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1 [The R.M.C. 803 session was called to order at 1302,
2 23 February 2015.]

3 MJ [Col SPATH]: All right. This commission is called to
4 order. Trial Counsel, who is here to represent the
5 government?

6 DCP [COL MOSCATI]: Good afternoon, Your Honor. Good
7 afternoon, Judge. All members detailed by General Martins'
8 detailing memo, AE 338, 20 February 2015 are present for the
9 government, Judge.

10 MJ [Col SPATH]: All right, thank you. And they have all
11 been sworn, qualified, certified? I saw the list.

12 DCP [COL MOSCATI]: Yes, Your Honor.

13 MJ [Col SPATH]: And then are the proceedings being
14 transmitted?

15 DCP [COL MOSCATI]: They are, Judge. These proceedings
16 are being transmitted via CCTV to two remote locations in the
17 United States in accordance with the judge's order dated
18 12 January 2015, AE 028J.

19 MJ [Col SPATH]: All right. Thank you very much.

20 Defense counsel, who is here to represent
21 Mr. al Nashiri?

22 LDC [MR. KAMMEN]: Besides myself -- my name is Richard
23 Kammen, for the record -- Commander Brian Mizer; Major Alison

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1 Danels; and Captain and very-soon-to-be Major Daphne Jackson;
2 Major Thomas Hurley; and a new member of our team, Lieutenant
3 Commander Jennifer Pollio.

4 MJ [Col SPATH]: What was the last name, I'm sorry?

5 LDC [MR. KAMMEN]: Lieutenant Commander Jennifer Pollio,
6 P-O-L-L-I-O.

7 MJ [Col SPATH]: Lieutenant Commander Pollio.

8 ADDC [LCDR POLLIO]: Sir, I have been detailed to this
9 matter by Colonel Karen Mayberry, United States Air Force
10 Chief Defense Counsel for the Office of the Military
11 Commissions. I'm qualified and certified under the ----

12 DDC [CDR MIZER]: Sorry.

13 MJ [Col SPATH]: One more time.

14 ADDC [LCDR POLLIO]: Yes, sir. I have been detailed to
15 this matter by Colonel Karen Mayberry, United States Air
16 Force, Chief Defense Counsel for the Military Commissions. I
17 am qualified and certified under both the UCMJ and the rules
18 governing these proceedings, and I have been previously sworn.
19 I have not acted in any manner which may would disqualify me
20 from this proceeding.

21 MJ [Col SPATH]: All right. Mr. al Nashiri, do you want
22 to have Lieutenant Commander Pollio as part of your defense
23 team?

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1 Thank you. And that was a yes. All right.

2 Mr. al Nashiri, I'm going to advise you of your right
3 to be present and your right to waive your presence at these
4 hearings. You have the right to be present during all
5 sessions of the commission. If you request to be absent, if
6 you do absent yourself from any session, such absence must be
7 voluntary and of your own free will.

8 Your voluntary absence from any session of the
9 commission is an unequivocal waiver of the right to be present
10 during that session. Your absence from any session may
11 negatively affect the presentation of the defense of your
12 case.

13 Your failure to meet with and cooperate with your
14 defense counsel may also negatively affect the presentation of
15 your case. Under certain circumstances, your attendance at a
16 session can be compelled, regardless of your personal desire
17 not to be present.

18 Regardless of your voluntary waiver to attend a
19 particular session of the commission, you have the right at
20 any time to decide to attend any subsequent session. If you
21 decide not to attend the morning session but wish to attend
22 the afternoon session, you must notify the guard force of your
23 desires. Assuming there's enough time to arrange the

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1 transportation, you will then be allowed to attend the
2 afternoon session.

3 You will be informed of the time and date of each
4 commission session prior to the session to afford you the
5 opportunity to decide whether you wish to attend that session.

6 Mr. al Nashiri, do you understand what I have
7 explained to you?

8 ACC [MR. AL NASHIRI]: Yes, I do understand well.

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

10 I want to summarize. We had an 802 session this
11 morning, and in that off-the-record session, both sides were
12 there. In fact, all of the counsel were there who are here
13 now, and I just want to summarize what we talked about while
14 we were doing that.

15 I discussed kind of the road ahead for today in large
16 part, and it was a focus on motions and issues related to the
17 unlawful influence motion before the court, 332C, E and G were
18 the specific numbers. And I told both sides what I'd like to
19 do is get a ruling on requests -- or motions to compel the
20 production of documents and motions to compel witness
21 testimony done sooner than later, so we can move to the
22 substance of the unlawful influence motion. And from there
23 we're going to move through the order that's contained on the

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1 docketing order.

2 During that session the defense did ask if the
3 unlawful influence motion needed to be resolved before we went
4 anywhere else. I said possibly. Maybe we could move forward
5 but not make any additional rulings. And I think in large
6 part today is going to be tied up with the unlawful influence
7 motion at any rate.

8 The defense had an interest that they expressed to
9 get through one of the other motions that had to do with
10 grooming, a request for grooming. Find out where we are with
11 that one, but they wanted to get through that earlier than
12 later as well. There was some discussion from both sides
13 about whether that issue was resolved or not resolved with
14 some more information coming.

15 Mr. Kammen?

16 LDC [MR. KAMMEN]: Your Honor, it is resolved. There are
17 issues attendant to that, but our preference is to try and
18 resolve them informally. So we'll just ask the court to table
19 that, and if it becomes an issue in the future and some of the
20 related issues, we'll address them.

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

22 At the same time -- as we finished that discussion,
23 the government brought up a desire in relation to 331A, and

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1 that has to do with the manner in which we're going to work
2 through hearsay statements and the preadmission of evidence.
3 And they had a request, which was to get through that sooner
4 rather than later as well, because it would help them plan for
5 next week. So the sooner we could resolve those issues, the
6 more assistance it would be in planning for next week, if we
7 are here for our second week of this hearing.

8 The defense indicated they had a concern, a recent
9 concern with some classification issues, particularly with
10 regard to Brady material, and the defense had a concern some
11 Brady material was being withheld from them. The government
12 did not concede anything about that. The defense was just
13 alerting me to that issue. And we're going to talk about that
14 on the record as well, I'm sure.

15 And the government asked if I would consider dealing
16 with some motions that were not fully briefed yet, but the
17 government believed they're ready to argue, 207F, 206N and O,
18 and 205EE were mentioned, and then I mentioned 332G, which is
19 a production of witness issues.

20 Then the government asked if I thought about the
21 timing of any 505 sessions, classified sessions this week, and
22 I told them that I had not thought about that yet, because we
23 needed to get through 332.

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1 Trial Counsel, do you want to add anything to my
2 summary of the 802 session?

3 DCP [COL MOSCATI]: No, Your Honor.

4 MJ [Col SPATH]: Defense Counsel?

5 LDC [MR. KAMMEN]: No, sir.

6 MJ [Col SPATH]: All right. So before we start working
7 through the issues attendant to and surrounding 332, let me
8 make a few disclosures for the record, and then if either side
9 has any questions for me, I'm more than willing to answer them
10 as they relate to it.

11 The litigation around 332 relates to Change 1 to the
12 Rules For Military Commissions. I found out about that change
13 when Mr. Fred Taylor sent me an e-mail and just let me know
14 that it had happened. The change was attached to it, already
15 signed. Prior to that e-mail coming to me, I had no
16 indication that there was a discussion of this Change 1. And
17 Change 1 is the requirement that detailed commission judges,
18 their exclusive judicial duties will be the commissions, and
19 that they relocate immediately to Guantanamo Bay until the
20 conclusion of the commission. It was the first I had seen of
21 it.

22 I forwarded that e-mail to my boss, the Judge
23 Advocate General of the Air Force; I copied the Deputy Judge

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1 Advocate General of the Air Force; I copied their exec; and I
2 believe I copied the head of the judiciary, Colonel Chuck
3 Killion. I'm positive I did. The e-mail traffic simply from
4 me was, "For your situational awareness. Very respectfully,
5 Vance," with my signature block. And that was the only
6 comment I made about it.

7 Approximately a week after it was signed I was over
8 at the Pentagon for a staff meeting. We have a staff meeting
9 every Thursday. When I'm in town, I try to attend it. The
10 Judge Advocate General hosts the staff meeting, and it's by
11 the directors of the various JAG agencies. So the
12 prosecutor -- the head of the judiciary is there, I'm there,
13 and then a variety of people are there that are not related to
14 criminal law. It's just a standard staff meeting to discuss
15 pending issues out in the JAG Corps.

16 At the end of that meeting General Burne asked if he
17 could speak with me, and so I stayed behind. And he said he
18 was concerned about Change 1, and he wanted to know how I
19 believed that affected me. I told him that there was pending
20 litigation about Change 1, and so I wasn't comfortable
21 discussing it until we dealt with the issue down here.

22 And not surprisingly, I think everyone would guess
23 the end answer to this. He was very respectful of that. He

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1 understood that there were pending issues, and there's pending
2 issues with another trial disconnected from the commission, a
3 U.S. v. Wilson at Robins Air Force Base. And I had already
4 noticed that motion was pending and that motion directly
5 related to the change, Change 1, and it was a request for me
6 to disqualify myself from U.S. v. Wilson, because I had been
7 ordered by the -- this was the styling of the motion --
8 whether I agree with it or not is a different issue. But I
9 had been ordered by the Deputy Secretary of Defense to move to
10 Guantanamo immediately and cease all judicial duties other
11 than the commissions.

12 So with those two issues pending, I declined any
13 comment, and again everybody was very respectful of that. It
14 was just General Burne, General Rockwell and myself in that
15 follow-on meeting.

16 I went down to do the United States v. Wilson motion
17 hearing last week. We had that motion hearing Wednesday
18 morning, and Change 1 was discussed in some detail in that
19 case. I made clear I wasn't ruling on Change 1 in
20 United States v. Wilson. The only ruling I was going to give
21 in United States v. Wilson was whether or not I would
22 disqualify myself from that case.

23 The defense argued that Change 1 was clear in its

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1 language, and that given that it was a lawful change, clearly
2 I had to disqualify myself. The government argued it wasn't
3 quite as clear on its face as it could have been, and more
4 importantly, the Judge Advocate General has detailing
5 authority over me by statute. The rule change is a rule
6 change, not a statute, and so, of course, a statute takes
7 precedence.

