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1 [The R.M.C. 803 session was called to order at 1602,  
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 Defense Counsel, you may call your witness.

6 DDC [CDR MIZER]: Your Honor, the defense would call the  
7 Deputy Chief Defense Counsel, Mr. Billy Little.

8 MJ [Col SPATH]: Okay. Mr. Little, would you come up to  
9 the witness stand. Trial Counsel, if you would swear the  
10 witness in, please.

11 **BILLY LEE LITTLE, JR., civilian**, was called as a witness for  
12 the defense, was sworn, and testified as follows:

13 **DIRECT EXAMINATION**

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

15 Q. Would you please state your full name, spelling your  
16 last name for the record.

17 A. It's Billy Lee Little, Jr., last name is L-I-T-T-L-E.

18 Q. What is the city and state of your residence?

19 A. It's Arlington, Virginia.

20 ATC [LT MORRIS]: Thank you.

21 **Questions by the Detailed Defense Counsel [CDR MIZER]:**

22 Q. Good afternoon, Mr. Little.

23 A. Good afternoon.

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1 Q. Mr. Little, I want to keep this as brief as possible.  
2 Can you state for the record where you are employed?

3 A. I am currently employed with the Office of the Chief  
4 Defense Counsel.

5 Q. And how long have you been employed in that capacity?

6 A. I started work on September 8, 2014.

7 Q. Can you give the judge a previous synopsis of your  
8 background and how you came to occupy that position?

9 A. Sure. Just prior to occupying this position I was an  
10 administrative law judge in Arizona. Prior to that I was in  
11 private practice. I did capital defense work. I also spent  
12 24 years in the military, not as a JAG officer. I spent time  
13 on active duty as a Marine Corps officer and an Air Force  
14 officer and I retired as a colonel, 06.

15 Q. Thank you, sir.

16 Now, do you know Mr. Vaughn Ary?

17 A. I know him. I'm not friends with him, but I know  
18 him. I have met him.

19 Q. Okay. And how is it that you know him, sir?

20 A. I became aware of him when he came to be the  
21 convening authority. That was, I believe, in October of 2014.

22 Q. And have you at any time had an opportunity to meet  
23 Mr. Ary?

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1 A. I have.

2 Q. And when was that, and what was the circumstances of  
3 that meeting? What were the circumstances of that meeting?

4 A. It was -- it seemed like an introductory type meeting  
5 in the middle of October. I don't remember the exact date.  
6 But I can tell you we met in Colonel Mayberry's office. She  
7 is the Chief Defense Counsel. Mr. Ary was on a brown leather  
8 couch with me, seated to my right. Colonel Mayberry was in a  
9 brown leather chair, seated to my left. Mr. Quinn was there,  
10 he was on a couch further to the right. So it was sort of a  
11 U-shape with a coffee table out in the middle.

12 Q. Do you recall how long that meeting lasted?

13 A. Approximately an hour to an hour-and-a-half.

14 Q. Okay. Did you have any conversations with Mr. Ary,  
15 or were there any discussions involving Mr. Ary during that  
16 meeting?

17 A. Yes, all four of us talked during that meeting.

18 Q. What, if anything, was discussed during that meeting?

19 A. Resourcing, how you doin', introductory type stuff.

20 Q. And any point during that meeting did Mr. Ary discuss  
21 the pace of litigation?

22 A. Yes, he did.

23 Q. And can you describe for the military judge Mr. Ary's

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1 comments?

2 A. Sure. Obviously, the conversation was not recorded.  
3 There's no transcript of it. I don't remember every single  
4 word of it, but I do remember two things. I remember the gist  
5 of it, and I remember some things that stuck out in my mind  
6 because they were a little shocking to me.

7 Q. Let's take those one by one. What was the gist of  
8 the comment?

9 A. The gist of the conversation was resourcing with an  
10 eye towards moving the cases forward. And I can explain that,  
11 if you'd like.

12 Q. Please.

13 A. Okay. We, Colonel Mayberry and myself, we were  
14 discussing the lack of resources. General Ary -- I'm sorry,  
15 Mr. Ary, was discussing his view on those resources, again,  
16 with an eye towards moving the case forward. And the reason  
17 why it sticks out in my mind is that he made a statement to  
18 me, turned to me on the couch and smiled in sort of a casual  
19 manner and said, "Well, you didn't come here all the way from  
20 Arizona not to see these cases move forward." And I had  
21 absolutely no response. I was surprised that he would say  
22 that to me, and that's why it sticks out in my mind.

23 So the gist of the conversation was resourcing with

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1 an eye to moving the cases forward, highlighted by the comment  
2 to me which kind of shocked me.

