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1 [The R.M.C. 803 session was called to order at 1424,
2 25 February 2015.]

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

5 Mr. Ary, can you hear us?

6 WIT: Yes, Your Honor.

7 MJ [Col SPATH]: All right. I know you're the same
8 Mr. Ary who has been testifying throughout the day. I just
9 remind you you are still under oath. Mr. Kammen, you may
10 proceed.

11 LDC [MR. KAMMEN]: Thank you.

12 **DIRECT EXAMINATION CONTINUED**

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

14 Q. Now, when we broke we were talking about Lieutenant
15 General Darpino and the fact that your actions or the Deputy
16 Secretary of Defense's actions reduced the pool of Army judges
17 who were available to the commissions.

18 Let's turn to the Navy. Who's the TJAG of the Navy?

19 A. It's Vice Admiral DeRenzi.

20 Q. Okay. Did you speak with her?

21 A. No.

22 Q. Have you had any communications with her since
23 this ----

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1 A. Yes.

2 Q. I'm sorry?

3 A. Yes, I have, but I haven't talked about this issue.
4 This issue has not come up.

5 Q. So let me see if I have got this right. After the
6 Change 1 was put in effect, you had some contact with Vice
7 Admiral -- how do you pronounce her name?

8 A. DeRenzi.

9 Q. ---- DeRenzi?

10 A. Yes.

11 Q. And she didn't bother to comment on this one way or
12 the other?

13 A. No, she did not. It was probably the subject of
14 litigation at that point.

15 Q. Okay. And so did she say something to the effect of
16 are you rethinking this in light of the litigation?

17 A. No, I don't believe we discussed the topic at all.

18 Q. You don't believe we discussed -- and was this
19 meeting in person somewhere?

20 A. Yes.

21 Q. Okay.

22 A. I mean, I've seen her since then.

23 Q. On how many occasions?

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1 ATC [LT MORRIS]: Your Honor, I'm going to object to
2 relevance. He has testified that he has not had any
3 conversation with Vice Admiral DeRenzi on this.

4 LDC [MR. KAMMEN]: Fair enough, I'll withdraw the
5 question.

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

7 Q. So you do not know sitting here as the judge -- as
8 the convening authority to what extent the pool of available
9 military Navy judges has been reduced as a result of Change 1,
10 correct?

11 A. That's correct.

12 Q. Might be none, and it might be a lot. You don't
13 know, do you?

14 A. I have no idea who is in the pool or who was in it --
15 I mean, I don't know whose -- how it may have changed or ----

16 Q. Okay. Now, General Burne of the Air Force, what --
17 have you had any communications with him ----

18 A. No.

19 Q. ---- about Change 1 since Change 1?

20 A. No, I have not.

21 Q. Or any member of his staff?

22 A. Not that I recall, no.

23 Q. Now, are you saying you don't recall it because it

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1 didn't happen, or you don't recall it because it happened, but
2 you don't recall? Which is it?

3 A. I don't recall it because it didn't happen.

4 Q. Okay. So your testimony is that you have no idea
5 what General Burne's reaction to all of this is, right?

6 A. I don't know other than I heard this morning that
7 there was an issue that might affect the current judge.

8 Q. Yeah, there was an issue that might affect the
9 current judge, like make him leave this case, right?

10 A. But I have not had any interaction with the JAG from
11 the Air Force.

12 Q. Okay. So he's not called, written, sent smoke
13 signals, nothing, right?

14 A. That's correct. That's correct.

15 Q. Okay. And the Marines? Your buddy at the
16 Marines ----

17 A. No.

18 Q. ---- any contact from him?

19 A. No.

20 Q. Okay.

21 A. I'm not sure who's in the pool from the Marines.

22 Q. That's not my question. Have you had any
23 contact ----

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1 A. No.

2 Q. ---- from the Marines?

3 A. No.

4 Q. So you do not know to what extent you even have a
5 pool of judges anymore, right?

6 A. I do not.

7 Q. They may all be gone because of Change 1. If Judge
8 Spath is -- has to leave the case, you may not be able to find
9 any replacements. You don't know, do you?

10 A. I have no idea.

11 Q. Now, as I understand your position in the
12 court-martial setting, the TJAG determines the qualifications
13 of the judges or -- we'll say judges, correct?

14 A. Yes, and they certify them under Article 26(b).

15 Q. And Article 26 ----

16 A. (b) of the UCMJ.

17 Q. Excuse me. And the TJAGs also are responsible for
18 what I'm going to call the requirements of the judges, what
19 duties they have, where they live, that sort of thing,
20 correct?

21 A. Yes. They establish the circuits, make assignments.

22 Q. Okay. And -- but that ultimately comes back up the
23 chain of command to the TJAG, right?

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1 A. Yes.

2 Q. In your vision of military commissions, the TJAG
3 still gets to say who is a judge, right?

4 A. Yes. I believe their role is to nominate qualified
5 judges that meet the requirements set out by the Deputy
6 Secretary of Defense in Chapter 6, I believe ----

7 Q. And once they ----

8 A. ---- of the Regulation for Trial.

9 Q. Okay. And once they nominate them, you get to set
10 the requirements, what their duties are and where they live
11 and that sort of thing, true?

12 A. No, I don't.

13 Q. Well, the Deputy Secretary of Defense does. Change 1
14 does, right?

15 A. That -- that's my belief.

16 Q. Okay. So the requirements at issue under your vision
17 would require -- oh.

18 And when you were staffing, you talked about, you
19 know, going to the prosecutor and the defense and everyone
20 about these requirements, but you said you didn't go to the
21 TJAGs, right? They ----

22 A. That's correct.

23 Q. Okay. And so whatever their requirements were,

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1 whatever their needs were, whatever their issues were, that
2 was of no consequence or concern to you, right?

3 A. No. I believed that the Deputy Secretary could set a
4 requirement for exclusive, full-time judges at Guantanamo, and
5 that the TJAGs would be able to support that requirement.

6 Q. Okay. Now, you're aware, in the biggest criminal
7 case in U.S. history, the judge has found that he is at a loss
8 to see how assigning the military judge at Guantanamo will
9 make the litigation proceed at a faster pace, right? You're
10 aware of that finding?

11 A. Okay.

12 Q. Do you agree that ----

13 A. I can see you're -- I can see you're reading from it.

14 Q. Yeah.

15 A. So yes, okay. That's ----

16 Q. You haven't had a chance to read it yet?

17 A. I skimmed through it, but I can't -- I don't have it
18 in front of me.

19 Q. Okay. Well, the hearings -- the prosecutor does. If
20 I misread it, I'm sure they'll correct me.

21 "The hearings require" ----

22 ATC [LT MORRIS]: I object, Your Honor. It's the same
23 objection. This is not in evidence. He has not laid the

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1 foundation for this witness from it, and for him to read from
2 it is impermissible hearsay, Your Honor.

3 LDC [MR. KAMMEN]: Let me fix this.

4 MJ [Col SPATH]: If you can rephrase. Thank you,
5 Mr. Kammen.

6 LDC [MR. KAMMEN]: Well, let me offer into evidence as
7 whatever the next appellate number is ----

8 MJ [Col SPATH]: Let me just ask the relevance for me
9 making my determination here on a motion pending before me.

10 LDC [MR. KAMMEN]: Your Honor, it seems to me that the
11 relevance is twofold. Number one, it goes to some issues -- I
12 think that -- sort of what I'll call Lewis issues, and I don't
13 want to be more precise than that.