8 I denied the defense motion. I did not disqualify
9 myself, but I made clear to them that if they believed the
10 circumstances changed based on the motion hearing in this
11 case, al Nashiri, the commission proceeding in this case the
12 following week, they could certainly refile a motion. But I
13 refused to disqualify myself. I denied their motion, and I
14 said I believed that it was premature and not ripe yet because
15 I hadn't ruled on the motion down here.

16 They disagreed with that ruling. They've asked me to
17 reconsider, and we'll get to that at some point. I won't
18 comment on that case here, just like I didn't comment on this
19 case at the U.S. v. Wilson hearing.

20 A follow-on discussion occurred -- and talk about
21 hearsay on hearsay. Our assignment chief, Colonel Plummer,
22 and I were on the phone discussing judiciary assignments
23 because we're starting to notify people who are going to come

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1 to the bench to work for me in the Air Force, of their jobs.
2 So we were having that discussion, and at the end of that
3 discussion Colonel Plummer said, "I'll call you next week to
4 give you the name of the 06s who were going to come to the
5 judiciary." I said, "I will e-mail you a good phone number
6 for me. I'll be down in Guantanamo next week, and so I'll
7 make sure that you have my DSN number."

8 And Colonel Plummer said in a conversation with Major
9 General Rockwell, and this is before I knew he was going to
10 say anything about Change 1, he was under the impression from
11 General Rockwell the issue no longer applied to me because I
12 am on -- this is the quote, a case about the COLE bombing and
13 not on the 9/11 case.

14 I told Colonel Plummer that I appreciated that input,
15 but please don't discuss it with me any further. I was
16 unaware of any e-mail traffic or anything that differentiated
17 between the different proceedings.

18 And I said, "Please don't say anything else about
19 it." So that -- it's obviously hearsay, a conversation that
20 he had with Major General Rockwell. I have no idea what led
21 to their conversation. I'm just telling you what was
22 communicated to me about it. And I told Colonel Plummer, "I'm
23 dealing with an issue next week related to this. I can't talk

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1 about it. Please don't say anything." And he did stop
2 immediately and said, "I'm sorry. Maybe I shouldn't have said
3 anything." I said, "No worries."

4 So those are my discussions, dealings with Change 1,
5 from the time, again, Mr. Taylor sent it to me by e-mail to
6 let me know about it, forward as I have, frankly, as you would
7 expect, not been willing to chat about it with anybody because
8 it's pending litigation before me here.

9 So let me see if either side has any questions they
10 want to follow up with. Trial Counsel, do you have any
11 questions you want to ask?

12 DCP [COL MOSCATI]: Judge, given that it's the defense
13 motion, would it be proper for them to proceed first?

14 MJ [Col SPATH]: I will let that happen, sure.

15 LDC [MR. KAMMEN]: Can we caucus a moment?

16 MJ [Col SPATH]: Absolutely.

17 [Pause.]

18 LDC [MR. KAMMEN]: Let me say that I have a few brief
19 questions, but mainly just to clarify things for the record.

20 Our feeling is that sort of the voir dire of you
21 beyond the clarification is premature, but that there could
22 come a time where we may have some other questions. So
23 without waiving any future rights, we just have a few that

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1 sort of flesh this out, with your permission.

2 MJ [Col SPATH]: Absolutely.

3 LDC [MR. KAMMEN]: I know this, or I've come to know this.
4 Just for the record, General Burne is the Judge Advocate
5 General of the Air Force?

6 MJ [Col SPATH]: That is correct.

7 LDC [MR. KAMMEN]: And the staff meeting, was this an Air
8 Force staff meeting or a military judiciary staff meeting?

9 MJ [Col SPATH]: It is a weekly -- they call it the
10 directors' meeting. It is Air Force JAG Corps members ----

11 LDC [MR. KAMMEN]: Okay.

12 MJ [Col SPATH]: ---- only.

13 LDC [MR. KAMMEN]: And General Rockwell, his position is?

14 MJ [Col SPATH]: He is the Deputy Judge Advocate General
15 of the United States Air Force.

16 LDC [MR. KAMMEN]: So he works for General Burne?

17 MJ [Col SPATH]: Correct.

18 LDC [MR. KAMMEN]: Okay. And at least prior to Change 1,
19 as I understood and understand the military, you work solely
20 for the Judge Advocate General of the Air Force, and he has
21 complete authority over your assignments, location, where you
22 reside, what cases you work on or don't work on. Is that
23 correct?

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1 MJ [Col SPATH]: Under Article 6 in the Uniform Code he
2 has assignment authority over all Judge Advocate Generals, so
3 that certainly includes myself.

4 LDC [MR. KAMMEN]: Okay.

5 MJ [Col SPATH]: As for the cases I do, that has been
6 delegated to -- I do all of the detailing for the Air Force
7 judges within the judiciary, including myself. And he does
8 not get involved with any of those detailing decisions,
9 including my own. He is the one, however -- it was his
10 predecessor who nominated me into the pool of judges available
11 to the commissions from the Air Force.

12 LDC [MR. KAMMEN]: And General Rockwell, is he responsible
13 for assignments within judges of the Air Force, or Air Force?

14 MJ [Col SPATH]: No.

15 LDC [MR. KAMMEN]: What is his general ----

16 MJ [Col SPATH]: As the Deputy Judge Advocate General he
17 is there to do what all deputies do, anything General Burne
18 has him do. He doesn't have Article 6 assignment authority,
19 and he hasn't made any assignments.

20 LDC [MR. KAMMEN]: So at least prior to Change 1, as I
21 understand it, wherever your present station is, if somebody
22 were to relocate you prior to Change 1, it would have been
23 General Burne?

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1 MJ [Col SPATH]: Correct.

2 LDC [MR. KAMMEN]: Okay. He would have said move from
3 here to there.

4 MJ [Col SPATH]: Correct.

5 LDC [MR. KAMMEN]: And if he wanted to make a change,
6 could he make a change in your status of Chief Judge of the
7 Air Force?

8 MJ [Col SPATH]: He has absolute assignment control over
9 Judge Advocate Generals.

10 LDC [MR. KAMMEN]: So he, prior to Change 1, was the only
11 person who could make -- perhaps other than the President --
12 who could make a change in your status as Chief Judge of the
13 Air Force?

14 MJ [Col SPATH]: Correct.

15 LDC [MR. KAMMEN]: And as Chief Judge, as I understand it,
16 you would assign yourself or other brother and sister judges,
17 you handle this case at Biloxi, you handle this case at
18 Wright-Patterson, and so forth and so on; is that correct?

19 MJ [Col SPATH]: That's correct.

20 LDC [MR. KAMMEN]: And nobody else in the military
21 universe had any authority over that, as long as you were
22 Chief Judge?

23 MJ [Col SPATH]: The Chief Judge -- the regional Chief

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1 Judge in Europe and the Pacific have detailing authority in
2 those two regions, from me.

3 LDC [MR. KAMMEN]: Okay.

4 MJ [Col SPATH]: I delegate it to them.

5 LDC [MR. KAMMEN]: It's your supervision.

6 MJ [Col SPATH]: Correct.

7 LDC [MR. KAMMEN]: So ultimately, with respect to
8 assignments, including your own, the buck, prior to Change 1,
9 stopped with you.

10 MJ [Col SPATH]: Yes.

11 LDC [MR. KAMMEN]: Now, this supposed e-mail that I
12 think -- is Plummer a general?

13 MJ [Col SPATH]: Colonel Plummer.

14 LDC [MR. KAMMEN]: Colonel Plummer.

15 MJ [Col SPATH]: And his was not an e-mail. He and I had
16 a phone call that was him letting me know what assignment
17 actions he was recommending to General Burne for judges that I
18 was going to get this summer.

19 LDC [MR. KAMMEN]: Okay. And then he made the comment
20 that he thought he had seen an e-mail that somehow the
21 Change 1 only applied to the 9/11 case and not the COLE case
22 or any other cases.

23 MJ [Col SPATH]: I'm under the impression it was based on

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1 a conversation he had with General Rockwell. The way he
2 communicated it to me was just by happenstance, because I
3 said, "I'll be in GTMO next week, you will have to reach me
4 there, I'll give you a DSN number," and he said, "That issue
5 with you having to move there has been resolved, I assume,
6 because General Rockwell said that only applied -- it doesn't
7 apply to you as a COLE guy, but the 9/11 people." And that's
8 when I said, "Stop talking."

9 LDC [MR. KAMMEN]: And there was no further detail, I
10 presume?

11 MJ [Col SPATH]: No.

12 LDC [MR. KAMMEN]: Okay. I'm going to guess when you
13 first saw Change 1 and saw that at least there was somebody
14 who said you need to be prepared to move to Guantanamo
15 immediately and give up your job as Chief Judge of the Air
16 Force and that wasn't General Burne, you were pretty
17 surprised?

18 MJ [Col SPATH]: I always worry about adjectives and
19 adverbs. I was surprised because I had heard nothing about
20 Change 1 prior to coming to me from the OMC judiciary attached
21 to an e-mail, and I had not seen or heard anything of it,
22 so ----

23 LDC [MR. KAMMEN]: We may have additional questions,

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1 but -- anything else?

2 Thank you very much. I appreciate it.

3 MJ [Col SPATH]: Thank you.

4 DCP [COL MOSCATI]: Judge, Lieutenant Morris will address
5 this with the court.

6 MJ [Col SPATH]: Okay.

7 ATC [LT MORRIS]: Good afternoon, Your Honor.

8 MJ [Col SPATH]: Good afternoon.

9 ATC [LT MORRIS]: Is there anything about Change 1 that
10 would keep Your Honor from being able to conduct his duties
11 now in this military commission, to be fair and impartial?

12 MJ [Col SPATH]: I don't know. That's, I think, the basis
13 for the unlawful influence motion, and it's not an issue that
14 I have resolved yet, because I haven't worked through the
15 discovery or the production of documents.

16 ATC [LT MORRIS]: Then based on that response, we'll allow
17 the defense to carry their burden and attempt to do that and
18 present whatever evidence they have to Your Honor. Thank you.

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

20 So that takes care of the disclosures. I was looking
21 at my e-mail. I wanted to make sure that I told you all about
22 every contact that I had about Change 1. I forgot one. I
23 don't know if there will be any additional questions.

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1 I did have one with Judge Pohl. I went over to the
2 commissions to review some classified material, in our
3 continuing effort to get the defense material, and Judge Pohl
4 and I had the opportunity to talk about it. He did not give
5 me any suggestions on how to deal with it, and I'm not even
6 suggesting whether that would be inappropriate or appropriate.
7 It was just a very general discussion.