3 Q. And so as you recall, did he discuss during that  
4 meeting accelerating the pace of litigation?

5 A. I don't recall him saying "accelerating," using the  
6 words "accelerating." Again, I don't remember every single  
7 word that was said, but I can tell you that it was definitely  
8 about how do we get these cases moving, and, again,  
9 highlighted by that comment about, you didn't come all the way  
10 here from Arizona.

11 Q. To be clear, is there any doubt in your mind that he  
12 discussed the pace of litigation during that meeting?

13 A. No doubt about it.

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

15 MJ [Col SPATH]: Lieutenant Morris.

16 ATC [LT MORRIS]: Your Honor, after listening to the  
17 witness' testimony, the prosecution's position is that this is  
18 improper --

19 MJ [Col SPATH]: We'll get to arguments. I just -- do you  
20 have any questions?

21 **CROSS-EXAMINATION**

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

23 Q. Mr. Little, you've been sitting in this courtroom the

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1 whole time during Mr. Ary's testimony; is that correct?

2 A. That's not correct.

3 Q. Were you sitting in for any portion of Mr. Ary's  
4 testimony?

5 A. Yes.

6 Q. And were you watching his feed when you were not in  
7 this courtroom?

8 A. No.

9 Q. Okay. And during listening to his testimony, did you  
10 hear him talk about the meeting that he had with you and the  
11 other people in your spaces?

12 A. He didn't mention my name. He mentioned Colonel  
13 Mayberry, the Chief Defense Counsel, but I did hear him  
14 discuss that meeting, which is why I didn't stay for any of  
15 the rest of the testimony. I assumed I might be called as an  
16 impeachment witness.

17 Q. You take office in September of 2014, you're three  
18 weeks on the job, and then you meet the convening authority;  
19 is that about right?

20 A. It was approximately five weeks.

21 Q. Five weeks on the job, less than two months, and you  
22 meet the convening authority for the first time, correct?

23 A. Correct.

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1 Q. And you know that he's also the director of military  
2 commissions?

3 A. I didn't know that. I mean, if you tell me that,  
4 I'll take your word for it.

5 Q. You are the Deputy Chief Defense Counsel, or what is  
6 your role?

7 A. I'm the Deputy Chief Defense Counsel.

8 Q. And if you need resources and you look around and you  
9 don't have them, do you know what to do?

10 DDC [CDR MIZER]: I would object here to relevance of this  
11 line of questioning, Judge.

12 MJ [Col SPATH]: Trial Counsel?

13 ATC [LT MORRIS]: Well, I'm simply trying to -- he's five  
14 weeks on the job, and meeting -- I'm trying to get some sense,  
15 even now, if he understands how the Office of Military  
16 Commissions works. And we've got a meeting in which the ----

17 MJ [Col SPATH]: His testimony is about the meeting, so  
18 just the relevance of it. What are you attempting to do with  
19 these questions right now, this series of questions right now?

20 ATC [LT MORRIS]: Well, I'm just trying to establish that  
21 he's fresh and new on the job. He's five weeks in, and then  
22 trying to put that in the proper context of his perception of  
23 the comments that are being talked about when he's brand new

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1 on the job.

2 MJ [Col SPATH]: You may proceed.

3 ATC [LT MORRIS]: Okay.

4 MJ [Col SPATH]: Do you need the question?

5 WIT: What was the question?

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

7 Q. Do you know, if you needed resources, how to get  
8 those resources, even though you have been on the job now  
9 going on five, six months?

10 A. You're going to have to be more specific. Like what  
11 resources are you referring to, or resources -- I know how to  
12 get paper for printers. I know how to request travel  
13 resources.

14 Q. We're not talking about paper, Mr. Little. We're  
15 talking about personnel.

16 So if you needed an additional attorney, would you  
17 know what to do?

18 A. Yes.

19 Q. And what would you do?

20 A. Request it from the convening authority.

21 Q. Because ----

22 A. As he ----

23 Q. ---- he is also the office -- he's the director of

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1 military commissions. Do you know that now, or did you know  
2 that before I just shared that with you?

3 A. I don't know. If you tell me that, that's -- I know  
4 him as the convening authority.

5 Q. Okay. He's also the director of military  
6 commissions. In that role he has a responsibility to resource  
7 all of the parties.

8 DDC [CDR MIZER]: I'm going to object to the form of this  
9 question, Judge.

10 MJ [Col SPATH]: Sustained. Rephrase your question.

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

12 Q. What I'd like to do is go ask you about now that  
13 meeting five weeks, six weeks on the job. He's discussing  
14 that role, he's discussing resourcing the military commissions  
15 specifically with your office; is that correct?