14 MJ [Col SPATH]: Understand.

15 LDC [MR. KAMMEN]: The second bit of relevance -- the
16 second relevance, Your Honor, is -- well, that's really the
17 relevance as it pertains to this.

18 MJ [Col SPATH]: All right. Understand. So I have no --
19 Trial Counsel, let me just ask: It has affected a judge in
20 another case, and I -- that's -- I get what we're offering it
21 for in that regard. Do we need to talk to this witness about
22 it in any detail?

23 LDC [MR. KAMMEN]: Well, okay. Let me do it another

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1 way ----

2 MJ [Col SPATH]: Okay.

3 LDC [MR. KAMMEN]: ---- where we don't have to get into
4 these huge details.

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

6 Q. You're aware generally of the ruling in the 9/11 case
7 dealing with Change 1?

8 A. Yes, I am.

9 Q. And you're aware -- are you aware of what it means to
10 abate the proceedings?

11 A. Yes, I am.

12 Q. It means the proceedings come to a full stop, right?

13 A. Yes.

14 Q. The glacial pace of litigation has slowed to nothing,
15 full stop.

16 A. That's correct, in that case, yes.

17 Q. So knowing that, if you had to do it again, would it
18 be fair to say, you would not change anything, true?

19 A. Knowing what I knew then, I didn't believe that it
20 would have this effect, no. And I would do that -- I stand by
21 that recommendation.

22 Q. You would -- nothing's different. It's all good.
23 Nothing to see here. Not a whiff of UCI in the air, right?

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1 A. I don't believe so.

2 LDC [MR. KAMMEN]: Thank you. Nothing else.

3 MJ [Col SPATH]: Trial Counsel, do you want to begin your
4 cross-examination, or would you like a break before you do?

5 ATC [LT MORRIS]: Sir, I can begin.

6 MJ [Col SPATH]: You may proceed.

7 ATC [LT MORRIS]: Sir, unless Mr. Ary would like a break,
8 I think we have been going for a while.

9 MJ [Col SPATH]: We took the ten-minute break. Mr. Ary,
10 do you want a break ----

11 WIT: No, I can continue.

12 MJ [Col SPATH]: ---- at this point, or are you okay?

13 WIT: No, Your Honor. We'll continue. I'm fine to
14 continue, Your Honor.

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

16 **CROSS-EXAMINATION**

17 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

18 Q. Mr. Ary, good afternoon. I'm going to be asking you
19 a number of questions, and I'm going to allow you the
20 opportunity to respond without interrupting you. Our goal
21 here, intention is to find out even more information about the
22 details surrounding your recommendation.

23 Defense counsel asked you a number of questions

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1 regarding your role as -- your role as defined by the statute
2 and the regulation. What I'd like to do is actually identify
3 those for you and go through those and try and clear some of
4 the fog so that we are ----

5 MJ [Col SPATH]: Trial Counsel, I'm going to give you the
6 same discussion I had with Mr. Kammen. I don't need a speech,
7 and I don't need your commentary on the evidence. I need you
8 to ask questions and get answers. I will resolve the issues.

9 ATC [LT MORRIS]: Understood, Your Honor.

10 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

11 Q. I'm going to direct your attention to -- well, I'm
12 going to actually put up on the ELMO for everybody's benefit
13 Regulation for Trial by Military Commission Chapter 2, and I'm
14 going to direct to you the first paragraph.

15 MJ [Col SPATH]: Give that some time to load. Trial
16 Counsel, we'll let you know when Mr. Ary can see it. Mr. Ary,
17 just let me know when it finally displays. It takes a little
18 while.

19 WIT: Yes, Your Honor. I can see it.

20 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

21 Q. Looking at paragraph A, this is in Chapter 2, titled
22 "Convening Authority," it states there that you're -- the
23 authority, direction and control that you're under, who is

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1 that?

2 A. The Secretary of Defense.

3 Q. And it goes on to talk about the roles of the Office
4 of the Convening Authority and the Director of the Office of
5 the Convening Authority. Who are those two people?

6 A. I wear both hats.

7 Q. And would you flesh that out a little bit? Before
8 you were trying to explain to defense counsel that as being a
9 difference between the commissions and courts-martial process.
10 Would you explain that for us?

11 A. To the extent that a normal, traditional convening
12 authority in the UCMJ would not have any responsibility for
13 essentially resourcing prosecution, defense and the trial
14 judiciary, especially the trial judiciary. That would be
15 something by the JAGs.

16 The other responsibilities that come under that
17 director title, arguably both, is that I have a responsibility
18 for resourcing everything from transportation to the
19 facilities both here in Washington, D.C., and in
20 Guantanamo Bay. And in performing those responsibilities, I
21 am part of the Office of the Secretary of Defense, and I
22 report to the Deputy Secretary of Defense, so the billet
23 resides in the office of the Secretary.

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1 Q. Thank you for that.

2 I'm going to direct your attention to -- can you see
3 Section 2-2?

4 A. Yes. It says I have the authority to convene
5 military commissions as delegated or designated by the
6 Secretary?

7 Q. That's right. And so you were sharing -- or you were
8 sharing earlier about who has the authority to convene
9 commissions, and that is under the Military Commissions Act.
10 And I wanted to allow you a chance to explain that further
11 with the act identified right in front of you.

12 A. Yeah. You know, to that degree that the convening
13 authority is the Secretary of Defense, and he's also
14 responsible for executing the Military Commissions Act.

15 Q. And that's the statutory authority that you were
16 referring to earlier?

17 A. Yes.

18 Q. And you are ----

19 A. I don't recall the specific provision.

20 Q. You are the designated individual under the Secretary
21 of Defense, correct?

22 A. Yes.

23 Q. Next I'll point your attention to the next page,

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1 number 6. Again, this is still under your responsibilities
2 and functions as the convening authority, and ask if you'd
3 like to comment on number 6.

4 A. Yes, I think that that's the ----

5 MJ [Col SPATH]: One minute, Mr. Ary. There's an
6 objection I've got to rule on. Trial Counsel, fair, please
7 rephrase the question.

8 LDC [MR. KAMMEN]: I'm sorry, I didn't ----

9 MJ [Col SPATH]: Say that again.

10 LDC [MR. KAMMEN]: I object because the form of the
11 question is improper. Inviting a witness to comment is not a
12 proper question. If you have a question ----

13 MJ [Col SPATH]: Understand. Rephrase.

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

15 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

16 Q. Are those -- in paragraph 6, are those part of your
17 responsibilities ----

18 LDC [MR. KAMMEN]: Objection ----

19 MJ [Col SPATH]: We can't hear -- hold on. You couldn't
20 hear Mr. Kammen. I'll have him repeat it, and we'll go from
21 there. I'll do it for him. Mr. Kammen's objection was to the
22 form of the question, asking someone to comment or whether or
23 not if they want to comment on the question isn't a proper

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1 question. I sustained that objection. I asked trial counsel
2 to rephrase. I cut trial counsel off just to make sure that
3 we got Mr. Kammen's comment on the record. All right.