8 He said he anticipated he would have pending
9 litigation about it. He knew I already did. He believed I
10 would be dealing with it first, just based on the current
11 trial schedule, and he said that he thought that likely it
12 would be me leading the way as to what to do with it.

13 From my discussions with Judge Pohl -- and that was
14 the extent of the discussion as substance. Again, we both
15 knew we had pending litigation headed our way, but it was
16 clear to me that -- again, I won't say very surprised. The
17 adjectives and adverb, I don't want to quantify where people
18 fall on a scale of surprise -- he did not seem to know
19 Change 1 was heading his way, and he's the Chief Judge of the
20 Commissions. That was my impression from that conversation.

21 So I didn't mention that, but I was looking, as I
22 said, at my notes, and I wanted to make sure that I disclosed
23 everything. I don't know if that generates any additional

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1 questions.

2 LDC [MR. KAMMEN]: The answer to this -- well, let me ask
3 you this: In your conversation with Colonel Pohl, did the two
4 of you in that conversation discuss the various delays that
5 have occurred both in this case under his administration and
6 the 9/11 case, and whether or not the notion that moving the
7 judges to Guantanamo was a remedy for those delays? Was that
8 part of your discussion at all?

9 MJ [Col SPATH]: I don't remember that being any part of
10 the discussion. I remember a comment about -- I clearly
11 remember a comment. I just don't remember who made it.
12 Because Mr. Taylor is there, of course, because he was helping
13 me with the classified review, and then we were in the area
14 with everybody else.

15 I remember a comment that they didn't believe we
16 would necessarily move faster by relocating trial judges to
17 Guantanamo, but that was the extent of it. I just ----

18 LDC [MR. KAMMEN]: One of the three of you may have made
19 that ----

20 MJ [Col SPATH]: Yes.

21 LDC [MR. KAMMEN]: ---- rather obvious observation?

22 MJ [Col SPATH]: Yes.

23 LDC [MR. KAMMEN]: The only other question I have, and

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1 perhaps the prosecutor misspoke, but, I mean, I don't
2 understand where it comes from that the government's going to
3 allow us to carry their -- our burden. My understanding is,
4 you know, if you'd like us to argue first, since it's our
5 motion, that's fine, but it seems to me where we're at, given
6 the -- and I'll let -- and I think it's appropriate that
7 Commander Mizer speak to this, but just so we're all clear,
8 given the fact that there is this wholesale change in who runs
9 you going from General Burne now to the convening authority,
10 I'm not sure that the burden hasn't already shifted, but I'll
11 let ----

12 MJ [Col SPATH]: And we'll get there. We haven't had that
13 discussion, because we're going to deal with the production
14 request and the witness request, but I understand what you are
15 saying.

16 LDC [MR. KAMMEN]: And perhaps when he said they'd allow
17 us to present evidence, perhaps they're waiving their
18 objection, but I'm going to guess not.

19 MJ [Col SPATH]: I don't think so. All right.

20 So next up, seems to make sense that we're going to
21 start with 332, and specifically 332C, and that's the request
22 for -- it was a request for discovery. There was some
23 discovery provided, there was some discovery not provided, and

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1 then we, the commission, myself, entered an order making clear
2 what I did expect, and that was for the internal documents
3 within the convening authority's possession related to
4 Change 1, needed to be provided to me so I could do an
5 in camera review of those documents.

6 We asked the government to submit what their theory
7 of privilege was, because they had alluded to privilege in
8 their response, and they did submit that and they're relying
9 on the deliberative process privilege, and I'm sure you will
10 correct me or talk me through it as we go through that issue,
11 and the defense, of course, disagreed and would like to see
12 those documents. I have read all of the documents. So I
13 am -- I am there. I've gone through all of the submissions
14 from the government, but I think that's probably our next
15 place to go.

16 So, Defense Counsel, recognizing that I denied some
17 of your motion to compel discovery, I think the only
18 outstanding issue -- not that you necessarily agree or
19 disagree with that ruling, but the outstanding issue is the
20 documents I have for an in camera review and whether I should
21 disclose them to you. So I'm interested in comments on that.

22 DDC [CDR MIZER]: Judge, given that the government bears
23 the burden with respect to that burden, would you like them to

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1 go first? I'll proceed however you would like.

2 MJ [Col SPATH]: That's interesting. For the discovery
3 piece, you all have to demonstrate the relevance or the need
4 to have those documents. You're right. For the privilege,
5 it's theirs. So it's an interesting -- you came to me to
6 compel the documents.

7 So what are you -- what I'd ask and what I would ask
8 in any trial is: What are you hoping to see in there and what
9 are you looking for?

10 DDC [CDR MIZER]: Sir, I think what we're looking to see
11 generally is, I think, some of what we already know, but to
12 have that bolstered, and it's a little bit difficult not to
13 blend this with the witnesses. So I'd like to constrain or
14 confine this argument to just this argument about privilege.

15 But we expect that there is going to be some
16 discussion between the convening authority and the DEPSECDEF
17 about the need to accelerate litigation. I mean, that was the
18 language that was used in the memo itself, the December 9th
19 memo.

20 And then ultimately -- if I can grab the memo itself.
21 Ultimately, we made the request to have the underlying
22 documents that at least went to the Deputy Secretary of
23 Defense, and we were given Tab B. So the government in its

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1 response says, hey, Defense, you're taking this one accelerate
2 the pace of litigation comment completely out of context; that
3 has nothing to do, really, with what was behind this process.

4 Then ultimately, when we get the document that was
5 initially withheld from us, that is the drumbeat of Tab B, the
6 executive summary, that is given to the Deputy Secretary of
7 Defense, and that is -- it's on 332A, Judge, it's Tab B, it's
8 the December 9, 2014 memo. It goes through a litany of
9 33 calendar days for a total of 107 hours and 50 minutes, and
10 sort of breaks that down further. Then it's virtually in
11 every single paragraph, beginning on the third, where, given
12 the complexity of these cases, the current pace of litigation,
13 the following paragraph. Moving forward, in addition to the
14 potential variable -- I just wanted to check the speed here,
15 Judge, I'm sorry -- could further, quote, "impact the pace of
16 litigation." The very next paragraph, I believe the pace of
17 litigation will accelerate, and then it skips a paragraph
18 talking about accelerating the pace of litigation. But then
19 finally, as the pace of litigation accelerates.

20 And so this is far from -- when you're actually given
21 the internal documents, far from some oblique reference to
22 what we submit is an impermissible purpose, that it is the
23 duty, as we cited in the Vargas case, of this commission to

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1 regulate the pace and conduct of proceedings, and not for the
2 convening authority. And mind you, after 60 days of coming
3 onto the job, respectfully, coming in and saying, I've got to
4 essentially seize the trial judiciary and relocate the judges
5 to Guantanamo Bay -- and that's what we're expecting, Judge,
6 we're expecting in those informal communications, and we would
7 also expect that to illuminate much in the same way as your
8 comments did this morning -- or, excuse me, this afternoon,
9 additional witnesses that we may need to talk to. Colonel
10 Plummer, I mean, how are these assignments being made? That's
11 ultimately what we're expecting, Judge.

12 MJ [Col SPATH]: And for Colonel Plummer, he was not
13 talking about -- his conversation with me was not about
14 commissions assignments. He was just talking to me about
15 here's the judges who are likely headed your way in the summer
16 to be trial judges across the Air Force.

17 I think what happened is I, by saying, "I'll be at
18 GTMO next week, here's my phone number," he had a comment pop
19 into his head that someone had made to him that he shared with
20 me.

21 DDC [CDR MIZER]: I understand, Judge, and that's really,
22 I mean, again, alluding to the witness issue. I mean, one of
23 the things we're going to have to iron out is, I think we're

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1 going to have to have that conversation that you and General
2 Burne couldn't have in that private meeting room from the
3 witness stand and on the record, so that we can dispel actual
4 influence, if that's even possible, and then also the
5 appearance of unlawful influence in accordance with Salyer,
6 Lewis, Stoneman, Simpson and the big UCI cases of the last
7 decade.

8 I think one of the other things, Judge, that really
9 serves as a backdrop for these commissions, is you will
10 recall, and are, respectfully, old enough to remember, that
11 the TJAGs didn't always have three stars. They were given a
12 third star at the insistence of Congress, after some
13 disagreements that they had with their civilian counterparts
14 over detainee policy, and then, as widely reported, rulemaking
15 changes for military commissions. And the thought was that if
16 you gave the TJAGs a third star, that they would have the
17 backing or power, if you will, to say no to their civilian
18 bosses.

19 So what needs to be really fleshed out in these
20 documents is was this just an end run around the TJAGs? Did
21 they know, as they knew in 2007, as they knew in 2004, that
22 they weren't going to get the answer that they were going to
23 want from the TJAGs, and so they decided to exclude them?

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1 And certainly the documents suggest that the TJAGs
2 were not included in that process. And we need to have all of
3 this laid out in the interest of actual transparency, Judge,
4 particularly when we're dealing with the standard of the
5 appearance of fairness of military justice.

6 So really what we're looking for, Judge, is the nuts
7 and bolts of how this happened, who generated it, did the
8 trial judiciary or office of courts go to the convening
9 authority and say, wow, we are really undermanned, we don't
10 have the individuals that we need to perform these functions,
11 or was that a CA function? Again, it appears from all of the
12 documents that the CA consulted no one outside of the
13 convening authority's office and just charged ahead, again,
14 60 days into this tenure.

15 And in the wake of considerable experience in these
16 commissions as to the actual difficulties in moving these
17 cases forward, I think chief among those is the classification
18 issues and the numerous equityholders that are involved in
19 these processes. I think Your Honor noted in a footnote that
20 we referenced in a pleading that the government's
21 interlocutory appeal on discovery is also delaying these
22 processes. That order was available to the convening
23 authority a week before he initiated this effort to have rule

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1 or Change 1 promulgated, Judge.

2 And so that's what we're really looking at, is this
3 just a convening authority, you know, out acting alone for an
4 unlawful purpose? And unlawful purpose, I don't use that
5 expression lightly. I mean, we're violating a number of
6 statutory provisions both in the UCMJ and also in its nearly
7 identical counterpart to Article 37 in the Military
8 Commissions Act, not to mention, as we pointed out in one of
9 the replies, Article 98 of the Uniform Code of Military
10 Justice, which although, as Judge Effron has pointed out, has
11 never been enforced in a UCI case, does in fact make it a
12 crime to unlawfully influence a military commission.

