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1 [The R.M.C. 803 session was called to order at 1500,
2 27 February 2015.]

3 MJ [Col SPATH]: The commissions are called to order. All
4 of the parties, including Major McMillan, are again present.
5 On the break the only development was the government let us
6 know that they were not going to present any evidence and we
7 were going to move into argument at 1500. Otherwise, at least
8 for this week, it was an uneventful break with no major
9 developments in this motion. So I think we're ready to argue.

10 Trial Counsel, I've telegraphed that I find the
11 defense has met their initial burden of raising some evidence,
12 so I'm going to turn it over to you for first comments. You
13 may proceed.

14 ATC [LT MORRIS]: Good afternoon, Your Honor.

15 MJ [Col SPATH]: Good afternoon.

16 ATC [LT MORRIS]: The actions of Mr. Ary have -- in this
17 courtroom, in this commission, they have been scrutinized,
18 they've been examined, they've been cross-examined. And there
19 is no evidence in front of Your Honor that any of his actions
20 were taken with anything less than good faith, good faith
21 towards the accused, good faith towards the government,
22 towards the American people.

23 There's no evidence that his actions that he took was

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1 anything less than lawful, lawfully resourcing and positioning
2 military commission for mission success, for the government,
3 for the defense, and for the American people. And as Your
4 Honor knows, incidentally, these are the three parties that
5 have interests in a speedy trial, the government, the defense,
6 and the American people. When we look at all ----

7 MJ [Col SPATH]: I'll ask right up front about the good
8 faith piece. Let's assume that I believe Mr. Ary had all good
9 intentions. Can you still have unlawful influence, if you
10 take actions with all the best intent?

11 ATC [LT MORRIS]: Absolutely, Your Honor, and that's why
12 it's not just the good faith, but it's the actions themselves
13 that were scrutinized. But the reason that it's important to
14 bring up good faith is the actions themselves were up front,
15 and they had been from the recommendation. The reason
16 that ----

17 MJ [Col SPATH]: Yeah, I don't want to stop, but were they
18 up front? They were not staffed through the Chief Trial Judge
19 of the Commissions.

20 ATC [LT MORRIS]: And if you'll allow me to proceed, we'll
21 get to that.

22 MJ [Col SPATH]: I think it's important, as we go through
23 this, that we are completely accurate about the state of where

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1 we're at.

2 Mr. Ary did not staff them through the Chief Trial
3 Judge; is that accurate?

4 ATC [LT MORRIS]: That is accurate.

5 MJ [Col SPATH]: Nor did he staff them through any service
6 TJAG.

7 ATC [LT MORRIS]: That is accurate.

8 MJ [Col SPATH]: The only place he looked to outside his
9 office was OJC?

10 ATC [LT MORRIS]: That is correct. And Your Honor asked
11 him about that and heard him testify about that. And the good
12 faith part, as I come back to that, is one of the reasons, one
13 of the main reasons he was called was to talk about his intent
14 behind the things. One of the defense counsel's original
15 propositions for what was going on here was some sort of
16 conspiracy between the DEPSECDEF and the convening authority.
17 It's in their initial pleading. That's how this whole thing
18 got started. That was one of their main predicate facts.

19 So when we bring him to say what was your intent, was
20 there any of those intentions, and we see that he comes and he
21 floats to the top clean, that what he did was in good faith,
22 and so that's why, Your Honor, I present that first and
23 foremost, because when not only Your Honor reviews the facts,

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1 but when the American people, and as we get into the
2 appearance part of who those American people are, the good
3 faith part becomes important.

4 What I did want to do, though, is pause just briefly
5 to say that the cases that have been put in front of Your
6 Honor, the cases of unlawful command influence, as we
7 understand them in courts-martial, these cases, we see a
8 convening authority reaching into the trial judiciary,
9 impermissibly reaching in, and we don't see any of those facts
10 before Your Honor.

11 And I want to make just one important point, and that
12 is the importance of adding to what this convening authority,
13 and not only how he's different, how he's unique from those
14 cases which informs his resourcing part, which is that he is
15 the director of military commissions. He is in charge of,
16 that it's his job to be involved with a whole host of areas
17 that a normal convening authority on a normal base as a
18 commanding officer would not be involved with. And that's an
19 important distinction for us to recognize at the outset. But
20 like I said, that when we look at that normal case, the cases
21 that defense counsel have cited, they are a convening
22 authority reaching down into the trial judiciary.

23 What do we see here? We see a convening authority

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1 reaching up, reaching up and making a recommendation to the
2 Deputy Secretary of Defense. And not only did we put him on
3 the stand to ask him these questions, we pierced the privilege
4 that he had invoked. And I understand your ruling ----

5 MJ [Col SPATH]: You did not pierce the privilege.

6 ATC [LT MORRIS]: I understand your ruling, and Your Honor
7 said that there wasn't even a privilege in the first place,
8 but the tenets of that privilege, Your Honor, was for there to
9 be -- to allow for the free flow of discussion. And I'm not
10 here to question Your Honor's ruling.