4 Trial Counsel, if you would, rephrase.

5 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

6 Q. It is part of your role and responsibility as
7 convening authority to maintain the proper and efficient
8 administration of the trial judiciary, is it not?

9 A. Yes, it is. And that was the duty I was speaking of
10 when I talked about the 2 July ten-page request from the trial
11 judiciary outlining their requirements and why they needed
12 civilian vice military attorneys, and I granted that request,
13 and really formed part of the genesis of the action that we've
14 been discussing.

15 Q. Next I'd like to put in front of you Chapter 6, the
16 same Regulation for Trial by Military Commissions, and looking
17 specifically at Section (b). Can you see that?

18 A. Yes. I'm sorry, it takes me a second. I have old
19 eyes, and it's a bit of a long ways.

20 Yes, I can see that.

21 Q. Now, you were ----

22 A. Um ----

23 Q. Go ahead, please.

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1 A. You know, I -- from my perspective, you know, this
2 document, this regulation was signed by the Deputy Secretary
3 of Defense and established how the trial judiciary was
4 resourced, who it consisted of, the role of the judge
5 advocates in nominating those to the pool, and the role of the
6 Secretary or his designee to select the chief trial judge.

7 Q. And that was part of your discussion -- and this is
8 Prod 107, 127326, in your response to -- in an e-mail with
9 General Darpino, correct?

10 A. Yes. You know, the detailing of the judges is the
11 purview of the Chief Judge, currently Judge Pohl, that
12 comment.

13 Q. That's correct.

14 A. And this is really the foundational piece of why I
15 believe that the Deputy Secretary of Defense had the authority
16 to assign and -- the judges pursuant to this authority, to
17 create a requirement for these judges to be exclusively
18 military commissions judges and to set the location for this
19 judicial circuit.

20 Q. What I'd like to do now is ask that when you became
21 the convening authority, when you became the director in
22 October, would you share with us what was on your plate coming
23 into that -- those roles.

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1 A. There were a number of outstanding personnel requests
2 that I needed to work through and validate, and I believed
3 that I needed to, you know, from the outset, take stock of
4 what facilities were going to be required. Really, I was
5 looking at it from the perspective of what is it that we need
6 to do to support the military commissions process in a way
7 that would facilitate getting these cases to trial.

8 And so I was looking at this approach holistically
9 from facilities in Guantanamo to new office spaces in D.C. I
10 was looking at the outstanding requests by the Office of the
11 Chief Defense Counsel for more attorneys. She specifically
12 requested civilian attorneys for their continuity. And I was
13 looking at dated requests, too, from the trial judiciary, the
14 ten-pager, that essentially laid out that this was a must-fill
15 requirement for them to meet their mission requirements
16 successfully in a timely fashion.

17 So I was looking at, you know, what are the
18 requirements, writ large. You know, one of the things I was
19 concerned about was whether there was a need for a courtroom,
20 another courtroom. And one of the COAs was could we schedule
21 around the cases. And my concern about that was, well, we
22 have to take a hard look at how many hours the commissions are
23 on the record. Do we need another courtroom, or would the

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1 existing courtroom be able to support all of the trials
2 concurrently? I concluded that, given the 34 days on the
3 record in FY '13 and the 33 days on the record, that it was
4 possible to schedule around availability, given the time on
5 the record.

6 But you know, the resourcing piece, I thought, was a
7 key piece because -- especially as we were moving out of the
8 early phase. I thought we were moving out of the early phase.

9 Q. Yes, Mr. Ary. What I'd like to do is go through some
10 of those things that you mentioned in your coming in and
11 desire to properly resource the military commissions. I'd
12 like to point your attention to a number of different
13 documents and start with that memo that you were talking about
14 from Colonel Baime, and that is, for the record, Bates 127707.
15 And, Mr. Ary, that's in Prod 113. That's 127707 to 127716.

16 A. I'm sorry, could you repeat that? I apologize,
17 Lieutenant Morris. I just didn't catch the ----

18 Q. What I'll do, Mr. Ary, is I'll give you the Bates
19 number, and I also would like to put it up on the ELM0. But
20 it is 127707, and that is under Product 113.

21 A. Okay. I have it.

22 Q. Mr. Ary, if you will let us know -- well, you have it
23 in front of you, so I'm going to ask you about ----

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1 A. I do.

2 Q. ---- the page 127707, which is in front of you.

3 Would you give us again the background of this memo and how
4 this impacted in any way your decision when you came into the
5 role that you currently are in?

6 A. I believe -- you know, when I first got here this was
7 a pending action that had not been acted on. I believed,
8 after my initial sort of meet and greet, welcome with the
9 clerks at the trial judiciary, that this was something that I
10 needed to move towards the head of the line, because I thought
11 that they needed the support.

12 But I also thought it was important to validate their
13 requirements, so I went back as part of the overall assessment
14 of resourcing in a document that my prior legal advisor and
15 chief of staff, Mr. Mike Quinn, sent out on October 31st,
16 asking prosecution, defense, and the trial judiciary to sort
17 of revalidate their requirements.

18 I got a response from Mr. Taylor, from the trial
19 judiciary, that incorporated this still-pending request, and
20 so I took action on all of them at the same time.

21 Q. What did the ----

22 A. But this ----

23 Q. Go ahead, sir.

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1 A. This specific document I felt like was very
2 persuasive on the need. It's a ten-page document. It lays
3 out -- they're reminding me of my obligations under the Deputy
4 Secretary of Defense's guidance. And probably one of the big
5 drivers for the need for the change, I thought, was this last
6 sentence in the first paragraph, "These structural changes
7 must occur in order for the trial judiciary to achieve mission
8 success and fully support the military commissions process in
9 a timely manner."

10 And then there was some guidance from the Deputy
11 Secretary of Defense, and they went through a long
12 justification as to the quality of the judge advocates being
13 assigned to the trial judiciary and their need for civilian
14 attorneys.

15 Q. So you have a memo from 2 July 2014, months before
16 you'd taken your position that hadn't been acted on, that's
17 asking for you to do something in -- for the convening
18 authority to do something in a timely manner, hadn't been
19 acted on, and then saying the DEPSECDEF has already put out
20 guidance for you to do something on this. That was all part
21 of your motivation?

22 A. Yes. And, you know, the focus of that one sentence
23 was not on me taking action in a timely manner, it was really

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1 to fully support the military commissions process in a timely
2 manner.

3 But, yes, there was a number of references to both --
4 you know, the 7 May from the current Deputy Secretary of
5 Defense on equitable resource, and I also had a request from
6 the chief defense counsel that was dated in April that I had
7 yet to act on or had not been acted on prior to my arrival.
8 And I believe both of those were urgent, and I needed to
9 revalidate the requirements before proceeding.

10 But this one was fully justified in my mind. In
11 fact, I think I provided more than what was actually
12 requested.

13 Q. You talked about going around and meeting the
14 different section chiefs and the different roles that the
15 Office of Military Commissions, different parties in it. Do
16 you recall meeting with the trial judiciary and any
17 conversations about -- in regards to resources or challenges
18 that they faced?