16 A. Correct.

17 Q. And he said that he -- the gist of what you remember  
18 is that the resources were there to move the case forward; is  
19 that the -- did I capture your testimony correctly, that the  
20 convening authority's comments in your office was that he was  
21 resourcing with an eye towards moving the case forward; is  
22 that your testimony?

23 A. I think that's a fair statement.

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1 Q. Well, it's your recollection. You just said that,  
2 you know, just three minutes ago -- you can't remember what  
3 you said three minutes ago, and we're asking you to remember  
4 what you -- what happened in a meeting back in October.

5 I'm asking you a simple question: Are you saying  
6 that your recollection of what the convening authority told  
7 you was that he was trying to resource your office with an eye  
8 of moving litigation forward? Is that your recollection?

9 A. Yes.

10 Q. And then the next comment that you remember, and you  
11 say you remember this one, is that he looked at you and he  
12 said, "You didn't move all the way from Arizona not to see  
13 these cases move forward"?

14 A. Correct.

15 Q. This was your first time meeting the convening  
16 authority, you're five weeks on the job.

17 DDC [CDR MIZER]: I would object to asked and answered. I  
18 think this is the third or fourth time on this one, Judge.

19 MJ [Col SPATH]: Overruled, unless we hear it again.

20 A. Yes.

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

22 Q. Majority of that meeting was about meeting you guys,  
23 shaking hands, showing you guys the spaces, meeting the

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1 different personnel; isn't that a fact?

2 A. No.

3 Q. You guys didn't shake hands?

4 A. Yes, we shook hands.

5 Q. Did you guys show him the spaces?

6 A. No, we did not.

7 Q. Well, how did he get to your office?

8 A. I wasn't -- I met him in the office, so how he got  
9 there, I don't know. I assume he drove.

10 Q. Were you with him the entire time that he was with  
11 your staff?

12 A. I was with him from the time that he came into  
13 Colonel Mayberry's office, and then I walked he and Mr. Quinn  
14 out to the door. What happened before that or after that, I  
15 don't know, but I can tell you that he did not walk the  
16 spaces. We have a number of spaces.

17 Q. But it's fair to say that in the smiles and  
18 handshakes that happened within this one hour, that there  
19 wasn't any indication that the purpose of the meeting was to  
20 set policy, there wasn't any indication to you that the  
21 purpose of the meeting was to tackle substantive issues. It  
22 was to meet you guys for the first time; isn't that a fact?

23 A. You would have to ask him what his purpose was.

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1 Q. I'm asking you, going to the meeting, was it your  
2 belief and after an hour of the meeting, that the purpose of  
3 the meeting -- the purpose of that meeting was to meet him,  
4 shake his hand for the first time, as you guys were going to  
5 be working together in the future, about things such as  
6 resourcing; isn't that correct?

7 A. You're asking what my purpose or his purpose was?

8 Q. I'm asking what ----

9 A. I don't understand the question.

10 Q. You're -- going to that meeting, an hour meeting, I  
11 mean, this isn't a point to debate. You knew that you were  
12 going to meet him for the first time and shake his hand,  
13 right?

14 A. I knew that I would meet him and I would -- for me, I  
15 would shake his hand for sure.

16 Q. Right. And you weren't there to try and address or  
17 propose new policy, address substantive resource issues,  
18 right?

19 A. Was I there to address substantive resource issues?

20 Q. That's my question.

21 A. If they came up, sure.

22 Q. So you were ----

23 A. I was ----

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1 Q. ---- prepared to at that meeting submit resource  
2 requests to this person that just now I'm telling you is the  
3 office of -- the director of military commissions; is that  
4 your testimony here today?

5 A. You're -- was it my purpose to submit an official  
6 request for resources at that meeting? That wasn't the forum  
7 to do that. Was it part of the idea that the meeting would  
8 be -- if the issue of resources comes up, we certainly want to  
9 make our position known, which is that we were -- we felt we  
10 were underresourced.

11 And so yeah, if you're asking about my purpose for  
12 the meeting, it was to meet the new convening authority, and  
13 if the opportunity came up to say, well, you know, we need --  
14 we're a little short on resources, sure. You always use that  
15 as an opportunity, and it certainly did come up.

16 Q. And you would expect that if you have more resources,  
17 things would move faster, and if you have less resources,  
18 things would move slower. Pretty straightforward, isn't it?

