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1 [The R.M.C. 803 session was called to order at 0831,
2 27 February 2015.]

3 MJ [Col SPATH]: Good morning everybody. These
4 commissions are called to order. All of the parties present
5 before the last recess are again present.

6 Last night we had -- sorry, yesterday afternoon we
7 had an 802 session. Just so everyone knows what we talked
8 about, it was relatively short. It in large part had to do
9 with scheduling of interviews of three flag officers, the
10 service TJAGs, then scheduling any perspective testimony from
11 two of the three -- I haven't ruled on the third one yet --
12 the time of their testimony.

13 Due to a variety of scheduling issues, they have
14 different periods of time when they're available throughout
15 the day. I just laid out the schedule so we could discuss
16 whether or not the Navy TJAG was going to testify or not.
17 We're going to do that first. The rest of the day, we just
18 went through who was available when for both testimony and
19 interviews.

20 The other issue that came up at the 802 session, I
21 just asked trial counsel regarding the burden in an unlawful
22 influence motion, similar to a UCI motion. Makes sense the
23 way the burden would work is if there is some evidence raised

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1 of UI or UCI, the burden then shifts to the government to
2 prove it beyond a reasonable doubt. I asked the government if
3 they believe there has been some evidence at the 802 session,
4 they indicated no, so I'm not going to stop the defense from
5 putting on their evidence at this point, until either the
6 government believes it's been raised or that the defense is
7 finished putting on their evidence.

8 Trial Counsel, do you want to add anything to my
9 summary of the 802?

10 DCP [COL MOSCATI]: No, Judge, not as to the 802, but I do
11 want to remind the court that these proceedings are being
12 transmitted to the continental United States via two -- or
13 through two -- two, numeral two, locations in the U.S.

14 MJ [Col SPATH]: Thank you.

15 Defense Counsel, do you want to add anything to my
16 summary of the 802?

17 LDC [MR. KAMMEN]: No, sir.

18 MJ [Col SPATH]: All right. So the first issue up then is
19 whether or not we're going to hear the testimony of the Vice
20 Admiral -- is it DeRenzi? Is that pronounced correctly?

21 DDC [CDR MIZER]: Yes, Judge.

22 MJ [Col SPATH]: All right. So the defense counsel did
23 submit, as I asked, an outline of the topics. They listed out

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1 eight topics they believe Vice Admiral DeRenzi would be
2 relevant for. I'm just going to put it in shorthand, but one,
3 her statutory, her role as the statutory supervisor of judge
4 advocates; two, how she identified and forwarded the names of
5 commission judges from the Navy, to the commissions; three,
6 the effect, if any, 1 has on her willingness to submit Navy
7 judges for consideration; four, any effect Change 1 has had on
8 the list of the currently submitted judges; five, any effect
9 Change 1 has had on the detailing of Captain Waits, who's
10 detailed to another military commission case; six, whether
11 Change 1 violates the UCMJ; seven, whether she thinks the
12 Department of Navy is bound by Change 1; and eight, if she has
13 voiced concerns to the general counsel, the DoD general
14 counsel's office.

15 The government then responded and said they were not
16 going to produce Vice Admiral DeRenzi, and then they went
17 through the responses to those eight areas. In large part,
18 they either said it has been resolved, the matter is no longer
19 in dispute, or it's just not relevant to the matter before us.
20 And that's what got us here today, is to talk about Admiral
21 DeRenzi specifically and to try to get this done in a
22 reasonably quick fashion because Admiral DeRenzi's interview,
23 I believe, is at 9:30 this morning, and so that's why we're

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1 doing this now.

2 Defense Counsel, do you want to add anything to the
3 relevance of Admiral DeRenzi?

4 DDC [CDR MIZER]: I will, Judge, and I won't -- I will try
5 not to repeat what is there.

6 Judge, I've provided both in the written proffer as
7 well as the oral proffer that we made at the start of this
8 week, with respect to Admiral DeRenzi, I'd like to have an
9 exhibit marked as the next appellate exhibit in order. It's
10 JAG Instruction 5813.4I. And a copy has been provided to the
11 prosecution, Judge. And if I could put this on the ELM0 and
12 publish it to Your Honor, then also to the gallery.

13 MJ [Col SPATH]: All right. Just give the court reporters
14 a chance to pull that up on my display screen. All right.
15 I've got page 4 of that instruction displayed in front of me
16 with a highlighted mark; is that ----

17 DDC [CDR MIZER]: That's correct, Judge, it's paragraph
18 five of that instruction, it's page 4, and that's really the
19 relevant language. This is the Judge Advocate General of the
20 Navy's regulation dealing with the establishment of the trial
21 judiciary, and we would expect Admiral DeRenzi to testify in
22 accordance with her regulation.

