

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1131,
2 27 February 2015.]

3 MJ [Col SPATH]: These commissions are called to order.
4 The parties are present -- the parties that were present
5 before the recess are again present. Major McMillan is not
6 here for this session. All right.

7 On the break somebody sent me an e-mail -- or
8 somebody sent Mr. Taylor an e-mail, sorry, and he let me know
9 that apparently Change 1 has been rescinded by DEPSECDEF, and
10 then I had the opportunity to see that. As the break went on,
11 I saw the recommendation from general counsel; the rescission
12 of Change 1; and then as another attachment, the ruling from
13 Judge Pohl that we've already discussed.

14 Soon after that, got an e-mail from the government
15 indicating they believe that the motion series AE 332 is moot
16 because Change 1 has been rescinded. Soon after that, we got
17 an e-mail from the government -- or from the defense
18 indicating they disagreed with that analysis and did not
19 believe that the issue is moot. And so I want to talk about
20 that first, since we have the 12:00 witness coming upon us.

21 So I guess first, Defense Counsel, why don't you
22 believe it's moot?

23 DDC [CDR MIZER]: Judge, and I apologize, I haven't had a

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 whole lot of time to work on this issue given the witness
2 interviews.

3 First, you know, I think it's great that this
4 certainly suggests, on the part of the Department of Defense,
5 at least, a concession that this was unlawful influence. I
6 mean, it doesn't say as much in the memo, but we're really
7 dealing with the distinction between actual and apparent
8 unlawful influence. And it may be true now, Judge, at least
9 for now, because if you read the memo the recommendation is
10 essentially that they want to coordinate next time with the
11 Judge Advocates General. And with respect to actual command
12 influence I think there needs to be a clear signal sent that
13 this was unlawful, and it hasn't happened yet, Judge, it
14 hasn't.

15 And you had the convening authority take the witness
16 stand yesterday, knowing that the 9/11 case had been
17 dismissed, and he'd do it all again anyway. And so, Judge, we
18 have really all of the principle players in place for Change
19 2, Change 3, 4, 10, however many, until they get their stated
20 goal on these memos and also in the documents leading up to
21 them to accelerate the pace of litigation, something that
22 under Vargas is your responsibility.

23 And so, Judge, we're dealing, I think, potentially

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 still with actual influence, but certainly with the appearance
2 of unlawful influence. So it's not hard to imagine that this
3 is a shot across the bow, to use a naval expression, or a
4 warning, Judge, that you've been told by the convening
5 authority, even if it failed -- I mean, this is a pretty --
6 very big public statement that has gone on here, that you're
7 not moving cases fast enough. You now know that they're
8 keeping records of your hours spent on the record and that
9 they determine that to be some valuable metric as to whether
10 or not these cases are proceeding in a timely fashion.
11 They've also gone apparently to the trial judiciary staff and
12 asked them to compile those numbers for them. I mean, that's
13 a request to Ms. Wilkins in those -- in those e-mails.

14 So, Judge, we certainly still have an appearance
15 problem, if not an actual unlawful influence problem, and it's
16 for the people -- you referenced this earlier -- over my left
17 shoulder, the people of the public, neutral observers that are
18 looking at this. And what do they think about this, Judge?

19 I mean, you've got the convening authority and we've
20 said in the papers the convening authority picked the chief
21 judge in this case in a 2010 memo. The convening authority, I
22 heard yesterday, doesn't believe he any longer has that power,
23 but Judge Pohl remains in place. You have the convening

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 authority picking the chief judge, the convening authority
2 under his inherent powers is going to pick the jury, the
3 members in this case, and now he's meddling with both the
4 staff and the judges of this court. And at best, if you
5 accept the convening authority's explanations, his decision to
6 move the judges to Guantanamo Bay was because of the SSCI
7 report. His decision to move the judges to Guantanamo Bay and
8 not to tell anyone about it was because of the Salyer case.
9 And the Salyer case doesn't say anything about that.

10 If you accept those explanations, at best, what the
11 convening authority did was fire a bullet into a crowded house
12 where three judges are sitting, knowing full well that one of
13 those judges might get hit by that bullet. Whether he
14 intended to remove the judges of this judiciary or not, he did
15 something he knew might remove the judges of this judiciary.
16 It's an inherently dangerous act, an inherently reckless act.
17 And until this court does something akin to what Judge Pohl
18 has done, at the very least I think we're going to have to ask
19 the convening authority and staff be dismissed from this case.
20 That's the bare minimum that has to happen in this case. None
21 of them has told you anything that they did was unlawful.