19 A. My -- from my perspective more resources -- it's not  
20 about moving the things faster or slower.

21 Q. That's not my question. What I'm saying is: In  
22 asking for more resources ----

23 A. Yes.

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1 Q. ---- we're not trying to, you know, get too  
2 complicated here ----

3 DDC [CDR MIZER]: Judge, I think we're way beyond the  
4 scope of the purpose of Mr. Little's testimony at this point.

5 ATC [LT MORRIS]: Well, they've called him, Your Honor  
6 as ----

7 MJ [Col SPATH]: I get that. I'm trying to ----

8 DDC [CDR MIZER]: We did, Judge ----

9 MJ [Col SPATH]: Stop. I'm trying to figure out, he's  
10 here for a pretty limited purpose. Mr. Ary testified about  
11 the substance of the meeting. There is a bit of discrepancy  
12 and one occasion, as I looked at my notes, Mr. Ary said the  
13 pace of litigation didn't come up, and a couple of other  
14 occasions he said he couldn't recollect or he didn't remember.  
15 His exact words aren't there.

16 This witness has just said, at least in his opinion,  
17 the pace of litigation came up, and he described the pace of  
18 litigation as the gist of the meeting was resourcing with the  
19 pace of litigation and he remembers a specific comment. And  
20 that's the extent of his testimony.

21 So how is this impeaching that or offering more  
22 testimony that that is helpful to this issue?

23 ATC [LT MORRIS]: Well, based on his testimony, the

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1 government has nothing further, and, again, reiterates that we  
2 haven't heard anything that isn't consistent with ----

3 MJ [Col SPATH]: Trial Counsel, you have been in courts a  
4 long time. Some impeachment is more valuable than others.  
5 The defense called him for this big a purpose, and I assure  
6 you, I'm going to put it into that much perspective ----

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

8 MJ [Col SPATH]: ---- a narrow purpose.

9 Defense Counsel, follow-up?

10 DDC [CDR MIZER]: I have nothing further, Your Honor.

11 MJ [Col SPATH]: Mr. Little, you heard my earlier  
12 instruction to Mr. Ary. I'm giving the same order. Don't  
13 discuss your testimony on this issue with anybody. I realize  
14 that you are involved in the commissions, you will be  
15 discussing this case. Until this issue is resolved, don't  
16 discuss your testimony. Do you understand that order?

17 WIT: I do.

18 MJ [Col SPATH]: Thank you. You are excused.

19 [The witness was excused and withdrew from the courtroom.]

20 MJ [Col SPATH]: All right. Almost a full day on the  
21 record. That's good. With some more to do on this particular  
22 motion, I'm sure.

23 Here's an idea of where I think we're at and maybe

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1 you can all help over the evening recess. One is, if the  
2 defense wants additional witnesses, what I need to happen is  
3 first submit the list to the government, go over and talk to  
4 them, and you guys can work out if it's -- you chat about it  
5 or you have to send them an e-mail with a discussion. I'm  
6 going to let you work on that.

7 Talk to the government. See if the government agrees  
8 that any of them are relevant. I'm sure they'll ask you the  
9 purpose. Hopefully, you can demonstrate the purpose like you  
10 did with Mr. Little. If the government agrees to those  
11 witnesses, just let us know who they are and then make them  
12 available tomorrow.

13 If the government denies those requests, send an  
14 e-mail to Mr. Taylor, copy the government, tell us who the  
15 government denied and a brief synopsis of why we're going to  
16 call them as we go forward -- I think through a timeline on  
17 those requests as we go forward. It's only 1622, so you have  
18 some time to do it this afternoon with the government.

19 What I'd like to do is sometime tonight -- it doesn't  
20 matter when that shows up -- I'd like an e-mail to Mr. Taylor  
21 saying here are the witnesses we agreed to, we'll have them  
22 available tomorrow. Here are the witnesses we want, the  
23 government said no, and that's the first thing we'll take up

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1 tomorrow.

2           This is not a ruling, Colonel Moscati, I assure. I  
3 just want you to know, the list they give you, those are the  
4 people to clearly get in touch with and make sure that they --  
5 we know how to find them tomorrow or as we go forward.

6           Hang on. I want to hear Colonel Moscati first.

7           DCP [COL MOSCATI]: Judge, we've done some of that already  
8 based on your comments and requests yesterday, and I can  
9 report to the court and defense counsel on that, if you'd  
10 like.

11          MJ [Col SPATH]: Maybe the list may have changed based on  
12 Colonel -- or Mr. Ary's testimony, maybe some of the witnesses  
13 have been resolved. That's why I want you all to talk and see  
14 if we can come to some agreement. If the government says no,  
15 you will let me know through Mr. Taylor tonight.