13 So that's kind of an overarching overview. I don't
14 really want to get into the specifics of the witnesses, Judge,
15 but if I could address the privilege claim, which I think is
16 the narrow issue that you wanted to address. M.C.R.E. 501
17 allows privileges that are, quote, "principles of common law
18 generally recognized in the trial of criminal cases in U.S.
19 district courts."

20 Excuse me, Judge, I'm sorry. I'm fighting off a
21 little bit of a cold. As we pointed out in the papers, the
22 deliberative process privilege is commonly invoked in FOIA
23 cases, and has even been codified in the relevant statutes

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1 there. Now, the government cites essentially three criminal
2 cases. One, In re Sealed Case out of the D.C. Circuit; two,
3 United States v. Edelin, which is a district court case out of
4 2001. If you want the correct cite for that case, Judge, it
5 took me to minute to find it. It's 134 F.Supp 2nd 49, and
6 then another district court case out of New Mexico 2009.
7 That's essentially the government's reliance. They also have
8 excuse me, a Fernandez case out of the Ninth Circuit. And
9 both Fernandez deals with the death penalty evaluation form
10 and U.S. Attorney memo.

11 And so to the extent that this privilege has been
12 invoked in criminal cases, it has been pretrial in the
13 decision stage, the U.S. Attorney memo that essentially goes
14 to the Attorney General as to whether or not a case will
15 ultimately be tried, and nothing akin to what is taking place
16 here, which is government action seeking to interfere with an
17 ongoing criminal case.

18 The convening authority's responsibility is largely
19 done with respect to that. I mean, were we here arguing over
20 documents as to his decision to seek the death penalty, I
21 think the government would have not a great argument, because
22 again it's three cases. And if we're going to bring in a
23 privilege that is generally accepted in the district courts of

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1 the United States, I would expect to see more than three or
2 four cases, Judge.

3 I think that Your Honor is well aware that unlike the
4 Federal Rules of Evidence, Army Captains Andy Effron and Fred
5 Lederer wrote what were then the draft privileges that never
6 made its way into the Federal Rules of Evidence, into our
7 Military Rules of Evidence in the late '70s, and that those
8 were ultimately adopted by the President.

9 So unlike federal litigation which operates largely
10 off of common law privileges, the President has elected to
11 write ours down. And the only deliberative privilege that we
12 recognize, and as we pointed out the Matthews case,
13 essentially the only C.A.A.F. case dealing with this, it's
14 your deliberations, Judge, it's the deliberations of the
15 members, and that's what has been written down.

16 So we would offer that as some support that, you
17 know, had the President elected to recognize this privilege,
18 he certainly has done so, and you have those in the 500 series
19 of the Military Rules of Evidence, those reduced to writing,
20 Judge.

21 So I think our first point would be that the
22 deliberative process doesn't even exist in this forum, but
23 even if it does, the government concedes on page 3 of 332 K,

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1 that it can be overcome by a sufficient showing of need, and
2 that's from the sealed case, In re Sealed Case. 737 and 738
3 is the page cite for that quote.

4 And the court cites a number of factors. The
5 relevance of the evidence, the availability of other evidence,
6 the seriousness of the litigation, the role of the government,
7 the possibility of future timidity by government employees.
8 And that's really the hook for this entire privilege.

9 And I'll get to in a few moments, this is precisely
10 where we would want the government to be timid, is where
11 they're venturing out into unlawful influence. And I suspect
12 that had the convening authority, if this turns out to be
13 true -- and again this is premature because we don't have the
14 discovery, we haven't heard from the witnesses.

15 But I suspect that if the convening authority had
16 discussed this with the TJAGs instead of civilian leadership
17 in the Department of Defense that may not be familiar with
18 military justice, that someone would have said stop. That --
19 I mean, this is naked unlawful influence, and we'll address
20 ultimately in the merits I think some of the most serious
21 unlawful influence that has occurred in military justice since
22 the 1968 changes to the UCMJ, because it's there, Judge, that
23 you become a judge instead of a law officer that conferences

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1 with the members and just advises them on the law; the CCAs
2 become actual courts.

3 There is an expectation that you are going to be a
4 judge, akin to civilian judges, and there's also this
5 principle that is now in Article 26, Judge, and specifically
6 I'm on paragraph (c). If you go, as it bleeds over to the
7 section just above Article 27. The sentence is, "A
8 commissioned officer who is certified to be qualified for duty
9 as a military judge of a general court-martial may perform
10 such duties only when he is assigned and directly responsible
11 to the Judge Advocate General," and it goes on from there.

12 And so on the plain face of the statute, I mean, if
13 this is to be given effect, Judge, I mean, it's striking on
14 the heart of whether or not -- and I mean this with all due
15 respect, you're even a military judge. Because the statute,
16 which has been essentially affirmed in Weiss, says that it
17 satisfied due process because you answer to no convening
18 authority, because you answer solely to the Judge Advocate
19 General. And this is the design of Congress, as I said, and
20 ultimately that's the seriousness. And getting back to my
21 main point here, which is this is exactly what we don't want
22 the government to be able to conceal.

23 Judge, I think one of the other points that I would

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1 like to make is generally privileges are to be construed
2 narrowly. There's a truth-seeking function that is taking
3 place here, and specifically with respect to this privilege,
4 and I guess that would be the Trammel case, which is the last
5 big Supreme Court case broadly on the common law of
6 privileges; it is cited in In re Sealed Case.

7 What that case also says is, quote, "The argument for
8 a narrow construction is particularly strong in cases like
9 this one where the public's ability to know how its government
10 is being conducted is at stake." And that is precisely what
11 is occurring here, and, again, it occurs all through the lens
12 of UCI, which is very akin to, say, an implied bias standard,
13 as well you know, public perception of fairness in the
14 military justice system. And the government's, I would
15 expect, position should be, sure, there's nothing to see here,
16 take the 37 e-mail strings, and let's have a full, fair and
17 transparent court-martial, instead of that just being a tag
18 line.

19 Judge, there's also a question here of how that
20 privilege was applied. There's certainly cases that say that
21 it needs to be invoked by the head of the department. And the
22 government rightly cites the Landry case, which the
23 D.C. Circuit says, well -- and, again, in civil context, not

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1 necessarily the head of the department, someone pretty
2 important will do -- and there it's someone directly below the
3 Attorney General.

4 And we would submit that that's not sufficient here,
5 that the convening authority isn't sufficiently high enough in
6 this chain. If not the Secretary of Defense, certainly
7 Mr. Work or the Deputy Secretary of Defense should have been
8 the one to personally review the documents and to assert
9 privilege over those documents.

10 Additionally, Judge, we're a little bit hamstrung
11 because, again, in these FOIA cases and civil litigation there
12 typically is something like a Vaughn index or, as we cited,
13 the Wright case, which as you know has been remanded to the
14 trial judge in that case to create a privilege log, and so
15 that we could have a more full debate about exactly, well, who
16 are these documents between; you know, what's the caption of
17 the documents; who are the recipients of the documents; what
18 are the dates of the documents. And so to the extent that
19 you're going to deny any of these documents, we should
20 certainly, at the very least, have that index.

21 I think -- and, again, we're not conceding that any
22 of these documents should be privileged under this privilege,
23 but to the extent that you deny production of any documents,

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1 we should be able to have those -- that privilege log so that
2 we can have a more full conversation as to why those documents
3 are or are not privileged. I mean, what we're getting now is
4 just kind of a -- first, we just got a generic assertion of
5 privilege, and then a few days later, I imagine flipping
6 through a book, because I honestly don't believe that this
7 occurred beforehand, that these discussions were going on and
8 someone was saying, this is going to be protected by the
9 deliberative process privilege. I think it was after the
10 defense sought these documents that this is a post hoc
11 rationalization. But we should certainly have a log to make
12 that argument, and if nothing else, the record for appeal,
13 Judge.

14 Additionally on this point, I think that there's a
15 serious conflict where you have the individual the defense is
16 alleging is involved in unlawful influence, the convening
17 authority, is also the person that is expected to make this
18 neutral -- and it's a quasi-judicial assertion of privilege.
19 If you read the FOIA cases, and, again, those civil litigation
20 cases, which is you have to get away from the litigants and
21 send it up to someone of sufficient authority, I think is
22 roughly the language in some of the cases, if not the
23 department head to ultimately make that determination. And

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1 none of that has happened in this case, Judge.

2 Finally, with respect to just the narrow mechanics of
3 how that privilege is applied, we have cited the cases in our
4 papers about how protects deliberations, not entire documents.
5 And so, I mean, the government is in effect asserting, you
6 know, a broader privilege, such as state secrets, in which
7 entire documents are withheld, whereas here it is merely the
8 deliberative process, and entire factual discussions are
9 entitled to disclosure.

10 And, Judge, that ultimately brings me to the final
11 point on this -- well, with the mechanics, I guess I would end
12 with the documents must be two prerequisites, that they
13 both -- that they are both predecisional and deliberative.
14 And we've had some of these documents turned over to us. I
15 mean, for instance, an e-mail from the Army Judge Advocate
16 General when she is notified, and that e-mail suggests that --
17 and for the record, Judge, that's Attachment B to AE 332G,
18 that the change has, quote, "caught me unaware." And
19 essentially, she says you can't have my chief trial judge,
20 which is obviously of interest to you in this case. And the
21 closing line of that -- and I don't include the phrase "Army
22 Strong" -- is, quote, "I can't afford to lose them to Cuba."

23 So you certainly have a series of e-mails, I would

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1 suspect that are not deliberative in nature, and certainly
2 weren't predecisional. And so that would also provide you
3 some basis to disclose those documents to the defense.

4 Judge, on page 738 of In re Sealed Case, the court
5 states that, "Finally, the privilege is routinely denied on
6 grounds that shielding internal government deliberations in
7 this context does not serve the public's interest in honest,
8 effective government." And that's exactly what is at issue
9 here.

10 I mean, UCI, UI, in this context -- and I'm probably
11 going to make that mistake a lot of times in the course of
12 these proceedings -- is the mortal enemy of military justice,
13 and you have been called the last sentinel in that struggle
14 versus unlawful influence. And ultimately the government
15 should not be able to do something that is unlawful merely
16 because they're doing it through regulations and asserting
17 privilege over those discussions, Judge. Thank you.

18 MJ [Col SPATH]: Thank you.

19 ATC [LT MORRIS]: Good afternoon. It is the defense's
20 desire that the convening authority's actions, that they have
21 some facts which would show that this is merely a subterfuge
22 for other intentions, other motives. And those facts which
23 defense needs to make this unlawful influence motion stick

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1 simply don't exist.