19 A. Yes, and it's ----

20 MJ [Col SPATH]: Excuse me. I'm sorry. Mr. Ary, I'm
21 sorry, there's been an objection.

22 LDC [MR. KAMMEN]: Given the fact that what we're here
23 about is Change 1, and, you know, we've been patient, but

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1 there doesn't seem to be a whole lot of linkage between any of
2 these documents and Change 1 since none of these documents
3 make the request to move the judge to Guantanamo. So I
4 question the relevance.

5 MJ [Col SPATH]: Trial Counsel?

6 ATC [LT MORRIS]: The whole reason that Mr. Ary is here
7 today is to talk about intent and to give us information that
8 we can't get from what's in front of us. And he has
9 represented that this was not one change that he was making.
10 This was a number of changes that -- and recommendations or a
11 recommendation that he was making. And it certainly goes to
12 intent. It goes to his state of mind ----

13 MJ [Col SPATH]: Understand.

14 ATC [LT MORRIS]: ---- of why he was making all of
15 these ----

16 MJ [Col SPATH]: Objection overruled. You may proceed.

17 ATC [LT MORRIS]: Okay.

18 MJ [Col SPATH]: Objection overruled. You may proceed.

19 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

20 Q. You can continue, and you were sharing. I was asking
21 you if you had had any conversations with any members of the
22 trial judiciary specifically in reference to any resources or
23 challenges with resources or anything, other challenges that

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1 they faced.

2 A. Well, the primary focus of this was to, you know be,
3 make sure that they made the case that I had a duty to
4 properly resource them. They did not believe, given the large
5 number of court filings, that they could keep up with the --
6 essentially a backlog, and that's in here someplace.

7 But, you know, there's a reminder in there from the
8 2008 Deputy Secretary memo that military commissions are a
9 national priority, conducting a fair, just and transparent
10 military commissions process, department's top legal services
11 priority, and necessitates our commitment to dedicate the
12 right number of and most skilled legal professionals the
13 department has to offer. And, you know, I think that that is,
14 you know, critical to who we have in the commissions.

15 They addressed what they believed was a lack of
16 quality in assigned military attorneys. They addressed in
17 here that there was a need for civilian attorneys. I
18 supported that request, and I think impact on mission was
19 paragraph 9 on page 8. And they talked about the impact of
20 the limited number, a lack of continuity, of limited
21 experienced, quality military attorneys.

22 Some of the orders of the 9/11 and the USS COLE cases
23 have not been issued even though they are fully briefed and

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1 oral argument before the commission has occurred without
2 resolution of the associated personnel issues, the backlog
3 could continue to get worse and the cases may be needlessly
4 delayed. The parties do not take breaks from filing motions.
5 The consequence is TJ attorneys need to advise the judge and
6 research on an exponentially growing number of motions.

7 Finally, most orders have second and third effects,
8 and some orders related to discovery appointment of expert
9 assistance directly affect the trial schedule and need to be
10 issued as soon as practicable. I had a duty, I believe, to
11 act on that request, but I felt like as a matter of due
12 diligence I needed to validate this July request, and I got
13 what I thought was more than enough validation in the
14 subsequent request from Mr. Taylor that incorporated this by
15 reference.

16 Q. Mr. Ary, were you able to, after examining this
17 request and looking at your role, were you able to do
18 something about this?

19 A. Yes.

20 LDC [MR. KAMMEN]: Excuse me. I object to the form of the
21 question. It's vague, "do something about this"?

22 MJ [Col SPATH]: I understand the question, and I
23 understand that we're in motion practice, and Rule 104 gives

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1 me a lot of discretion.

2 Objection overruled. You may proceed.

3 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

4 Q. Can you answer that question?

5 A. Yes. They had requested the civilianization of two
6 military attorney advisors. They had asked for two additional
7 attorney -- civilian attorney advisors, and that two
8 additional civilian paralegals be authorized.

9 My action ultimately was, I believe we added five
10 civilian legal advisors to the judiciary, four paralegals, an
11 office manager and three courtroom security officers, because
12 I think the subsequent request addressed the challenges of
13 working through a large number of documents in discovery.

14 So my goal was to ensure that we properly resource
15 the trial judiciary. And this is one of the things that was
16 the genesis of the action to the Secretary, making sure that
17 the trial judiciary was properly resourced and positioned to
18 accomplish their mission in a timely manner.

19 Q. What I'd like to do next, Mr. Ary, is go to a -- what
20 you had referenced earlier, a discussion with defense counsel
21 first on the use of the courtroom, and then also you had
22 mentioned this earlier as being part of this genesis. This is
23 going to be under Prod 112 and Bates 127556. That's

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1 Product 112 and Bates 127556.

2 A. Okay.

3 Q. Why was, Mr. Ary, the hours that the courts were
4 being used an important consideration in your analysis, in
5 making your recommendation?

6 A. You know, the genesis of this was part of my
7 facilities review. All of this was a holistic review, and I
8 think that that reflects the convergence of two issues that
9 reflected on the support requirements for the trial judiciary
10 that I had as one of my obligations.

11 But I think that I addressed that in my -- basically
12 my assessment in the sense that, you know, we have, I don't
13 know how many, over 250 people full time on this issue, and I
14 believe we needed full-time judges on site to address these
15 issues. I'm not sure. Maybe I'm not understanding your
16 question.

17 Q. Understand. So -- no, it's helpful when you say a
18 holistic approach to identify all of the parts and put those
19 documents in their proper place.

20 What I'd like to do next is go to a memorandum by the
21 Chief Defense Counsel sent on 10 December 2014, and that's
22 Bates number 127730 and under Product 113.

23 A. 127730. Did you say 127730?

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1 Q. That's correct.

2 A. Okay. Just a second. I'm sorry. Okay. Okay.

3 Q. Are you there, Mr. Ary?

4 A. Yes.

5 Q. Can you explain -- there was some back and forth on
6 your role in resourcing and with defense, specifically with
7 the defense, but can you explain first what this memo is?

8 A. This is a request -- there was a 7 April 2014 request
9 from the Office of the Chief Defense Counsel for additional
10 attorneys to support the defense mission, and it had not been
11 acted on prior to my arrival.

12 I believed that I needed to revalidate that
13 requirement as part of my due diligence. And so it was
14 included and addressed in a chief of staff -- who referenced
15 that she sent out. And so this was her request for additional
16 support.

17 Q. Do you know if you were able to facilitate meeting
18 those requests?

19 A. Yes. You know, one of the issues that had come up
20 was there was essentially all of the military billets were not
21 being filled, and so the legal advisor, Mr. Quinn, had
22 proposed that essentially we could convert some of the
23 military structure to civilian.

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1 I ultimately decided to leave the military billets,
2 that requirement, the same, because even if it was
3 proportionately filled, I believed that we needed to make sure
4 that we had all of the proper resources, military and
5 civilian, to meet the challenge.

6 In response to this request, we approved -- I believe
7 it's eight for the civilians in an action, and I did not
8 approve any additional structure for the Office of the Chief
9 Prosecutor.

10 Q. And not to leave ----

11 A. I believe this action ----

12 Q. Go ahead.

13 A. I essentially believed that this action was required
14 to fully and equitably resource the prosecution and defense.

