[The R.M.C. 803 session was called to order at 1332, 24 February 2015]

MJ [Col SPATH]: All right. These commissions are called to order. All parties present before the recess yesterday are again present.

This morning at noon, we had the 802 session we talked about yesterday. I just want to summarize what we talked about during the 802 session. We had a discussion about Mr. Ary's availability, and he indicated he was available the rest of today and then all day tomorrow.

Defense counsel, as I requested, submitted a list of additional witnesses that they were interested in hearing from. They submitted a list of four additional witnesses, and we received that before noon today, at which point we communicated that we would allow the defense to make the showing for their justification, either on the record or in writing. And we discussed at the 802 that process, and the defense said they were going to do it here during our session at 1330.

I let both sides know I was going to discuss with them my plan for outstanding motions and whether or not I felt I could deal with those while the UI motion was pending. I didn't tell either side my planned ruling. I just said that I

1 would get that to you-all while we were on the record today.
2 I was going to talk about how we were going to deal with other
3 witnesses that may or may not be produced for the unlawful
4 influence motion.
5 The defense counsel let the trial counsel know that
6 they were missing a page. I think they got discovery last
7 night, they were missing one of the Bates stamps numbers, and
8 they just let the trial counsel know what that was and
9 hopefully that's been resolved. There's some discussion about
10 making sure we get whatever exhibit Mr. Ary is going to be
11 looking at produced as soon as we can so that the
12 classification authorities can look at it so we are able to
13 display it in the courtroom and it's appropriately classified,
14 if it needs to be.
15 And then I discussed yesterday, as I was trying to
16 work through how to deal with the exhibit, which was the
17 Government Exhibit 332J, which was the ex parte submission of
18 the 47 tabs of e-mails and documents related to the unlawful
19 influence motion. I had said that we would make a separate
20 exhibit for the things that I did not release. Having some
21 time to reflect on that and some discussions with the
22 judiciary team that is here with me, it made more sense --
23 332J is already sealed in the record. That's the ex parte

1 filing, and it was filed under seal. It included the 47 tabs,
2 plus it had an index explaining each of the exhibits. Then it
3 had the cover sheet. The cover sheet, I know everybody has
4 seen, but then it had the filing under seal, and it had the
5 exhibit index.
6 So the parts that are going to be remain sealed are
7 the exhibit index, in here, because it has all 47 tabs, plus
8 each of the tabs, the seven tabs I discussed yesterday that
9 I'm not releasing. Those all will remain sealed in 332J.
10 Everything else has been released to the defense.
11 The defense let me know that they had received
12 additional documentation along with what I had released
13 yesterday over the course of the evening and that they were
14 working through those documents, and they indicated they would
15 prefer to have a discussion or have Mr. Ary as a witness
16 starting tomorrow morning. At the end of the 802, Trial
17 Counsel, Colonel Moscati, asked me if I would allow him to let
18 Mr. Ary know if he was going to testify tomorrow or when he
19 was going to testify, for his schedule.
20 I indicated I didn't want to make a decision in the
21 802 or a ruling. Both sides had no objection to that, and so
22 I indicated that we would hear from Mr. Ary at 9:30 tomorrow.
23 And so that's the plan for him to testify.

1 Hopefully between now and 9:30, we can make sure that
2 exhibit gets to the classification authorities so we can make
3 sure we can use it tomorrow so we don't get held up in the
4 morning. That was the matters discussed at the 802 session.
5 So let me first check, Trial Counsel, do you want to
6 add anything to my summary of the 802 session?
7 DCP [COL MOSCATI]: Yes. Briefly, Judge, the missing page
8 first was in the discovery provided last night. Perhaps there
9 was a printing problem. We have provided a hard copy of it as
10 well.
11 The material that was provided yesterday evening was
12 material previously provided. It wasn't new, except for the
13 privileged documents that you ordered yesterday. Also,
14 Judge -- may I use the podium, Judge?
15 MJ [Col SPATH]: Absolutely. Let me do this. I'll hear
16 from you. Anything to add to the 802 summary?
17 DCP [COL MOSCATI]: It's in addition to, Judge.
18 MJ [Col SPATH]: Okay. We'll get to the in addition to.
19 I just want to make sure that we summarize what we talked
20 about off the record first.
21 Mr. Kammen, do you want to add anything to the
22 summary of the 802 session?
23 LDC [MR. KAMMEN]: It's really such a small point, but

1 just for clarification, the e-mail -- or the second bit of
2 discovery, I don't know that we discussed the timing of when
3 it was provided to the defense. That actually was this
4 morning, about 1045.
5 MJ [Col SPATH]: We did not discuss that during the 802
6 session. That's true. All right.
7 Colonel Moscati, I will let you address the
8 additional issues since you were about to start. Sorry about
9 cutting you off.
10 DCP [COL MOSCATI]: Thank you, Judge. On the same theme
11 of discovery, I want the court and defense to be aware there
12 is a continuing -- as there always is by the government, a
13 continuing effort to find relevant discovery. The office of
14 the Secretary of Defense and Office of General Counsel is
15 looking for materials as well. That was actually a subject of
16 the defense motion in 332.
17 In your order, 332I, you did not order disclosure of
18 internal Defense Department communications; however, again, I
19 just want you to be aware, Judge, that discovery nevertheless
20 is being looked for. The prosecution does not have it. If we
21 get it or when we get it, we will review it for
22 discoverability under the rules and provide it as needed.
23 MJ [Col SPATH]: All right. Thank you.