2 MJ [Col SPATH]: Agreed. I'm focused in on the documents
3 themselves, though. I know we're going to have a lot of
4 conversation about actual and the appearance of unlawful
5 influence, but for the documents, you're asserting a
6 deliberative privilege, correct?

7 ATC [LT MORRIS]: The convening authority is invoking and
8 has invoked that specific privilege. And in response to Your
9 Honor's order in 332I, we have facilitated and provided those
10 specific documents to Your Honor, and also in response have
11 given you what is the legal rationale and the appropriate use
12 of that specific privilege.

13 MJ [Col SPATH]: I have been looking. Have you all been
14 successful in finding a case where a military convening
15 authority -- different than the commissions, I realize -- a
16 military convening authority asserted deliberative process
17 privilege in relation to decisions affecting a trial or
18 something like that? I couldn't find any, and I assume you
19 were looking as well.

20 ATC [LT MORRIS]: What the government points Your Honor to
21 is a rule itself that says there's a lot of privileges out
22 there, and so look to see -- and this is specifically under
23 Military Commission Rule of Evidence 501(a)(4), is it found in

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1 common law, is it used in criminal district courts. And we
2 provided, as defense counsel has stated, that, yes, it is.
3 It's found in common law, cited in In re Sealed, that this is
4 a principle that's rooted in common law, and then giving Your
5 Honor death penalty cases in which this is used as sufficient
6 basis to show that under 501, this is a privilege that is
7 used.

8 MJ [Col SPATH]: Let me ask this, then: I agree that
9 there are some death penalty cases out there in which the
10 privilege was asserted. The In re Sealed Case, that was not a
11 death penalty case. We agree?

12 ATC [LT MORRIS]: Yes, sir.

13 MJ [Col SPATH]: And they made -- it appeared to me they
14 made clear it's a qualified privilege that can be pierced.

15 ATC [LT MORRIS]: Yes, sir.

16 MJ [Col SPATH]: By showing of need, we do. I just want
17 to make sure we are in agreement where we can be on the law.
18 Do you agree with that?

19 ATC [LT MORRIS]: Absolutely. Is not an absolute
20 privilege. It is a privilege that is qualified and has a very
21 real and appropriate rationale for why that privilege is
22 specifically applied to government agencies in making policy
23 and decision. There is a desire for -- in policy-making in

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1 decision-making, the back and forth between those people that
2 are involved in that process to not be chilled or not be timid
3 in creating a quality product. And so the privilege grows out
4 of that, in allowing for them to have the free exchange of
5 ideas, good ideas, bad ideas, before the final policy and
6 decision is made, that they would have that ability to
7 exchange communication, much as we see here, Your Honor, prior
8 to making this recommendation, that they would have the
9 ability to know that their work product is going to be
10 protected by a privilege.

11 It can be pierced, and Your Honor has all of the
12 material in front of you. And upon looking at the material
13 itself and comparing it to what defense counsel thinks is
14 there, I mean, it certainly should be a helpful starting place
15 in whether or not you should pierce that privilege, and we
16 would simply in this forum, in an open session, submit that to
17 Your Honor's review.

18 MJ [Col SPATH]: Understand. I think it's two
19 hypotheticals, then: If the privilege does not apply -- so
20 let's take that hypothetical first. I find the deliberative
21 process privilege inappropriately invoked in this particular
22 case, what standard should I use in reviewing those documents
23 before I turn them over to the defense?

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1 ATC [LT MORRIS]: It should be your standard for the
2 compelling discovery, Your Honor.

3 MJ [Col SPATH]: All right.

4 ATC [LT MORRIS]: Absolutely.

5 MJ [Col SPATH]: Okay. And then if I find there is a
6 privilege, then I'm going to use -- I think the factors in the
7 In re Sealed Case are helpful. Are they relevant? Is there
8 other evidence out there that satisfies it? The seriousness
9 is the litigation, the role of the government and then future
10 timidity by government employees, if I were to pierce it.

11 Do we agree that's a pretty good framework to do that
12 analysis?

13 ATC [LT MORRIS]: Yes, Your Honor.

14 MJ [Col SPATH]: In that case they do talk about one of
15 the reasons to pierce, and it says it in two places in the
16 case, in In re Sealed, is to shed light on alleged, and I
17 thought that word was important, government misconduct or
18 malfeasance.

19 ATC [LT MORRIS]: So in applying that specific language to
20 an allegation of unlawful influence, it's helpful to look at
21 the burdens and, first of all, know that it's not going to fit
22 exactly, because again we're talking about a civil case and
23 we're talking about a criminal case.

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1 But what we can do is we can say in this criminal
2 case they're making an allegation of unlawful influence. What
3 is enough of an allegation to actually start -- or to pierce
4 this privilege? And taking all of the factors into
5 consideration, I think that in the In re Sealed Case, if you
6 look at that specific section, it says when there's reason to
7 believe. And I think that that fits nicely with the
8 underlying and initial burden in the Biagase case relies on
9 the defense. It's not just an allegation that they make; it's
10 not just a speculation; it's not just a characterization of
11 facts; it's facts which constitute unlawful influence.

12 So in using the In re Sealed in that specific factor,
13 there needs to be more. There needs to be an object of the
14 unlawful influence to pierce that privilege. That's what the
15 government -- what the defense has not been able to do. They
16 have not in their motions -- in fact, in their latest filings,
17 you will see them say it is unclear whether unlawful influence
18 will affect this proceeding, even at this point. With all of
19 the discovery that's been provided to them, with all of the
20 pleadings, they still are unclear whether there is any object
21 to the unlawful influence. So when you talk about that
22 specific factor in the In re Sealed Case, it is not -- there
23 has not even been reason to believe that there is government

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1 malfeasance.

2 When we look at the other factors, the other evidence
3 that's been given, when we look at the factors of the
4 potential of creating timidity within other government
5 employees, those are very real, and those are real
6 considerations in Your Honor's decision whether to pierce
7 this privilege. Those are absolute, and those are clear in
8 front of you. You've seen attachments to the motions. Those
9 are documents that are relevant to this, and those fit that
10 factor exactly.

11 We've given the defense over a hundred documents,
12 anything and everything that has to do with this, and we've
13 turned those over to the defense. In addition to that, just
14 contemplating, you know, in the convening authority's or any
15 government agency's ability to create quality products, make
16 quality recommendations, and then this commission is going to
17 say, well, everything from A to Z, even if it was
18 deliberation, which is exactly what this privilege is for,
19 we're just going to pierce the privilege and turn it over.

20 Well, that would violate exactly the factor that
21 In re Sealed is putting before Your Honor in saying, well,
22 take that into consideration, and in a very real way, that
23 would have a very real effect, I would submit to Your Honor,

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1 for the proposition that this privilege is an appropriate
2 privilege and it should not be pierced.

3 Now, back to your original hypothetical: Is this a
4 privilege that is appropriate for this military commission?
5 Because ultimately if it's not, then we go straight to the
6 compulsion of discovery.

7 The defense made a number of points and pointed to a
8 number of cases trying to say that this is not appropriate for
9 this forum. They said that there wasn't enough cases that
10 were cited. Very clearly the deliberative -- the requirement
11 under M.C.R.E. 501(a)(4) is can the claimed privilege be found
12 in the principles -- in common law principles generally. And
13 what we've provided for you is not just the basis of common
14 law, but that it is there. It's there generally. It doesn't
15 say overwhelmingly. Because the defense is right, this is a
16 privilege that is typically used in FOIA cases, and so you
17 wouldn't expect that criminal cases, that this would be
18 something that would be found. But we think it fits squarely
19 within M.C.R.E. 501(a)(4).

20 MJ [Col SPATH]: I looked at the capital cases that were
21 cited. It seemed to focus in on -- because there was Taylor
22 and Fernandez. They appeared to be arguments of selective
23 prosecution made by capital defendants and, at least in

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1 Taylor, they ultimately -- they said that's a pretty rigorous
2 standard. To demonstrate selective prosecution is a high
3 burden on any person accused of or convicted of a crime. So
4 in that case they said those same standards, that rigorous
5 standard should be applied for the memos where they were --
6 the U.S. Attorneys were discussing the capital referral. I
7 know it's not a referral, but for our purposes.

8 We're different here with the role of the convening
9 authority intertwined in our process. That's why my first
10 question was: Have we found a case where a convening
11 authority has asserted and been successful using the
12 deliberative process privilege?

13 ATC [LT MORRIS]: The convening authority and the world
14 that we live in with that is different. It is often difficult
15 to explain the role of the convening authority to civilians.
16 That it's different; that the convening authority, a neutral
17 party that examines evidence, that provides resources, that
18 looks at how he can help a criminal proceeding go forward,
19 doesn't mean that principles of privilege don't apply ----

20 MJ [Col SPATH]: I agree.

21 ATC [LT MORRIS]: ---- and specifically don't apply to
22 deliberations.

23 MJ [Col SPATH]: I'm just trying to find out if I ----

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1 ATC [LT MORRIS]: To answer your specific question, we
2 have not found a case where that is applied in that specific
3 manner, Your Honor.

4 MJ [Col SPATH]: What I found is in cases like Wright -- I
5 realize it's been sent back, but it's been sent back for
6 clarification of the order and the privilege log. But even in
7 Wright it appeared the court was -- the deliberative process
8 privilege was not enjoying a lot of success at the appellate
9 level because of the role of the convening authority.

10 That's the issue that I think I'm struggling with,
11 and I'm just trying to figure out -- no case is directly on
12 point, understand. We don't have any in the commissions
13 context, and I couldn't find any in the military context. So
14 you're suggesting because it is a common law privilege and it
15 has been recognized, that's how it's appropriate here?

16 ATC [LT MORRIS]: And in addition to that, that either you
17 look at -- that's where it's rooted and that's where it comes
18 from. But in addition to that, Your Honor, this is a
19 deliberation that is at the very heart of the deliberative
20 process privilege, that this is not material that is -- and
21 you've had an opportunity to review it and will make a
22 determination whether it applies to this specific allegation.

23 But in as far as it is declarations, in as far as it

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1 is back-and-forths between different people in the convening
2 authority's office, I think there is case law that says that
3 unlawful command influence, unlawful influence in this case,
4 is not just influence in the air, and what is more, you know,
5 it is not just influence in the air of the convening
6 authority's office.