16          DDC [CDR MIZER]: Judge, I mean, I think we can truncate  
17 that process. The only witnesses we are looking for now are  
18 General Burne and General Darpino.

19          MJ [Col SPATH]: Are you going to oppose both of those  
20 witnesses, or are you going to agree that any of them are  
21 relevant?

22          DCP [COL MOSCATI]: Judge, we do not oppose either one of  
23 them.

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1 MJ [Col SPATH]: Okay. Then I'm going to let you all  
2 certainly start making arrangements for those two witnesses  
3 tomorrow. Their schedule may drive our start time tomorrow as  
4 we move forward, of course. And so I will stand by for an  
5 e-mail as to their availability, because that's what I don't  
6 know. I don't know their availability, of course.

7 Colonel Moscati?

8 DCP [COL MOSCATI]: Just a little awkward, Judge, to ----

9 MJ [Col SPATH]: No, I understand it is.

10 DCP [COL MOSCATI]: ---- semi stand up and hold the  
11 microphone.

12 MJ [Col SPATH]: I appreciate it.

13 DCP [COL MOSCATI]: I can report on General Darpino's  
14 availability based on conversations yesterday. Obviously, we  
15 have been in court all day today, but she is not available to  
16 testify tomorrow. She would be available to testify on  
17 Friday. She is available and willing to speak to the defense  
18 tomorrow, and I was given a time of 9:30. I'm assuming that  
19 hasn't changed, but -- and I do think there's been some  
20 coordination between defense and General Darpino. So I don't  
21 know where that's at right now.

22 MJ [Col SPATH]: Okay, good. Hopefully with the interview  
23 off, right, you will hopefully take them up on that, if you

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1 want to.

2 DDC [CDR MIZER]: That would help, Judge, and co-counsel  
3 points out, given Captain Waits, we would like to speak also  
4 with Admiral DeRenzi, because we're dealing with the trial  
5 judiciary pool as part of this motion. So essentially the  
6 three TJAGs. We'll leave the Coast Guard TJAG alone.

7 MJ [Col SPATH]: To see if they're changing the pool how  
8 they're changing the pool?

9 DDC [CDR MIZER]: That's exactly right, Judge.

10 MJ [Col SPATH]: And I assume for relevancy, Trial  
11 Counsel, at least you don't oppose those issues you're  
12 conceding may be relevant?

13 DCP [COL MOSCATI]: Judge, we would want to see a more  
14 formal relevancy under 703 on the vice admiral.

15 MJ [Col SPATH]: Okay. Have that discussion and then  
16 submit that to Mr. Taylor. I assume it's going to be pretty  
17 similar.

18 DCP [COL MOSCATI]: Aye, sir.

19 MJ [Col SPATH]: Let's do that. Okay. I'm going to  
20 have -- for General Burne, it seems clear, because of course  
21 he's my detailing authority, at least to be the chief trial  
22 judge and at least his predecessor was for me to serve as a  
23 commissions judge. And I will leave that to you all to work

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1 with his staff because I'm certainly not going to get involved  
2 with witness availability in any case for any of the  
3 witnesses, and that doesn't change even with General Burne, my  
4 superior, testifying, so I'm going to leave that to you-all.

5           So as that transpires with his staff, if you could  
6 let us know -- probably the same order of events, which is  
7 will he consent to be interviewed, and if that's the case,  
8 help the defense with the time that they can do that, and then  
9 what his schedule is for testimony.

10           It may well be that we can take General Burne  
11 tomorrow in testimony at some point, even if he agrees to some  
12 interview. Again, I have no idea what his schedule is  
13 tomorrow. I have not looked.

14           But -- so let's do this: Update those schedules as  
15 we go through tonight and in the morning. We need a little  
16 bit of time and notice, so that we can have Mr. al Nashiri  
17 transported over here if we are going to get on the record to  
18 have General Burne's testimony. The sooner we get notice the  
19 better, so the guard force can know and Mr. al Nashiri can  
20 know and we can get him here for that testimony.

21           So, just Mr. Taylor is your point man for me, update  
22 us as best you can today about General Burne's schedule. I  
23 assume his exec will be in for a while tonight, so hopefully

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1 she will be helpful in his schedule and then update us in the  
2 morning as we move forward. If he says he's available 9:00  
3 tomorrow, that would have to happen awfully fast, again, for  
4 the transportation requirements. That's one piece.

5 Here's the other piece and here's the question, and I  
6 only want to take a couple of minutes, and we can talk about  
7 it more tomorrow. In UCI motions, I have been asked to do  
8 this and I have done this in both ways.