1 LDC [MR. KAMMEN]: Your Honor, the only thing I would
2 clarify -- and I don't want this to be become an issue. What
3 we received last night from the government, from the
4 prosecution, was what we understand to be the materials you
5 had ordered released. If they believed they had sent us
6 something else, some composite of that plus something else, we
7 have not received it.
8 We did receive what we understand to be the materials
9 you ordered released.
10 MJ [Col SPATH]: All right. Government, I assume that's
11 accurate. They have what I ordered released from 332J?
12 DCP [COL MOSCATI]: Yes, Your Honor.
13 MJ [Col SPATH]: All right. A good place to start, then,
14 is probably with the four witnesses that have been requested
15 in addition. So if we could go through them by name, and then
16 what we believe would be the relevant testimony they would
17 offer, and then, Government, I'll allow you to respond to
18 that.
19 DDC [CDR MIZER]: Judge, thanks for allowing us to do this
20 on the record instead of writing so that we can keep this, to
21 the extent that we can, moving.
22 We have -- I guess I should say at the outset that
23 one of the central things that is going to have to be

1 addressed in the UI motion, is as the late Senator Howard
2 Baker put it, what did the convening authority know, and when
3 did he know it. That is going to be one aspect of the
4 unlawful influence motion.
5 But as you know, Judge, from the Lewis case, the
6 actions of a Staff Judge Advocate in that case, it was Marine
7 Colonel Canham that committed the unlawful influence in that
8 case, and not the convening authority himself, and so the
9 actions of a Staff Judge Advocate, or in this case legal
10 advisor, can be imputed to the convening authority and can
11 constitute unlawful influence.
12 And so I want to start with that kind of legal
13 framework as to why we believe that these witnesses are
14 relevant and necessary, because either the convening authority
15 was involved in the unlawful command influence or his staff
16 was, or somehow implausibly, and we'll find out, he was
17 unaware of it, as the e-mails that we were provided last night
18 reveal.
19 Judge, first, we are requesting one of the legal
20 advisors, Alyssa Adams. And if you look at the documents that
21 we were provided last night, you see a slow evolution, and
22 with comments and markups on what ultimately becomes the
23 convening authority's December 9 memorandum to the Deputy

1 Secretary of Defense. And, Judge, first, I would refer to
2 Tab 2, which appears to be the first iteration -- and only
3 Ms. Adams, I think, can tell us that -- of that memo. It's
4 captioned "Info Memo." And for reference, I'm dealing with
5 Bates number 127498.
6 The third paragraph down says, "In order for the
7 military judges to effectively administer military commissions
8 cases, their priorities must be clearly laid out, and they
9 must be physically located at the site of the trial." Again,
10 this is the first version of this, and part of the argument in
11 the UI motion is going to be they essentially make the package
12 a little bit more slick -- not slick enough, because I think
13 that the documents that we were provided in the initial
14 discovery constitute unlawful influence, but we're going to
15 need to bring these witnesses in and go through these in this
16 case with Ms. Adams.
17 If you go down to the next paragraph, they're citing
18 exactly what I told you we expected to have in these memos. I
19 mean, it's a critique of Captain Waits in the Hadi case;
20 comments that he made that he had a day job.
21 And then the last sentence in that paragraph is, "It
22 is apparent that the division of duties experienced by
23 currently detailed military judges and their geographical

1 separation from the trial location is hampering their ability
2 to try cases in a timely, efficient manner." And so these are
3 the keywords that are right out of the statute that in some
4 instances, Judge, are ultimately massaged out of the final
5 product. And these are the witnesses that we're going to need
6 to come in and discuss those, Judge.
7 If I could move to Tab 8 as another example, Judge --
8 and I'm not going to go through, obviously, all of these
9 e-mails, but I would like to make my showing for 703. Tab 8
10 is one of the substantive e-mail chains that takes place.
11 It's from, again, Ms. Adams. It's to the OMC list, CA Legal
12 Advisors. We don't know who is on that list. I assume
13 Ms. Adams can provide that information for us. It's a
14 discussion between Ms. Adams and another member of the CA's
15 staff, another legal advisor, Raghav -- and if I'm
16 mispronouncing, that, please forgive me. For the record,
17 that's R-A-G-H-A-V and then Kotval, K-O-T-V-A-L, Commander,
18 United States Navy.
19 And in this discussion, Ms. Adams discussed how she
20 has changed again, referring to the proposed regulation sole
21 duty, which appears in an earlier draft of Change 1, back to
22 primary duty which is ultimately the language that is in
23 Change 1 itself, and tweaks some of the language of

1 paragraph 62, she says. But what's interesting there, and I
2 don't want to jump around too much, but she, and Commander
3 Kotval or Kotval are pretty intertwined in this discussion,
4 it's actually two e-mails, one which would appear to be
5 unsolicited, that it's at 4:34 p.m. And for the record, I'm
6 discussing Bates stamp 127542. One of the questions that
7 Commander Kotval asks is, "Would we need to put people on
8 notice because of the regulatory changes here?" The second
9 question he asks is, "If so, would that give the defense time
10 to file motions?" Three, "If so, the defense and the judges
11 are aligned on this issue. The defense don't want a speedy or
12 speedier trial. The judges don't want to move." And number
13 four, "The defense would file motion after motion saying that
14 the CA's real goal is to influence the judiciary. The judges
15 would rule on them, and even if the judges rule in our favor,
16 the issue may become the topic of motions and serve to impugn
17 the CA's impartiality." That e-mail is a 14 November e-mail.
18 One of the questions, again, just to say that the
19 legal advisor is certainly aware of the unlawful influence,
20 that is taking place here. And so, again, what did the
21 convening authority know? Did he talk with his legal advisors
22 while this was going on. In some sense, there is certainly a
23 suggestion that Commander Kotval is a whistleblower. There's

1 certainly some suggestion of that.
2 I mean, one of the questions he asked is, "Are we
3 coercing or by unauthorized means influencing the action of a
4 judge, and if not, why are we intruding on what is not
5 typically or traditionally a convening authority's role? What
6 is the explanation for the action?" And the second -- one of
7 the second questions that he asks is, "In trying to speed up a
8 trial, are we affecting its fairness? If, for example, the
9 judge is less inclined to grant a continuance because it means
10 more time on GTMO, is that adverse to the accused?"
11 And then he goes through, in laundry-list fashion,
12 and checks off each of the statutory provisions that the
13 defense argues are offended by ultimately what the Deputy
14 Secretary of Defense's action, which was successfully lobbied
15 for by the convening authority in this case.
16 MJ [Col SPATH]: Isn't that -- if this is an issue --
17 isn't that the issue, that is that it is the -- regardless of
18 the and I'm open to hear it, but as we talk about producing
19 witnesses, isn't the issue ultimately what the convening
20 authority did? Because I think you at least have some
21 evidence the convening authority was lobbying for this effort,
22 based on all of the documents you've been provided and had
23 been provided prior to this week's hearings.