7 You know, when we look at what is relevant, what is
8 necessary, and the defense is trying to make the statement,
9 well, that every single utterance that was made in the
10 convening authority's office should be in some way -- there
11 should be a compulsion of disclosure, well, that's not
12 accurate. So when we look at, well, how do we actually apply
13 a protection of the deliberations, this is it. This is the
14 privilege which the convening authority's invoking, which the
15 convening authority is passing on to us. The defense
16 counsel's comments of ad hoc or a decision by us or to open a
17 book are completely unfounded and completely untrue.

18 This is the convening authority's invocation of the
19 privilege. We facilitated turning all of that material over
20 to you, and in a legal analysis we believe this is the
21 appropriate privilege to be applying here.

22 Now, to get into the specific ----

23 MJ [Col SPATH]: What about public policy concerns,

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1 though? Because again, we're in a -- where there's been an
2 allegation of unlawful influence. Now, whether or not there's
3 some evidence of it yet or not, we'll get to that when we move
4 on. But one thing we do know is that unlawful command
5 influence allegations certainly are something that the system
6 views very seriously, because of the unique role of the
7 convening authority, the impact of unlawful influence is so
8 detrimental to our process.

9 So what about just the public policy argument of
10 transparency in our process?

11 ATC [LT MORRIS]: That's why the prosecution is heartened,
12 Your Honor, that you have all of the material in front of you,
13 that you will be able to, on the record, for the public and
14 for appellate courts, say that you've examined that and that
15 you've looked at it, and, you know, your decision on whether
16 to pierce the privilege on some or none of them has been made
17 deliberately.

18 So it would be concerning, obviously, if there were
19 things that were not turned over. That is not the case here.
20 So the public can know that Your Honor can examine these
21 documents and can make a determination based on all the
22 factors that are before Your Honor in the In re Sealed Case,
23 which one of them is to look at and see what those

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1 implications would be.

2 The defense makes a number of other objections. I
3 will try and chase some of those down, but they say it needs
4 to be invoked by the head of the -- or that the DEPSECDEF at
5 the least needs to be the person to do that, and they cite the
6 Landry case for the proposition or in recognition that it does
7 not need to be cited or held by the head of a department.

8 I would point Your Honor in the Landry case to a
9 specific line that says, "For these privileges, it would be
10 counterproductive to read the head of the department in the
11 narrowest possible way."

12 So the Landry case is saying the exact opposite of
13 what defense counsel is trying to say in that there should be
14 this privilege and who invokes this privilege should be
15 narrowly construed. And it's the government's position that
16 the convening authority can properly invoke that privilege.

17 And we'd also point Your Honor to M.C.R.E. 501(c)
18 that defines a person who can invoke a privilege as a person
19 pursuant to the privilege exceptions as an appropriate
20 representative of the federal government's state, or political
21 subsection of or any one entity claiming to be the holder of
22 the privilege. And the SECDEF holds that and we certainly
23 think the Office of the Convening Authority is an appropriate

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1 representative.

2 So again, Your Honor, we're heartened that you have
3 the material, you can make a determination based on all of
4 that material, and we have attempted to facilitate getting
5 that material in a way that would be easy to review, and for
6 the sake of being able to do this quickly.

7 Subject to any questions, Your Honor?

8 MJ [Col SPATH]: No. Thank you.

9 ATC [LT MORRIS]: Thank you.

10 MJ [Col SPATH]: I do appreciate we did get the documents
11 in a timely manner. We had a one-day delay because of the
12 snow and a closure. I got the documents 332J under seal, and
13 I appreciate that.

14 DDC [CDR MIZER]: Judge, if I may briefly respond. The
15 defense has no military authority to point this court to,
16 either, that this privilege exists in the military courts.
17 The only case the defense has been able to find is the
18 Matthews case, which, again, deals with judges.

19 And, Judge, the actual quote from 501 is principles
20 of common law generally recognized in the trial of criminal
21 cases. One of the points that you alluded to is these cases,
22 Taylor, Fernandez. I mean, the deliberative process privilege
23 is listed as almost the tertiary ruling or holding in each of

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1 those cases. Selective prosecution, and if not selective
2 prosecution, then work product, and if not work product, then
3 it's deliberative process. If you actually go look at the
4 Edelin case, for example, it's all in one sentence. The
5 entire holding is one sentence. Selective prosecution is
6 race-neutral, the materials sought were attorney-client work
7 product and deliberative process.

8 And so this is pretty thin gruel to say that this is
9 a generally accepted privilege, in criminal cases, in
10 Article III courts, and that somehow this needs to be the
11 first, this capital case needs to be the first case where we
12 trot out the deliberative process case -- deliberative process
13 privilege. And, again, that's one of the factors in
14 In re Sealed Cases, the importance of this case, which isn't
15 just limited to the capital nature of this case. I mean, this
16 is an important case for any number of reasons. National
17 security is often invoked by the government in this case.

18 I think, really, the problem, and I would ask the
19 court not to lose sight of really what's happening here, which
20 is a convening authority saying move this capital case faster,
21 and you're going to stay at my base until you finish it. I
22 mean, that's really -- and were that to happen in any
23 court-martial anywhere, alarm bells would go off, and they

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1 should be going off here because this is the mortal enemy of
2 military justice.

3 And that's really what is at the heart of this, is
4 that what the government is asserting this privilege over is
5 that the convening authority is deliberating something that it
6 is unlawful for him to deliberate. Speed up this litigation
7 is what is in black and white on those documents, accelerate
8 the pace of this litigation, I hope it will, it's my belief
9 that it will. And that, Judge, is entirely impermissible, and
10 it shouldn't be shielded from disclosure to the defense.
11 Thank you, Judge.

12 MJ [Col SPATH]: Any final comments?

13 ATC [LT MORRIS]: Nothing, Your Honor.

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

15 332E and G, we can do together. Those are the compel
16 production of witnesses, and there's a long list of witnesses
17 that the defense is requesting. So I'll hear from the defense
18 first.

19 DDC [CDR MIZER]: Thank you, Judge.

20 At the outset, I would ask -- I've mentioned a lot
21 about UI here, but I don't want the court to lose sight of
22 really what is an equally important, if not arguably more
23 important, aspect of these motions, which is the Weiss due

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1 process issue, and ultimately the assurance that there is an
2 independent trial judiciary sitting here at Guantanamo Bay,
3 and something that to the greatest extent possible mirrors
4 what your trial judiciary looks like in the Air Force, what
5 the Navy's looks like, what the Army's trial judiciary looks
6 like.

7 So with that said, Judge, I think -- and this may
8 change, if we are entitled to some of the discovery as we
9 maintain that we are, but the witnesses -- the key witnesses
10 that we need, of course, Mr. Ary. Again, within 60 days of
11 coming in to this position, how did he reach the determination
12 that the pace of litigation here, which in many cases has
13 taken a decade, is the responsibility of the judges, and in
14 other memos, the responsibility of the judges' staff? Did he
15 read this court's orders? Was he aware of the government's
16 interlocutory appeal in this case?

17 Again, I won't go back through and quote, but the
18 memo beats like a drum, this pace -- or this phrase,
19 "accelerate the pace of litigation." What authority does he
20 believe he has to accelerate the pace of litigation? And so
21 we believe that Mr. Ary is obviously central to this
22 litigation and needs to be produced.

23 If you look at Tab C to AE 332C, it's another memo

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1 from the convening authority to the director of DHS. It's
2 undated. But one of the quotes is the military staff of the
3 trial judiciary, so it says, military staff has generally
4 lacked the specialized experience to support the judges
5 adequately, and then ultimately request hire attorneys for the
6 court, with, quote, "national security and capital
7 experience."

8 So again, you have the convening authority assessing
9 the judges, assessing the staff, in contravention of statute,
10 Judge. It's 949b(a), No person shall admonish with respect to
11 the exercise of functions in the proceedings. Then, of
12 course, the provisions dealing specifically with the judges,
13 948j(b), I've mentioned the eligibility with respect to
14 Article 26, but specifically (e), other duties may be
15 performed as assigned by the JAG, and then (f), is that no one
16 shall make comment, report on the efficiency of a military
17 judge.

18 So I don't know what other word you can use to
19 describe paragraph after paragraph of saying these things are
20 spending too much money, they're not moving fast enough, other
21 than the efficiency of the judges of this court. So we
22 believe that Mr. Ary is central to this litigation and needs
23 to be produced, along with Mr. Robert Work, Judge. We need to

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1 know the mechanics of how this happened, why were the TJAGs
2 cut out of this process, if that is in fact the case.

3 MJ [Col SPATH]: Let me ask, just reading the submissions
4 and reading the attachments in the e-mails, isn't that
5 something, if I were to say that Mr. Ary has to testify
6 because he is the convening authority and he was the one
7 responsible for moving this change forward, couldn't he answer
8 those questions?

9 DDC [CDR MIZER]: Potentially, he could, Judge, but I
10 think ultimately you would want Mr. Work there as -- to
11 provide another account. I mean, it appears from the
12 documents that there are three people involved in this
13 process, three principals: Mr. Preston, who is DOD OGC,
14 Mr. Work, and Mr. Ary. And so I think it's not unreasonable
15 to ask the three individuals to that agreement to be called
16 here to testify.

17 Certain certainly, Mr. Ary is the central focus. I
18 would imagine Mr. Work's testimony would be far more limited
19 and not as burdensome, but again, the mechanics of how it
20 happened. Is he even aware of the principle of unlawful
21 influence? And it could be that he is so senior in the
22 Department of Defense that he doesn't know. I mean, this is
23 why we have civilians sitting atop the system, and it's also

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1 why Congress wanted the JAGs involved in advising that system,
2 and not cut out of it.

3 And that brings me to the TJAGs themselves. Judge, I
4 won't go over again Army TJAG's message. I think it's curious
5 that we only have response from Army TJAG. I don't know
6 whether that's because Navy TJAG and General Burne decided not
7 to reduce their response to Mr. Ary to writing or if they
8 didn't have a response. But we certainly need to inquire as
9 to what their position is with the judges that are assigned to
10 this judiciary.

11 It's also -- it's both backward-looking as to how
12 this took place. Were you notified of this? Did you have,
13 General Burne, any intent to move a judge to Guantanamo Bay
14 before this took place? Which again gets to the statutory
15 requirement of who controls the judge, where do they sit under
16 Article 6, what are their duties under Article 26, what are
17 the scope of their duties, and ultimately if they are solely
18 answerable to their service TJAG.

19 But it's also forward-looking, Judge, what do they
20 think of the order. I mean, we need to know that for these
21 proceedings.