9 I have gone to a motion hearing where the government  
10 has asked, once you believe the defense has met their burden,  
11 can you let us know so that we can then respond and meet our  
12 burden if we can.

13 I have also been there when both sides could not  
14 agree on that process, and we allowed the defense counsel to  
15 go until they felt they had raised some evidence, and then I  
16 turned to the government to -- they didn't know whether or not  
17 the defense had gotten there or not and whether or not they  
18 had anything to do.

19 And I offer this as a discussion point. If it's  
20 conceded, do you need the witnesses or do you want them to  
21 start because you'll, of course, get a rebuttal case. Do you  
22 want them to start responding if it's not conceded.

23 So just think about that tonight. It's an

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1 interesting question. But if you believe it's been raised by  
2 some evidence and you all agree and you want me to make that  
3 ruling, maybe I can do it. But I don't want to presuppose  
4 anything. I'm going to let you all talk about that, and if  
5 it's something we want to have a discussion about tomorrow,  
6 I'm willing to do that and then find out if you-all have come  
7 to some agreement.

8           Unfortunately for everyone watching, I don't have a  
9 firm start time for tomorrow because of the issues with the  
10 flag officers and their availability. Hopefully, your  
11 liaisons will let you know as that develops overnight or  
12 tomorrow.

13           Trial Counsel, at this point, again, we'll just deal  
14 with each other in the morning by e-mail. Why don't we shoot  
15 to have an 802 at 9:30 just to see -- oh, no, your interview  
16 is at 9:30. Sorry.

17           Let's shoot to have an 802 at 10:30. I assume your  
18 interview won't take longer than that. If it's going to,  
19 we'll postpone a little bit. Let's shoot for an 802 at 10:30  
20 and see where we're at with availability. If there's breaking  
21 news on availability with General Burne, let us know that  
22 sooner than later. And then for Admiral DeRenzi, I know  
23 you're going to make the request and explain what you're

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1 looking for there. All right.

2 Trial Counsel, any other matters that we can take up  
3 tonight on the record?

4 DCP [COL MOSCATI]: It's a bad sign walking to the podium,  
5 Judge.

6 MJ [COL SPATH]: That's okay.

7 DCP [COL MOSCATI]: Yes, they are for the most part  
8 housekeeping, Judge.

9 First, the standard admonition you gave to the  
10 witness, Mr. Ary, about not talking to anybody.

11 MJ [COL SPATH]: Yes.

12 DCP [COL MOSCATI]: If I could, Judge, I'd like to ask  
13 that be modified or at least clarified a little bit.

14 Certainly, not talk to anybody about his testimony on this  
15 motion, but given his position and some developments today,  
16 Judge, I'm sure his duties will require him to talk to  
17 others -- again, not about his testimony, but ----

18 MJ [COL SPATH]: I believe I made that clear.

19 DCP [COL MOSCATI]: ---- as a general issue ----

20 MJ [COL SPATH]: I didn't give my standard admonition,  
21 which is don't talk about the case or about your testimony, I  
22 modified it for both, because of their duties in the  
23 commissions.

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1 I'm pretty clear I told Mr. Ary do not discuss what  
2 you testified about in here, your testimony in here with  
3 anybody until the motion's resolved, and that was the extent  
4 of my order. If there is -- when you talk to him, if there's  
5 any confusion about that, let me know. Again, e-mail  
6 Mr. Taylor, copy the defense, and we can work that out. But  
7 that was my ----

8 DCP [COL MOSCATI]: That's fine, Judge. That clarifies  
9 it.

10 MJ [Co1 SPATH]: That was absolutely what I thought I  
11 said. The defense nodded in agreement with that, that they  
12 heard that.

13 LDC [MR. KAMMEN]: Yes, that is our memory.

14 MJ [Co1 SPATH]: So I think -- make sure he understands  
15 that, but I thought I was reasonably clear.

16 DCP [COL MOSCATI]: Yes. Thank you, Judge.

17 MJ [Co1 SPATH]: Modified it on the fly, which is  
18 dangerous, and I know that.

19 DCP [COL MOSCATI]: Also, obviously, the Appellate  
20 Exhibit 3220 ----

21 MJ [Co1 SPATH]: 332.

22 DCP [COL MOSCATI]: Or 332, I'm sorry, Judge ----

23 MJ [Co1 SPATH]: That's all right. 3320.

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1 DCP [COL MOSCATI]: ---- 0, was used extensively, was  
2 marked for purposes of this hearing, was to be used to examine  
3 the witness. I just want to clarify, Judge, it's not in  
4 evidence. Those -- those items are not in evidence. They're  
5 from my Article III district court world -- they're court  
6 exhibits where we could call them court exhibits. They're  
7 being used in cross-examination -- or examination or  
8 cross-examination. They're not in evidence.

9 MJ [Col SPATH]: Some of them are attached to defense  
10 motions, many of them, and some of them are attached to your  
11 motions, many of them. So when doing motion rulings,  
12 attachments to motions -- this is a little different, this was  
13 discovery driven, I realize.

14 But attachments to motions I tend to -- well, not  
15 tend to -- I consider as submitted as evidence for the  
16 motions, because 104 allows me to basically -- I don't say  
17 relax the rules because it's not sentencing, but privilege  
18 applies; the rest of the rules of evidence really don't. So  
19 attachments to motions, I will consider. Affidavits carry  
20 considerably more weight than an unsigned paragraph somebody  
21 attaches to a motion, clearly. That's my job I think as the  
22 fact-finder.

23 So I think we're talking about the same thing. The

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1 discovery provided, and all of those things, different issue.  
2 But the 332 exhibits that have attachments where we have  
3 Mr. Ary's memos and we have some e-mails, I read those as  
4 substantive.

5 Defense Counsel, I see you're standing?

6 DDC [CDR MIZER]: Judge, just to be clear, I mean, 3320,  
7 that stack of documents is an appellate exhibit that is going  
8 to be attached to the record of trial. I mean, this does  
9 differ from an Article III context, but ----

10 MJ [Col SPATH]: It does.

11 DDC [CDR MIZER]: ---- but it is in evidence, to use that  
12 phrase, as far as the defense is concerned.

13 MJ [Col SPATH]: And I guess I'd ask trial counsel. Given  
14 the same 104 rationale for motions -- everyone has to bring me  
15 facts somehow. Stipulations are wonderful. We don't have  
16 many in this case.

17 And so then, exhibits and documents, not motions.  
18 The statement of facts and the motions, that kind of stuff,  
19 I -- those are helpful just to guide me, but exhibits, I --  
20 where are we at with that?

21 DCP [COL MOSCATI]: The issue here, Judge, is that the  
22 things that were attached to motions, and there were  
23 motions -- they were discovery motions.

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1 MJ [Co1 SPATH]: They were.

2 DCP [COL MOSCATI]: Motions to compel discovery. So in  
3 responding to those, whether it's the government or the  
4 defense, you're attaching things to your motion responses  
5 because it adds to the response. That's different than being  
6 in evidence and before the court.

7 I understand 104, so I am just trying to clarify.  
8 Obviously the government feels, Judge, that some of those  
9 things, they may be discoverable, and that's why we provided  
10 them. But that doesn't necessarily mean that we concede that  
11 they should, that they are relevant under the rules of  
12 evidence, that the relevance should be considered. There is a  
13 different ----

14 MJ [Co1 SPATH]: I concur. Hold on. There's a lot in  
15 here that is not helpful on this motion. There is a host of  
16 information in here. The NDAA jumps out as not helpful.  
17 There's a variety of documents in here. But there is a  
18 variety of documents in here that relate directly to this  
19 motion. And they're all before the court, at least for me to  
20 rule on and deal with.

21 Many of the documents in here are attached to the UCI  
22 motion in here, 332, which started the ball rolling here. I'm  
23 wary. I'm not saying anything about moving forward or not,

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1 but sometimes we do things that cause us a significant amount  
2 of effort to move forward, you know, a step, and we make it  
3 eight steps.

4           A good example is the discussion about tomorrow.  
5 It's taken 15 minutes to talk about witnesses that we have  
6 agreed on, and so now we're -- I can have the defense go  
7 through 320 0 and tell me what they want me to consider  
8 document by document, but that seems like a waste of their  
9 time, and my time when the motion ruling is going to lay out  
10 my findings of fact, and the appellate court is going to tell  
11 me if those facts are in the record by a preponderance of the  
12 evidence.

13           The appellate court, they've never been shy about  
14 letting me know when one of my findings of fact is not based  
15 on evidence properly before me, and that doesn't change here  
16 during the commissions. So I understand, and I will read  
17 everything with an eye on that, understanding the risk if I  
18 step outside what's properly before me.

19           DCP [COL MOSCATI]: Thank you, Judge.

20           Final point, you've mentioned 319 and the evidentiary  
21 hearing next week. I don't -- the thing is, I don't think  
22 you've mentioned it in any definitive way.