1 So what does it matter that lower-level people in his
2 legal advisory chain were either saying to him, hey, this
3 could be a problem ----
4 DDC [CDR MIZER]: Right.
5 MJ [Col SPATH]: ---- or whistle-blowing or -- do you
6 understand what I'm trying to ask?
7 DDC [CDR MIZER]: Yes, Judge. I think it goes to, number
8 one, public perception of fairness of the military justice
9 system. I think if you have a convening authority that is
10 ignoring legal advice, that knows what he is doing is
11 unlawful, then absolutely we have to call these witnesses.
12 And if Mr. Kotval -- or Commander Kotval is going to come in
13 and say I tried to stop this but the convening authority
14 didn't listen, I think that that goes into the unlawful
15 influence analysis. And, Judge, as I stated, the actions of
16 these SJAs can constitute unlawful influence in and of
17 themselves.
18 And so, you know, we have got a big ask here, Judge.
19 And I think the court is well aware of it. I think the judge
20 outlines it in Bowser and they certainly outline it in Lewis
21 and Salyer where dismissal is essentially the only remedy.
22 And I think we've got to be allowed, to the extent that we
23 have the burden of production, to make that burden of

1 production to say that either it's unlawful influence here by
2 virtue of the convening authority or unlawful influence by
3 virtue of his legal advisors.
4 MJ [Col SPATH]: All right. Sorry to interrupt. I know
5 you are talking through Ms. Adams, particularly.
6 DDC [CDR MIZER]: Yes, Judge. If you can give me just a
7 moment, Judge, I think I have jumbled my papers here.
8 Judge, if you go, then, to Tab 19 -- actually,
9 Tab 18, I think that there's another e-mail that would provide
10 fodder for relevant testimony. For the record, that's Bates
11 127578, and it's again part of this exchange between Commander
12 Kotval and Ms. Adams -- or I believe she's Lieutenant Colonel
13 Adams. And the e-mail there is, yes, he, being the convening
14 authority, is influencing it, but is it unauthorized
15 influence? And I think not. And ultimately they're talking
16 about more of this language that is or is not going to be
17 included, a position for success will be taken out, and it
18 hasn't even been written by Mr. O'Toole yet.
19 And then if you go to Tab 19 -- and this is the last
20 document I'll deal with Ms. Adams -- and I appreciate the
21 court and opposing counsel's indulgence -- that's 127582.
22 Again, it's this string of e-mails between these legal
23 advisors, and the e-mail here from Ms. Adams is, "Already did

1 that, got a memo from Fred Taylor," who I believe is from the
2 trial judiciary, and in the courtroom, for the record, now,
3 Judge, which will be included. And then the quote is, "Enough
4 e-mails now," exclamation point. I think we needed to know
5 exactly what Ms. Adams meant as they're discussing unlawful
6 influence when she writes, "Enough e-mails now."
7 Now, with respect to Commander Kotval. I think I've
8 gone through exactly -- you know, why are we intruding on this
9 role. If we're trying to speed this up, does that constitute
10 unlawful influence?
11 There's a cameo appearance, Judge, by a third -- what
12 would appear to be a third legal advisor in the record at
13 Tab 11. This would be the third witness we're requesting,
14 Captain Matthew Rich. This is an e-mail dated November 14,
15 2014, Bates number 127561, and Captain Rich writes, "My two
16 cents regarding 6-3(c)" -- that's the provision of the current
17 regulation that says that a military judge detailed here must
18 be on active duty at the time of detailing. In the stack of
19 documents there's some discussion and some drafts as to
20 whether they're going to change that to expressly allow the
21 detailing of reserve judges, but if ultimately the
22 determination is made to leave it as-is, presumably a reserve
23 judge could be recalled to active duty and then detailed.

1 And what Captain Rich then goes on to say, is there
2 may be reserve judges who have prior experience as
3 U.S. Attorneys or some experience in national-security-related
4 cases. Given the UCMJ Article 3 hybrid world we currently
5 occupy, Judges with both Article 1 and Article 3 experience
6 may be ideal candidates, if we were willing to put PCS to
7 GTMO.
8 So, I mean, this is all evidence of what we think was
9 ultimately one of the goals here, which is to unseat the three
10 sitting military judges of this trial judiciary, and there
11 certainly is some contemplation of that taking place, that we
12 can get better judges that have the necessary experience. And
13 then ultimately, what you get in the final package -- again,
14 so much of this is massaging, someone's taking a look at this
15 and saying this is outrageous UCI, let's make it less
16 outrageous UCI.
17 Ultimately, one of the documents that I referenced
18 yesterday talks about the clerks lacking the experience, and
19 so it's the clerks ultimately is what makes it out of this
20 process. It's the clerks that they're talking about, no
21 longer talking about the judge, but it's the clerks that lack
22 capital experience; it's the clerks that lack national
23 security experience.

1 And these are the witnesses, Judge, that can tell us
2 how these memoranda evolved, why they evolved, the discussions
3 that they had with Mr. Ary, did they have discussions outside
4 of the CA's office.
5 And then finally, Judge, John Vaughn, Lieutenant
6 Colonel John Vaughn, who I referenced yesterday -- and so I
7 won't go back through those conversations. But on Tab 29,
8 Bates 127621, we're dealing with an e-mail between Commander
9 Kotval and Lieutenant Colonel Adams, and Lieutenant Colonel
10 Vaughn writes, "FYI, you guys are the lead for RAH materials
11 and the like. Good hunting."
12 So at this point we would add that as to the basis of
13 why he needs to testify. We don't know what RAH materials
14 stands for. It could be something innocuous, it could not.
15 But I would imagine just a very limited examination of
16 Lieutenant Colonel Vaughn.
17 Judge, the last thing I would say with respect to the
18 witnesses is I don't want to be in the business -- well, let
19 me say this first: Yesterday I mentioned an opinion of
20 Judge Effron dealing with the failure to prosecute Article 98
21 violations of UCI. I was mistaken. It's actually the late
22 Homer Ferguson, senator and Court of Military Appeals judge.
23 The case is United States v. Ray. It's 20 U.S. C.M.A. 331,

1 and it's Homer Ferguson, Judge Homer Ferguson, who says, "I
2 have yet to learn of a single instance wherein the sanctions
3 of Article 98 have been involved. Its enactment has not
4 resulted in the anticipated objective and for all intents and
5 purposes appears to be an exercise in futility."
6 I guess I would just raise that because I don't want
7 to be -- it's dangerous business for defense counsel to be
8 advising individuals of their Article 31(b) rights. Judge, I
9 just draw that to the court's attention. Mr. Ary is subject
10 to retirement recall, as are the other three witnesses.
11 I think the final thing I would say, is we attended
12 Mr. Nashiri's argument at the D.C. Circuit -- I think it was
13 last week -- and I saw Commander Kotval there, and he informed
14 me that he is no longer mobilized, so I think that's another
15 aspect of this. Why is Commander Kotval no longer mobilized?
16 Is it just a matter of his year being up, or is this
17 quasi-whistleblower and then sent out to pasture, by the
18 convening authority? Because he appears to be the only
19 dissenting voice in these documents.
20 Thank you, Judge.
21 ATC [LT MORRIS]: Good afternoon, Your Honor.
22 MJ [Col SPATH]: Good afternoon.
23 ATC [LT MORRIS]: As Your Honor stated, the relevant

1 question for these four witnesses that is in front of you now
2 is the issue of what the convening authority did. The defense
3 counsel cites the Lewis case, the 2006 C.A.A.F. case for the
4 proposition that they can compel lower-level people involved
5 in the chain of command, in this case assistant legal
6 advisors, to testify as to an allegation of unlawful
7 influence. That's not what the Lewis case is about.
8 If you look at the Lewis case, you see it was an
9 SJA-directed voir dire of the judge. That was an SJA action
10 that was reaching into the courts-martial. It is inapposite
11 to what we have, or the allegation that the defense is making
12 here today.
13 So for all of these witnesses, we would echo what
14 Your Honor stated yesterday, and that is simply that these
15 requests are moot. The convening authority has been ordered
16 to testify, at this point scheduled for tomorrow morning, and
17 to ask these questions as to, well, what did these people tell
18 the convening authority when we have the convening authority
19 that's going to testify tomorrow morning, is entirely
20 premature. Not only is it premature, Your Honor, to, on the
21 basis of 703, order them to compel, it's defense's burden to
22 show that they're relevant and necessary to the underlying
23 issue.

1 And to talk about now that these e-mails have been
2 given out, it is exactly what you would expect to find, Your
3 Honor. It is legal advisors contemplating before making a
4 recommendation to the Deputy Secretary of Defense. This isn't
5 something that's done lightly. You don't just ----
6 MJ [Col SPATH]: To be fair, I would have expected that
7 this would have been coordinated with more than one person
8 outside of the convening authority's office before somebody
9 would go to the Deputy Secretary of Defense. I have been in
10 the Air Force a long time and I would have expected there
11 would have been some consultation outside of that office.
12 What I see here is people raising what are the very
13 concerns we all have to talk about now, and that's what I
14 think the defense is just trying to put me on notice of, is
15 that other people can engage in UCI. It doesn't have to be
16 just the convening authority. It can be other people.
17 Here my question to you would be: How can this be
18 unlawful influence since it couldn't affect me? I would never
19 see these e-mails. They wouldn't impact me. It's the action
20 of the convening authority that seems to be the most relevant
21 piece currently. At least that's how I'm ----
22 ATC [LT MORRIS]: And the government agrees with Your
23 Honor's assessment of where we are now, and the convening

1 authority ----

2 MJ [Col SPATH]: Let me ask this, though: With that --
3 because as the government and the prosecutors, you, too, have
4 to be very wary on unlawful influence. You, too, are supposed
5 to be the guardians against it. Aren't you concerned that
6 these concerns are being raised to the convening authority?

7 ATC [LT MORRIS]: So ----

8 MJ [Col SPATH]: And there's no discussion of those
9 concerns in the memo, ultimately. When you read the support
10 memos that they send out, the negatives, this could be
11 unlawful influence, this could be a problem for the
12 commissions that we want to move along. These very issues
13 weren't put in those memos, it appears. Again, we have seen
14 the memos, both of us. Doesn't that cause, even your side, at
15 least some concern?

16 I'm not saying it is UCI or UI, and I'm not
17 suggesting dismissal would ever be appropriate or isn't
18 appropriate. I don't know. I just -- do you have concerns
19 about the way this change came to pass now that you've had an
20 opportunity to look at this traffic?

21 ATC [LT MORRIS]: The government is heartened that these
22 concerns were looked at, and to look at the e-mails, what you
23 see is you see potential issues, as you would expect -- in any

1 roundtable discussion, before a recommendation is put forward,
2 you would expect that there would be a brainstorming of
3 potential issues. And that's what we see here.
4 We see them looking at what the rules are and asking
5 is there anything that we need to be cautious of. And so,
6 again, the government looking at the e-mail and the exchanges
7 back and forth, first of all, are heartened by them examining
8 this. If there was no examination of convening authority's
9 actions, then we would -- that would cause us concern, and the
10 prosecution, our eyebrows would raise.
11 MJ [Col SPATH]: Let me ask ----
12 ATC [LT MORRIS]: A second point, if I may, Your Honor.
13 If you would just indulge me.
14 MJ [Col SPATH]: You may.
15 ATC [LT MORRIS]: When you actually dig into the e-mails,
16 the one part that the defense counsel failed to indicate is
17 these are not e-mails to the convening authority. These are
18 e-mails in the free flow of exchange back and forth to legal
19 advisors chopping ideas, proposing ideas, thinking things
20 through.
21 The defense counsel has not given to Your Honor as a
22 rationale for compelling these witnesses: You sent an e-mail
23 to the convening authority on such and such a date; therefore,

1 this person is relevant to testify. But ultimately, the
2 convening authority, the recipient of this e-mail that doesn't
3 exist, is here tomorrow -- or will be here tomorrow, or on
4 VTC, to testify as to what he heard, what conversations he had
5 and what actions he took within those conversations.
6 MJ [Col SPATH]: All right. And I think that's a fair
7 comment. I guess my question would be -- there is no evidence
8 that these e-mails, you're correct, went to Mr. Ary, who is
9 going to testify tomorrow. But where did -- and maybe Mr. Ary
10 is the witness -- the comment "The defense and the judges are
11 aligned on this issue," and then the follow-on, "The judges
12 don't want to move," is that a perception that the convening
13 authority has, that he is sharing openly in his office. Is
14 that a perception that people have developed within his office
15 based on conduct by the convening authority? That -- and are
16 those questions relevant, then, when you're working through
17 the issue of unlawful influence? Because again, it's not just
18 actual influence, it's the appearance of influence and how it
19 affects the integrity of our process.
20 So those questions are of interest, and aren't these
21 witnesses the best ones to answer those questions? Maybe it
22 is after Mr. Ary testifies we don't need any other witnesses.
23 I don't know.

1 ATC [LT MORRIS]: The fact that defense counsel is raising
2 these motions now post-recommendation and the fact that these
3 issues were looked at to see is there anything that we need to
4 be wary of, what that tells us is that this issue was examined
5 within the office, this issue was examined in a variety of
6 different ways, and the recommendation went forth.
7 So tomorrow morning, if that's the set time for
8 Mr. Vaughn Ary's testimony, those are perfect questions to be
9 asking him, and I fully expect defense counsel to be asking
10 those type of questions: Who did you have conversations with?
11 What was the -- what was the information that you put out in
12 your office in drafting these? Did you have those type of
13 representations? That is who they're alleging unlawful
14 influence, and they still up to this point haven't given Your
15 Honor what the object of that is. But that is the witness
16 that will be here tomorrow, and I fully expect defense counsel
17 to flesh that out.
18 I would previously bring to Your Honor's attention
19 their request for Lieutenant Colonel Jonathan Vaughn. The
20 Tab 29 that they reference, this is the -- well, I'd like to
21 start by saying this is the same witness that they made a
22 request for in their prior request. So this is the second
23 time. The only difference, that they removed his rank from

1 the request, whereas with Alyssa Adams, they seem to give her
2 a rank. It's the same witness that they are requesting, the
3 same reasons that they requested before.
4 The only thing that they add to it and the only thing
5 that the material turned over yesterday is two things, and for
6 the record, it is this tab, and it's also the Tab 27, which is
7 a scheduling e-mail, Tab 44 is identical to that, and Tab 36,
8 which is a 7 January e-mail saying this has been signed. So
9 those are all -- if you look at those, those cannot be reasons
10 to compel.
11 So you denied him yesterday. You denied him on the
12 basis that the convening authority was going to testify. So
13 when we really focus in on the only thing they have is
14 Lieutenant Colonel Vaughn saying you guys are the lead for the
15 RAH materials and the like, "Good hunting," that is not reason
16 in and of itself to compel a witness' testimony. Certainly,
17 they haven't made the case that that is sufficient for
18 compelling testimony.
19 Subject to Your Honor's questions on any of the
20 witnesses.
21 MJ [Col SPATH]: No, thank you.
22 ATC [LT MORRIS]: Thank you, Your Honor.
23 DDC [CDR MIZER]: Judge, I'll kind of briefly address that

1 in reverse order. The e-mail dealing with the RAH material
2 occurs in an e-mail chain where they're effectively selling
3 this to DEPSECDEF. So I think it's incredibly relevant as to
4 "Good luck finding the RAH materials."
5 Again, when you see in this evolution is where we go
6 from just complaining about the military judges to essentially
7 a ship that's already left the station. I mean, this thing
8 starts apparently on November 7. Captain Waits doesn't make
9 those comments until a week later. And then ultimately they
10 start querying the trial judiciary for metrics on efficiency,
11 billable hours, essentially, Judge.
12 And that's ultimately what makes its way to the
13 December 9 memo. It's this after the fact, we're going to do
14 this, we're going to move these judges here, but this stuff is
15 pretty naked UCI. What can we come up with that is a little
16 less appalling to a military justice practitioner? And these
17 are the witnesses that can do it, Judge.
18 You heard my friend, shipmate from the prosecution,
19 make exactly the argument that we expect that they're going to
20 make, which is they can't attribute this or can't prove that
21 Mr. Ary knew it, and ultimately we can ask Mr. Ary that. But
22 at the very least these witnesses serve an impeachment
23 process -- or an impeachment purpose, excuse me. And, again,

1 the actions of a convening authority can -- or, excuse me, of
2 his staff can constitute UCI.
3 Judge, I would just respectfully disagree about that
4 characterization of Lewis, and in full disclosure, I was
5 Justin Lewis' appellate defense counsel. What happened there
6 wasn't Colonel Canham coming into the well and voir-diring the
7 judge. It was repeated efforts by trial counsel to unseat the
8 military judge. And when those efforts proved unsuccessful,
9 Colonel Canham took the witness stand and engaged in
10 outrageous conduct that I won't repeat here.
11 Ultimately C.A.A.F. says that that is imputed to the
12 convening authority in that case, and ultimately we may need
13 the ability to say that this conduct -- if it's conniving
14 legal advisors, I think that's incredibly implausible, but
15 somehow come out with this change and dupe the convening
16 authority.
17 If that's ultimately to be the government's story or
18 potentially Mr. Ary's story, we need these witnesses to come
19 in, and I would presume say, yep, we completely tricked the
20 convening authority. And that's what they're going to have to
21 say, if that's the story, and only those witnesses can say
22 that, Judge.
23 I think with respect to the production, ultimately we

1 have made our burden of showing more than UCI or UI in the
2 air, and that in many cases I think we would simply rest and
3 allow the government to meet its burden that this is harmless
4 beyond a reasonable doubt. But I think given the gravity of
5 what's taking place here, that we should have these witnesses,
6 Judge, be allowed to make that, so that you can make the most
7 complete ruling.
8 And I've referenced the Wright case before, that's
9 ultimately what happens when you make a ruling in a UCI case,
10 where every I isn't dotted and every T isn't crossed,
11 ultimately it gets remanded back to a trial judge to cross
12 that in that case, a privilege log here, and we're just asking
13 that to occur here under 703. Thank you, Judge.
14 MJ [Col SPATH]: Trial counsel, any final comments?
15 ATC [LT MORRIS]: Nothing based on that, Your Honor.
16 MJ [Col SPATH]: With regard to Mr. Ary, are we going to
17 be -- are we comfortable that we can get him a document that
18 will include all of the pages that either the defense or trial
19 will be referring to so that we can clearly identify it on the
20 record over the course of this break?
21 DCP [COL MOSCATI]: Yes, Judge, he already has that.
22 MJ [Col SPATH]: Defense counsel.
23 LDC [MR. KAMMEN]: Can we be provided with whatever he

1 already has?
2 DCP [COL MOSCATI]: Yes, Judge, it is the same thing that
3 was provided to him, but we'll give that to him again.
4 LDC [MR. KAMMEN]: In a hard copy, so we don't have to
5 worry about the computer system?
6 MJ [Col SPATH]: And my goal, I'm not -- I know you've
7 given it to him. I know you gave it to him yesterday. What I
8 want to make easy is I want to make the testimony something
9 that we can all follow when Mr. Ary testifies. That's all,
10 something the court reporters know the document, since it's
11 going to be the next document in our 332 series, and that
12 everybody knows what page we're on, plus we can get it through
13 any declassification efforts. I would hope they would be
14 easy, given the nature of what is included in the e-mails, but
15 I think we've all learned occasionally things crop up that
16 surprise us. All right. So I'll let you all work on that on
17 the break.
18 Mr. Ary is first tomorrow at 9:30, and I believe he's
19 going to take some time, given the number of documents that
20 both sides are looking at.
21 This is not a ruling. I want to be clear. This is
22 just -- I promised, I think, on day one of this that I have
23 very thick skin. It was in relation to -- not day one this

1 time, day one way back when I first started -- that I have
2 very thick skin, and that was in relation to the recusal
3 motion about Commander Mizer, in fact, and it was about the
4 fact that he is working on an appellate case on which I was
5 the prosecutor, and I said it doesn't bother me, doesn't
6 matter to me, and it's true. And I have a thick skin about
7 what's contained in the e-mails, or I'd recuse myself.
8 My concern is the impression that goes out to the
9 public that trial judges don't want to move these cases
10 forward. And I don't know why anyone would say it, and I wish
11 possibly my fellow judge had not made the comment "day job."
12 We all make comments we probably regret later, especially from
13 the bench, because we have to watch everything we say all of
14 the time, and it is very easy to make a misstep.
15 I came down here to move this case forward, scheduled
16 it for two weeks, which we haven't done in the past in this
17 case, ready to move into evidentiary hearings with every
18 intention of getting there. And we would be there next week
19 absent -- we'll decide if it's UI or not -- a change by the
20 convening authority to the Rules of Commissions that was
21 staffed through the general counsel and nobody else. And it's
22 the same person that tells me to move these cases forward
23 faster.

1 And so, again, this isn't a ruling. This is a
2 suggestion that three of the four witnesses the defense has
3 mentioned today, not Lieutenant Colonel Vaughn, but the other
4 three, and we've got Adams and Kotval being the two. Who is
5 the third witness, defense counsel?
6 DDC [CDR MIZER]: Captain Rich Matthew or Matthew Rich.
7 MJ [Col SPATH]: Thank you. I couldn't read my note. I'm
8 going to go through the tabs again. Again, this is not a
9 ruling. I want to move this case forward. And the only way
10 to move it forward is to have witnesses ready to testify, so
11 we don't have to take day-long breaks in between.
12 If they'll be interviewed by the defense counsel, it
13 might preclude them from having to be called, and it might
14 make the time faster. I don't know if they're willing to do
15 that or not. And, again, it's not direction from me, because
16 it might not speed it up or slow it down. If they're
17 interviewed, the defense might still want them; if they're not
18 interviewed, we know the defense is going to want them. So I
19 just offer that up as an alternative, that maybe there's some
20 room there to do the interviews and work out a stipulation of
21 testimony or come to some agreements, maybe there's not.
22 I would have those three witnesses, at least
23 identified and make sure we know where they are and find out

1 if they want to come down here in person or if they want to
2 testify by VTC, if they're required.
3 In that same vein -- and, again, this is not a
4 ruling. I'm going to rule on this after I hear from Mr. Avery
5 (sic). Maybe all will be clear after Mr. Avery testifies, and
6 there will be no concerns. Or frankly, I can give you an idea
7 of where I'm heading with this. But Lieutenant General
8 Darpino, her e-mail causes me concern as we work through UI.
9 And that is because the actions of the convening authority
10 caused her in e-mail by definition to at least start looking
11 at removing judges from the pool.
12 She put that in there, and she said, do not detail
13 Colonel Osborn. Do not detail Colonel Hargis, until we figure
14 out what we're going to do with this, indicating to me, she is
15 thinking about removing them from the pool of available
16 judges, which means the convening authority may have had an
17 impact on detailed available judges for trial.
18 And so, again, it may be all resolved by what Mr. Ary
19 tells us. Maybe he knows all of the discussions and can give
20 us the background of that, and he knows everything and I'm
21 comfortable that we don't need additional information, and it
22 will be cumulative. But, again, I know she is likely busy,
23 and so I would make sure that she, too, is someone we can find

1 and get on VTC; or if she'd like to come down here, she can
2 travel down.
3 Again, those are not rules. I just -- I do have an
4 interest in moving forward. It's why we have docketed two
5 weeks going forward almost every month, except for a month set
6 aside for Ramadan. I can't say any more about my desire to
7 move the case forward. That's why we're trying to do
8 evidentiary hearings.
9 I think because of the pace of litigation this week,
10 we're likely to get through the UI motion. I don't know --
11 obviously, the ruling on the UI motion will drive some things.
12 If we get through the UI motion, we're likely to be able to
13 move into all of the other motions that we have pending.
14 Those will take us a while now because we're already going to
15 be at Wednesday, and we haven't resolved UI, so that will get
16 us through our second week. But we're not going to get to
17 evidentiary motions next week. We can see that on the horizon
18 because of the complications with the evidentiary motions
19 even, as I try to move those forward.
20 And so I would start to make plans in that direction,
21 which is either we're going to work through that docketing
22 order to finish up all of those outstanding motions or we're
23 going to stop based on the UI ruling, but I don't envision us