15 Q. Now, you mentioned the prosecution. Not to leave the
16 Office of the Chief Prosecutor out, but you also, as part of
17 your holistic approach to properly resource military
18 commissions, you did reach out to Office of the Chief
19 Prosecutor as well?

20 A. Yes.

21 Q. And ----

22 A. And as ----

23 Q. Go ahead.

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1 A. To sum up -- and to sum up their request, they wanted
2 to keep their military manning, and I believed that that
3 rationale should probably apply across the board.

4 Q. Next I'd like to direct your attention under
5 Product 107 and to Bates number 127325.

6 A. I apologize. I'm probably a little slow, but could
7 you say that again?

8 Q. Sure. It's 127325.

9 A. Okay. Yes. This is a request for reassessment of
10 classification guides employed in support of military
11 commissions. It's from me to the acting director of the
12 Defense Intelligence Agency and all of the original
13 classification authorities on this security declassification,
14 declassification review team.

15 Q. And this is a memo -- a memorandum written by
16 yourself, correct?

17 A. Yes, and I -- it's dated on 10 December, the day
18 after the release of the Senate Select Committee on
19 Intelligence report ----

20 Q. And you had shared ----

21 A. ---- and ----

22 Q. Go ahead.

23 A. Go ahead.

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1 Q. You had shared that this was one of the -- you said
2 more important -- I don't remember if you said most important,
3 but in this holistic approach, understanding that this was
4 part of it and part of the overall resourcing and taking
5 impediments out of the way; is that correct?

6 A. That's correct. I believed the challenges with
7 discovery and access to the evidence remained probably the
8 biggest challenge in these cases proceeding to trial, and
9 essentially, I wrote that we were committed to promoting
10 transparency to the maximum extent possible as part of our
11 mission to provide a fair and just forum to cases referred to
12 military commissions, talked about that goal.

13 I believe we -- I believe we must re-evaluate the
14 classification guides applied to military commissions, to
15 ensure they stay consistent and keep pace with the evolving
16 national security posture. Yesterday's declassification
17 release of the executive summary of the SSCI -- to use the
18 acronym -- study of CIA's detention and interrogation program,
19 represents a significant departure from past classification
20 practice. This change presents an opportunity for those
21 agencies involved in declassification or
22 classification/declassification review process, to revisit
23 their classification guides employed in support of the

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1 military commissions.

2 Accordingly, I request the original classification
3 authorities take this opportunity to reassess whether these
4 guides can be simplified and clarified in a manner that will
5 better support the interests of justice and national security.

6 And then in a related matter, I stated that the
7 military commissions currently operates without access to the
8 different guides used to classify court filings. Under the
9 current practices or practice, documents are prepared by the
10 parties and subsequently classified by the review process. If
11 it is possible to provide OMC and the litigants with any
12 documents that would clarify the classification standards in a
13 way that would support an increased pace of litigation, it
14 would be helpful.

15 By taking advantage of this opportunity to create
16 greater transparency for the military commissions, I believe
17 we have the ability to take a significant step toward
18 providing a more open, fair, and just military commissions
19 process. Thank you for your consideration.

20 MJ [Col SPATH]: Lieutenant Morris, the court reporters
21 believe that we're going to have to mark everything as a
22 demonstrative exhibit. We'll debate that later since we're
23 identifying them, but keep track of what numbers we're putting

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1 on the ELMO.

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

3 MJ [Col SPATH]: We'll deal with that as we move on, but
4 they're all out of the same exhibit in the same form.

5 ATC [LT MORRIS]: Yes.

6 MJ [Col SPATH]: I understand, but just keep track of the
7 numbers.

8 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

9 Q. Now, you can probably do that better than I can, and
10 I'm going to ask if you would, for all of the documents that
11 we've gone over, for the July memo, for the trial judiciary,
12 for the defense memos asking for resources, for the examining
13 the hours that the courtrooms were being used, your memo
14 reaching out to the Defense Intelligence Agencies, can you,
15 for our benefit, explain how all of that fit into your
16 recommendation to the Deputy Secretary of Defense?

17 A. Yes. I believed I essentially needed to take a
18 holistic approach to all of the challenges affecting the
19 military commissions from the viewpoint of what is it that the
20 convening authority can do that would promote a more
21 transparent, fair and just process.

22 As I looked at it, probably the biggest challenge was
23 classification issues. And I believed that in order to meet

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1 the discovery obligations, in order to get these cases to
2 trial, this was a fundamental step. And I'm referring to it
3 because it was the last one we discussed.

4 But to me this was a game-changer. I believed that
5 the release of that report would loosen up some of the
6 challenges that I believed had plagued discovery in these
7 cases. And once that was released, then I thought that -- we
8 had 250-plus people working these cases full time. I thought
9 it was at that point that we probably needed to look at the
10 issue of whether we should have full-time judges onsite.

11 So to look at it prior to the release of the Senate
12 report, I thought, would be premature, so that explains the
13 thought process and my timing.

14 Q. That's helpful.

15 And then in regards to the recommendation that you
16 made, Change 1 to the Deputy Secretary of Defense, what -- can
17 you give us a little bit more on your thought process on the
18 lawful and proper way to do that, and then also explain there
19 was back and forth with the defense counsel on not reaching
20 out to the TJAGs. Can you explain that a little bit?

21 A. Yes. In the sense that my billet is placed in the
22 Office of the Secretary of Defense and I work for the Deputy
23 Secretary, I didn't believe it would be appropriate to staff

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1 internal communications within the office of the Secretary to
2 either the Secretary of the Army, the Secretary of the Navy,
3 the Secretary of the Air Force, or the TJAGs.

4 I believe I had a proposal, a recommendation, and he
5 had the authority to take an action that would establish a
6 requirement. And I believed it was a requirement that would
7 be filled by the services in a way that would provide the very
8 best judges, and I was satisfied. I believed we had great
9 judges. I hoped that they would stay.

10 I didn't believe that the duty station of the judges
11 or the fact that they had been taken off of UCMJ requirements
12 would affect in any way their substantive rulings in any case.
13 I believed it would only affect where it was they were and
14 their availability to address these issues on the record. So
15 I thought it was influence-neutral, and that was the
16 recommendation of my legal advisors prior to proposing a
17 change in the requirement.

18 But I think it's fundamental to my decision process
19 that I was assessing what I believed was an issue that related
20 to the military commissions process as a whole. This was not
21 about any particular judge, any particular case, or any
22 particular decision. This was, in my mind, necessary to
23 address requirements of the pending cases and future cases.

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1 Q. This was a recommendation that you made up to the
2 Deputy Secretary of Defense as your boss, and not something
3 that you were trying to reach down into any of the judges'
4 courtrooms; is that correct?

5 A. That's correct.

6 LDC [MR. KAMMEN]: Objection. Self-serving.

7 MJ [Col SPATH]: Overruled. I need to know his
8 motivations, or at least what he testifies his motivations
9 are.

10 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

11 Q. Can you state your answer again as to your
12 motivations?

13 LDC [MR. KAMMEN]: Just for the record, same objection.

14 A. I believed that ----

15 MJ [Col SPATH]: Same ruling.

16 Sorry, Mr. Ary. You can answer.

17 WIT: Yeah. I'm sorry, Your Honor.

18 A. I wanted to make sure I was ---- I believed that I
19 was to raise my recommendations. In fact, I believed I had a
20 duty to raise any observations or recommendations to my boss,
21 the Deputy Secretary of Defense, and that if I had solicited
22 the input of the TJAGs, they might have taken some sort of
23 action that was pre-decisional that might have affected the

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1 trials.

