusion perhaps inferentially saying the burden had
18 shifted and then the government presented evidence and why was
19 disproved beyond a reasonable doubt.

20 But your position in this case is there is no
21 reason for the government to do that since the defense
22 position -- the defense evidence doesn't cause a burden shift.

23 ATC [LT DAVIS]: That's correct.

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1 MJ [COL POHL]: Understanding if there is burden shift
2 and you present no evidence then you will lose. I'm not
3 making any conclusions here. I'm just saying that's the
4 process.

5 ATC [LT DAVIS]: I understand, Your Honor.

6 MJ [COL POHL]: I'm just trying to make this clear.

7 ATC [LT DAVIS]: The government would disagree that is
8 the process. The government is not necessarily required to
9 present evidence. The government can meet its burden beyond a
10 reasonable doubt by persuading the commission.

11 MJ [COL POHL]: I didn't mean that, okay? Let me -- I
12 have your pleadings, what you put on there too. What I'm
13 saying is that this is not an advisory opinion context -- I
14 want to make sure this is clear because sometimes in UCI cases
15 it is not clear.

16 The court makes a ruling on whether or not the
17 burden has shifted. Then the court makes a ruling, if the
18 burden has shifted, whether it has been rebutted beyond a
19 reasonable doubt. The court does not give a first-prong
20 ruling then give the government a second chance to come and do
21 it. So I just want to make -- so there is no confusion about
22 how the process works, because there apparently is confusion
23 in other courts about the process for UCI litigation.

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1 ATC [LT DAVIS]: Yes, Your Honor, the government
2 understands.

3 MJ [COL POHL]: Okay.

4 ATC [LT DAVIS]: Understand, the government's argument
5 is, first, that the defense has not raised some evidence under
6 Biagase. Should the commission disagree, the government
7 certainly thinks, based on the pleadings, based on some of the
8 evidence attached to the government's motion, and if we
9 were -- if we were to get to a voir dire situation or when we
10 get to a voir dire situation, that the government will have
11 proven beyond a reasonable doubt ----

12 MJ [COL POHL]: The focus right now is on the Convening
13 Authority. And just to make it clear, Major Hurley, as the
14 government is taking your attachments as facts, do you have
15 any objection to me taking their attachments as facts?

16 ADDC [MAJ HURLEY]: No, sir.

17 MJ [COL POHL]: So, again, when I said you lose, I
18 didn't mean to say you lose. What I really meant to say is
19 that then you go the next step, and I will take the evidence I
20 have at that time. I just didn't want you to think that
21 somehow we are going to do the first part, and the second part
22 the government comes back two months from now and says oh, by
23 the way we now want to present evidence because we didn't do

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1 well the first time. Go ahead.

2 ATC [LT DAVIS]: Understood, Your Honor.

3 Getting back to our discussion about the
4 statements of the Bush administration, whether it is unlawful
5 command influence or unlawful influence, the influence still
6 has to be unlawful. And as was indicated earlier, that's
7 going to require that there is this deliberate orchestration
8 with the intent. What the defense presented again is just
9 speculation that that's the case.

10 Even -- or equally as important is really the
11 context of the statements and what that purpose is. Defense
12 again speculates that it was to influence a commission or a
13 trial that was years into the future, which is a factual
14 impossibility. Charges had not been sworn or referred. Very
15 little, if any, thought had gone into that process.

16 The actual context of those statements was an
17 ongoing war against terror. And public officials under an
18 unlawful command influence analysis are not precluded from
19 making comments that are of great public ----

20 MJ [COL POHL]: Just to be clear, when this case was
21 originally referred it was during the Bush administration,
22 right?

23 ATC [LT DAVIS]: Late, yes, sir.

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1 MJ [COL POHL]: Late in the administration, then
2 withdrawn and rereferred by the Obama administration ----

3 ATC [LT DAVIS]: Yes, sir.

4 MJ [COL POHL]: ---- or during the Obama administration.

5 ATC [LT DAVIS]: Yes, sir. But with regard to the
6 statements defense placed before this commission, those were
7 pre-referral statements. We are talking about 2002, at the
8 latest 2006. That's ----

9 MJ [COL POHL]: But hadn't a commission process already
10 started then? I mean, you are right in saying that the MCA
11 itself was not passed until 2006, but wasn't there other
12 executive order iterations? So the argument that these
13 statements are made in the context with no pending proceedings
14 are technically right. There's no pending commission
15 proceeding under the MCA, but there was military tribunals
16 under the executive order pending at the time, weren't there?

17 ATC [LT DAVIS]: Well, Your Honor, what it goes to again
18 is the intent of those statements.

19 MJ [COL POHL]: Okay.

20 ATC [LT DAVIS]: And the likelihood that the intent was
21 to influence proceedings that at that point didn't even exist.