22 MJ [Col SPATH]: I guess that's my -- what does it matter
23 for the issue before me whether or not there has been an

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1 actual unlawful -- I keep wanting to say command influence
2 myself -- unlawful influence or interference or the appearance
3 of it, if they were not involved in the process? How can they
4 help with whether or not there has been this appearance of or
5 actual unlawful influence?

6 DDC [CDR MIZER]: Well, because what we have, Judge, from
7 Army TJAG's e-mail is she says, essentially, I'm going to need
8 to take a look at this. I mean, nothing like this has
9 happened, ever happened before. That's no small thing to say.
10 She doesn't commit as to what's going to happen in her case
11 and effectively with Judge Pohl. I mean, Judge Pohl could be
12 replaced by Army TJAG. And that's why it matters, Judge, is
13 because we're going to have to have that conversation, as I
14 referenced earlier, that you couldn't have that conversation
15 with General Burne at that Army staff meeting and as
16 uncomfortable as it may be to have the TJAG on the screen or
17 here ----

18 MJ [Col SPATH]: Not uncomfortable. I see him every week
19 at a staff meeting. Not uncomfortable.

20 DDC [CDR MIZER]: That's all right.

21 MJ [Col SPATH]: I want to be clear, it has nothing to do
22 with where they are assigned or their rank about whether or
23 not I will order them here to testify. I am quite comfortable

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1 that I have peaked in my military career. I'm comfortable.

2 DDC [CDR MIZER]: I'll take the court's word on that. And
3 let me add, though, I don't doubt that Your Honor would, if
4 legally required, call the witnesses. And here we believe
5 that they are, that they are required; that General Burne
6 needs to come and testify as to what is their view of this
7 order. Do they think it's a lawful order? Do they believe
8 that it can trump the statutes that it directly conflicts
9 with?

10 MJ [Col SPATH]: Is that a question -- is that a question
11 that affects the analysis, or is that a question of law for me
12 in ruling on it?

13 DDC [CDR MIZER]: It affects their analysis, Judge,
14 because they determine where you go, at least given where the
15 statute is given effect. They determine the scope of your
16 duties. The regulation is saying that someone else does that.
17 So we need, I think, at the very least, from an appearance
18 standpoint, them to say I'm the Judge Advocate General of the
19 Air Force, I own the judge of this corps, and not some
20 interloping convening authority, whether it's the commissions
21 authority, convening authority, or another convening authority
22 at another military base. Do they intend to enforce it?

23 I mean, do we have new judges on the way? Because

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1 you know, frankly, I would like to have you rule on this. If
2 there's testimony from the witness stand that all of you are
3 being sacked and there are new judges on the way, I think that
4 that directly goes to the issue in Salyer and Lewis, which is
5 the undetailing of a properly detailed military judge.

6 And remember, Salyer goes a little bit further than
7 Lewis, which says it doesn't matter what the ultimate purpose
8 was if you unseat a properly detailed military judge, that is
9 unlawful influence per se, and then we're just looking for a
10 remedy at that point, Judge. So I would commend Salyer to
11 you.

12 I think one of the other questions that we need to
13 ask the TJAGs is how do they plan to staff this? I mean, is
14 it going to be like any other PCS assignment where you go out
15 and say are you willing to go down to Guantanamo Bay? Or are
16 they going to actually follow the statutory requirement that
17 they select the most qualified members, somewhat similar to
18 the convening authority's qualification of the selection of
19 the Blue Ribbon Panel, the most qualified members. Is that
20 who are going to sit on the bench, Judge? Are we going to get
21 the person who doesn't have kids that are in high school or is
22 willing to go down? In this case, I mean, Major Danelis has
23 been on this case for five years, Judge.

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1 And so I think it's going to be an interesting
2 question, if we ultimately get to this regulation being lawful
3 in the view of the TJAGs, as to what judges are signing up for
4 a six-, seven-, eight-year tour at Guantanamo Bay. And I
5 would invite the court's attention to the Dowdy case, which I
6 may recall. It's 60 MJ 164. It's a C.A.A.F. case out of
7 2004. And that dealt with volunteering members. But again, I
8 mean, the statutory provisions are similar, selection of best
9 qualified. There, I believe it was the hospital at Bethesda
10 sent out the e-mail, who wants to be on a court-martial. And
11 I think we need to hear from the JAGs that if we're going to
12 give effect to this, that it's not going to be who wants to
13 move to Guantanamo Bay for a third or half of your career at
14 the end of a military career.

15 Judge, with respect to Lieutenant Colonel John
16 Vaughn, there's a 7 January 2015 e-mail from the convening
17 authority which he essentially -- and for reference that's
18 Attachment C of AE 332G. And the convening authority writes
19 an e-mail essentially to Lieutenant Colonel Vaughn, who works
20 in, I think, OGC, the OGC office of the Secretary of Defense.
21 And the convening authority says, "Hey, I think you should
22 tell the TJAGs that DEPSECDEF just signed off on this
23 regulation about their military judges," and to his credit,

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1 Lieutenant Colonel Vaughn says this is, quote, "OMC-CA's
2 action, you do it," I think anticipating exactly what would be
3 the reaction had they conferenced this again with the TJAGs
4 before taking this action.

5 But I think that -- and this is what's really
6 important -- one of the quotes is, at the last meeting with
7 the service GCs and TJAGs, it's Mr. Preston did not
8 mention because DSD, Deputy Secretary of Defense, I assume,
9 had not yet made a decision. And that leads me to Mr. Preston
10 as well, Judge.

11 I think, at least from an optics standpoint, it's
12 worth noting here that Mr. Preston spent three years as the
13 former OGC for the Central Intelligence Agency, the same thing
14 with one of his deputies that he has apparently brought with
15 him to the Department of Defense, Mr. Hostetler. So in a very
16 real sense, you have the convening authority reaching out to
17 CIA veterans to DEPSECDEF at the exclusion of the Judge
18 Advocates General of the Army, Navy and Air Force, with an
19 express desire to accelerate this litigation.

20 And, Judge, if that is not actual influence, it
21 certainly looks like unlawful influence, where you have
22 veteran CIA lawyers advising Mr. Work in this case how to
23 speed up these cases and ultimately protect the government's

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1 equities in a capital case.

2 So Judge, we believe that we need these witnesses.

3 At the very least, the spectre of unlawful influence has been
4 raised. I think that we, frankly, have sufficient evidence
5 now to be seeking a remedy. I realize we're way down the
6 road, but at the very least we should have the documents, we
7 should have the witnesses, we should be able to ask the
8 witnesses sitting over there what they meant by such and such
9 document, what they intend to do, and ultimately what's going
10 to happen with these proceedings. Is it going to look like
11 military justice, or is it going to look like something else.
12 And that's really at the heart of this, Judge.

13 MJ [Col SPATH]: Thank you.

14 DDC [CDR MORRIS]: Even in the defense's most zealous
15 characterization of the facts, they still don't have any facts
16 which constitute unlawful influence. They seek ----

17 MJ [Col SPATH]: That's the whole point of what we're here
18 for. I haven't decided yet whether they do or they don't, but
19 what we do have is a convening authority making a number of
20 statements in the attachments that have been submitted to the
21 defense already in discovery ----

22 ATC [LT MORRIS]: Yes, Your Honor.

23 MJ [Col SPATH]: ---- about his displeasure with the pace

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1 of litigation, and at least, arguably, his displeasure with
2 the speed at which I am moving this case forward. I mean,
3 that's in there. He doesn't name me personally, he just uses
4 "judges" in the global sense.

5 But the convening authority, who has no authority
6 over me, at least for my reports for my service, as you know,
7 and even as my assignment, is making a number of comments. So
8 the question is: Is there an impact on me? Is there an
9 actual impact on me, or is there an appearance of an impact on
10 me?

11 And when you look at cases like Salyer and Lewis,
12 it's far-reaching, because what I can't have is somebody with
13 no connection to the case -- and that's important, because
14 many people have a bias in the case, right? I mean, there's
15 no doubt that people have feelings about this case one way or
16 the other. An objective member of the public watching, when I
17 rule against the convening authority's interests in the
18 future, am I doing that because I'm trying to pay him back for
19 a change I don't like, or am I doing that because that's the
20 right answer? When I rule for you-all, am I currying favor
21 with him so I don't have Change 2 to the commissions directing
22 me to do something else other than move here.

23 Those are the questions. What I'm suggesting is to

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1 just say wholesale no witnesses, that the defense hasn't even
2 given you reason to pause on any witness to come explain that
3 change. Frankly, I think it's doing short shrift to all of
4 the documents that we have before us. You don't think any of
5 these witnesses are at all relevant to this issue at hand.

6 ATC [LT MORRIS]: Two things, Your Honor. What are the
7 documents we have in front of us? What does that, in a fair
8 and reasonable reading of those documents, what is the
9 appropriate characterization of those documents? And then
10 secondly, do we dismiss the rules that are there for the
11 compulsion of witnesses?

12 MJ [Col SPATH]: I'm not suggesting that we do. First,
13 what is a fair reading of the documents we'll withhold for
14 another day; however, it does appear that there was a lack of
15 significant coordination based on the documents themselves.
16 And, again, I am not counting the documents I've reviewed in
17 camera. I'm just talking about the documents attached to
18 these motions.

19 So what does the defense need to show? That
20 witnesses are going to offer relevant, noncumulative testimony
21 about this issue. And again, I'm suggesting -- you don't
22 believe any of the witnesses, not one, could offer relevant,
23 noncumulative testimony about this issue in front of us right

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1 now.

2 ATC [LT MORRIS]: I think the indicative word, Your Honor,
3 in the production of witnesses in 703(b)(1) is "necessary."
4 And when the defense puts in front of this commission an
5 underlying rationale, which is in opposite to the facts, to
6 their attachments, I'll give you an example, Your Honor, that
7 they asked for the TJAGs. They asked for the TJAGs because
8 they don't know whether or not they were consulted. It's the
9 same rationale that they asked for the service general
10 counsels.

11 Well, the facts in front of defense, the facts that
12 are in their attachments is that post-decision the service
13 TJAGs were notified. They were notified of this change. And
14 you have one response back from the Army TJAG which says this
15 caught me unaware.

16 And so they want to compel her production to say,
17 well, were you coordinated with? Were you aware of this?
18 Their underlying premise requesting her as a witness is
19 inapposite to the facts that they have.