1 getting further than that over these two weeks.
2 And the final comment I would make has to do with my
3 ability to rule on anything else right now. Because of the
4 issues at hand with unlawful influence and the importance of
5 that issue, I am not comfortable that a disinterested member
6 of the public would think that I'm being completely impartial
7 and fair. I know I am, but that position is pending, and UI
8 can permeate everything in a trial. That's why it is so
9 serious and we have to resolve that issue before we resolve
10 anything else. So we're not going to do anything else until
11 we get this UI issue resolved. I want to get it resolved
12 while we're down here. I want to get you a ruling while we're
13 down here, so we can all then go to our respective places and
14 deal with whatever fallout that might bring.
15 So, again, that's not a ruling and there's no ruling
16 on witness production at this point. We have Mr. Ary ready to
17 go. If we have them and we can get to them quicker, we can
18 move this along. And if we have to wait day after day to get
19 witnesses together -- and that's not a -- that's -- Mr. Ary
20 came late yesterday, I know that, and documents came by the
21 time we got the ruling out later yesterday, and I understand
22 that. But I want to be able to get these witnesses here and
23 to be able to testify sooner than later, if they become

1 relevant to the issue at hand.
2 Just check, I believe that resolves all of the issues
3 I have to talk with you all about today. Give me just a
4 second, and then I'll check with each of you as well.
5 LDC [MR. KAMMEN]: I just wanted to alert the commission,
6 I mean, we got 36 very dense pages of discovery at 1045 this
7 morning.
8 Again, I don't know what Mr. Ary is or isn't going to
9 say and what justification he will or won't have for some of
10 the things that have occurred, but some of the things that are
11 referred to in that production, which the government clearly
12 thought was relevant to this discussion, may give rise to yet
13 additional witnesses. And I just -- I don't know that. I'm
14 not sitting -- you know, we haven't even gotten through
15 reading it one time, and, again, it's not completely clear to
16 us how this fits into this piece of the discussion. But I can
17 foresee that if there's certain justifications used, that that
18 will then create the need for additional witnesses.
19 Let me be very clear, we don't want to be in the
20 position of having somebody say this is it without any
21 opportunity to at least investigate whether or not that is
22 completely forthright.
23 MJ [Col SPATH]: Understand. Fixing the UI motion is

1 critical, and it's the first order of business. It is an
2 unfortunate order of business because it's going to slow us
3 down this week, as it already has, but that's where we're at.
4 Trial Counsel, any other matters we need to take up
5 today?
6 DCP [COL MOSCATI]: Judge, would you permit one additional
7 comment on the production of the three legal advisors?
8 MJ [Col SPATH]: There's no -- I haven't ruled on it. It
9 is just -- I'm just suggesting -- the defense has the burden
10 of production. They have to produce some evidence of UI, we
11 know that.
12 Let me ask you, Colonel Moscati: Based on your
13 review of all of these e-mails and keeping in mind what some
14 evidence of UI is, the burden of proof is reasonably low, and
15 you being -- sitting second chair -- unless General Martins
16 wants to take this one -- do you believe the defense has shown
17 some evidence, again, that's not UI, that is that there is
18 some evidence out there that there is potentially UI? It's a
19 low burden, and you've had a chance to review all of this.
20 And that's why I'm talking about these witnesses in the -- in
21 that realm. I think that's important. But I'll be happy to
22 hear your comment.
23 DCP [COL MOSCATI]: Thank you, Judge. The short answer to

1 your question is no. Commander Mizer, Judge, says that the
2 actions of legal advisors can be imputed to the convening
3 authority, and there's a very important distinction to be made
4 with respect to that argument. These legal advisors, the
5 three witnesses on Mr. Ary's staff, they were discussing
6 matters among themselves, as legal advisors would be expected
7 to do, as Lieutenant Morris has said. That's their role.
8 That's their job, to consider the legal ramifications of the
9 actions of their principal.
10 MJ [Col SPATH]: Absolutely.
11 DCP [COL MOSCATI]: If their principal had not done
12 anything, had not acted, we wouldn't be here. They are not
13 actors. In the cases where legal advisors have their actions
14 imputed to a convening authority, they have -- those actors,
15 those legal advisors, have reached out and touched the
16 judiciary. It's not just internal communications among them
17 in their roles as legal advisors. They may have sent an
18 e-mail. They may have made a call, an SJA, an assistant SJA,
19 to a judge, that's what gets imputed to a convening authority.
20 MJ [Col SPATH]: But here's the question, and this is just
21 a question. Again, this is not a ruling on those three. It
22 is a way to continue to attempt to move this ball forward, so
23 that we don't have lots of stops, if they become relevant.

1 If those comments that we see in the e-mail are being
2 made to the convening authority -- let's assume for a moment
3 the convening authority is the object of the influence; is
4 that important?
5 DCP [COL MOSCATI]: And since ----
6 MJ [Col SPATH]: It doesn't show in the e-mails, I realize
7 that.
8 DCP [COL MOSCATI]: I understand your question.
9 MJ [Col SPATH]: Okay.
10 DCP [COL MOSCATI]: Since we're discussing 703 and
11 production of witnesses, and obviously, Commander Mizer has
12 made many arguments beyond that, but since that's what we're
13 discussing right now, that legal -- I'm sorry, not the legal
14 advisors. The convening authority is going to be here. He is
15 going to be here. You've ordered us to make him available.
16 MJ [Col SPATH]: Yes.
17 DCP [COL MOSCATI]: He's going to testify to these things.
18 He is going to be able to say what advice, what counsel, what
19 e-mails, what discussions he had with his staff, and he will
20 be able to explain what they meant; if, in fact, he was aware
21 of these discussions, and if he was, what they meant and how
22 they factored into his thinking, his eventual recommendation.
23 But, again, we're talking about should those legal