22 And, Judge, you can go through every MJ, 1 through
23 74, and you're not going to find anything that even comes

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 close to the unlawful influence that is present here and at
2 the highest levels of the Department of Defense. And, Judge,
3 I would submit that this memo is, itself, further unlawful
4 influence. I mean, when was the last court-martial that you
5 were sitting in where the Deputy Secretary of Defense is
6 taking action on essentially the Rules for Court-Martial as
7 litigation proceeds? And that's what's taking place here.
8 And I, frankly, don't know how the public can have any
9 confidence in the fairness of these proceedings as they're
10 being steered by executives in the Department of Defense.

11 So, Judge, no, absolutely not do we believe that this
12 has been cured. I won't concede a cure of actual influence,
13 and certainly not the public appearance of fairness, Judge.
14 The burden is still on us and we would like to proceed with
15 our witnesses. We expect that Admiral DeRenzi is going to
16 come in and state she was going to go along with this. She
17 viewed this as a resourcing request. They hadn't worked out
18 the nuts and bolts of it, but, Judge, she was going to go
19 along with it. And, Judge, that goes right to our due process
20 argument.

21 MJ [Col SPATH]: That was going to be, and a couple
22 questions about you had the opportunity to interview two, so
23 far, correct?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DDC [CDR MIZER]: Yes, Judge.

2 MJ [Col SPATH]: Okay. And I know this is not evidence
3 before me. I just, as an officer of the court, I want an idea
4 of -- working through two different things, whether or not the
5 motion has been resolved or not, and then whether or not, and
6 if there's a change in the landscape as to the testimony I
7 need to resolve the issue, two different issues. We all agree
8 with that?

9 DDC [CDR MIZER]: Yes, Judge.

10 MJ [Col SPATH]: With regard to General Darpino, had she
11 made a decision -- at least is she going to testify that she
12 made a decision to drain the pool or remove Judge Pohl,
13 whether she could or not? Was that her way ahead?

14 DDC [CDR MIZER]: Judge, I think that both of them are
15 going to say they're working through logistics. I think that
16 General Darpino will say that one of her questions was whether
17 or not you needed three full-time judges or whether there
18 could be one full-time judge here at Guantanamo Bay. So
19 that's precisely our point, is they're meddling with the
20 judiciary, I believe that her testimony is not duplicative on
21 that point with Admiral DeRenzi.

22 MJ [Col SPATH]: Your conversations with Vice Admiral
23 DeRenzi, was it similar? She was still working through the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 logistics as well?

2 DDC [CDR MIZER]: Yes, she was still working through the
3 logistics order, Judge.

4 MJ [Col SPATH]: No decision on ----

5 DDC [CDR MIZER]: No decision, although I think the key
6 thing from her was I got no sense that there was any pushback.
7 She only talked about resourcing. I think that's important
8 for the future for a judge, because I don't believe for a
9 second there aren't further changes coming once they figure
10 out how to do this in a less hatchet manner than they did it
11 here.

12 MJ [Col SPATH]: So, again, two separate questions.

13 DDC [CDR MIZER]: Yes, Judge.

14 MJ [Col SPATH]: The unlawful influence piece I'm not
15 talking about now. It's more the witness testimony, because I
16 have evidence before me, with the rescission of Change 1,
17 those discussions -- those discussions with the TJAGs seem to
18 be moot, until we get another change properly staffed. I saw
19 the memo where they directed the convening authority for
20 future changes to consult with the people that should be
21 consulted with.

22 But I'm looking for actual impact on currently
23 detailed judges, and the closest we have is General Burne,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 frankly, suggesting that he's planning on removing me, he just
2 hasn't gotten there yet.

3 DDC [CDR MIZER]: Colonel Frakt, what he told me the
4 statement from General Burne was, I can't afford to have
5 Colonel Spath sitting in Guantanamo staring at iguanas.
6 That's the statement attributed to General Burne.

