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1 [The R.M.C. 803 session was called to order at 1232,
2 25 February 2015.]

3 MJ [Col SPATH]: These commissions are called to order.
4 All of the parties that were present before the recess are
5 again present. And that is the same right before lunch, for
6 we came in for a short period of time. I don't know if I
7 accounted for all of the parties. All of the parties were
8 present for that session as well who have been here this week.

9 Trial Counsel, is Mr. Ary available and on the VTC?

10 DCP [COL MOSCATI]: I believe so, Judge.

11 I also want to mention, Judge, I was remiss this
12 morning. The proceedings are being transmitted to two sites
13 in the continental United States per your order.

14 MJ [Col SPATH]: All right. And I would like to think
15 legal issues in this case that are going to cause concerns on
16 appeal aren't going to be that or accounting for the parties,
17 so if we do miss that, and it's going to happen, to be clear,
18 we'll certainly brief the exception, if a party is missing or
19 something I'll certainly try to pay attention to that. So we
20 should presume some regularity with the parties here when
21 we're in session, but I will also do my best to remember each
22 time. All right.

23 Let's get Mr. Ary up on the screen and then we can --

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1 Mr. Ary, can you hear us?

2 WIT: Yes, Your Honor.

3 MJ [Col SPATH]: All right. I know you're the same

4 Mr. Ary who was testifying this morning. I just remind you,
5 you are still under oath.

6 Mr. Kammen, you may proceed.

7 LDC [MR. KAMMEN]: Thank you, Your Honor.

8 WIT: Yes, sir.

9 **DIRECT EXAMINATION CONTINUED**

10 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

11 Q. We'll talk about the KSM opinion in a little bit, but
12 would it be fair to say that you certainly did affect the
13 status quo. Can we agree on that?

14 A. Yes.

15 Q. Now, in affecting the status quo, we were talking
16 about an e-mail that you sent out to a number of people, and
17 we'll come to that e-mail, so if you found it -- but before we
18 get there, we have been talking about Change 1, and you said
19 that this was your brainchild, your idea. Is that still your
20 testimony?

21 A. Yes, it was my proposal and my recommendation.

22 Q. Okay. And after you made that proposal internally,
23 who on your staff worked on it with you?

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1 A. I believe all of my legal advisors did.

2 Q. And could we have their names ----

3 A. The ----

4 Q. I'm sorry.

5 A. And then the other piece of it, the resourcing piece,
6 was worked by the operations section, too.

7 Q. Let's talk about the advice part of it. Who are the
8 names of your legal advisors who worked on this, please?

9 A. Mr. Mark Toole, who is the acting legal advisor,
10 Ms. Alyssa Adams, Lieutenant Colonel Patricia Lewis. We had
11 Captain Matt Rich, we had Commander Raghav Kotval. And I
12 believe that's the lineup for that time frame, yes.

13 Q. And these are the people to whom your door was always
14 open, right?

15 A. That's correct.

16 Q. These are the people who you told, I presume at some
17 time, you didn't want them to be yes-men and women, right?

18 A. That's correct.

19 Q. You wanted their advice?

20 A. That's correct.

21 Q. And you solicited their advice during the time of --
22 you were working up to making this recommendation to the
23 Secretary of Defense?

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1 A. That's correct, and we had a couple of discussions
2 about it.

3 Q. Just a couple, or would it be fair to say that it was
4 a very routine matter of discussion over those -- that time?

5 A. No, I think we discussed it several times.

6 Q. Yeah. Because this was a real big deal, wasn't it?

7 A. Yes.

8 Q. You were proposing a major change in how military
9 commissions had worked, certainly since 2003 when the military
10 commissions system was being created. You were aware that you
11 were proposing such a major change, right?

12 A. I thought it was an important change, yes.

13 Q. Well, we know you thought it was an important thing.
14 Did you think it was a major important change, as it's proven
15 to be?

16 A. Yes.

17 Q. Okay.

18 A. It's a major change.

19 Q. And so you vetted it and discussed it thoroughly with
20 your advisors, right?

21 A. That's correct.

22 Q. Okay. Now, the e-mail we were discussing, 127234, do
23 you have that in front of you?

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1 A. Yes, sir, I do.

2 Q. Okay. And is that an e-mail ----

3 LDC [MR. KAMMEN]: And, Your Honor, just so I'm clear, the
4 exhibits we've been provided are not in evidence before this
5 commission; is that correct? I'm just ----

6 MJ [Col SPATH]: They're part of AE 3320.

7 LDC [MR. KAMMEN]: Okay. So I don't need to have a
8 separate -- okay. Thank you.

9 MJ [Col SPATH]: You're welcome.

10 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

11 Q. So looking at Bates number 00127234, you were
12 advising certain people of the action of the Deputy Secretary
13 of Defense, who had approved Change 1, correct?

14 A. That's correct. On my -- the e-mail from me in that
15 string?

16 Q. Right. And that e-mail went to Nanette DeRenzi, Vice
17 Admiral Nanette DeRenzi, correct?

18 A. Yes.

19 Q. Who was the TJAG for the United States Navy?

20 A. That's correct.

21 Q. It went to Flora -- Lieutenant General Flora Darpino,
22 correct?

23 A. Yes.

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1 Q. And who is she?

2 A. She's the Judge Advocate General of the Army.

3 Q. Is that what we would call the TJAG of the Army?

4 A. Yes.

5 Q. It went to Lieutenant General Christopher Burne,

6 Burne or Burne? It's B-U-R-N-E.

7 A. Yes.

8 Q. And who is he?

9 A. He's the Judge Advocate General of the Air Force.

10 Q. And it went to Major General John Ewers.

11 A. Yes. And he's the Staff Judge Advocate to the

12 Commandant.

13 Q. He was the guy who took your job?

14 A. Yes.

15 Q. And had you discussed this change with Major General

16 Ewers prior to ----

17 A. I don't, I don't recall. No, I do not.

18 Q. You hadn't even discussed it with -- you and he

19 were -- were you and he friends?

20 A. Yes.

21 Q. You've probably known each other a good part of your

22 career?

23 A. Yes.

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1 Q. And you didn't talk to your friend, your brother
2 Marine, about this major change you were making to the
3 military commissions system, correct?

4 A. I don't recall discussing it with him.

5 Q. And you don't -- and it would be fair to say you
6 didn't discuss it with Vice Admiral DeRenzi, Lieutenant
7 General Darpino, Lieutenant General Burne, true? You didn't
8 discuss it with any of them, either?

9 A. That's correct. I did not.

10 Q. Okay.

11 A. I did not.

12 Q. Just for completeness, it also went to -- I guess
13 that's Rear Admiral Steven Poulin; is that correct?

14 A. Yes.

15 Q. And who is he?

16 A. He's the Judge Advocate General of the Coast Guard.

17 Q. Okay. Now, as you sent this -- those were the
18 primary recipients of this e-mail; is that correct?

19 A. That's correct.

20 Q. And as you sent this to these primary recipients, you
21 advised them that the change effectively establishes a
22 requirement for the military judges to serve at Guantanamo Bay
23 for their duration of the cases, right?

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1 A. The exact wording is -- I guess I could read it.

2 Q. Well ----

3 A. Change -- essentially it makes the change -- the
4 military commissions the exclusive judicial duty for those
5 military judges detailed to the commissions. In addition, it
6 provides the judge be issued assignment orders for duty at the
7 venue where the military commissions are to be convened. A
8 copy of this action is attached. Then I explain the effect --
9 what it affected and how it ----

10 Q. And in the interest of time, the effect of this, as
11 you said, was to require the military judges to serve at
12 Guantanamo Bay for the duration of their cases, right?

13 A. That's correct.

14 Q. Okay. Now, you went on to say that you certainly
15 hope that the three judges currently detailed can remain on
16 their cases, right?

17 A. That's correct.

18 Q. And so you understood when you sent that e-mail that
19 there was a possibility one or more of the judges might have
20 to leave the cases for various reasons, correct?

21 A. That's correct.

22 Q. You had staffed that with your staff -- you had
23 discussed that with your staff, right?

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1 A. Yes, but I also ----

2 Q. You also ----

3 A. I also recognized the JAGs owned the decision on
4 assignments, reassignments, and the whole nomination process.

5 Q. Well, let's just stick with the letter as opposed to
6 what you knew, and let's talk about your staffing. And you
7 discussed that with your staffing, about whether judges would
8 stay or leave, and kind of tried to game it out, fair to say?