20 It's the same with the service general counsels. You
21 see in an e-mail from Lieutenant Colonel Vaughn that very
22 specifically he says, and I'll give you for the transcript or
23 for the record the specific location of this. It's a

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1 7 January e-mail from Lieutenant Colonel Vaughn saying that
2 TJAGs were not consulted, saying that the service general
3 counsels were not consulted at a prior meeting.

4 So here he is, 7 January, the date of the decision,
5 saying that both the service general counsels and the TJAGs
6 were not consulted at a prior meeting. There's nothing in
7 there that shows, well, maybe they were consulted. There's
8 nothing in there that would make ----

9 MJ [Col SPATH]: Sure. Here's my question, though -- and
10 that's why I'm asking you. There's not a single witness that
11 the defense has suggested they need that you would concede is
12 necessary, relevant, and noncumulative on a motion as
13 important as this? Because right at the top of that e-mail,
14 it says, "as this was an OMC-CA action."

15 ATC [LT MORRIS]: There we get back to when taking that
16 fact in light of all of the facts and the characterization of
17 that fact, it was a recommendation that was made by the
18 convening authority's office, a lawful recommendation in the
19 proper and appropriate channels to the person that had the
20 authority, the DEPSECDEF, and from this one person's
21 perspective and the way that they described that, that the
22 recommendation came from the convening authority's office.

23 So are we going to call him to ask him, well, what

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1 did you mean by this being an OMC-CA action? Did you think
2 that the convening authority had the appropriate authority to
3 make this change? The obvious answer to that is no because
4 they made a recommendation to the DEPSECDEF. You wouldn't
5 make a recommendation, a lawful recommendation, if you thought
6 you had the authority to do something. And there's nothing in
7 any of the facts and all of the attachments that the defense
8 has shows that it was a recommendation.

9 We gave them the entire executive summary, all of the
10 tabs, which shows not just the recommendation that was made,
11 but also his underlying rationale. So they want to call the
12 convening authority to say, well, what was your underlying
13 rationale? Well, they have that as an attachment to the
14 recommendation itself.

15 MJ [Col SPATH]: But that's presupposing I concur that is
16 some evidence of the underlying rationale. And the defense
17 has pointed that that's some of their concern, in fact,
18 because of what's said in that underlying rationale. But
19 isn't that the person you would call to make sure was there
20 additional factors considered?

21 Not everything ends up in writing or in e-mails, and
22 here you have a convening authority who put a rationale in an
23 e-mail. Isn't it fair to follow up with that person to figure

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1 out if that was the entire rationale, if anything else was
2 considered? And the comments in there, again, are about the
3 trial judiciary and the perceived pace of litigation. And my
4 question to you is, again: The appearance or even actual --
5 but does the appearance of unlawful influence, how do you not
6 let the defense flesh that out with the person with the person
7 who is clearly working to make that change, again, just based
8 on the attachments, at face value?

9 ATC [LT MORRIS]: I understand Your Honor's position.

10 MJ [Col SPATH]: And not a position yet. I haven't ruled.
11 I'm just trying to sort through. We can't ignore what was
12 said by the convening authority. And the convening authority
13 clearly believed the trial judiciary was not moving the cases
14 along at a speed at which he required. And there is very
15 little in those documents suggesting where the other problems,
16 where the other problems of the pace of litigation come from.

17 ATC [LT MORRIS]: There are two facts that need to be
18 put -- we can take one sentence from an e-mail and miss -- and
19 then characterize it that way, but I'd rather take the e-mail
20 as a whole, that in the notification by the convening
21 authority to the service TJAGs of the recommendation, he says,
22 "I sure don't want to lose the three judges."

23 MJ [Col SPATH]: He was very complimentary of me.

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1 ATC [LT MORRIS]: So to somehow characterize that he's
2 looking down at the judges, when we talk about not only ----

3 MJ [Col SPATH]: Not looking down.

4 ATC [LT MORRIS]: Well ----

5 MJ [Col SPATH]: Not looking down. That's not the
6 requirement for unlawful influence. Not looking down.

7 ATC [LT MORRIS]: I'm responding to defense's
8 characterization.

9 MJ [Col SPATH]: No, mine is -- my question to you is
10 though, what I'm looking at is a convening authority who is
11 both commenting on the trial judiciary and attempting to, by
12 his own words, alter the pace at which I'm moving this
13 litigation. Because another question is: If -- I don't know
14 about prospectively yet, we'll talk about that when we do the
15 motion. Maybe it's a lawful order prospectively. I don't
16 know. We'll figure it out.

17 The issue for me is, though, for me -- and, again, a
18 member of the public with no connection to the case, an
19 unbiassed objective member of the public watching, are they
20 going to think I'm making decisions to get this case resolved
21 faster so I can move home?

22 ATC [LT MORRIS]: Obviously, we haven't drifted into the
23 underlying motion itself, and the government is prepared ----

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1 MJ [Col SPATH]: So who is the best person, though?
2 Again, you-all have said not one witness, not one witness can
3 offer anything on an unlawful influence motion.

4 ATC [LT MORRIS]: What the government is saying is that
5 the four TJAGs that are clearly not relevant and not
6 necessary. We're saying that the four general counsels, to
7 testify whether they were -- the service general counsels
8 should testify whether they were consulted with, and all of
9 the evidence shows that they're not, that they're not relevant
10 and necessary.

11 That Mr. Work, you see that his -- the recommendation
12 went to him, he signed it off, he didn't modify it. There
13 wasn't anything that was changed by it. So to call him to
14 say, did you sign off on this, by what authority did you do
15 that? What's in front of us already establishes that.

16 And in regards to, and I hear you pinpointing and
17 focusing right in on Mr. Vaughn Ary.

18 MJ [Col SPATH]: You'd agree that, as the list of
19 witnesses the defense is requesting, he seems to clearly be
20 the one most obviously close to being necessary and relevant
21 on the issue before the commission.

22 ATC [LT MORRIS]: The government would concede that. But
23 we also wouldn't concede that if defense does not under 703

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1 give a proper proffer of why a witness is relevant and
2 necessary, that we would automatically turn him over; that
3 they need to proffer facts which aren't inapposite to the
4 facts which are in front of Your Honor, which are his
5 intention, his rationale, and then even more -- if we want to
6 get into the weeds, his intention of saying I sure don't want
7 to lose these judges, and then his follow-up to the Army TJAG
8 of saying I don't want to lose Judge Pohl.

9 I mean, those are the facts that are in front of Your
10 Honor. But he made a lawful recommendation upon taking
11 office. He examined his office. He looked at where he could
12 provide resource. He did that in facilitating eight GS15
13 defense counsel for the Office of Chief Defense Counsel. He
14 looked at the trial judiciary, what staffing they had, he
15 looked at all of the offices, could a part-time judge position
16 be turned into a full-time judge position, also facilitate the
17 resources, could that help made a recommendation, a lawful
18 recommendation in that regard.

19 And so ultimately when we flesh this out in the
20 underlying motion, the government doesn't have any concerns of
21 any actual unlawful influence because defense has not alleged
22 any object of the unlawful influence up to this point, and
23 that when we flesh out the motions, the government is also not

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1 concerned at the appearance of unlawful influence. And if
2 Your Honor finds that given the defense's proffer, that you
3 still need to compel just the convening authority, then the
4 government understands that, but without conceding that
5 they've met their burden under 703.

6 MJ [Col SPATH]: Understand.

7 ATC [LT MORRIS]: Thank you, Your Honor.

8 MJ [Col SPATH]: Thank you.

9 DDC [CDR MIZER]: Judge, very briefly, look, the TJAGs'
10 relevance isn't so much the backward-looking nature of this,
11 that they weren't consulted. I think to the extent that we
12 can get a definitive statement on the record from a witness to
13 say that, that would be sufficient for that aspect of their
14 testimony.

15 It really is the issue of I cannot afford to lose
16 them to Cuba. I mean, that's really what it is, what's going
17 to happen here. We're dealing with issues that nothing less
18 than the Supreme Court has grappled with. And that's pretty
19 important.

20 I mean, if you look at the Supreme Court cases since
21 direct review was put in place in 1984, you're dealing, with
22 the exception of perhaps the Scheffer case in '98 on
23 polygraphs, you're dealing with independence of the judiciary,

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1 Appointments Clause problems in Edmond and Weiss, and then
2 more recently, death penalty litigation in Loving, and then
3 also Goldsmith and Denedo all the All Writs Act of authority.

4 So you're really hitting two of those wickets that
5 are of that grave concern to military justice, the
6 independence of the judiciary and also a capital case here,
7 Judge. Are we going to get an independent judiciary? And
8 only the TJAGs can testify to that. Are you going to stay
9 here, Judge? Only General Burne can answer that.

10 And then we set up a -- a crisis that has yet to be
11 answered in military justice, and that is alluded to in the
12 Graf case, which is if a TJAG tries to strike you down from
13 the bench what happens then? And the C.A.A.F. -- it may have
14 been COMA at that point, suggests, no, that the TJAG doesn't
15 have the authority to remove you from a case. But we've got
16 to have those facts, Judge. We've got to have those facts
17 from an appearance standpoint for UCI and, as I began this
18 argument with, from a due process standpoint.

19 Because if there's a military justice case -- and
20 look, taken a lot of cases for military defendants to the
21 Supreme Court, and not successful, because they typically
22 don't have the issues that the Supreme Court is interested in.
23 But this case has at least two of the three that they've

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1 expressed interest in before, in the past, and we're walking
2 right through Weiss v. United States here, Judge, and we've
3 got to be allowed to make that record, we have got to have the
4 Judge Advocates General come in and tell us what you're going
5 to do.

6 And then ultimately, you're going to have to tell us
7 what you're going to do, Judge. And potentially, you're going
8 to have to tell the Judge Advocate General of the Air Force
9 what you're going to do. We got to be able to make that
10 record, Judge.

11 MJ [Col SPATH]: Trial Counsel, any final comments?

12 ATC [LT MORRIS]: No, Your Honor.

13 MJ [Col SPATH]: All right. We're going to take a break
14 in a moment. It's a perfect time. We've been in here for a
15 little while. Let me see if I can get to any resolution with
16 regard to the documents and the witnesses before you depart
17 for the day. So what I'm saying is it's probably going to be
18 an extended break right now, but I don't want to depart for
19 the four corners of the base. I want to make it easy to get
20 back here. So stay in reasonably close proximity.

21 I'll have Mr. Taylor give you a heads-up as soon as I
22 have any idea if we can get there and how long that process
23 will take to get back on the record and then at least resolve

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1 these issues. Commission is in recess.

2 [The R.M.C. 803 session recessed at 1452, 23 February 2015.]

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