23           MJ [COL SPATH]: I didn't.

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1 DCP [COL MOSCATI]: And of course we have logistical and  
2 witness issues and sort of people on the way, Judge, so ----

3 MJ [Co1 SPATH]: I didn't.

4 DCP [COL MOSCATI]: ---- I need to get some clarification  
5 on that.

6 MJ [Co1 SPATH]: I talked about it yesterday and I was  
7 responding to Mr. Kammen, because it is important that there's  
8 not a perception that I am moving the case along that a  
9 convening authority allegedly directing me to do. But I'm  
10 moving the case along as any trial judge in an efficient,  
11 smart process, because everybody needs closure. I hope I made  
12 that clear.

13 Yesterday I said it is either highly unlikely or just  
14 unlikely. I don't remember if I put the adjective or adverb  
15 in front of the "unlikely." I know I said unlikely that we  
16 were going to get to evidentiary hearings. When I was talking  
17 to Mr. Kammen, as I said yesterday, it's tough being a judge  
18 because everything you said, you can say the wrong thing and  
19 it can come back to haunt you in e-mail traffic about certain  
20 things. And I haven't made a definitive ruling.

21 The problem is, if you are waiting for a definitive  
22 ruling on every aspect of the evidentiary hearing at the end  
23 of next week, it's hard to do. We have already heard we

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1 have -- General Darpino can't be available until Friday. So  
2 that means the UI motion at best -- at best, is done Friday.  
3 It's not going to be. I'm going to need some time after she  
4 testifies and whatever other witnesses testify to put together  
5 a ruling. So that moves us into likely early next week before  
6 there's a ruling on it, and then it depends on the ruling.

7           We know the host of remedies, if I rule in favor of  
8 the defense, that are out there. If I don't rule in favor of  
9 the defense, we then have the scheduling order or the  
10 docketing order that has all of those motions still  
11 outstanding to argue next week.

12           Assuming those will take two days, and just looking  
13 at what's on that docketing order, a day and a half, two days,  
14 we're already to Wednesday. Do you know what I mean? If  
15 everything works out perfectly. You get a ruling on Monday,  
16 which could easily become Tuesday depending on witnesses, then  
17 we have two days of those motions. We're already towards the  
18 end of the second week, and so a day of evidentiary  
19 hearings -- I don't know if that's helpful or not for you all,  
20 if we get there. And I can't tell you we're going to get  
21 there or not, request any definitive answer for quite some  
22 time.

23           So I would say buyer beware. If you want to travel

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1 them down here, I think it's highly unlikely that we're going  
2 to get to them. If you don't travel them down here, you're  
3 not going to be penalized because they're not here when we get  
4 to the end of the current docketing order where we finish up  
5 the motions. I'm not going to turn to you and say where are  
6 your witnesses? Hopefully, we'll have set ourselves up for  
7 success for the next hearing.

8 Does that make some sense? Because I can't rule on  
9 it yet because I don't know, but you're not going to incur any  
10 punishment because witnesses aren't here.

11 DCP [COL MOSCATI]: No, I understand, Judge. Again, we're  
12 sort of thinking out loud.

13 MJ [Col SPATH]: We are.

14 DCP [COL MOSCATI]: For the record, the government's  
15 position is we will have witnesses here next week, if  
16 necessary. Perhaps it's clear they wouldn't be necessary  
17 Monday, Tuesday. I believe there's usually a rotator.  
18 Perhaps we could say there wouldn't be witnesses before  
19 Wednesday.

20 MJ [Col SPATH]: I think we can say that with some degree  
21 of fidelity.

22 DCP [COL MOSCATI]: And maybe each day sort of revisit  
23 this.

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1 MJ [Col SPATH]: I think we can say that with fidelity  
2 right now because of General Darpino's availability Friday.  
3 If she was available tomorrow, I would still wonder where we  
4 were going to be at the end of tomorrow. But with her  
5 availability not until Friday, and we still don't know General  
6 Burne's availability, we have already chewed up our first  
7 week. And we still have a list of motions to deal with before  
8 we even turn to the evidentiary motions on the original  
9 scheduling order. So I just am going to stick with highly  
10 unlikely.

11 DCP [COL MOSCATI]: Judge, I think I have the guidance I  
12 need and certainly have exhausted what you can give me on  
13 this.

14 MJ [Col SPATH]: At least at this point. Tomorrow it will  
15 probably be more clear.

16 DCP [COL MOSCATI]: Thank you, Judge.

17 MJ [Col SPATH]: All right. Defense Counsel, anything  
18 else we can take up on the record tonight before we recess?

19 DDC [CDR MIZER]: No, Your Honor.

20 MJ [Col SPATH]: All right. Thank you for your work  
21 today. We are in recess.

22 [The R.M.C. 803 session recessed at 1643, 25 February 2015.]

23 [END OF PAGE]

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