2 I wanted to avoid any impact. I wanted to go to the
3 boss, the Deputy Secretary, to make a decision on a
4 requirement because I believed that the JAGs would fully
5 support having full-time judges down there.

6 Q. In fact, Mr. Ary, when we look at post-decisional,
7 your e-mail to notify the TJAGs -- and this was referenced
8 earlier, that you stated that you know how difficult it can be
9 to replace judges with their exceptional qualifications and
10 experience. Do you remember writing that?

11 A. Yes, and I believe I expressed the hope that they
12 would be allowed to remain on the cases. But I believed I had
13 to recognize -- I mean, they had the authority to take
14 whatever action. This is their decision as to how they fill
15 requirements, much like it's their decision on how they fill
16 and who they send to fill military attorney requirements in
17 the commissions.

18 Q. So just to get the clearest answer, there was nothing
19 about any of the judges' conduct or the judges themselves that
20 influenced your recommendation to the DEPSECDEF for Change 1?

21 A. Absolutely not. This was not about any judge, case
22 or decision. It was about what I believed was necessary to
23 make the commissions process more available to the litigants

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1 in addressing these complex, important cases.

2 Q. And what do you say to defense counsel's comment that
3 because your legal advisors explored this, among other issues,
4 that that somehow establishes a credibility to that statement?

5 A. Well, my legal advisors advised me that I had the
6 right and the duty to bring these issues up to my boss. They
7 believed that essentially the DEPSECDEF had that authority.

8 You know, there's probably no good idea in any
9 process, and there's three sides to every argument. I've
10 always asked that I get all sides to the argument, and I was
11 fully informed by my legal account -- legal advisors of all of
12 the issues. But I believed that I had a duty to raise this
13 with the Secretary because I believed that we needed full-time
14 judges with this as their exclusive duty and available to go
15 on the record and support the litigation in the process in
16 Guantanamo or the venue for the commissions.

17 Q. Isn't it a fact that if your legal advisors weren't
18 taking your recommendations and comparing them to the manual
19 and the regulations in your role and examining it from every
20 angle, they in fact would not be doing their job, correct?

21 A. That's correct.

22 Q. Let me just ask the question again but in a different
23 way: Did you perceive this recommendation in any way to be

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1 trying to unlawfully influence this commission case or any
2 commission case?

3 A. No, I did not. I believed that it was simply a
4 change in a requirement that would be supportive of really the
5 mantra of increased transparency and fairness and justice, and
6 I believed it was something that would make it easier for the
7 judiciary to work through the challenges of these complex
8 cases because of the magnitude of those cases.

9 I truly believed these were a national priority, and
10 my primary focus was the interest of justice, but I believed
11 that the accused, the government, the victims, the families,
12 the American public all deserved a full and fair trial in a
13 timely manner, and all of these actions were designed to do
14 that and intended to do that.

15 Q. Sir, based on that intent, that was the intent and
16 origin of Change 1 and your recommendation to the DEPSECDEF?

17 A. That's correct.

18 ATC [LT MORRIS]: Can I have just a moment, Your Honor?

19 MJ [Col SPATH]: You may.

20 [Pause.]

21 Questions by the Assistant Trial Counsel [LT MORRIS]:

22 Q. I'm going to ask you some more questions about the
23 staffing of the trial judiciary, and then specifically focus

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1 in on your -- I think what you called your -- when you first
2 got here you went and met with the different people. Did you
3 have a conversation with the -- any members of the trial
4 judiciary in regards to, again, resourcing or challenges that
5 they faced in resourcing?

6 A. Yes. You know, I think that those challenges are
7 probably fairly well explained in that 2 July mission -- or
8 request, but, you know, they talked about the challenge of,
9 you know, preparing a large number of documents, and they
10 didn't believe that they had had the military attorneys
11 capable of dealing with the complex litigation that they were
12 involved in, and that the burden essentially lay with the two
13 senior civilian advisors.

14 And given the large teams on all sides, the high
15 volume of numbers, you know, I believed that that was clearly
16 a valid resourcing request. They believed they were behind.
17 They believed they had a backlog, so I believed that that had
18 to be a priority to meet their request, and that was a huge
19 genesis in my taking this action.

20 I could authorize the increase of the attorneys,
21 paralegals, courtroom security officers and the office
22 manager, but anything affecting the judges I believed had to
23 go to the Deputy Secretary of Defense.

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1 Q. Do you recall -- go ahead, Mr. Ary.

2 A. So that's why I took that recommendation to him.

3 Q. Do you recall any comments specifically with them
4 talking about challenges addressing geographic challenges?

5 A. Yes. It was mentioned by one of the them that, you
6 know, one of the challenges was that they didn't have judges
7 on site. I realized that meant in D.C. ----

8 LDC [MR. KAMMEN]: Excuse me.

9 A. ---- but it was they had the tyranny of distance that
10 created an issue for them.

11 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

12 Q. And in the ----

13 A. I believe that's also addressed in the -- I believe
14 that's also addressed in the 2 July document. I'm not sure
15 where, but I'd have to look at it.

16 Q. But you're saying you remember in your conversation
17 with trial judiciary that challenges of location and then not
18 being collocated was mentioned to you? And collocated ----

19 A. Yes.

20 Q. ---- I mean with the judge; is that correct?

21 A. I think they were just merely referring to the
22 challenge of being in the Hoffman Building in D.C. and their
23 judges at other locations. It was just one of their -- you

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1 know, I don't think it was a defining factor for them, but it
2 was one of the challenges as they prepared documents in
3 support of the trial judiciary.

4 Q. And the ----

5 A. I think it's a challenge that affects all of the
6 organizations. Guantanamo is a different -- is a difficult
7 location when most everybody is in D.C.

8 Q. And with the new resources and the personnel that
9 have been approved for the trial judiciary, what is the intent
10 of where you'd like that collocation to take place?

11 A. Well, that was something I was going to leave for the
12 trial judiciary to determine where those bodies would best
13 support their requirements.

14 ATC [LT MORRIS]: Just a moment, Your Honor.

15 [Pause.]

16 Q. Based on, you know, comments and a shared challenge
17 of the spread-apart nature of all of the parties, if these new
18 resources of the trial judiciary -- if they came to you and
19 asked for you to accommodate lodging for them at
20 Guantanamo Bay for a location -- for their location, would you
21 support that?

22 A. Yes.

23 ATC [LT MORRIS]: Mr. Ary, those are all of the questions

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1 I have for you now. Before ----

2 WIT: Thank you.

3 **Questions by the Assistant Trial Counsel [LT MORRIS]:**

4 Q. Before I finish, I wanted to give you an opportunity:

5 Is there anything that you wanted to, from my questions,

6 clarify?

7 LDC [MR. KAMMEN]: Objection.

8 MJ [Col SPATH]: Sustained.

9 All right. Mr. Ary, just hold on a second. The
10 defense counsel may have some additional questions.

11 WIT: Yes, Your Honor.

12 **REDIRECT EXAMINATION**

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

14 Q. As I understand your talking to the prosecutor, you
15 talked to the chief defense counsel, and the issue was that --
16 the concern she had was that the military wasn't sending
17 enough people, right?