9 A. You know, I asked my staff to address all of the pros
10 and cons of the decision, to develop a legal advice to me as
11 the convening authority what actions or what potential
12 ramifications this type of a change would have. One of the
13 issues was is that, well, it may affect the judges that are
14 assigned to the cases, and, you know, that issue was going to
15 be -- have to be addressed by the JAGs, by the individual
16 judges. But my focus was on whether there was a valid
17 requirement for the commissions to be at the designated venue
18 for the trials.

19 Q. Okay. So if I understand your answer correctly, you
20 discussed the pros and the cons, and one of the -- I don't
21 know, is it a pro or a con, that the judges might quit? Was
22 that a pro or a con?

23 A. I was hoping that we would keep the same judges ----

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1 Q. But ----

2 A. ---- but what I believed was that ----

3 Q. Excuse me, could you answer my question?

4 ATC [LT MORRIS]: Objection, Your Honor. I would ask that
5 the witness be allowed to answer the question.

6 MJ [Col SPATH]: Overruled.

7 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

8 Q. My question, sir, is was it a pro or a con that the
9 judges might leave?

10 A. That was a con.

11 Q. Okay.

12 A. I believed that they should -- I was hoping that they
13 would remain.

14 Q. Okay. Now, was it a pro or a -- or in your staffing
15 and vetting, did you discuss with your staff the possibility
16 that if -- that this might also limit the pool of available
17 judges to the commissions?

18 A. You know, I'm sure that issue probably came up.

19 Q. Okay.

20 A. Yes.

21 Q. And was that a pro or a con, that the pool of judges
22 would be limited?

23 A. I think that's a con.

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1 Q. Okay. Now, in fact, as you discussed this and vetted
2 it with your staff, you asked them to find out some
3 information, if change -- to know what the effect of change --
4 or the resources that would be available if Change 1 went into
5 effect, correct?

6 A. I don't recall asking them how it would affect
7 resources.

8 Q. Well, do you recall ----

9 A. I know that we discussed ----

10 Q. Excuse me. Do you recall tasking one of your staff
11 to reach out to Admiral Cozad to see if there was housing
12 immediately available for the judges after Change 1 went into
13 effect?

14 A. You know, I probably asked for estimates of
15 supportability. I don't recall asking that specific question
16 prior to the change being made.

17 Q. Well, do you remember discussing that with the Deputy
18 Secretary of Defense -- excuse me, with Mr. Preston on
19 December 31st, that you had discussed that with Admiral Cozad
20 and that there was housing ----

21 A. Yes.

22 Q. Okay. So you did discuss it?

23 A. Yes, but I believe that the decision had been made on

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1 the 9th or that the day that I -- we had the brief.

2 Q. Okay.

3 A. I don't remember that day, in December.

4 Q. All right.

5 A. It was post-decision, I believe.

6 Q. Okay. So you thought the decision had been made on
7 December the 9th, even though it wasn't signed until
8 January the 6th or 7th, right?

9 A. Those are probably the right dates. The 9th was the
10 date that I submitted the recommendation. I had a meeting
11 with Mr. Work subsequent to that date. I'm not sure of the
12 date, but probably around a week later, and I believe he made
13 the decision at that time.

14 Q. Well, as we know, when you talked to Mr. Preston on
15 December the 31st -- and Mr. Preston is Mr. Work's -- is the
16 general counsel for the Department of Defense at that time?

17 A. That's correct.

18 Q. Okay. And he was under the impression, as we've seen
19 in an e-mail, that this was going to be further vetted with
20 the TJAGs, but you -- do you remember him saying -- sending
21 you an e-mail to that ----

22 A. That's correct.

23 Q. And you disabused him of that ----

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1 A. That's correct.

2 Q. ---- and said no, we're not going to discuss it with
3 the TJAGs, right?

4 A. That's correct. I thought the decision had been
5 made.

6 Q. And the decision had been made in your mind on
7 December the 9th, and prior to ----

8 A. No.

9 Q. Excuse me. Prior to December the 9th, you had not in
10 any -- you had not discussed this with the TJAGs in detail,
11 had you?

12 A. That's correct.

13 Q. I gotta ask. Why not?

14 A. You know, I thought that the -- in discussing that
15 issue with my legal advisors, that the issue was that I made
16 recommendations to my boss, the Deputy Secretary of Defense,
17 on a requirement. He could establish the requirement. How
18 that requirement would be filled would be up to the JAGs and
19 the services.

20 But I was also concerned that since I was in the
21 office of the secretary, that it would be inappropriate to
22 staff that decision to the JAGs based upon the findings in
23 U.S. v. Salyer. I thought that there was a potential, based

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1 upon the advice of our legal counsel or my legal advisors,
2 that the JAGs might believe that I was criticizing one of
3 their individual judges that they had nominated in the pool
4 that was detailed to this case. I didn't want anyone to
5 believe that I was criticizing any particular judge.

6 This was about a requirement for the commissions as a
7 whole, as a system, for these cases and future cases, that the
8 commissions should be collocated with the selected venue for
9 the trial. So that was the intent of that.

10 I also believed -- and I think it was reflected in an
11 e-mail -- that the cost on the services was one judge for each
12 case detailed, and to my mind, that was a total of three, or
13 one from each of the military departments, and that that was a
14 supportable requirement.

15 Q. Now, is this Salyer rationalization you've just told
16 us about mentioned in any e-mails?

17 A. I don't know. I don't -- I have not looked at all of
18 the e-mails that my legal advisors passed ----

19 Q. Was it ----

20 A. ---- because they were not forwarded to me and not a
21 part of my decision.

22 Q. I'm sorry. It was not a part of your decision?

23 A. Oh, it was a part of my decision. It was something

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1 that we discussed ----

2 Q. And is it mentioned ----

3 A. ---- in our meeting.

4 Q. Is it mentioned in any e-mails you prepared?

5 A. No.

6 Q. Now -- excuse me. Bear with me.

7 We know the end result, and in your e-mail and in
8 various documents that you have submitted or that we have
9 seen, you talk about an assessment, right?

10 A. Yes.

11 Q. Okay. Now, we've been through this, and I don't want
12 to go over plowed ground. I know that part of your assessment
13 was to meet with the prosecutor, General Martins, and perhaps
14 his staff and discuss their needs, correct?

15 A. That was really part of my welcome aboard.

16 Q. Okay.

17 A. But I was gathering information as I met with
18 everybody.

19 Q. So the answer is yes, right?

20 A. Yes.

21 Q. Okay. And you met with Colonel Mayberry and her
22 deputy, same thing, welcome aboard, what do you need, right?

23 A. Yes. Yes.

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1 Q. And the clerk ----

2 A. Yes.

3 Q. And you met with the clerk and perhaps his or her
4 deputy, what do you need, right?

5 A. Yes, with Mr. Taylor and Mr. Polley.

6 Q. And as you've told us earlier, it's your testimony at
7 none of those meetings was the pace of litigation discussed,
8 true?

9 A. That's correct.

10 Q. Okay. Now, in this assessment is the end product
11 wanted to affect the status quo, and so one of the things that
12 you presumably began looking at was the reasons for the delay,
13 true? Why is this taking so long?

14 A. Yes.

15 Q. Why is this moving so slowly, right?

16 A. That's correct.

17 Q. Okay. And you reviewed the judicial records and
18 maybe even the transcripts in this case, true?

19 A. You know, the real -- probably the driving issue to
20 me was the number of days on the record and that assessment
21 that was part of that document.

22 Q. And you commissioned people in the -- I guess the
23 operations, to assess the judicial function and the number of

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1 days on the record in each of the cases; isn't that true?

2 A. Yes. I was trying to make an assessment of whether
3 we needed a third courtroom, and I came to the conclusion that
4 we could probably schedule in the existing courtroom without
5 the expense of building a third courtroom.

6 Q. And in any e-mails in this case, is there ever a
7 mention of a third courtroom with respect to the need for this
8 assessment?

9 A. No, but I'm trying to give you my thought processes
10 behind, you know, why I was asking about the hours.

11 Q. Okay. And you then looked at -- well, I mean,
12 certainly, you learned in your job as the convening authority
13 that, for example, Colonel Spath had dismissed some counts
14 pertaining to the MV Limburg, right?

15 A. Yes.

16 Q. Provoking an interlocutory appeal by the prosecution,
17 true?

18 A. Yes. Yes, I was aware of that.

19 Q. Yeah. You were aware that perhaps Colonel Pohl had
20 some trouble ruling promptly and that there was a number of
21 issues he hadn't gotten -- been able to get to in both our
22 case and when he was the judge in the 9/11 case, right?