23 Remember, Judge, that there are two issues before

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1 this court, there is the UI issue, but there's also a due
2 process issue and Judge Pohl addressed both of those issues in
3 his ruling. They've been in this litigation from jump, in the
4 initial motion. And, the language here is, the court reasoned
5 that the UCMJ and service regulations have adequately
6 insulated military judges from convening authorities and any
7 other inappropriate influence. That's why military justice
8 survives due process. That's why we supply the holding and
9 expect the judge advocate general to testify to that.

10 And there's one more in this instruction, and it
11 deals with tenure. If you go back to Weiss and Graf, in the
12 early '90s, there was this debate over tenure. And the JAGs,
13 through regulation, have attempted to remedy some of those
14 concerns through providing tenure. Admiral DeRenzi has
15 decided that judges will normally spend three years in a
16 billet and no less. Of course, you know, military necessity
17 may relieve her of that requirement, but that's her intent.
18 And the highlighted section here citing the Campos case is the
19 continuity, and predictability, and the assignment of military
20 judges is also needed to ensure against any perception of
21 improper influence of such assignment or reassignment.

22 Now, I expect her to testify, Judge, that Captain
23 Waits, who is the circuit judge in EURAFRSWA sitting in

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1 Naples, Italy, was assigned to that billet next year and that
2 she had no intention of moving Captain Waits until Change 1 of
3 this regulation. And according to her this regulation, that
4 creates the perception of unlawful influence, this sudden
5 change, and, again, at the behest of a convening authority.

6 Judge, the other day you said that -- that the target
7 of the unlawful influence was Mr. Work, and I think it's -- to
8 put a finer point on it, he's more appropriately the
9 intermediary target. The ultimate target of this action was
10 also you and your brother judges of the trial judiciary. And
11 so to the extent that he has enlisted Mr. Work, we need to
12 find out if he's also enlisted the TJAGs, because if they're
13 going to go along with this, the influence extends to them as
14 well.

15 And then that ultimately leads then to the due
16 process argument, because really the government here is on the
17 horns of a bull. Because if they eliminated everyone above
18 you and subordinated them to the convening authority's wishes
19 in this case, then you don't have a friend in the world,
20 Judge. None of the judges do, and you're standing here, as
21 the Campos case says -- and the citation is in there, that you
22 serve essentially -- you serve by grace. And I would commend
23 that case to you for several reasons.

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1 I think the most important here is that the defense
2 was allowed to have a full hearing and the judge allowed the
3 defense to fully flesh out the unlawful influence. That's a
4 big point in Campos. And, Judge, you know, the other day you
5 said that you have a job to do. We have a job to do. Your
6 duty is to root out unlawful influence; that's our duty as
7 well. It is no small matter in my mind that calling my boss
8 to the witness stand is not something that I take lightly, but
9 it is my duty, Judge, and I'm asking you to let me do it.
10 Thank you.

11 MJ [Col SPATH]: Trial Counsel.

12 DCP [COL MOSCATI]: Judge, the important distinction to
13 make between Admiral DeRenzi and General Darpino, and
14 certainly General Burne, is that Admiral DeRenzi has not done
15 or said anything that may affect this commission. Everything
16 that's being argued by the defense as it pertains to Admiral
17 DeRenzi is prospective and hypothetical.

18 Admiral DeRenzi has no connection to this case,
19 Judge. Now, throughout the week we've heard a lot of
20 testimony and argument that is about the commissions in
21 general, the commissions as a whole. And that's appropriate
22 because Mr. Ary, obviously, is the convening authority over
23 all commissions, so he's the convening authority of this

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1 commission. That's appropriate.

2 When you get to the service TJAGs, you have to
3 examine what relevance they have to this commission. The
4 government has, I think, gone further or, you know, beyond
5 actually -- what was actually necessary in the case of General
6 Darpino, because I could make the same argument about General
7 Darpino. The difference is General Darpino did say something
8 that is in e-mail, had a contact with Mr. Ary, and so there's
9 some argument there. Mr. Ary testified about that. So
10 there's some argument that General Darpino would be relevant,
11 her testimony would be relevant and necessary.

12 General Burne, of course, is your supervisor, is the
13 Air Force TJAG, and there's also been a proffer, at least,
14 that he has made some comments that could affect this
15 commission. So it's appropriate, and the government has
16 agreed that those two TJAGs should be -- or can be called.

17 Vice Admiral DeRenzi, all hypothetical, all
18 prospective, Judge. She hasn't done or said anything that may
19 affect this commission. And on that basis, Judge, under 703,
20 she's not relevant and necessary to your determination.

21 MJ [Col SPATH]: Let me ask this. She is unique -- and
22 you're right. I don't have any evidence in front of me that
23 she has said anything about this particular commission case.