18 A. It was -- it was probably enough people, the right
19 people, and for the requisite period of time. I believe a
20 concern she had was that a lot of the folks will come over for
21 a one-year session, and she believed she needed longer
22 periods.

23 Q. They needed people ----

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1 A. I'm sorry, I was just trying to ----

2 Q. They needed more people for longer periods of time,
3 right, than the military was willing to provide, right?

4 A. That's correct.

5 Q. And by people, what we're talking about are lawyers,
6 correct?

7 A. Yes.

8 Q. That would have had to have been detailed to the
9 chief defense counsel by the TJAGs, right?

10 A. They're sourced and assigned, and then she, the chief
11 defense counsel can either reject or accept, yes ----

12 Q. And they're sourced and assigned ----

13 A. ---- which meet the requirement.

14 Q. Excuse me. They're sourced and assigned by the
15 TJAGs, right?

16 A. Yes.

17 Q. Thank you.

18 So she decides -- so she requested more civilians.
19 True?

20 A. That's correct.

21 Q. Okay.

22 A. That's correct.

23 Q. Now, the clerk had a similar problem, right?

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1 A. Yes.

2 Q. The people the military was sending were not there
3 long enough, correct?

4 A. Yes.

5 Q. Would be maybe not the right fit?

6 A. Yes, that was an issue, too.

7 Q. Sometimes maybe in the view of the administrative
8 people, some of them were not really qualified, true?

9 A. Yes, that's accurate.

10 Q. So they wanted more civilians, right?

11 A. Yes. Yes.

12 Q. And so the staffing and the resource was to provide
13 at least two of the three legs of all of this with more
14 civilians, correct?

15 A. That's correct. I believe that that best fit the
16 requirement.

17 Q. And before you -- because the civilians haven't yet
18 been hired by the Office of the Chief Defense Counsel, have
19 they? That was just approved.

20 A. No, they have not.

21 Q. Okay. And as I understood your answers earlier, the
22 civilians that are going to go to the trial judiciary haven't
23 yet been hired, true?

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1 A. That's correct. That's my understanding.

2 Q. So before you hired these civilian resources that
3 were necessary for two of the three legs, your first order of
4 business was to move the judges and only the judges to
5 Guantanamo Bay, correct?

6 A. Yes, I recommended that the Deputy Secretary make
7 that a requirement ----

8 Q. And in making that ----

9 A. ---- and I thought that that would ----

10 Q. And in making that recommendation as we've discussed,
11 you didn't discuss it with anybody else except -- outside of
12 your office and Mr. Preston; isn't that correct? And
13 Mr. Work; isn't that true?

14 A. Yes. I'm sure it was discussed at the DoD GC, but
15 that's correct.

16 Q. That's Mr. Preston, isn't it?

17 A. Yes.

18 Q. Okay.

19 A. Yes.

20 Q. And as I understood your answer, it was because you
21 were afraid that the TJAGs would undermine it in some way, if
22 they learned of it?

23 A. No. I think that the challenge from Salyer was that

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1 if you contact a supervising -- a supervisor of a judge, that
2 could be viewed as an attempt to remove the judge, and I had
3 no intent to remove the current judges.

4 Q. So if you put the judge -- order the judge to a place
5 and make him quit his job and his boss removes him, that's not
6 removal?

7 A. I went to the Deputy Secretary to create a
8 requirement to make it the exclusive duty of the judges in
9 Guantanamo.

10 Q. And as ----

11 A. How the JAGs reacted to that was going to be their
12 decision.

13 Q. And as we discussed, and I won't belabor the point,
14 when you did that, you knew there was a real good possibility
15 one, two or all three of these judges would be gone, true?

16 A. Well, I hoped that this would be treated as our
17 number one national priority and we would keep the same
18 judges.

19 Q. We understand your speech. Would you answer my
20 question. We've discussed this earlier.

21 A. There was a possibility.

22 Q. Yes?

23 A. Yes, sir, there was a possibility.

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1 Q. Now, one final question: As you visualize and you
2 understand in your view of the commissions, the Deputy
3 Secretary of Defense or his designee gets to appoint the Chief
4 Judge, right?

5 A. Yes, that's how it reads.

6 Q. And you are the designee, true?

7 A. No, I'm the convening authority.

8 Q. But you ----

9 A. I'm designated as the convening authority only, and
10 that's different from -- I can't -- I don't believe I could
11 make changes to the regulations. That's the Deputy
12 Secretary ----

13 Q. Oh. My question's ----

14 A. ---- and he's the ----

15 Q. My question's unclear and I apologize.

16 You believe you have the authority to appoint the
17 Chief Judge of the Military Commissions; isn't that correct?

18 A. Absolutely -- absolutely not.

19 Q. Absolutely yes?

20 A. Not.

21 Q. Ah. Thank you.

22 LDC [MR. KAMMEN]: Nothing further.

23 MJ [Col SPATH]: Trial Counsel, any additional questions?

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1 about current sitting judges that -- since there was one from
2 each service, essentially.

3 And so I believed this was about establishing a
4 requirement, essentially a circuit for military commissions
5 exclusively at the venue for the commissions, and then it was
6 up to the JAGs to fill that requirement.

7 Q. Was there any thought in the discussion process
8 within your office about making the change in duty location to
9 move it down to the site of the commissions, to make it
10 prospective, where it would impact judges who were assigned to
11 future commissions cases?

12 A. No, I don't believe we addressed that. We probably
13 did -- I mean, we talked about a lot of things, whether it
14 should be primary, sole, exclusive; whether you -- we
15 didn't -- there were a variety of issues that we addressed,
16 whether it didn't affect the move, it was just the exclusive.
17 But the recommendation is what it is.

18 Q. You testified -- you talked about there was some
19 recognition that you may lose some of the currently detailed
20 judges. Was there any discussion in the office about how that
21 might impact a commissions case where a judge had been
22 currently detailed and the hearing process -- I know none of
23 the trials, but the hearing process was underway?

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1 A. Yes. And, you know, that was one of the concerns,
2 because I believe the start-up cost, given the complexity of
3 the litigation and the voluminous records, that was going --
4 that was a potential for delay.

5 I also believed that at the point in which trials
6 began, maybe even with sequestered members, these trials could
7 last for a significant period of time, and in effect they
8 would become the exclusive duty and sole duty, and that the
9 judge would have to remain in Guantanamo for an extended
10 period of time during the trials. So I believed that I was in
11 some ways only moving that requirement up. So that was
12 the ----

13 Q. There was some ----

14 A. Does that answer your question? I'm sorry.

15 Q. No, that's all right.

16 There was some discussion during your testimony that
17 there was a change -- the Change 1 I'm talking about,
18 obviously. It was initially your idea, and then of course
19 sent to DEPSECDEF for his decision and signature. When it --
20 when you had the idea and when you were talking to your office
21 initially about here's what I want to do, can you tell me what
22 your direction was to your staff?

23 I assume they drafted the initial change and the

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1 drafts that we've seen and the memos we've seen. What was
2 your direction to them in creating this?