7 MJ [Col SPATH]: Again, this is not evidence before me. I
8 recognize he hasn't testified.

9 DDC [CDR MIZER]: That's my proffer, Judge.

10 MJ [Col SPATH]: Yes, I appreciate that, and that
11 certainly sounds like something General Burne might say. It
12 has the markings of a comment by him. I haven't heard that
13 one before. All right.

14 Let me hear from the government.

15 DDC [CDR MIZER]: Aye, sir.

16 MJ [Col SPATH]: All right. Two parts obviously, Colonel
17 Moscati. One, moot; and then two, do I need to hear from the
18 witnesses? So two different questions to you.

19 DCP [COL MOSCATI]: Yes, Judge. First, Judge, I
20 participated in the interview of General Darpino and I would
21 like to proffer her answer to your question, did she say she
22 would remove Judge Pohl or alter or change the pool? She did
23 not say that. She said that she did not -- had not made any

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 decisions and did not completely understand the change yet and
2 that she, her staff, and she had asked others to look into
3 that, study that. So -- and, Judge, I did not participate,
4 but I'm told Admiral DeRenzi said she also had taken those
5 steps with respect to current judges.

6 So now back to the legal arguments, Judge. As we
7 said in an e-mail, we feel, Judge, that the underlying factual
8 basis is gone, so there would have been, obviously, no motion
9 if there had been no Change 1. There is no Change 1 anymore,
10 so there's no factual basis to bring the motion.

11 Now, a motion has been brought, it's pending and so
12 forth, Judge, and again we have the issue of actual influence
13 or apparent influence. On the actual, Judge, again the
14 government's position, Judge, is we think that is gone, would
15 be gone, should be gone. But ultimately, Judge, you are the
16 commission, you are sitting on this case, and perhaps voir
17 dire, whether a verbal statement from the bench, an order, I
18 think it's the commission who would have to indicate whether
19 with this change -- rescission of the change, you feel there's
20 any actual influence. The government does not think there
21 would be.

22 As far as apparent influence, Judge, I don't know
23 what could be, you know, more demonstrative of the seriousness

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 with which the government takes the Change 1 and the
2 allegation, the motions regarding Change 1 than within
3 24 hours of Judge Pohl's order rescinding Change 1. Certainly
4 the government sees this as a serious matter and, again, took
5 action to rescind it within 24 hours.

6 And, again, there couldn't be anything more, Judge,
7 to show the public again this concern about an apparent
8 influence to show that it's not the intent, it's not the
9 belief that these commissions and you, this commission, should
10 be affected by the convening authority, DEPSECDEF. They took
11 that away within 24 hours, Judge. That certainly addresses
12 appearance.

13 Even if, Judge, we got to the conclusion of this
14 motion and you found there to be influence, if we got all the
15 way to a possible remedy, there couldn't be a remedy any more
16 appropriate, apt and significant than a rescission of the
17 change. So, you know, the change is gone. The motion is
18 moot. The underlying basis is moot.

19 Again I defer to the court, whether the court feels
20 there's still influence without Change 1. And in terms of
21 appearance there's a very strong record now that the
22 government saw the appearance as a concern and addressed it in
23 the most significant and drastic way. Thank you.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: All right. And assuming the motion's not
2 moot, I'm going to give everyone time to talk about the UI
3 piece in some detail later. But in response to where we're at
4 now, the ----

5 DDC [CDR MIZER]: Sir, I don't disagree with Colonel
6 Moscati's factual characterization of the interviews. Both
7 general officers said they hadn't reached final decisions in
8 this matter. It's some of the comments about, you know, the
9 thoughts, for instance, in Army TJAG. The discussion of can
10 we just have one judge? I mean, if that judge is going to
11 live down here, can we just reduce the pool to one judge? I
12 mean, those are the types of things that are being done and I
13 think the important thing is with respect to Admiral DeRenzi
14 she views herself as a resource provider. She must have said
15 that half a dozen times. And so when the DEPSECDEF gets this
16 requirement, she's going to fill it one way or the other.

17 And that's precisely the problem, is that there's no
18 check. And when you're looking at the due process issues --
19 and I believe we should be able to make that record with the
20 TJAGs -- that when the convening authority and DEPSECDEF say
21 jump with respect to this judiciary, they're going to say how
22 high. And I think that that undermines Weiss, it undermines
23 Article 26, and undermines the provisions with respect to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 unlawful influence and the statute.