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1 If the defense theory is that Change 1 has so polluted the
2 detailing, that it is impacting detailing decisions by TJAGs,
3 where they're either changing the pool or removing judges who
4 are already assigned cases, or attempting to remove judges who
5 are already assigned cases from the pool, is that a factor --
6 again, I'm not suggesting it's happening -- is that a factor
7 that goes into the unlawful influence reasoning?

8 DCP [COL MOSCATI]: Arguably. And in your decision-making
9 process, obviously, you may consider that ----

10 MJ [Col SPATH]: Because it's not just the convening
11 authority's impact on a limited -- the limited case we're here
12 for. Fair that it is the convening authority's impact on the
13 process can arguably demonstrate influence, unlawful, lawful,
14 but influence for sure.

15 DCP [COL MOSCATI]: And, again, the different -- the
16 answer is yes, Judge. But the difference being in the case of
17 General Darpino and in the case of General Burne, there's been
18 some showing that deserves maybe some further inquiry of them,
19 and we're going to have that.

20 MJ [Col SPATH]: Just common sense, I could be -- I could
21 be off, and maybe the TJAGs will share that with me. I find
22 it hard to believe they haven't talked about this change.
23 Mr. Ary said they didn't talk with him, nor has their staff

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1 talked with him. Just understand -- you've been in the -- I
2 think you're in the reserves, correct?

3 DCP [COL MOSCATI]: I am, Judge.

4 MJ [Col SPATH]: Being in the military for a long period
5 of time, the TJAGs take their assignment authority awfully
6 personally. They take that statutory responsibility to heart,
7 and when they feel it's being intruded upon, they tend to talk
8 to one another, at least, if not to the interlopers who are
9 attempting to alter their statutory responsibility. And they
10 haven't had an opportunity to interview her yet.

11 I would anticipate, as an officer of the court, if
12 they interview her and they have nothing that they are -- that
13 is relevant, they will tell me at noon that we don't need her
14 to be here. I know that.

15 My question to you is, as I work through this
16 process, the burden is still on them. We have an e-mail from
17 General Burne where -- or at least we have a discussion from
18 General Burne, as demonstrated by Colonel Frakt, that I
19 disclosed to you all where he said, My intention is to take
20 Colonel Spath off the case. Again, whether that -- how that
21 works, the mechanism for that, whether he has to reassign me
22 or whatever, we'll leave that to your questions for General
23 Burne. But we have evidence of that before us.

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1 And so that begs the question they're going to have
2 to replace me with somebody in that hypothetical. And if the
3 Navy pool is impacted such that the people who are currently
4 detailed have been changed or there is significant
5 contemplation about changing it, that impacts the pool for
6 this case.

7 And so as we work through this, doesn't it seem --
8 again, I have to dispel -- I know you all have not conceded
9 there's been some evidence of unlawful influence, and that
10 is -- that is absolutely your right. Understanding how low
11 that burden is, I'm not sure I understand why there hasn't
12 been any concession of that at this point, but that's your
13 call.

14 Defense has the burden, and I'm going to let them
15 ask -- again, they haven't had the interview yet. Maybe
16 they'll come to say they don't need her. If they come back
17 and say they have information about how she is altering a pool
18 of detailed commission judges or that she had a conversation
19 with the convening authority's office about Change 1, or that
20 she's going to fire a commissions judge case, or remove him, I
21 believe that's relevant. As I work through -- because I not
22 only have to sort out if you raised it by some evidence, but I
23 have to sort out if you all have dispelled it beyond a

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1 reasonable doubt and not just actual command influence ----

2 DCP [COL MOSCATI]: Your Honor -- I'm sorry.

3 MJ [Col SPATH]: I have to dispel for the public even the
4 appearance. And so my -- I take that to heart with the Campos
5 case, and frankly with Lewis and Salyer and any number of
6 command influence cases, and that is there is no harm to a
7 full discussion of the facts in here and for the public to see
8 it. And if at the end of the day the answer is you've raised
9 it by some evidence and you've disproved it by beyond a
10 reasonable doubt, then that's the answer.

11 But to continue to -- it was difficult to convince
12 you all that Mr. Ary should come here and testify, and that
13 seemed to me to be completely clear. He's the convening
14 authority who effected a change that has clearly had
15 resounding impact. And I just don't understand why we're not
16 making an effort to dispel every part of the appearance of
17 unlawful influence on the judiciary in a case that is
18 garnering more and more attention, frankly, by the day right
19 now.