22 Understood that command is not an aspect under the
23 MCA, but influence still is, leadership influence. And when

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1 we are talking about these statements from the Bush
2 administration, and its ability to affect these proceedings
3 and these members or this Convening Authority, it's important
4 to recognize that President Bush is no longer the Commander in
5 Chief. He has not been the Commander in Chief for over six
6 years, and as such his ability to influence these proceedings,
7 this commission, this Convening Authority is virtually none.
8 That's an important aspect for the commission to consider.

9 MJ [COL POHL]: Did the Convening Authority,
10 Admiral MacDonald in the case, was he appointed during the
11 Bush administration by the Secretary of Defense?

12 ATC [LT DAVIS]: I'm not clear on that exact timeline,
13 Your Honor. But when we are talking about when he actually
14 referred charges in this case in 2011, clearly at that point
15 President Bush had left office.

16 MJ [COL POHL]: Okay, got it. Go ahead.

17 ATC [LT DAVIS]: So we kind of talked about how the
18 statements are not really unlawful, that we don't really have
19 this specter of command influence. And then finally, the last
20 piece of unlawful influence is that there actually is
21 influence. And, again, there is no evidence before the
22 commission that any of those statements, that the Convening
23 Authority was either aware or acted upon any of those

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1 statements.

2 Now, with regard to the statements made during the
3 Obama administration, we have, I believe, two statements that
4 the defense has put before this commission, one by Attorney
5 General Holder and one by Senator Lindsay Graham. Now, again,
6 it's important to understand, you know, whether these are
7 first unlawful -- whether we have this issue of leadership or
8 whether we have a question of influence.

9 It's not unlawful when public officials are making
10 statements about -- that are statements of great importance to
11 the public, and that's really the context that we have here.
12 This is a far different situation than the typical UCI cases
13 where we see -- we don't have these statements being made
14 through command channels or any of -- or disseminated in a way
15 that is referred in United States v. Simpson.

16 Command authority certainly is not present -- is
17 not present whatsoever. I think it's -- the defense would be
18 hard pressed to suggest that a statement by one of 100
19 senators or by the Attorney General would have the type of
20 impact on a member that a military superior would have. And,
21 again, there is no evidence whatsoever that these statements
22 by the Attorney General or by Senator Graham were actually --
23 that the Convening Authority was either aware of them or was

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1 influenced by them in any other way.

2 What we can be more sure of are the DoD press
3 releases that the government attached to its motion as
4 Attachments B, C and D. And I think the government thinks
5 that these are really the clearest evidence of whether there
6 is any question of unlawful influence in this case,
7 particularly with regard to the Convening Authority.

8 If you take a look at the June 30, 2008 release
9 when charges were sworn, initially sworn against the accused,
10 the relevant part -- we are talking about the Convening
11 Authority, the release says that the Convening Authority, who
12 at that time was Susan Crawford that she will make an
13 independent determination as to whether to refer some, all or
14 none of the charges to trial by military commission.

15 That is a clear statement from the Department of
16 Defense to the Convening Authority. It is certainly more
17 likely that that was actually received than statements that
18 were made years before that. This was the direct instruction
19 to the Convening Authority, letting everybody know that they
20 weren't just independent by nature of being a civilian outside
21 of the military chain of command, but they were actually
22 required to make an independent judgment and that that was the
23 expectation.

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1 Further, in that same statement it notes the
2 charges are only allegations, only allegations, not that
3 there's any preconceived notion that this accused is guilty.
4 The charges are only allegations that the accused has
5 committed offenses under the Military Commissions Act, and the
6 accused remains innocent until proven guilty beyond a
7 reasonable doubt.

8 December 19th, 2008 when charges were referred
9 against the accused in this case. Again, charges are only
10 allegations. The accused -- only allegations that an accused
11 committed offenses under the Military Commissions Act. The
12 accused remains innocent unless proven guilty beyond a
13 reasonable doubt.

14 And then finally again with specific regard to the
15 decision of the Convening Authority when charges were sworn,
16 April 20th, 2011 you see first various references to the word
17 alleged. There is no indication the accused is presumed
18 guilty. It talks about the charges alleged, what Mr. Nashiri
19 may have done, it is further alleged, the charges allege.

20 And then finally and perhaps most importantly, it
21 says the Convening Authority will make an independent
22 determination as to whether -- as to whether to refer some,
23 all or none of the charges for trial by military commission.

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1 The direction, and if there is any influence on
2 the Convening Authority is clear, that direction is that the
3 Convening Authority is to make an independent judgment. And
4 there is absolutely no evidence whatsoever before this
5 commission that the Convening Authority did anything but that.