3 A. You know, my focus was always on properly resourcing
4 and positioning the commissions to do the mission, and I
5 believe that, you know, my direction was essentially to lay
6 out the rationale behind what we needed to do to support the
7 judiciary from a resourcing standpoint, what we -- where we
8 were in the litigation, given the status of the motions, and
9 essentially -- how do you position the commissions so that we
10 can focus on these extremely complex cases, given their
11 importance to national security and the nation.

12 Q. With regard to Change 1, as I read the regulations
13 for trial, and obviously we've got a Change 1 to it, but as I
14 read that, the Chief Judge is the SECDEF's designee to
15 supervise and administrate the trial judiciary.

16 Why didn't you talk to the Chief Judge prior -- about
17 this particular change, the movement to Guantanamo of trial
18 judges and the exclusivity of their duties, prior to moving
19 forward with your recommendation?

20 A. You know, it's not something that really came up on
21 my menu, Your Honor. I probably would have been reluctant to
22 have ex parte communications with the judge. I know it's a
23 resourcing argument, but all of my dialogue with the trial

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1 judiciary had always been through the clerks. I didn't
2 address it with them either. I just looked at it as something
3 I needed to recommend to my boss because I believed it would
4 support the mission of the military commissions process.

5 Q. And I know you talked in your testimony about your
6 belief that its influence is neutral on the trial judges,
7 that, I mean -- yes, we'll have a new place where we're
8 supposed to move, and yes, we're having a change from primary
9 duty to exclusive duties. But the goal wasn't to have a
10 negative or a positive impact, it was to be influence-neutral,
11 you said.

12 I guess my question really has to do with appearance
13 concerns and the like. You've obviously had a brief
14 opportunity to look at the ruling in KSM. Was there any
15 discussion about the appearance issue, that if you move just
16 the judges to GTMO, if they don't particularly want to be
17 here, they might feel they're under some pressure to move
18 cases forward in a way that's inappropriate?

19 A. I didn't believe so. I thought that -- you know, my
20 thought process going into that was that if we really wanted
21 to make these cases move, we would probably look at moving
22 everyone down, but that's not supportable in Guantanamo.

23 But I believe that making it the exclusive duty and

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1 making the commissions on site from an appearance perspective,
2 I believe I -- I thought that most people would assume that we
3 had the full-time exclusive judges at GTMO, since that was the
4 site of it and the venue of the commissions.

5 And then I thought it would be neutral in the sense
6 that I didn't believe it would affect the professional
7 judgment of any judge given their -- they would make the same
8 substantive calls whether they were wherever or in Guantanamo.
9 I didn't think that impacted judges' decisions in Iraq or
10 Afghanistan either.

11 Q. I know we went through a conversation about your
12 conversations regarding Change 1 with the various TJAGs, and
13 it appears only General Darpino has engaged with you directly
14 in response to the change; is that correct?

15 A. That's correct, Your Honor.

16 Q. Has there been any engagement from the other TJAGs
17 through their staff or their deputy ----

18 A. No ----

19 Q. ---- deputy TJAGs?

20 A. ---- I haven't. No, I left all of that to the DoD
21 general counsel. I believed I should stay out of any issues
22 regarding implementation or how they may approach the
23 Secretary's change in the requirement.

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1 Q. Through the deputy -- or through the DoD general
2 counsel, have you learned about the reaction to it within the
3 TJAG community?

4 A. I had heard that they believed they should have been
5 consulted, yes. But I didn't follow up with that later.

6 Q. All right. Just give me another moment to look
7 through the rest of my notes. Thank you.

8 [Pause.]

9 MJ [Col SPATH]: Defense Counsel, any questions based on
10 my questions?

11 LDC [MR. KAMMEN]: No.

12 MJ [Col SPATH]: Trial Counsel?

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

14 MJ [Col SPATH]: All right. Mr. Ary, I appreciate your
15 testimony. I don't know if we're going to need additional
16 testimony as we work through this motion, but I'll have
17 counsel engage regarding scheduling if that becomes a
18 necessity. I'm going to give you a standard order in the
19 interim, and that is please don't discuss your testimony or
20 any aspect of your testimony with anyone right now until this
21 motion is resolved, just because there may or may not be other
22 people near you who might have to testify about this. If you
23 could do that. Do you understand?

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1 WIT: Yes, I understand. Thank you, Your Honor.

2 MJ [Col SPATH]: All right. Thank you. We're going to
3 turn off the video feed here in just a moment. Thank you very
4 much for your testimony and your time today.

5 WIT: Thank you, Your Honor.

6 **[The witness was warned, excused, and the VTC was terminated.]**

7 MJ [Col SPATH]: I want to try to cover a little bit more
8 on the record today, try to get a road ahead for tomorrow or
9 at least give you an idea of when I can give you a road ahead
10 for tomorrow. Let's take ten minutes and come back on the
11 record for a little while and I'll have some questions.

12 Mr. Kammen? Make sure you push the microphone down.

13 DDC [CDR MIZER]: Do I need to push the microphone here,
14 sir?

15 MJ [Col SPATH]: No.

16 DDC [CDR MIZER]: The defense would like, when we come
17 back, Judge, to call the Deputy Chief Defense Counsel,
18 Mr. Little, who has re-entered the courtroom, for the purposes
19 of impeachment of Mr. Ary's testimony under 613(b). Mr. Ary
20 was offered the opportunity twice to say whether he discussed
21 the pace of litigation during his initial meeting with the
22 chief defense counsel. Mr. Little was there. We believe that
23 would be directly contradicted by Mr. Little's testimony,

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1 Judge.

2 MJ [Col SPATH]: Trial Counsel?

3 DCP [COL MOSCATI]: Judge, I'm not sure I was following
4 Mr. Mizer's assertion. He asserted that the witness indicated
5 Mr. Little was not there, but yet he was? Is that -- is that
6 my understanding?

7 MJ [Col SPATH]: I don't think so. Let me double check.

8 DDC [CDR MIZER]: Judge, Mr. Ary testified ----

9 MJ [Col SPATH]: No, I remember that. He said ----

10 DDC [CDR MIZER]: Yes.

11 MJ [Col SPATH]: ---- the pace of litigation was not
12 discussed during his meeting.

13 DDC [CDR MIZER]: That's exactly right. Mr. Little was at
14 that meeting, and he will testify that the pace of litigation
15 was in fact discussed.

16 MJ [Col SPATH]: Thank you.

17 DCP [COL MOSCATI]: Judge, the only thing I would say is
18 we would like to check the transcript. There were many times
19 the witness indicated he knew something verse he did not
20 believe something.

21 MJ [Col SPATH]: I -- well, I'll do this. I took copious
22 notes. I'm going to look at the transcript. Ultimately
23 credibility is critical in any motion practice. Is that the

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1 limited purpose for which you're going to call Mr. Little?

2 DDC [CDR MIZER]: It is, Judge. I imagine it would take
3 ten minutes.

4 MJ [Col SPATH]: We're going to take 10 minutes to do that
5 instead of talk about it for 20. So we'll do that when we
6 come back. We'll take ten minutes and have some conversation
7 when we come back.

8 [The R.M.C. 803 session recessed at 1554, 25 February 2015.]

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