20 DCP [COL MOSCATI]: If I may, Judge.

21 MJ [Col SPATH]: You may.

22 DCP [COL MOSCATI]: I think your comments, Judge, make the
23 government's point. You said if they interview Admiral

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1 DeRenzi and if they develop information that she may have done
2 or said -- I'm paraphrasing, not your words -- something like
3 or similar to what General Darpino said in an e-mail or
4 General Burne has allegedly said, then perhaps there would be
5 relevance. But right now ----

6 MJ [Col SPATH]: I know, but here we get to the problem we
7 have every time we come in here. So we let them go interview.
8 We can find more time to come back and discuss it again. We
9 can miss the interview time at noon or the testimony time at
10 noon. We can be in at 2:30 with General Burne. We can be in
11 at 1600 with General Darpino, and we can be here next week
12 with Vice Admiral DeRenzi.

13 Or we can do what, frankly, makes sense, and that is
14 they're officers of the court. When that interview is done,
15 if they have zero relevance to offer, I am sure we will see an
16 e-mail that says we don't need her. Otherwise, I'm interested
17 in what she has to say about these issues and, frankly, I'm
18 interested in asking her if her or her staff have had
19 discussions with the convening authority about Change 1, or
20 members of the convening authority staff.

21 Now, the defense counsel mentioned the OGC office.
22 I'm telling you as a fact-finder I want to know what
23 discussions have gone on about Change 1 in the convening

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1 authority's office, if they have gone on. That's relevant.

2 Again, it is my duty to dispel the appearance of command

3 influence, if you can or if I can because ----

4 DCP [COL MOSCATI]: Judge ----

5 MJ [Col SPATH]: ---- the public has to have confidence in

6 the openness of this process, Colonel Moscati.

7 DCP [COL MOSCATI]: Judge, the convening authority has

8 testified under oath, and you will weigh his credibility, that

9 there were no contacts and discussions with Admiral DeRenzi.

10 So if you believe, Judge, that that needs to be explored

11 further, without any evidence in that regard, without any

12 discovery, without any suggestion, all hypothetically, that

13 she has, and his testimony was false, then I guess you might

14 rule that she's relevant.

15 MJ [Col SPATH]: Colonel Moscati, I'm going to say this.

16 I tell court members every day we don't leave our common sense

17 or knowledge of human nature at the door. There is no way

18 Change 1 went down and the three service TJAGs have not

19 engaged in a debate, either directly or through their staff.

20 That is completely within the realm of common sense and my

21 knowledge of human nature of human ways in the world after my

22 time.

23 It is critical that this process is viewed as open

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1 and transparent, and in all your filings you tell me it is.
2 And this is your opportunity to demonstrate to the public it
3 is open.

4 DCP [COL MOSCATI]: Judge, there's no -- I have to respond
5 to those comments, Judge. There's been no act, indication by
6 the government that we believe anything else.

7 MJ [Col SPATH]: Correct.

8 DCP [COL MOSCATI]: What we argue before you, Judge, are
9 the rules of the Military Commissions Act and the rules
10 promulgated thereunder, and there is a rule ----

11 MJ [Col SPATH]: But sometimes we have got to let common
12 sense help us interpret those rules. Who would have
13 envisioned Change 1 coming to us with no coordination with the
14 service TJAGs and no coordination with the Chief Trial Judge
15 of the Commissions? Who would have? Maybe I am naive, but
16 the documents and the lack of coordination on something like
17 that is something of note.

18 DCP [COL MOSCATI]: Judge, one final thought, don't want
19 to belabor it. I think the government has aptly demonstrated
20 our belief in fullness, openness, fairness. We ----

21 MJ [Col SPATH]: I concur.

22 DCP [COL MOSCATI]: If I may, Judge, we agree ----

23 MJ [Col SPATH]: I concur, except you fought me on

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1 Mr. Ary.

2 DCP [COL MOSCATI]: And the two other TJAGs, Judge.

3 MJ [Col SPATH]: But initially we had to debate Mr. Ary.
4 That should have been conceded on day 1. He is clearly
5 relevant to an unlawful influence motion where he is the prime
6 motivator by every document we'd seen behind Change 1. You
7 all are open and you are -- no doubt you are working this
8 process to be transparent. I see that by the declassification
9 of more and more information. Good. And I'm telling you that
10 Vice Admiral DeRenzi is going to testify at noon. Absent an
11 e-mail from the defense telling me they don't need her after
12 their interview, she'll be here at noon. That is my ruling.
13 Then we're going to have -- at 1430 we will be ready for
14 General Burne, and at 1600 we will be ready for General
15 Darpino.

16 Are there any other matters I need to take up before
17 we recess for your interview? Defense Counsel?

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

19 MJ [Col SPATH]: Trial Counsel?

20 DCP [COL MOSCATI]: No, Judge.

21 MJ [Col SPATH]: Defense Counsel, if after your interview
22 you don't need her, please let Mr. Taylor and the trial team
23 know. Otherwise, we'll come on the record at 1200 for the

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1 testimony.

2 Commission is in recess.

3 [The R.M.C. 803 session recessed at 0855, 27 February 2015.]

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