2 And, Judge, you know, ultimately the action itself,
3 the Change 1 isn't the unlawful influence that has been
4 excised. It's the actions surrounding it. And so by
5 merely -- merely removing the vehicle that they chose, you
6 haven't excised the mortal enemy of military justice from this
7 case. And, Judge, you know, I would ask that we just be
8 allowed to proceed with our witnesses, with our case, and make
9 that case, Judge. Thank you.

10 DCP [COL MOSCATI]: Judge, just very briefly, the mortal
11 enemy that's now being argued, again, doesn't exist as a
12 factual matter. But in terms of appearance we're right back
13 to the hypotheticals and the speculation of what TJAGs might
14 do. Earlier this morning, Judge, I was arguing that they were
15 hypothetical and speculative when Change 1 existed. Now there
16 is no Change 1 and we're still -- the defense is still
17 arguing, well, what might the judges do in reaction to this?

18 It doesn't exist anymore, and we can go down the
19 rabbit hole of speculation and hypotheticals, but we're on a
20 different -- we're on a different factual turf at this time,
21 Judge, and it makes no sense to take the time, the court time,
22 and go into something with TJAGs that's purely speculation and
23 hypotheticals. There's no Change 1. Thank you, Judge.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: Let me just check with the court
2 reporters. What's our next appellate exhibit in this series?
3 Sierra, all right.

4 We're going to mark the rescission package, the
5 rescission of Change 1, as 332S. And, again, that includes
6 the cover memo and then the tabs supporting it, one of the
7 tabs being Judge Pohl's ruling, and the other tab being the
8 change.

9 I think it's important to give you all a road ahead,
10 and one that, in all fairness, I've been thinking about
11 because, having seen Judge Pohl's ruling, I assumed there was
12 going to be one of two responses to it, an Article 62 appeal
13 or a rescission of Change 1. Seemed likely those were the two
14 paths, or to sit in abatement for an undetermined period of
15 time, and I found it unlikely that that was going to be the
16 response.

17 I think the rescission of Change 1 has changed the
18 glideslope that we're on in relation to, at this point,
19 testimony from the TJAGs, because the evidence I have, and
20 what I use the assertions from counsel, I was just in the
21 normal 703, should I produce a witness. That's all I'm using
22 them for, and I would use it for that in every case. They
23 hadn't yet taken action, they had contemplated action, which

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 goes to the follow-on discussion in a minute about where we're
2 at with 332. But it's prospective, and so if we have Change 3
3 or an undetailing of a trial judge or a shrinking of the pool,
4 there may well be follow-on UI motions based on that fact
5 pattern.

6 What I have in front of me -- so at this point, I
7 don't need to hear from the TJAGs because I see what impact it
8 had on them. They were contemplating, and the evidence is
9 before me, both in the motion practice I put into the record
10 so you all could see, plus General Darpino's e-mail, plus the
11 testimony of Mr. Ary, that he too contemplated an effect on
12 the pool and an affect on detailed judges, and it's before me.
13 So I agree the glideslope has changed.

14 We're in a position now -- and we're not going to do
15 it this minute, but I want to do it today. But we're in a
16 position now that I want to be able to argue the merits of
17 332. However, defense indicated that TJAGs, and I've
18 indicated to you all that at this point I don't find them
19 necessary for resolution of the motion. I don't think the
20 UI -- prospective UI is not going to assist. I already know
21 what they were thinking about doing. Change 1 is gone. We'll
22 see if they coordinate on an additional change in the future
23 and do this.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That does not resolve the UI motion. It is certainly
2 not moot, given the record that has been built. And given the
3 record that has been built, Defense Counsel, as I have, I
4 think, hinted if not suggested strongly, you've carried your
5 burden of some evidence. If the government puts on evidence,
6 I will give you an opportunity to rebut, of course. But the
7 government -- and I'm not saying you haven't done it through
8 the rescission of change -- this is not a comment on where
9 you're at. It is just based on what defense presented to me,
10 the e-mail traffic and the testimony of Mr. Ary. That's some
11 evidence of unlawful influence.