23 A. I thought that was clearly explained in the

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1 submission from the trial counsel or the trial judiciary in
2 their request for -- their ten-page request for why they
3 needed additional resources to address the piling-up or the
4 backlog of motions pending their consideration.

5 Q. And at no point in that memorandum where they talked
6 about the piling-up did they say, boy, this would go a whole
7 lot faster if we could just move the judges to Guantanamo Bay,
8 did they?

9 A. No, they did not.

10 Q. Okay. Now, you also became aware, presumably, of the
11 varying other issues that have impacted the speed of these
12 commissions? I mean, for example, did you become aware of the
13 issue regarding whether or not someone was monitoring
14 attorney-client communications? Did you become aware of those
15 issues?

16 A. I was aware of that.

17 Q. Did you become aware of the issue regarding the
18 potential for monitoring of attorney-client or attorney
19 communications in this courtroom that required the courtroom
20 to be rewired or reconfigured? Right?

21 A. Yes, I believe those were ----

22 Q. You became aware of that?

23 A. ---- prior to my ----

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1 Q. Right. It was prior, but it was part of the cause of
2 the status quo.

3 A. Yes.

4 Q. Okay. And you became aware of the -- in 9/11, the
5 FBI's efforts to infiltrate the defense teams and, I guess,
6 investigate one or more of the lawyers that caused -- that has
7 caused a substantial delay in that case? You're aware of
8 that?

9 A. Yes, I was aware of that.

10 Q. That happened on your watch, right? I'm not
11 suggesting you're responsible for it, but it happened while
12 you were the ----

13 A. I think -- now, that all occurred -- that was an
14 issue, I think, that much predated my arrival.

15 Q. Fair enough.

16 A. It was ongoing and has been ongoing.

17 Q. Fair enough. You're right on that and I'm wrong.

18 You were aware of the litigation over torture that
19 I'll only summarize, in this case is known as litigation over
20 AE 120 and the government's compliance with that?

21 A. Yes.

22 Q. Okay. You were aware of the -- perhaps not aware of
23 the new issue regarding possible classification of information

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1 from Yemen, but you're aware classification issues are rampant
2 in these cases, right?

3 A. Yes. And in fact that's one of the reasons for the
4 timing of the recommendation that I made.

5 Q. Sure.

6 A. The recommendation was made on the date of the
7 release of the Senate Select Committee on Intelligence Report
8 on Rendition, Detention and Interrogation, and I immediately,
9 the next day, submitted a request to the acting director of
10 DIA, the official classification -- the original
11 classification authorities in these cases, in an effort to
12 improve transparency and to change classification guidelines
13 to comply with the standard used on the SSCI report.

14 I believe that classification and those challenges
15 were one of the -- probably the most important impediment to
16 moving these cases because of the delay all of that process
17 required.

18 Q. And your ----

19 A. I believe that once we ----

20 Q. Are you done?

21 A. Okay.

22 Q. We understand ----

23 A. Yes, sir.

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1 Q. ---- classification is a big issue.

2 And your response to all of these in Change 1 was to
3 move the judge to Guantanamo Bay, right?

4 A. That's correct.

5 Q. That's what Change 1 is about, isn't it?

6 A. That's correct.

7 Q. Okay.

8 A. And to make it their exclusive duty.

9 Q. Right. Now, the judges can't declassify things, can
10 they?

11 A. No.

12 Q. The judges can't make the FBI ----

13 ATC [LT MORRIS]: Objection, Your Honor, as to relevance
14 of this line of questioning.

15 MJ [Col SPATH]: Defense Counsel?

16 LDC [MR. KAMMEN]: Judge, it goes to the very heart of
17 this. If it doesn't have any bearing in logic, it makes ----

18 MJ [Col SPATH]: Understand.

19 LDC [MR. KAMMEN]: ---- no sense.

20 MJ [Col SPATH]: Overruled.

21 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

22 Q. The judges weren't responsible for monitoring of
23 attorney-client communications, were they?

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1 A. No.

2 Q. The judges can only act as fast as events are
3 discovered, right?

4 A. That's correct. On the issue of ----

5 Q. And ----

6 A. ---- of declassification ----

7 Q. Excuse me.

8 A. --- I thought that that was ----

9 Q. May I ----

10 A. Okay.

11 Q. They can only act as fast as things are discovered
12 and as fast as lawyers file motions and as fast as the parties
13 respond, right?

14 A. That's correct.

15 Q. Until the lawyer files the motion, and the other side
16 responds, there's nothing for the judge to do. You're aware
17 of that, aren't you?

18 A. Yes.

19 Q. Now, if, because of the needs of the varying
20 equityholders, it takes a long time for the prosecution to
21 provide information that's classified, there's nothing the
22 judge can do about that, is there?

23 A. No.

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1 Q. He can't order them to, you know, make the -- he
2 can't declassify things?

3 A. No, but that's why I requested that DIA and -- the
4 Defense Intelligence Agency ----

5 Q. But that's not the issue.

6 A. Yes.

7 Q. We're not fighting about that.

8 A. No, but I think that's critical, because it went into
9 my thinking as to the -- as to the timing of this
10 recommendation.

11 I believed that the release of that report from the
12 Senate Select Committee was a game-changer that would lead to
13 declassification and remove one of the major roadblocks and
14 challenges to getting on with these cases.

15 Q. Okay. So then the -- the removal of that particular
16 roadblock, the response is to make all three judges move to
17 Guantanamo Bay?

18 A. Yes.

19 Q. Even a case that might not have been affected by the
20 SSCI report?

21 A. Yes. I wasn't looking at any particular judge ----

22 Q. Excuse me. Hold it ----

23 A. ---- in any particular case ----

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1 Q. ---- hold it. You don't get to response until
2 there's a question.

3 A. Okay.

4 Q. You had been working on this recommendation that's
5 Change 1 for over a month prior to December the 9th; isn't
6 that true?

7 A. That sounds correct.

8 Q. This wasn't something that came about just because
9 the senate report was -- the redacted senate executive summary
10 was released. You had been working on this for over a month
11 prior to that; isn't that true?

12 A. Yes, but I anticipated the release of that report,
13 because it had been widely publicized.

14 Q. And I'm curious if there is a single e-mail, a single
15 piece of paper you generated in which you discuss why the
16 release of this report somehow made it more efficient for the
17 judges to move to Guantanamo Bay. You got any writing that
18 you prepared to that effect?

19 A. Not that I recall.

20 Q. Okay. Now, one of the things that happened in this
21 case -- and let me own it and be fair, because if you looked
22 at -- well, you did look at -- I mean, you analyzed
23 the performance of the judges and courtroom stuff for 2013

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1 with Judge Pohl, in 2014 with Judge Spath. You looked at all
2 of the judges, didn't you?

3 A. I looked at the commissions system as a whole to
4 determine how many times it had been on the record in all of
5 these cases combined ----

6 Q. And that included ----

7 A. ---- yes.

8 Q. ---- individual assessments of each judge; isn't that
9 true?

10 A. You know, I believe I got a total of all of the
11 cases. I think they may have broken them out by judge and by
12 case. My focus was on the total number ----

13 Q. You are ----

14 A. ---- and that's what was contained in my assessment.

15 Q. You asked your staff for reports; isn't that true?

16 A. Yes. I asked for the court reporter records, because
17 I believe they kept accurate records of the amount of time we
18 were on the record in court.

19 Q. And they provided you with those breakdowns; isn't
20 that correct?

21 A. Yes.

22 Q. And those breakdowns were broken down by session and
23 by judge and by year; isn't that correct, sir?

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1 A. I'm sure it probably is. I'm sure they're probably
2 in the binder. I'd have to refresh my recollection on it, but
3 I'm sure that's ----

4 Q. If you would like to take a second, go ahead, because
5 then I'll look for it, too.

6 A. I'm not sure. I know I asked for the total number of
7 hours.

8 Q. Here we go. Why don't you turn to Tab 12.1.

9 A. 12.1.

10 Q. Bates number 127567.

11 A. I'm sorry, could you repeat that?

12 Q. Sure.

13 A. I don't have mine tabbed the same way.

14 Q. Bates number 127567. It's Tab 12.1 of the e-mails,
15 the binder with the e-mails.

16 A. Oh. Okay.

17 Q. You got it in front of you?

18 A. Yes.

19 Q. Now, that's the assessment of Colonel Pohl's -- or,
20 excuse me, of Colonel Pohl -- Colonel Spath's time on the
21 record for 2014; isn't that true?