1 advisors also be produced.
2 MJ [Col SPATH]: I agree.
3 DCP [COL MOSCATI]: They didn't take any action ----
4 MJ [Col SPATH]: Not a ruling.
5 DCP [COL MOSCATI]: ---- that affected or arguably
6 affected this court.
7 MJ [Col SPATH]: But, again, what you have -- the theory
8 of the defense, I'm assuming, is that there is an object of
9 the influence. Ultimately the object is Deputy Secretary of
10 Defense who has been detailed, the rulemaking ability, or --
11 I'm sorry, delegated the rulemaking ability.
12 So the convening authority is in this case going
13 almost, if not VFR direct, to the Deputy Secretary of Defense.
14 That we have seen in the traffic. You would agree with that?
15 DCP [COL MOSCATI]: Yes, Judge.
16 MJ [Col SPATH]: So all I'm suggesting is depending on
17 Mr. Ary's answers, it is possible some pool of people could
18 become relevant. That's all I'm suggesting. And so one way
19 to deal with it is not to give you all a heads-up, and then
20 after Mr. Ary finishes tomorrow or the next day, depending on
21 how long he is on the stand for, I say out of all of those
22 witnesses, Ms. Adams is the only one I'd be interested in
23 hearing from for whatever reason -- Mr. Ary says something

1 that is different than what Ms. Adams said in the e-mails, and
2 that's just odd, so she would be important. It would just be
3 easier for you-all if she knew there was the potential that
4 she is out there. That's all. That's all I'm doing.
5 I am not -- you've seen it in other motion rulings
6 where I have indicated it's not a ruling, and I come out and I
7 rule the exact opposite way, even based on the questions I
8 ask. I want to move this forward, and so I just -- I'm
9 letting you know the ones I see that possibly -- possibly, not
10 probably -- possibly could become relevant, depending on how
11 the cross-examination or the direct goes, and Mr. Ary
12 testifies. I just want to have them closer than farther away.
13 And same with the Army TJAG because of that e-mail. That's
14 really all I'm looking for.
15 DCP [COL MOSCATI]: Judge, I understand. I acknowledge
16 that. Commander Mizer did take the argument a bit further,
17 Judge, and you actually in your comments indicated that one of
18 these e-mails, one of these comments of legal advisors,
19 seems -- I'm going to use the term "resonated," Judge.
20 MJ [Col SPATH]: Here's what resonates ----
21 DCP [COL MOSCATI]: Again, that's internal discussion, and
22 but for the action of Mr. Ary, you never would have seen that,
23 and it would have never had any real, actual, or possible

1 affect on the court.
2 MJ [Col SPATH]: Again, this is a hypothetical. This is
3 where it resonates. If the impression that the judges don't
4 want to move the cases comes from somebody who works for the
5 convening authority, who I've never heard about, you're right.
6 I don't care.
7 If the convening authority is out making those
8 comments in forums where people can hear it, does that cause
9 an issue, commenting on the judges' effectiveness or
10 efficiency? Now, that's not a report in the sense it's not an
11 OPR, but it is a report on? I don't know. I'm reading the
12 same rule, regulation and statute that you are. And so that's
13 an interesting question, right? And I'm sure we're going to
14 hear lots of it when we get to argument.
15 So it didn't resonate with me more than I was trying
16 to figure out what the defense counsel -- why they were
17 arguing they were relevant, and that's why I asked them the
18 question of midlevel people talking, ultimately isn't it the
19 convening authority's action that matters? Absolutely.
20 DCP [COL MOSCATI]: That's my point, Judge.
21 MJ [Col SPATH]: But if the convening authority testifies
22 in contravention to what's in the e-mails -- and I'm not
23 saying he will or he won't. Or maybe he says, "I had no idea

1 these discussions were going on. I have a day job, and I
2 don't know every discussion that's going on in my office,"
3 totally -- totally understandable.
4 DCP [COL MOSCATI]: Judge, and with all due respect, many
5 of the arguments being advanced to you are hypotheticals about
6 the future, and that's not where we're at.
7 So Mr. Ary will testify tomorrow, and the court will
8 have facts before it.
9 MJ [Col SPATH]: Yeah. So that's -- I was trying to give
10 you-all a heads-up so that we can move this forward, where we
11 can, more efficiently. It is important to everybody involved
12 in this process that this case move, if it's going to move,
13 faster. I know we agree on that.
14 DCP [COL MOSCATI]: Yes, Your Honor.
15 MJ [Col SPATH]: And I know there are people interested in
16 the case who agree with that. It just -- it's got to move one
17 way or the other. And so I am just trying to find
18 efficiencies as I look forward this week so that we're
19 actually working over the next two weeks, as opposed to we
20 finish, and we're sitting here on Monday with nothing to do
21 for four days, and I'm using the Internet here as opposed to
22 in D.C. where the speed seems to be different. And I want to
23 use the Internet here because we're working here, not just be

1 stuck here, not being able to move this case forward. And I
2 know you feel the same way.
3 DCP [COL MOSCATI]: I do. Thank you, Judge.
4 MJ [Col SPATH]: So absolutely. All right.
5 Commander Mizer.
6 DDC [CDR MIZER]: Judge, very briefly, one thing.
7 MJ [Col SPATH]: Yes.
8 DDC [CDR MIZER]: And I think I said it: I don't think
9 it's fair to cast these -- all of these e-mails as private
10 discussions between two legal advisors. As I referenced
11 earlier, it was apparently some list. I don't know if Mr. Ary
12 is on the list. Most these e-mails are to OSD List, CA Legal
13 Advisors.
14 MJ [Col SPATH]: Understand. That's why -- again, same
15 response and I appreciate it. I've looked at them a couple of
16 times. I'm going to look at them tonight and Mr. Ary's first
17 up. I'm just trying to find some efficiencies so you all have
18 an idea of what witnesses to at least make some preparations
19 for on the chance, that they end up being relevant as Mr. Ary
20 testifies.
21 The only relevant witness right now that I have ruled
22 on is Mr. Ary, and we have worked, and he is available
23 tomorrow, and I look forward to hearing from him tomorrow at

1 9:30. We will come on the record -- I assume we'll come on
2 the record at 9:00. We'll deal with any preliminaries if we
3 have any, and that will give the technicians the ability to
4 make sure the VTC is working and that we have done everything
5 we need to to move that testimony forward. So we'll start at
6 9:00.
7 Last chance, Trial Counsel, anything else tonight
8 before we go off the record?
9 DCP [COL MOSCATI]: No, Your Honor.
10 MJ [Col SPATH]: Defense Counsel?
11 LDC [MR. KAMMEN]: No, sir.
12 MJ [Col SPATH]: See you all tomorrow. We're in recess.
13 Thank you.
14 **[The R.M.C. 803 session recessed at 1436, 24 February 2015]**
15 **[END OF PAGE]**
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