6 We've already discussed United States v. Simpson.
7 I think the other important case for the -- I think the other
8 important case for the commission to consider is United
9 States v. Calley, this being the case that discusses the
10 charges that came about as a result of the My Lai massacre.
11 That was a case that, of course, had a significant,
12 significant amount of media attention, and in that case two
13 things really stand out.

14 First -- and understand the commission said this
15 is more about the Convening Authority, but the defense has
16 argued some, this is about the members. Despite statements by
17 the President, by the Secretary of War, people that clearly
18 had the mantle of command authority, the court in that case
19 found that the voir dire officially suffices to rebut a claim
20 of influence due to statements by higher officials. The same
21 would be -- the same would certainly be the situation in this
22 case.

23 The defense's position seems to be that in any

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1 case where there is a great deal of media scrutiny, where
2 there are many, many statements perhaps made by officials that
3 the result must be that nobody associated with those types of
4 crimes could ever be prosecuted. And as the court in Calley
5 pointed out, we simply cannot accept that proposition.

6 As the court in Calley said, undeniably the
7 offices of those making the statements are prestigious, but
8 their utterance almost a year prior to trial, their overall
9 neutral character, and the vague recollection of these
10 statements by court members represent no unfair risk of
11 improper command influence upon them.

12 Two points on that. One, that just because a
13 public official in some kind of leadership capacity has made a
14 statement by the nature of their office that is not a, that
15 does not create per se unlawful influence. The other
16 important aspect there is this timing issue. And the defense
17 seems to suggest that the government has pointed to no
18 authority whatsoever that statements can become stale.

19 Well, in fact in United States v. Calley that is a
20 significant part of the analysis. In the passage that I just
21 read they noted that those statements in the peak of the media
22 attention about that case was almost a year prior and that the
23 passage of time can indeed diminish the impact that those

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1 statements can have. In that case it was less than a year and
2 in this case we are talking about several years. No
3 statements made since referral and no statements made in the
4 last three and a half years.

5 Finally, Your Honor, the defense brought up the
6 issue of the appearance of unlawful command or of unlawful
7 influence. And the courts have held that the approach that we
8 take to that is similar to what we take when we look at
9 whether there is implied bias with regard to members, that is,
10 the public's perception that there is an improper influence
11 going on seen through the eye of the public, knowing all of
12 the facts and circumstances at hand.

13 Now, it's the government's position that should
14 the public look at this situation, the public would actually
15 be outraged that we are talking about dismissing a case based
16 on statements that were not made -- when there is no evidence
17 that those statements were made directly to the Convening
18 Authority, that the Convening Authority was even aware of
19 them, when there were no statements made directly to any
20 member or that a member would or a witness would change their
21 behavior as a result of them.

22 Where the public would have a concern is when we
23 really have these issues of rank, and that is why it comes up

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1 in the military context and in the UCI context, where you have
2 a person of a certain military rank that is really directly
3 exerting that influence on someone else. That is where the
4 public would be concerned. The public would not be concerned
5 when we are talking about statements that are in some cases
6 ten years old and there is no evidence that they were directly
7 passed on to anybody that has a relationship to this
8 particular process.

9 If I may have one moment, Your Honor.

10 MJ [COL POHL]: Sure.

11 ATC [LT DAVIS]: That is all I have.

12 MJ [COL POHL]: Thank you, Lieutenant.

13 Major Hurley, anything further?

14 ADDC [MAJ HURLEY]: Yes, sir, a few things.

15 MJ [COL POHL]: Just so you understand, I generally let
16 a rebuttal argument by each side, but then we are done.

17 ADDC [MAJ HURLEY]: Sir, would you say that last part
18 again?

19 MJ [COL POHL]: Yes. I said I generally allow a
20 rebuttal argument by each side, okay, and then we are done.
21 So I'm saying this probably not so nice, but this is your last
22 chance.

23 ADDC [MAJ HURLEY]: Is that pretty much what the court

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1 is saying, last shot?

2 MJ [COL POHL]: No. I'm just saying I want to give you
3 an opportunity to respond to what he said, he will have an
4 opportunity to respond to what you said, then we are done with
5 the issue.

6 ADDC [MAJ HURLEY]: Certainly, sir.

7 The first response by the defense in this case is,
8 as the government was arguing about the overall neutral
9 character of what President Nixon's remarks were about
10 Lieutenant Calley, I looked, sir. I couldn't find what
11 President Nixon's remarks were about Lieutenant Calley. I
12 read through every opinion I could find, did as much research
13 as I could find, I couldn't find what they were specifically.
14 But they are characterized -- the lieutenant is right, they
15 were characterized as overall neutral.

16 Saying that a person did it and is morally
17 responsible for the crimes isn't a neutral statement. And
18 that's what President Bush said in 2002, he did it
19 Mr. al Nashiri, he bombed -- he was mastermind of the COLE
20 bombing. Enough said. We can move on now. That is far from
21 neutral, sir.