12 And so I turn it over to you all on the lunch break.
13 Are you going to call any witnesses? Are you going to submit
14 any additional documents? I've submitted the rescission. Or
15 do you believe that you have successfully cleaned up the issue
16 and are prepared to argue? And if that's the case, we're
17 going to come back this afternoon and hear argument on the UI
18 motion and where we're at on the UI motion, because, again, I
19 don't think it's moot. And I do think that both sides need an
20 opportunity to make that record complete when they argue
21 and -- because you both asked for argument, and I said we'd
22 have argument, and I've said that all week, and I want to hear
23 your thoughts on it.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Mr. Kammen, I see you want to make a comment?

2 LDC [MR. KAMMEN]: Quite honestly, and I will defer to
3 Commander Mizer, but we had anticipated the arguments over the
4 weekend. I mean, there's quite a lot to marshall and -- not
5 the arguments over the weekend, the arguments on Monday, and
6 there's really quite a lot to marshall. These are not simple
7 arguments.

8 I mean, he and I have been working through them for
9 the last two days and, obviously, if we're not going to hear
10 from the TJAGs so be it, but, you know, there's still a lot to
11 marshall. And we've just -- we'll obviously defer to the
12 commission, but we just wanted to point that out, that we
13 really were preparing for this further evidence.

14 MJ [Col SPATH]: I appreciate that.

15 Trial Counsel, any comments on that?

16 DCP [COL MOSCATI]: The government would be ready to argue
17 the motion, Judge.

18 MJ [Col SPATH]: Here's -- here's where I'm at. I have
19 empathy for both sides in this. Frankly, I thought we'd be
20 there on Monday. However, it has been a pending motion for a
21 significant period of time. What I'm not going to do is take
22 a one-hour break and expect you all to come in here and start
23 arguing.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We need a couple things. Your request could
2 change -- I mean, it could end up being Monday based on
3 whether or not the government's going to put forth any
4 evidence. So during the lunch break what I need from you all
5 is whether or not, in fact, there's going to be additional
6 evidence from the government or not. If not, send an e-mail
7 to Mr. Taylor, copy the defense and let us know the answer to
8 that.

9 I can take motions without argument. I don't want to
10 do that in this case. I think it's fair. But I also know
11 that we have been pending this for a long period of time, and
12 the amount of information that's come in recent time, although
13 it is a significant amount to marshall, it's something that
14 can be done by 1500.

15 And so at 1500, if the government says no additional
16 evidence, we're going to come in and I'm going to take
17 argument on the UCI or the UI issue. If the government has
18 additional evidence, we'll start earlier to hear their
19 evidence. We'll start at 1400. We'll take a two-hour break
20 so the government has time to assess whether or not they're
21 going to put on evidence and make sure everyone knows and
22 knows when to be back here. So I know that doesn't give us an
23 exact start time, but it's close.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 If the government does put on evidence, Mr. Kammen's
2 argument will be on Monday -- well, could be later than that,
3 depends on the evidence, of course. Otherwise, we'll see
4 everybody at 1500 for argument on the motion.

5 Trial Counsel, any other matters to take up right
6 now?

7 DCP [COL MOSCATI]: Judge, could we have just a moment to
8 discuss the change in position?

9 MJ [COL SPATH]: Absolutely.

10 DCP [COL MOSCATI]: Thank you.

11 [Pause.]

12 MJ [COL SPATH]: Colonel Moscati, you can take more time.
13 I just -- I don't know if you have somebody on your staff who
14 can let Admiral DeRenzi ----

15 DCP [COL MOSCATI]: Yes, Judge, we'll let the commission
16 know during the break.

17 MJ [COL SPATH]: Perfect. And obviously make sure you let
18 defense counsel know.

19 DDC [CDR MIZER]: Judge, I think he didn't hear you, the
20 Admiral.

21 MJ [COL SPATH]: I was going to say, do you have someone
22 that can tell the admiral? I got a head nod that she's not
23 necessary at this point.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 DCP [COL MOSCATI]: Yes, Judge.

2 MJ [Col SPATH]: Defense Counsel, do you have anything to
3 take up before the recess?

4 DDC [CDR MIZER]: No, Judge.

5 MJ [Col SPATH]: All right. I will see you in the
6 afternoon at some point. Commission is in recess.

7 [The R.M.C. 803 session recessed at 1201, 27 February 2015.]

8 [END OF PAGE]

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT