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1 [The R.M.C. 803 session was called to order at 1601,  
2 23 February 2015.]

3 MJ [Col SPATH]: These commissions are called to order.  
4 All parties who were present before the recess are again  
5 present.

6 We'll start with 332C. That's the material that was  
7 submitted to me in camera for review. We're going to have  
8 additional findings of facts and conclusions of law as we move  
9 forward. We'll mark them and make them part of the 332  
10 series, but for efficiency, so we can move forward, I am going  
11 to provide the defense a number of the documents that were  
12 submitted to me.

13 What I have found is that there is no deliberative  
14 process privilege in any of these documents. It is not  
15 applicable to these. However, once I got past that analysis,  
16 the next analysis then becomes one of discovery, what is  
17 relevant and necessary and noncumulative for discovery.

18 And so I know there was an index that has not been  
19 provided to the defense, Government, but I'm going to give you  
20 the numbers of the documents that are not released. This is  
21 using that index of Attachment B to Appellate Exhibit 332J.  
22 Again, these are the documents you're not going to release.  
23 We'll seal those in the record as an exhibit in the 332 series

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1 as well. The ones that are not going to be provided are  
2 Number 4, Number 5, 15, 16 and 17, 21 and 23. The remainder  
3 of the 47 line items will be provided to the defense, and I  
4 would suggest doing that sooner -- or as soon as you can, so  
5 they have time to start reviewing those documents.

6           Again, for the nondisclosure piece, I did what I  
7 would do for any discovery requirement, and those documents  
8 are unrelated and irrelevant to the issue before us right now,  
9 which is Change 1.

10           Any questions, Trial Counsel, on the numbers, so you  
11 all know what documents I'm referring to?

12           DCP [COL MOSCATI]: No, Judge. We expect that to take  
13 about an hour.

14           MJ [Co1 SPATH]: All right. And again in the record, the  
15 ones that were not provided, they'll be sealed in the record  
16 so the appellate court can see what was not provided to the  
17 defense down the road.

18           And, Trial Counsel, you can make sure the court  
19 reporters get those exhibits as well so they can seal that  
20 exhibit and mark it appropriately in the 33 series.

21           DCP [COL MOSCATI]: Yes, Judge.

22           MJ [Co1 SPATH]: With the documents, it is possible you  
23 will decide that you want to have another witness or two

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1 witnesses, or however many witnesses, after you've reviewed  
2 the documents. I recognize that as a likelihood. So what I  
3 would like is, based on how long it took me to review them,  
4 which was when I was on the ride down here, and then some  
5 yesterday evening, and then today, I think you're going to  
6 find it's reasonably easy to go through the document, because  
7 there is repetition in the e-mail chains and there is  
8 repetition in the documents.

9           And so I would ask you to identify any additional  
10 witnesses as soon as you can, currently, by noon tomorrow, and  
11 then let me know if that becomes an unattainable time.

12           LDC [MR. KAMMEN]: If I may ask, Your Honor, is the volume  
13 of documents 47 minus six or seven, or is it -- are they  
14 strings, so that it's really a hundred? I'm just trying to  
15 figure out ----

16           MJ [Col SPATH]: It is 47 minus the exhibits. This is the  
17 full volume, just the notebook. So it's about three inches,  
18 three and a half inches of paper. I took out some of the -- I  
19 haven't taken those out of my copy yet, so there's a little  
20 less than that. And again, there's some repetition.

21           LDC [MR. KAMMEN]: Seeing it helps us.

22           MJ [Col SPATH]: Oh, and that's a good point. One of the  
23 documents is the 2014 NDAA. So that's a thick document. It

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1 accounts for some of that. Public record, likely you've seen  
2 it before. I don't understand why anyone would claim a  
3 deliberative process privilege over it. But again, ruling to  
4 follow, those are the documents.

5 For the witnesses, here's where we're at on the  
6 witnesses. I believe Mr. Ary is necessary and relevant and  
7 material to the resolution of this issue. Again, I'm trying  
8 to make this so that we can move forward and not cause delay  
9 in the process. It is possible after Mr. Ary testifies other  
10 witnesses may well be, but at this point I believe Mr. Ary  
11 satisfies what needs to come before the commission for the  
12 motion that is before me right now.

13 So for the prosecution team, for the government,  
14 please work to determine his availability to testify. He does  
15 not have to -- he's certainly welcome to join us in person.  
16 He does not have to, of course, and I couldn't make him come  
17 down here; he's a civilian employee. If he wants to testify  
18 in person, we can see how long that will take, and he can do  
19 that. Otherwise, invitational travel orders. I know the  
20 rules. And if he wants to testify by VTC, then we'll have him  
21 testify by VTC. But I need you all to work on his schedule  
22 and what that looks like tomorrow or Wednesday to have him  
23 testify.

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1           What I would like to do is to finalize for today --  
2 so I think that gives us a good road ahead, at least for that  
3 issue and for that motion.

4           I mentioned in the 802 session there was some  
5 discussion about whether or not we could do anything else  
6 while the unlawful influence motion is pending, and there  
7 seems to be at least some difference of opinion on that  
8 between the two sides. So I want to ask you all, because that  
9 too is going to drive what we do tomorrow, outside of dealing  
10 with 332.

11           So, Trial Counsel, do you believe I can deal with  
12 other additional motions, or at least start hearing argument  
13 and evidence on those motions, prior to the resolution of this  
14 issue?

15           DCP [COL MOSCATI]: We do, Judge. We're here. We're  
16 available. Defense is here. You are not ruling at this  
17 stage. We do think you can hear other matters, hear argument,  
18 and they would not be affected.

19           MJ [COL SPATH]: Okay. Defense Counsel?

20           DDC [CDR MIZER]: Judge, our position would be that it's  
21 all-stop until that issue is resolved, and I think that's  
22 consistent with what happened in Lewis, I think that's  
23 consistent with what happened in Salyer, and certainly my

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1 experience with Navy practice, Judge.

2 MJ [Col SPATH]: I'm going to take some time this evening  
3 to work through that and work on that, because that is an  
4 issue that I need to resolve, and likely we need to do  
5 findings for the record before we move one way or the other.  
6 What I don't want to do is just rule from the bench lightly,  
7 because there is an unlawful influence motion pending, and  
8 there are a lot of moving parts to resolve that motion  
9 currently.

10 So that's where we're at. Again, by noon tomorrow,  
11 let me know if there are additional witnesses other than the  
12 ones that were already provided in 332E and G, if there are  
13 additional witnesses. And then by that same time, I would  
14 like an update from the government -- actually, if we could  
15 get an update from the government before noon tomorrow. If  
16 Mr. Ary is available in the morning, we can take his testimony  
17 in the morning.

18 LDC [MR. KAMMEN]: We would need some time to prepare.

19 MJ [Col SPATH]: You do need the documents. Let's do  
20 this. Let's see his availability tomorrow from noon forward.  
21 There is likely to be some questions that come from the  
22 documents that I have just turned over to the defense. It's  
23 going to take them an hour to get them the documents, as you

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1 just mentioned, an update on any of the additional witnesses  
2 based on review of the documents by noon, and by noon an  
3 update as to Mr. Ary's availability starting tomorrow  
4 afternoon.

5           And in that time I will try to get a ruling together  
6 on whether or not we can handle additional motions over the  
7 next day or so while this issue is pending, or if we're going  
8 to wait until we resolve this issue.

9           So pending -- I'm going to wait to hear at noon, but  
10 I would count on a 1300 start tomorrow.

11          LDC [MR. KAMMEN]: What I would -- and I just throw this  
12 out, would be an 802 at 1300, just to see where we are. And  
13 if you decide to go forward -- I mean, there's some matters  
14 that we may be able to take out of order that are less  
15 complicated. But if we're going to go into real complicated  
16 stuff, when the same people are, you know, really trying to  
17 prepare, we're ----

18          MJ [Col SPATH]: Understand. Let's do this. Let's do the  
19 802 at noon. That will give us that hour in case Mr. Ary is  
20 available and able to testify right at 1300, then we can do  
21 that. Again, if you find the documents are overwhelming in  
22 the amount of it -- but I don't think you will, but if you do,  
23 we can readdress at noon. 802, same location, noon tomorrow,

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1 and then we'll have an eye towards 1300.

2 I will attempt to work on a ruling on whether or not  
3 we can move forward. I -- the expression no good deed goes  
4 unpunished will come back to haunt me. Here's the deal.

5 The unlawful influence motion is important, and this  
6 is not the prosecution's doing. All of the e-mail traffic and  
7 every document that you will see, Defense Counsel, and that  
8 you've already seen, it's fairly clear that the prosecution,  
9 at least by document and e-mail, was no more involved in that  
10 decision than anybody else.

11 But as I was looking through the manual, I was  
12 looking through the statute, and I was looking through the  
13 rules, and the convening authority's place in this process is  
14 not in the judiciary. It is in his place to fund and to  
15 provide resourcing for the judiciary, but it is not to be in  
16 the judiciary.

17 The Chief Judge of the Commissions is the Secretary  
18 of Defense's person for the judiciary in matters to do with  
19 detailing and the judiciary. It's right in the rules. And  
20 that's why I think Mr. Ary is relevant and needs to talk to us  
21 about the thought process and what he's hoping to effect,  
22 because unlawful influence in any form is incredibly  
23 destructive to our process and we need to stop it and fix it

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1 and clean it, if it's here. And I'm not saying it is. I'll  
2 be interested to hear what Mr. Ary has to say tomorrow, or as  
3 soon as we can get him here.

4           Feel free to update Mr. Taylor by e-mail. You don't  
5 have to wait until noon tomorrow. If you have updates on  
6 scheduling or timing or anything, let us know by e-mail  
7 through Mr. Taylor, so that we can move forward. If you find  
8 the document review goes even faster and you can let us know  
9 witnesses before noon, please do so. But right now, let's  
10 count on a 1200 802 where we had one today, and at least  
11 tentatively a 1300 start.

12           Trial Counsel, any other matters to take up before I  
13 recess?

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

15           MJ [Col SPATH]: Defense Counsel?

16           LDC [MR. KAMMEN]: No, other than then Mr. Nashiri will  
17 not be here until shortly before 1300?

18           MJ [Col SPATH]: Okay. But that makes sense for  
19 scheduling purposes. Even if you all let me know you're  
20 through the documents quickly and Mr. Ary is available before  
21 1300, we're not going to get on the record significantly  
22 before that, for obvious reasons. Understand that.

23           Thank you. We're in recess.

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1 [The R.M.C. 803 session recessed at 1614, 23 February 2015.]

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