22 MJ [COL POHL]: When a U.S. Attorney announces an
23 indictment, doesn't he essentially say the same type of

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1 things?

2 ADDC [MAJ HURLEY]: Sir, I would hope ----

3 MJ [COL POHL]: I'm not saying it is right or wrong.

4 ADDC [MAJ HURLEY]: Sir, I hope fondly and pray
5 fervently that he would use legal language. If this is an
6 attorney skilled in the practice of law, that he uses words
7 like alleged and only time will tell and we believe we have
8 the proof.

9 MJ [COL POHL]: Okay.

10 ADDC [MAJ HURLEY]: That is not what President Bush said
11 in this case.

12 Sir, secondly if the defense believes it has
13 raised this issue, the sum evidence -- Biagase, is the correct
14 pronunciation we agreed on?

15 MJ [COL POHL]: Sure.

16 ADDC [MAJ HURLEY]: I like Biagase, but to each his own.

17 If the court believes he needs more information,
18 if the government would like to call the Convening Authority
19 as a witness, the defense won't stand in the way if that is
20 the ultimate goal. Again we believe we satisfied our burden,
21 we believe in satisfying our burden. We have shown the
22 government can't satisfy its under the Biagase standard ----

23 MJ [COL POHL]: I know what you mean. Call it whatever

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1 you want.

2 ADDC [MAJ HURLEY]: If that's the way the court wishes
3 to call this witness certainly we would have no objection.

4 It was interesting I didn't talk about the press
5 releases in the government's response because I didn't quite
6 understand them, and even after hearing the lieutenant, I
7 still don't.

8 So the Convening Authority has to consider or we
9 should consider DoD press releases and not the statements of
10 these very influential American policymakers; in the case of
11 the President, the most influential American policymaker. A
12 press release? That is something that is -- that makes front
13 page news, that is on the front of the New York Times that is
14 the 6 o'clock news when we sit down as we are eating dinner
15 with our family and watching?

16 No, what is more likely to be included, what is
17 more likely to penetrate the mind of the Convening Authority
18 in this case, and if we extend it to the members, the minds of
19 the members, is the statements of these public officials, not
20 press releases by the Department of Defense. With all due
21 respect, that is a very important job, but that is just not
22 something that is going to sway public opinion. What sways
23 public opinion are the very public, very unequivocal routine

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1 statements.

2 And how often do these statements need to be made?

3 I mean if they stopped once this case was referred capital,
4 well, those individuals got what they wanted. The case is
5 here. It's a capital case. The accused is here. There is no
6 need for any other public statements. We are where we are.

7 So, sir, we would submit to you that the
8 defense -- I'm sorry, sir, restart that.

9 We would submit to you that some evidence of
10 unlawful influence has been raised, that the clear,
11 unequivocal statements about Mr. al Nashiri specifically, as
12 they happened over the years, and they happened over the
13 years, and there are instances we did not cover in the facts,
14 but they continued to happen, those statements ----

15 MJ [COL POHL]: Major Hurley, if you don't put it in
16 your brief, I don't consider it.

17 ADDC [MAJ HURLEY]: Yes, sir. You are right.

18 MJ [COL POHL]: You are referring to things that aren't
19 in there. Go ahead.

20 ADDC [MAJ HURLEY]: Yes, sir. We believe, sir, those
21 statements as they continue to -- as they happened in 2002
22 which were clear and unequivocal as they continued, amounted
23 to unlawful influence on the Convening Authority. An

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1 individual appointed by the President, supervised by the
2 Secretary of Defense, and in this case someone who
3 participated in the decade-long -- or not decade, the
4 years-long struggle to identify the proper legal framework for
5 these commissions, that that individual is going to not have,
6 is going to have in this case his head buried in the sand, not
7 be aware of what way the wind is blowing is, to say the least,
8 hard to believe.

9 So, sir, again the relief we seek is, because of
10 this unlawful influence, the dismissal of all charges and
11 specifications in this matter. Thank you.

12 MJ [COL POHL]: Thank you. Lieutenant Davis, anything
13 further?

14 ATC [LT DAVIS]: No, Your Honor.

15 MJ [COL POHL]: I will take the motion under advisement.
16 We will break for lunch now. Before we do that, I think as we
17 discussed in the 802, just for going forward I'm just doing
18 things off my docket sheet, do 184 next dealing with
19 Mr. Rodriguez, and then skipping to 188 and then just
20 basically continuing from 188 on down from the docket sheet as
21 it's written, okay?

22 We will go ahead and recess until 1300.

23 Commission is in recess.

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1 [The Military Commission recessed at 1149, 19 February 2014.]

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