22 A. Let me -- I haven't found that page.

23 Q. Oh. I'm sorry. I ----

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1 A. I'm sorry. Just a second.

2 I don't know as I see that page, but it's broken down
3 by case and judge.

4 Q. Yeah.

5 A. I don't see his page, but I see Colonel Allred
6 and ----

7 Q. Well, look for ----

8 A. ---- Judge Waits and Judge Pohl.

9 Q. ---- 127567. It's in Tab 12.1.

10 MJ [Col SPATH]: Mr. Ary, I think we're talking about two
11 different documents again. We have Appellate Exhibit 3320,
12 and it should have Production 112 as one of the tabs. Do you
13 have that?

14 WIT: Well, I'll have to look at another -- I believe, you
15 know, they're all broken out by case and judge.

16 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

17 Q. Thank you. And will you just accept --

18 LDC [MR. KAMMEN]: Is he able to see -- he's not able to
19 see the ELMO here, is he? Oh. They say yes. Okay.

20 MJ [Col SPATH]: I believe you will be able to see the
21 document, Mr. Ary, that we put up on the screen.

22 LDC [MR. KAMMEN]: Okay. How do I get this to work?

23 MJ [Col SPATH]: We're doing it right here.

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1 LDC [MR. KAMMEN]: Uh-oh.

2 WIT: I don't know how to ----

3 LDC [MR. KAMMEN]: Okay.

4 WIT: I don't know how to see it.

5 LDC [MR. KAMMEN]: People are pointing, and -- okay.

6 MJ [Col SPATH]: Did it come up, Mr. Ary?

7 WIT: It did not.

8 MJ [Col SPATH]: Give it just a second to load.

9 WIT: Oh. Here it is.

10 LDC [MR. KAMMEN]: Thank you. All right.

11 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

12 Q. And what we're looking at is document 127567, and it
13 is the assessment of the military judge that was being
14 assessed and evaluated -- is Colonel Spath; is that correct?

15 A. Yes.

16 Q. Do you see MJ there?

17 A. You know, the --

18 Q. Okay. And then we know that ----

19 A. Yes.

20 Q. ---- he spent between the 17th and the 25th, 18 hours
21 and 51 minutes on the record, right?

22 A. Yes. But I think it's important that I was looking
23 at this ----

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1 Q. Excuse me.

2 A. ---- from the whole ----

3 Q. Just so you're clear of the process, they're going to
4 get to ask you questions ----

5 ATC [LT MORRIS]: Object, Your Honor, to the argumentative
6 nature of Mr. Kammen's ----

7 MJ [Col SPATH]: Mr. Kammen is just explaining. He does
8 get to ask the questions, and the witness, when they're not
9 argumentative, does have to answer. And you will have your
10 turn.

11 You may ask your question again. Objection
12 overruled.

13 LDC [MR. KAMMEN]: Thank you.

14 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

15 Q. What this document tells you, if you had looked at
16 it, was about Colonel Spath and his time spent on the record
17 in 2014, correct? At least up -- fiscal year ----

18 A. Yes.

19 Q. ---- 2014, true?

20 A. That's correct.

21 Q. Now, it doesn't tell you anything about what he was
22 doing and the work he was doing on this case when he wasn't on
23 the record, does it?

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1 A. No, it does not.

2 Q. You don't know from this how many motions he was
3 deciding, right?

4 A. No, I do not.

5 Q. You don't know from this how many pleadings he had in
6 front of him, right?

7 A. In the commissions cases?

8 Q. Yeah.

9 A. That's correct.

10 Q. In this case.

11 A. That's correct.

12 Q. You don't know from this whether there was a lull
13 because one of the lawyers was, say, in trial or sick or
14 something like that. That wouldn't be reflected on this,
15 would it?

16 A. No, it would not.

17 Q. Now, one of the causes of delay in this case prior
18 to -- under Colonel Pohl was the fact that I was in a trial
19 that lasted, sort of from beginning to end, about six months.
20 You were aware of that, weren't you?

21 A. I don't recall being aware of that.

22 Q. Well, that's why nothing happened on this case under
23 Colonel Pohl from like June to December of 2013. You weren't

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1 aware of that, right?

2 A. Okay.

3 Q. And had your rule been in effect in 2013, Colonel
4 Pohl would have been sitting in Guantanamo Bay with no other
5 duties and nothing to do, right?

6 A. That's correct.

7 Q. And can we agree that maybe that's not the best use
8 of judicial resources? Right?

9 A. Yes.

10 Q. Now, in this case there's an interlocutory appeal on
11 one issue, right?

12 A. That's correct.

13 Q. And one of the issues that may be addressed this
14 week, may not be, is sort of the breadth of that, and to what
15 extent it keeps us from going forward with other things,
16 correct? Are you aware of that?

17 A. Yes, I believe I had heard that that was an issue.

18 Q. Okay. Now, if -- and, you know, for all we know,
19 there could be other appeals filed in this case that could
20 stop the whole thing, correct?

21 A. Yes.

22 Q. And for example ----

23 A. Yes.

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1 Q. And, for example, we see in the 9/11 case a rather
2 huge development which may play out in a number of different
3 ways, right?

4 A. Which development?

5 Q. The fact that as a result of the change you
6 recommended, the 9/11 case has been abated and stopped ----

7 A. Yes.

8 Q. The biggest criminal case ----

9 A. Yes.

10 Q. ---- in the history of America is tolled because of
11 your action, that change. You're aware of that, aren't you?

12 A. Yes.

13 Q. Okay. Now, if your rule were in effect and it takes
14 six or eight months or more to sort that all out, Colonel Pohl
15 would be sitting in Guantanamo Bay with nothing to do, right?

16 A. That's correct.

17 Q. Pretty good use of time and resources, right? That's
18 your opinion? That's the best available use of time and
19 resources?

20 A. No, I would not say that.

21 Q. Well, you did say that because you recommended
22 Change 1.

23 A. That's right.

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1 Q. And you got the Secretary of Defense to approve
2 Change 1?

3 A. The Deputy Secretary, yes.

4 Q. And you got him to say that, too, right?

5 A. Yes.

6 Q. You got him to supplant the judgment of the TJAGs and
7 to fundamentally change the commissions system, right?

8 A. He didn't supplant the nomination and the decisions
9 of the TJAGs in their supervisory role. It was designed to
10 create a requirement for the commissions to be located at the
11 site of the -- or the venue for trial.

12 Q. Right. And so what he -- what you did, as we've
13 discussed, is imposed on a judge something that in the
14 military court-martial system could not happen: Judge, I'm
15 ordering you to move, coming from the convening authority,
16 right?

17 A. That's correct.

18 Q. Okay.

19 A. I think it's slightly different in the military
20 commissions ----

21 Q. Right. Because you see the military commissions ----

22 A. ---- system.

23 Q. ---- system as being somewhat different than the

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1 military commissions system (sic), correct?

2 A. Than the UCMJ, yes.

3 Q. Yeah. What authority do you have for that? What
4 statutory authority do you have for that?

5 A. Well, these cases are being tried under the Military
6 Commissions Act.

7 Q. Right.

8 A. Not under the Uniform Code of Military Justice.

9 Q. So your statutory authority for the notion that the
10 commissions are different and you have greater power and you
11 have the very power you talked about earlier is -- comes, in
12 your mind, from the Military Commissions Act of 2009, correct?

13 A. It would -- I don't have that power, which is why I
14 requested that the DEPSECDEF make the change, because I
15 believed he did. He set the Chapter 6 for the military
16 judges. He established the requirements for who's in the
17 pool, the numbers. I think that that was pretty much set
18 forth as he was the one who established the requirement, so I
19 made the recommendation to him.

20 Q. But you believed -- or he believed -- well, I can't
21 speak for him.

22 You believe that the authority that gives him that
23 comes from the Military Commissions Act. I just want to know

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1 what's -- is that the statute you were relying on?

2 A. That, and the rules governing the military
3 commissions.

4 Q. Those two bodies of law, the statute and the rules?

5 A. Yes.

6 Q. Okay. Now -- and I want to make sure -- we want to
7 make sure that this is the position. The Deputy Secretary of
8 Defense, you assert, has the statutory authority to determine
9 the scope of judge duties in military commissions, right?

10 A. No, he can set requirements for who the -- who can be
11 nominated, and he can set -- I believe he can set that the
12 place of duty for folks where -- the venue of the commissions.
13 I believe that, that's why I recommended it.

14 Q. Okay. And if he can affect the place of duties,
15 can't he affect the scope of duties?

16 A. No, I believe that's a matter for the TJAGs and the
17 judges in their discretion, to carry out their judicial duties
18 in the location that he has specified.

19 Q. Well, but part of the recommendation is also to say
20 that the commissions could only -- the judge can only --
21 commissions can be basically their only major duty, right?

22 A. That's correct. I believe it's the sole duty for
23 the ----

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1 Q. That's part of the scope of the duties, true?

2 A. That's correct.

3 Q. Thank you.

4 Now, you've been to Guantanamo Bay, right?

5 A. Yes.

6 Q. And I don't doubt that there are worse places, much,
7 much worse places that military personnel could be assigned,
8 but can we agree that there are much more efficient places for
9 judges and lawyers to work than Guantanamo Bay?

10 A. Yes, but I didn't pick the venue. Congress and
11 previous administrations did.

12 Q. That's true, but you picked -- it was your
13 recommendation to make the judges move to this place where
14 working is inefficient, true?

15 A. Yes.

16 Q. And, you know, you've sort of gone on at length about
17 how, yeah, but you're going to give the judges more clerks and
18 more people and more this and more that, right?

19 A. Yes.

20 Q. And you've published the requirements, and you've --
21 I think you're advertising for those folks, true?

22 A. I wasn't aware we had started to advertise, but I
23 know that they had discussions on the position descriptions

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1 with the trial judiciary.

2 Q. Right. And ----

3 A. If that's the case, that's the case.

4 Q. And the position description that's been published
5 provides these people and advises these people that they're
6 going to be living in Washington, D.C., true?

7 A. I haven't seen the position description.

8 Q. Well, you're the convening authority.

9 A. I would assume they have ----

10 Q. The buck stops with you. Are these people going to
11 have to live in Washington, D.C.?

12 A. Well, I thought it would have significant periods of
13 time in Guantanamo, so that the judge would have
14 flexibility ----

15 Q. Please.

16 A. ---- to bring them down like part of their own
17 clerks.

18 Q. Please, my question is a simple one: Are the people
19 going to be allowed to live in Washington, D.C., or are they
20 going to be required to live in Guantanamo Bay?

21 A. I haven't seen that part of the position description.

22 Q. You are the convening authority. The buck stops with
23 you, right?

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1 A. I understand that.

2 Q. And so ----

3 A. I understand that, but ----

4 Q. Okay.

5 A. The position description would have been prepared by
6 the trial judiciary folks and then advertised through our HR.

7 Q. Okay. So if that allows them to live in
8 Washington, D.C., then they're up in Washington, D.C., but if
9 Change 1 goes into effect, the judge is in this inefficient
10 place, right?

11 A. I thought that we were going to have either in
12 Guantanamo or with the -- with significant periods of duty
13 within -- at Guantanamo, so that the judge would have
14 flexibility to move them down for hearings, et cetera.

15 Q. Well, of course. Everyone moves down here for
16 hearings, et cetera. We're talking about when there's not
17 hearings.

18 Your Change 1 doesn't make the judge come for
19 hearings. Change 1 makes the judge live here, right?

20 A. That's correct.

21 Q. Now, we were talking about the advice you got -- oh,
22 and just so we're clear. I think it's obvious to all of us.

23 When you were considering Change 1 and making your

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1 recommendations, if I understand your testimony correctly, you
2 didn't go to any of the litigants on the prosecution side and
3 discuss with them, does this make any sense, did you?

4 A. No, I did not.

5 Q. You didn't go to any of the litigants on the defense
6 side and discuss with them, hey, I'm thinking of doing this,
7 does this make any sense?

8 A. No, I did not.

9 Q. You didn't go to the -- I'll call it the trial
10 judiciary, the administrative staff, and tell them what you
11 were thinking about in terms of moving the judge to
12 Guantanamo Bay and say, does this make any sense? You didn't
13 do that, did you?

14 A. No, I did not.

15 Q. You didn't go to the TJAGs.

16 A. No, I did not.

17 Q. You didn't go to the TJAGs, right?

18 A. That's correct.

19 Q. Okay. Now, you said that Mr. Kotval was one of your
20 advisors who had the open-door policy, right?

21 A. That's correct.

22 Q. And it would be fair to say that as this was working
23 through this process, is it true he shared with you some

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1 concerns he had about what you were doing or what you were
2 thinking about?

3 A. You know, it would have been in a group discussion
4 with all of the legal advisors.

5 Q. Okay. Well, let's see if this sounds familiar.
6 Let's see if this refreshes your recollection about the
7 group -- what might have occurred in a group discussion with
8 all of the legal advisors.

9 Do you recall him asking whether or not we needed to
10 put people on notice because of the regulatory changes you
11 were considering?

12 A. I don't -- I don't recall that.

13 Q. Okay. Do you recall him saying, boy, if we put
14 people on notice, the defense is going to file motions?

15 A. You know, I think there were a lot of discussions
16 covering a wide range of issues. My legal advisors give me
17 advice as their client.

18 Q. And I appreciate that, but what I want to find out is
19 if specific legal advice, if you remember -- because what we'd
20 like to know is if you were given this advice and just made
21 the decision to reject it or if nobody said it to you. So
22 bear ----

23 A. No, I don't believe I got ----

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1 Q. So bear with me. Let's just see if any of this
2 sounds familiar, okay?

3 A. Okay.

4 Q. Okay. Did he ever suggest to you that if the defense
5 filed motions challenging this, that the defense and the
6 judges would be sort of psychologically aligned on this issue
7 because, you know, in his view, the defense doesn't want a
8 speedy trial? Do you remember him saying that sometime along
9 the way? I mean, it's a common accusation, defense ----

10 A. Yeah. I don't believe -- I don't recall that coming
11 up.

12 Q. Okay. Do you recall it coming up that the judges
13 don't want to move to Guantanamo Bay?

14 A. We discussed that that may be an issue, that either
15 the judges may not want to or they may be removed by the JAGs
16 in a nomination process, but ----

17 Q. Do you recall ----

18 A. ---- I believed ----

19 Q. Do you recall him saying to you something to the
20 effect of, boss, the defense will file motion after motion
21 saying that your real goal is to influence the judiciary? Do
22 you remember him saying something like that to you?

23 A. I don't recall that, but I'm sure something like that

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1 may have come up in the discussions.

2 Q. Yeah. And it may have come ----

3 A. Everything in these cases are litigated.

4 Q. And it came up -- might have come up in the
5 discussion that even if the judges rule in our favor, the
6 issue may become the topic of motions and serve to impugn your
7 impartiality, right? Do you recall him saying that?

8 A. I don't recall that.

9 Q. Okay.

10 A. I don't know how it would affect my impartiality.

11 Q. Now, do you recall -- okay. Thank you.

12 Just so we're clear, when you say you don't recall
13 that, you don't recall that advice, you don't recall any such
14 discussions. Are you saying you don't recall it because you
15 don't think it happened, or are you saying you don't recall it
16 because you don't remember somebody telling you what you were
17 doing might be thought of as improper?

18 A. No, we discussed that some may view it as unlawful
19 command influence, and we had that discussion. I think we
20 covered most of the topics.

21 Q. Who is we?

22 A. I believe I made an informed decision ----

23 Q. Okay. But ----

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1 A. My legal advisors.

2 Q. Okay. Which specific legal advisors? All of them?

3 A. I'm sure -- I'm sure we had all of them in some of
4 these meetings.

5 Q. Okay.

6 A. At least one or more.

7 Q. And so if I understand your testimony correctly, at
8 some point somebody might have said -- would have said, you
9 know, boss, this may be unlawful command influence, right?
10 Somebody might have said that?

11 A. That's correct.

12 Q. And your response is ----

13 A. That's correct.

14 Q. ---- who cares. Let's go ahead. I'll substitute my
15 judgment for yours. Fair enough? The buck stopped with you?

16 A. No.

17 Q. Okay.

18 A. No, I -- I wouldn't phrase it that way.

19 Q. You made -- of course you wouldn't, and it would have
20 been more elegant.

21 But at the end of the day, as we know, you rejected
22 that advice and moved ahead.

23 A. I accepted the advice of the consensus of my legal

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1 advisors in taking the action and recommendation that I did.

2 Q. Okay. So there were dissents?

3 A. I believe that Commander Kotval, in the discussion
4 you're having, was essentially playing a devil's advocate in
5 his really suppositions and estimates as part of his, you
6 know, privileged attorney work product, as part of the legal
7 advisor's open and free discussion as to what advice to
8 provide me.

9 Q. Okay. But we've been through that argument. So you
10 think he was playing devil's advocate. But he was a pretty
11 good devil because it turns out, at least in one case, he's
12 batting a thousand. You're aware of that, aren't you?

13 A. Yes.

14 Q. You're aware that Judge Pohl in the other case has
15 found almost exactly the concerns that Mr. Kotval, you claim
16 being devil's advocate, addressed, right?

17 A. That's correct.

18 Q. Now, Mr. Kotval also suggested to you that it might
19 be ----

20 ATC [LT MORRIS]: Your Honor, I'm going to object to this
21 line of questioning, specifically under Rule 612. This is not
22 this witness' statement, this witness was not on these e-mail
23 communications, and to ask him to refresh his recollection or

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1 to be put on giving testimony with this specific content is
2 not proper questioning.

3 MJ [Col SPATH]: Trial Counsel, I did not take it as he
4 was showing the witness the e-mail. We haven't opened the
5 book in a while. I took it as he is asking Mr. Ary if he
6 remembers specific conversations, if he has memory of those
7 conversations, and if so, what impact they had. And so ----

8 ATC [LT MORRIS]: The objection, Your Honor, is to the
9 specific reading of the other statements of other people.
10 That's the objection, Your Honor.

11 MJ [Col SPATH]: My discussion of my ruling would be
12 exactly as I just stated. The questions have been framed does
13 he remember discussions like this, and that is fair for this
14 witness to talk about. Your objection is overruled.

15 LDC [MR. KAMMEN]: Thank you.

16 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

17 Q. As we said, Mr. Kotval -- or strike that.

18 Did anybody say to you, you know, maybe we ought to
19 vet this with the TJAGs just to make sure that they're on
20 board with this?

21 A. I don't believe so.

22 Q. It never came up in the month or month and a half
23 this was under consideration that maybe we ought to go to the

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1 TJAGs; is that what you're telling this commission?

2 A. Only in the discussions with the general counsel
3 after I thought the decision had been made.

4 Q. And the discussion with the general counsel turns out
5 to have been before the decision was finally signed off on,
6 right? Because that discussion was ----

7 A. That was before the ink was on the paper, yes.

8 Q. ---- before -- okay.

9 And can we agree that until ink is on the paper, the
10 decision is not final?

11 A. I thought the decision was made at the meeting.

12 Q. Sir, you've been in government a long time, haven't
13 you?

14 A. I also assumed that it was signed subsequent to the
15 meeting which is why I --

16 Q. December the 31st ----

17 A. -- got the general counsel to make that
18 clarification.

19 Q. December the 31st, you met with Mr. Preston, right?

20 A. We had a telephonic exchange and an e-mail.

21 Q. And an exchange by e-mails, correct?

22 A. Yes.

23 Q. And ----

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1 A. And at that point, I realized we did not have any
2 kind of ink on the paper, so the decision was not final for
3 the purposes of your question.

4 Q. The decision was not final, and Mr. Preston advised
5 you in effect, don't you think you ought to go talk to the
6 TJAGs, right?

7 A. That's correct.

8 Q. And you said, look, we've made this decision. Let's
9 move ahead. Words to that effect?

10 A. That's correct.

11 Q. And he said, okay, if that's what you want to do.
12 Words to that effect?

13 A. That's correct.

14 Q. Right?

15 A. Yes.

16 Q. Now, you indicate -- we were talking at the very
17 beginning -- and let me direct your attention again, excuse
18 me, to document 127498, referred to it at the very beginning.

19 A. Yes, I'm there now on the page.

20 Q. Okay. Now, I wanted to see if you remember the 19th
21 of November and 20th of November of last year, okay? On
22 November the 20th you -- prior to November the 20th you had
23 been discussing this proposed Change 1 within your office,

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1 right?

2 A. Yes.

3 Q. It was being discussed and vetted, and you were
4 having these meetings where unlawful influence was or wasn't
5 discussed, and judges moving was being discussed, and what the
6 reaction was going to be. That was a big deal, right?

7 A. Yes.

8 Q. Okay. And it was particularly a big deal because --
9 do you remember Mr. Kotval saying at Production 105 -- I'm
10 sorry. I apologize.

11 I'm going to guess that if you are not on an e-mail,
12 you don't know whether you got it or not, correct?

13 A. I don't know. I know there were a lot of drafts and
14 e-mails among my legal advisors on these issues, but if I
15 wasn't on them, I probably didn't see any of those documents
16 or e-mails.

17 Q. Okay. That's true.

18 A. So I have no knowledge of them.

19 Q. Fair enough.

20 But you did have knowledge of other stuff going on,
21 correct? Well, let me make that ----

22 A. Other stuff?

23 Q. Yeah, let me make that more precise.

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1 We're talking about the judges and the judges'
2 reactions and that they may be less than happy about being
3 ordered to go to Guantanamo Bay. Do you recall that
4 discussion?

5 A. Yes.

6 Q. And do you recall anyone saying something to the
7 effect of, you know, the proper way to support a judge is to
8 ask them what resources they need? You probably had that
9 discussion with people, right?

10 A. And we did that on the October 31st ----

11 Q. Exactly my point.

12 A. Yes.

13 Q. You did that. And as we've discussed, you got a
14 rather lengthy response from Mr. Taylor in which he discussed
15 his -- the needs of the trial judiciary, none of which
16 involved moving anyone to Guantanamo Bay, right?

17 A. That's correct, and he incorporated the other ----

18 Q. And did anyone express ----

19 A. ---- July submissions.

20 Q. And did anyone express to you that getting that
21 report and acting or not acting on the recommendations of the
22 trial judiciary staff would be a proper way of supporting the
23 judges, but couldn't be seen as trying to influence them?

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1 A. I don't -- I don't recall that discussion. I think
2 everybody believed I had a duty to act on that request.

3 Q. Okay. And so your action on that request, the most
4 immediate action was to move the judges to Guantanamo Bay,
5 right?

6 A. No, I ----

7 Q. I know you've done other stuff.

8 A. It was to approve the resourcing.

9 Q. Okay. And part of that approval of the resourcing
10 was, Judge, you gotta move to Guantanamo Bay, right? Isn't
11 that right?

12 A. It was as much -- yes, and about their exclusive
13 duty ----

14 Q. Yeah.

15 A. ---- would be the commissions.

16 Q. Now, this was important and discussions among your
17 staff and you, to the extent that you might remember them,
18 were important on the 20th -- or on the 19th, because on the
19 20th you met with Mr. Preston, right?

20 A. That sounds about right ----

21 Q. Yeah. And ----

22 A. ---- on the dates.

23 Q. Yes. And when you met with Mr. Preston, you didn't

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1 go empty handed. You took him an informational memo; isn't
2 that true?

3 A. I don't recall having an informational memo when I
4 met with him.

5 Q. Well, let me show you -- can you find 127498?

6 A. 127 ----

7 Q. Tab 2.1 of Production 112.

8 A. 127498?

9 Q. Yes, sir.

10 A. Yes.

11 Q. Got it?

12 A. Yes. This is some draft that I don't believe I've
13 ever seen before.

14 Q. Well, it doesn't say draft on it, does it?

15 A. No, but I ----

16 Q. Sir, please.

17 A. I don't recall ever seeing it.

18 Q. Okay. Well, do you see your name on it?

19 A. Yes.

20 Q. And who's it for?

21 A. It's an information memo.

22 Q. Sir, please. Sir ----

23 A. It's for the Deputy Secretary ----

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1 ATC [LT MORRIS]: Objection. I ask that he be allowed to
2 answer.

3 MJ [Col SPATH]: He does need to answer the question.
4 Mr. Ary ----

5 WIT: I'm sorry, I may not be looking at the right
6 document.

7 MJ [Col SPATH]: I think you are. Let me just ask. The
8 127498, the one that says info memo, why do you believe that's
9 a draft?

10 WIT: Because it's not the -- it's not the document that
11 I -- I only sent one document to the Deputy Secretary of
12 Defense. It was the -- I think it was entitled executive
13 summary and it had my initials at the top.

14 MJ [Col SPATH]: And we looked at that one ----

15 WIT: This was some early iteration.

16 MJ [Col SPATH]: I understand. We looked at that document
17 earlier in your testimony. Do you remember talking about that
18 one?

19 WIT: Yes, and it had my initials up by that document.
20 Anything that -- you know, I can't comment on something I
21 haven't seen that might have been prepared by my legal team in
22 preparing their advice to me on this issue ----

23 MJ [Col SPATH]: Is it your ----

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1 WIT: ---- or a draft.

2 MJ [Col SPATH]: Did you typically put your initials on
3 documents that you are sending out under your signature?

4 WIT: Yes.

5 MJ [Col SPATH]: All right. I'm sorry, Mr. Kammen. I
6 just need to get the facts so that I understand what I am
7 looking at.

8 LDC [MR. KAMMEN]: Such as they are. Okay.

9 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

10 Q. Well, when you went to the meeting with the Deputy
11 Secretary of Defense on November the -- or Mr. Preston, excuse
12 me, on November the 20th, did you discuss the various concerns
13 that you had?

14 A. Yes.

15 Q. Did you discuss the various things that led to
16 Change 1? You did, didn't you?

17 A. That was part of it ----

18 Q. Sure.

19 A. ---- but I discussed other challenges at that time.

20 Q. Let me ask you: Did you discuss with him that you
21 had conducted an assessment of the Office of Military
22 Commissions with a view to implementing measures that will aid
23 in the fair and just administration of ongoing and future

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1 military commissions? Did you tell him that?

2 A. Yes, but I'm not sure it was finalized then. I
3 didn't have any documents for him at that time.

4 Q. I understand that your testimony is you didn't have
5 any documents, but let's see what you remember. Because this
6 is -- this was a big meeting, wasn't it? You were getting the
7 deputy -- the general counsel of the Department of Defense
8 onboard with your plan to fundamentally change military
9 commissions. Pretty big meeting; isn't that right?

10 A. Yes.

11 Q. Okay. So let's see what you remember about it.

12 Did you tell him or was it discussed, and certainly
13 it would be foremost in your mind, that you were responsible
14 for trying some of the most important criminal cases in United
15 States or arguably world history, right?

16 A. I don't believe -- I don't believe that came up. I
17 mean, I know he knows the magnitude of these cases.

18 Q. Sure. And the two of you discussed the importance of
19 the 9/11 case, right?

20 A. I don't believe we discussed particular cases. I
21 can't recall that.

22 Q. Well, did you ----

23 A. I believe I discussed ----

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1 Q. Did you discuss with him your view that the trial
2 judiciary was underresourced?

3 A. I probably told him that I was going to make some
4 decisions regarding resourcing, and I may have made that
5 decision already ----

6 Q. Yeah.

7 A. ---- on the resourcing of the clerks. I had not made
8 the decision on the defense or prosecution resourcing issues,
9 I don't believe.

10 Q. Well, but did you tell him that in order for military
11 judges to effectively administer military commissions cases,
12 their priorities must be clearly laid out, and they must be
13 physically located at the site of the trial? Did you tell him
14 that on November the 20th?

15 A. No, not that quote at all.

16 Q. Okay. Well, did you talk to him ----

17 A. But I -- I'm sure I probably told him that I believed
18 there was a requirement for the commissions system to be
19 collocated at the designated place for the trials.

20 Q. Sure. And did you tell him about what had occurred
21 in the al-Iraqi case just two days before, where Judge Waits
22 said I can't come back because I have a day job? Did you
23 remember telling him about that?

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1 A. I don't recall bringing that up.

2 Q. You don't?

3 A. I don't recall bringing that issue up.

4 Q. Okay.

5 A. It probably or may have come up. I don't know.

6 Q. Probably or may have come up.

7 But you did tell him that your recommendation is --

8 was going to be what we now know is Change 1; isn't that true?

9 A. Yes. I was working on ----

10 Q. Okay.

11 A. ---- that proposal.

12 Q. All right. Now, just so we're clear, Mr. Preston --

13 you've known Mr. Preston for a while; isn't that correct?

14 A. Yes.

15 Q. And you knew him when he was general counsel at the

16 Central Intelligence Agency, before he came to the ----

17 A. No, I did not.

18 Q. You were aware that he held that position; isn't that

19 true?

20 A. Yes, I was aware.

21 Q. Okay.

22 A. Yes.

23 Q. And the two of you have discussed, perhaps, some of

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1 the issues he dealt with while he was at the CIA that are now
2 public?

3 A. No.

4 Q. Never talked to you about ----

5 A. No, I have never discussed -- I have never discussed
6 any issue at the CIA with Mr. Preston.

7 Q. Okay. But you do know that the CIA has a pretty
8 vested interest in this military commissions process, right?

9 A. They have classified some of the information, yes.

10 Q. Just some of it, like huge volumes of it. Fair to
11 say?

12 A. Yes.

13 Q. Now, I'm unclear, so help me understand, and we're
14 getting close to being done. We know from the e-mails that we
15 have seen that there were multiple drafts of what came out --
16 what became your recommendation to the Deputy Secretary of
17 Defense. Is it your testimony that you didn't review any of
18 those interim drafts?

19 A. No. I'm sure I probably saw some of the later
20 drafts. I had meetings where we discussed how we should
21 approach the issue with all of the legal advisors and what the
22 important concerns were and how to lay out what eventually
23 became the assessment.

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1 Q. And you ----

2 A. But I don't believe I saw the early drafts.

3 Q. Well, but in those meetings did you discuss the kind
4 of language that should or shouldn't be in these drafts or
5 should and shouldn't be in the final product to make it, my
6 words, go down more smoothly? Were you part of those ----

7 A. Yes.

8 Q. Were you part of those discussions?

9 A. I'm sure I was towards the end, and the version that
10 I signed is the version that constituted my recommendation.

11 Q. Right, I understand that. But did you make changes
12 in prior versions -- did you personally make changes in prior
13 versions prior to ----

14 A. Yes, I believe I -- yes, I believe I did.

15 Q. Do you happen to know the dates of any of those
16 changes or what those changes were?

17 A. I do not.

18 Q. I'm sorry?

19 A. No, I do not. No, I do not.

20 Q. Okay. Did you communicate those changes to your
21 staff, things you wanted changed?

22 A. I'm sure I did. I talked about the general approach
23 to it and had a number of discussions with the legal advisors.

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1 Q. Okay. Now, did you discuss with Mr. Kotval the
2 notion that the way to frame this legally to make this more --
3 less different was to refer to the judges as services, so that
4 the convening authority would have control over services? Did
5 you have that discussion with Mr. Kotval?

6 A. No, I don't recall that issue at all, and I don't
7 believe I would agree with that approach.

8 Q. Okay. You wouldn't have agreed with that approach?

9 A. To the extent that I understand it.

10 Q. Okay. Now, we've seen e-mails, and certainly it
11 appears that by November the 14th this proposal has got a full
12 head of steam and they're discussing various languages to it,
13 and it is only later in the month of December that you began
14 requesting the financial information; would that -- the number
15 of hours on the record. Would that be consistent with your
16 memory or not?

17 A. I don't recall.

18 Q. Okay. So it's possible that you made the general
19 decision to proceed with Change 1, move the judges to
20 Guantanamo Bay, and then began looking at the detailed hours
21 they spent on the record. That's a possibility, right?

22 A. Well, I think it was a course of action that was
23 being considered, and I was looking at the other data that

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1 might help inform the decision.

2 Q. Well, other than the number of hours on the record --
3 perhaps I misunderstood. What other data were you looking at
4 when you were evaluating the judges?

5 A. Well, when I was evaluating the commissions process,
6 I think I had an assessment. I'd have to find the document.
7 Do we recall which -- oh, here it is.

8 You know, there's the -- there's the third
9 paragraph ----

10 Q. Which -- could you just ----

11 A. ---- that talks about ----

12 Q. Sir, what you are referring to?

13 MJ [Col SPATH]: Can you give me the Bates stamp number?

14 WIT: I'm sorry. It's 127193.

15 LDC [MR. KAMMEN]: Bear with us. Oh. Okay.

16 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

17 Q. Now, we'll let you -- this was -- I asked what you
18 referred to other than the financial in making your
19 assessment, and what you've directed us to is the executive
20 summary that you provided to the Deputy Secretary of Defense
21 that, this one you admit having read and authored, correct?

22 A. That's correct.

23 Q. Okay.

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1 A. This is the assessment.

2 Q. This is the assessment. Okay.

3 A. On this part of the issue.

4 Q. Okay. Okay. This is the assessment that really is
5 where we began, where we talked about your desire to change
6 the status quo. First paragraph of page 2, you wrote that,
7 isn't that correct?

8 A. Yes. And in answer to your previous question, I was
9 looking at 3 ----

10 Q. And you want to -- please bear with me.

11 A. Okay.

12 Q. You wanted to impact the pace of litigation, right?

13 A. I don't -- where does it say that?

14 Q. The middle of page -- the middle of the first
15 paragraph on page 2.

16 A. Those are other potential variables that could
17 further impact the pace of litigation that would be
18 complicators in this.

19 Q. Right. And ----

20 A. That could -- that would cause -- those periods of
21 delay you referred to, potentially.

22 Q. Okay. And your response to those periods of delay
23 that we referred to, as we've discussed, is to dedicate

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1 full-time judges at Guantanamo Bay so they could sit for
2 months and months and months with nothing to do?

3 You don't say that last part, but that's the
4 recommendation you had here, correct?

5 A. I believe that we needed full-time judges onsite,
6 that's correct.

7 Q. Yeah. Okay.

8 Now, so the assessment of the hours on the bench and
9 executive summary, that's your assessment, right?

10 A. Yes.

11 Q. Okay. Now, just out of curiosity -- you may know the
12 answer to this -- what are RAH materials that you tasked your
13 staff to hunt for?

14 A. I think that's read-ahead.

15 Q. Read-ahead materials? And what kind of read-ahead
16 materials would you have your staff ask for in this context?

17 A. I'm not sure of the context. Could you ----

18 Q. Well ----

19 A. Normally, you provide read-ahead materials for a
20 meeting.

21 Q. Oh.

22 A. I -- if read -- I'm not sure if I understand what
23 your question is. I don't normally request read-ahead

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1 materials from my staff.

2 Q. Okay. Well, let's go to December the 31st. You
3 know, we've been through this, and, you know, it's clear to us
4 that you thought that this was in effect, and then you learned
5 it wasn't in effect, but you had a number of discussions or
6 e-mails with Mr. Preston over that day; isn't that correct?

7 A. I believe that's the right date. Might I request a
8 number on that, the Bates stamp number?

9 Q. 127630, I think is the last one.

10 But there were a series over the course of the day,
11 right?

12 A. Yes.

13 Q. Okay. Now, one of those things -- one of those
14 e-mails refers to the judges, correct? And I'm looking at
15 the ----

16 A. Now, which -- I'm sorry.

17 Q. Let me make it more precise.

18 You sent an e-mail to Mr. Preston and some other
19 people, not the TJAGs, on December the 31st at 12:29 p.m.,
20 correct?

21 A. Yes.

22 Q. And ----

23 MJ [Col SPATH]: Can I -- what Bates stamp are you on?

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1 LDC [MR. KAMMEN]: I am on 127631, Your Honor.

2 MJ [Col SPATH]: Thank you.

3 WIT: I was on 632. I was on 632.

4 LDC [MR. KAMMEN]: Well, go back to 631.

5 WIT: Okay. I'm sorry.

6 LDC [MR. KAMMEN]: Okay.

7 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

8 Q. And in the middle there is an e-mail that you sent
9 to, among other people, Mr. Preston, at 12:29 p.m., correct?

10 A. Yes.

11 Q. Is that yes?

12 A. Yes.

13 Q. Okay.

14 A. Yes.

15 Q. One of the things that was discussed, of course, is:
16 What's going to happen with all of these judges? Are they
17 going to quit or not, or are they going to -- you know, are we
18 going to -- what's going to happen, right?

19 A. Whether there's -- I don't believe there's anything
20 about whether they're going to quit or not.

21 Q. Well ----

22 A. I'm sorry, I don't see what you're talking about.

23 Q. Okay. Then let me help you.

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1 One of the -- you indicated that you believed the
2 command coordination is arguably complete, correct?

3 A. Yes.

4 Q. You said that Rear Admiral Cozad at JTF-GTMO has
5 assured me they can support this requirement, right?

6 A. Yes.

7 Q. That means the judges would have a house or a cuzco
8 or a tent or someplace to live while they were here?

9 A. Yes.

10 Q. Okay. And then you go on to say, "and each of the
11 services have the dedicated inventory to send one judge to
12 support this important mission," right?

13 A. Yes.

14 Q. So in your mind on December 31st, the judges are just
15 inventory? If you get rid of Spath, we've got another widget
16 who can come along.

17 A. No, that's -- that wasn't the intent.

18 Q. Okay. That's perhaps an inelegant use of the word --
19 pretty inelegant to refer to judges as inventory, can we agree
20 on that?

21 A. Well, if the Secretary creates a requirement, you
22 look to whether they have the number of judge advocates and
23 the people to support it. We had three dedicated judges to

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1 these cases.

2 Q. Right.

3 A. But there's an inventory to support it.

4 Q. Well ----

5 A. This is about an estimate of supportability.

6 Q. Yeah. And one of the people that you had not
7 coordinated with were the people who, up until this change,
8 legally, in the military context, owned the judges. That
9 would be the TJAGs, correct?

10 A. That's correct.

11 Q. Now, after this was approved, after change --
12 December the -- or, excuse me, January 7th, you certainly
13 heard from at least one TJAG; isn't that correct?

14 A. I received an e-mail from Lieutenant General Darpino,
15 the Judge Advocate General of the Army. I'm not sure what
16 day.

17 Q. Yeah. Well, it was after this was approved; isn't
18 that correct?

19 A. That's correct.

20 Q. And what she said was that -- and I'm operating from
21 memory here, we can find it if we need to -- that she was
22 rather surprised by this Change 1, right?

23 A. I -- yes. I'd like to see that e-mail ----

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1 Q. Okay. Well ----

2 A. ---- if we happen to have it at hand, just real
3 quick. I know there were words to that effect.

4 Q. Yeah. Let's find it. This may not be the correct
5 Bates number. The one we have is 127326, but I'm going to --
6 this may be an old iteration. Let's look.

7 MJ [Col SPATH]: That's it.

8 LDC [MR. KAMMEN]: Perfect. Okay. You got it?

9 WIT: Just a second, sir.

10 LDC [MR. KAMMEN]: Sure.

11 MJ [Col SPATH]: It's Production 107, and then it's Bates
12 stamped 127326. I think it's the third page behind that.

13 WIT: Yes. I have it, Your Honor. I have it, Your Honor.

14 LDC [MR. KAMMEN]: Okay.

15 **Questions by the Learned Defense Counsel [MR. KAMMEN]:**

16 Q. Now -- so neither of us have to operate by memory,
17 she said, "This change in policy has caught me unawares,"
18 right?

19 A. Yes.

20 Q. She indicated to you that she needed some time to
21 digest this?

22 A. That's correct.

23 Q. To determine the ramifications?

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1 A. Yes.

2 Q. And she told you that this change required her to
3 request that you reduce the pool of available judges, true?

4 A. I'm sorry, could you please restate that?

5 Q. Sure. She indicated to you that this change required
6 her to reduce the pool of available -- of judges who would be
7 available to the military commissions, right?

8 A. She said, "I'm not sure they are the right officers
9 to serve as commissions judges under this altered construct.
10 I cannot afford to lose them to Cuba."

11 Q. Right.

12 A. I don't know if they're still part of the pool or
13 not.

14 Q. Neither do I. But the point is she identified two
15 specific judges, right?

16 A. Yes.

17 Q. One was her chief judge, right?

18 A. Yes.

19 Q. The other was responsible ----

20 A. Yes.

21 Q. ---- for some very significant administrative work,
22 correct?

23 A. Yes.

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1 Q. And she said, well, with this change, I can't have
2 them doing commissions work because I can't have them living
3 in Cuba. That's what she says there, isn't it?

4 A. That's correct.

5 Q. And so if they were a part of the commissions pool at
6 that time, she was basically saying don't include them, right?

7 A. And I said that that was the purview of Colonel Pohl,
8 but that is what she was saying.

9 Q. Yeah. Now ----

10 MJ [Col SPATH]: Mr. Kammen, I just want to ask about how
11 much more you have, just ----

12 LDC [MR. KAMMEN]: Not a huge amount.

13 MJ [Col SPATH]: Okay. Because -- I want to give the
14 prosecution some time in between. So if you think you can
15 finish in a reasonable amount, we'll keep going. If you
16 don't, we can take a break and come back, either way. I don't
17 want to cut you off before you're ready to stop. If there's a
18 natural breaking point, let me know where it is.

19 LDC [MR. KAMMEN]: It might be good to just take a break
20 and I can confer with, and we'll wrap it up and then ----

21 MJ [Col SPATH]: All right. Mr. Ary, what we're going to
22 do is we're just going to take ten minutes. It should be just
23 ten minutes on this recess, and we'll be back in session.

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1 Commission is in recess. Thanks.

2 [The R.M.C. 803 session recessed at 1413, 25 February 2015.]

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