11 MJ [Col SPATH]: You're here -- I really want to engage in
12 an intellectually honest debate about this. The convening
13 authority's staffing package, which we have in evidence, that
14 went to the Secretary of Defense, he did not put in there one
15 concern, starting at Bates stamp 127182, you've got the
16 initial -- the package that went to the Deputy Secretary of
17 Defense. He did not put one concern that his staff had raised
18 to him about how this could cause problems in these
19 commissions, that this could be unlawful influence, that this
20 could be reaching into the judiciary, that this could be
21 viewed as a problem.

22 He staffed this to the Deputy Secretary of Defense,
23 and he did not put in a single negative that his staff

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1 highlighted for him. So he did reach up to the person who
2 could effectuate the change, but where is the evidence that he
3 told that person here are the risks?

4 ATC [LT MORRIS]: The evidence is in front of you in this
5 the way, Your Honor, that he examined those risks, that his
6 legal staff examined those risks. And the point that I was
7 trying to make, and I think that's an important point that I
8 had made to you before, is that this is exactly what you would
9 expect legal advisors to do. Look at all the statutes, look
10 at his rule, look at the areas where this may go afoul and
11 raise this to point ----

12 MJ [Col SPATH]: I would. But wouldn't you expect the
13 same advisors to advise the decision-maker, the Deputy
14 Secretary of Defense, wouldn't you expect they would tell him
15 here are some of the concerns that have been raised?

16 ATC [LT MORRIS]: Absolutely not, Your Honor. I would not
17 expect legal advisors that work for the convening
18 authority ----

19 MJ [Col SPATH]: Wait a minute. Wouldn't you expect the
20 convening authority, who is effectuating this change -- it's
21 different if the DEPSECDEF woke up one day and said I have an
22 idea, then I would be talking to him and probably he would
23 have testified to find out who he reached to for advice.

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1 The convening authority was advising DEPSECDEF, which
2 he testified to, on an idea that was his, which he also
3 testified to. And does it not trouble you at all that he did
4 not share at all with the ultimate decision-maker, the person
5 who could change the regulation, here are the real risks that
6 might happen? That doesn't concern you?

7 ATC [LT MORRIS]: If you look at the recommendation
8 itself, there are citations to those appropriate provisions,
9 citations to what his role is and how this recommendation came
10 about ----

11 MJ [Col SPATH]: I understand that.

12 ATC [LT MORRIS]: ---- and his assessment.

13 MJ [Col SPATH]: I'm asking: Does it concern you at all
14 that the convening authority did not highlight any of the
15 concerns that had been raised to him as he staffed this
16 recommendation through his office?

17 ATC [LT MORRIS]: What I would expect, Your Honor, if
18 those concerns rose to the level of the convening authority
19 even thinking that there was a chance within the appearance
20 aspect, that the recommendation would not have been made in
21 the first place.

22 You have a man who's a career military officer who is
23 familiar with UI, who has legal advisors around him who are

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1 examining these tenets and who are advising him of this. And
2 the point that I submit to Your Honor is that what's important
3 here is looking to see the convening authority's actions and
4 comparing them to the other UCI cases, was he impermissibly
5 trying to influence Your Honor? Was he impermissibly trying
6 to influence this case? Was he speaking in his office
7 negatively about Your Honor or this case?

8 And, in fact, what you see -- even as Your Honor
9 said, we're not piercing a privilege, but there certainly was
10 no intent for all of those e-mails to be in front of all the
11 American public. But what's heartening is you pull the
12 curtain back, and what do you see not once, not once was there
13 anything unhallowed that was said about the sacred ground of
14 this trial judiciary. And, in fact, when you look and you
15 press even more, you see that Mr. Ary's language towards this
16 trial judiciary was nothing but speaking of Your Honor in the
17 highest praise.

18 When we look at the facts themselves, I submit to
19 Your Honor the case of United States v. Thomas, it's a 1986
20 C.M.A. case, and what it does is -- obviously it's before
21 1999, the seminal Biagase case, but it gives us nice factual
22 cubby holes to look for the court saying here are the areas
23 that represent when UCI takes place and how the accused is

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1 affected.

2 If the UI is directed at chilling a defense witness,
3 which is a lot of cases that we've seen, then it disallows the
4 accused to put on favorable evidence. The Thomas Court says
5 if the UI is directed at defense counsel, it prevents the
6 accused from being able to put on or have effective assistance
7 of counsel. And the last category that the Thomas Court
8 highlights is if it is highlighted or if it is directed at
9 either a court member or the military, Judge, it would deprive
10 the accused of an impartial forum, quote, "because the court
11 personnel has a personal interest in not incurring reprisal by
12 the CA due to a failure to reach his intended result." We
13 have zero evidence of that in front of Your Honor.

14 MJ [Col SPATH]: Isn't that the issue?

15 ATC [LT MORRIS]: That is the issue. That is the issue.

16 MJ [Col SPATH]: Isn't that the very issue with Change 1?

17 ATC [LT MORRIS]: That is the issue that the defense is
18 alleging.

19 MJ [Col SPATH]: Isn't that the very issue with Change 1?
20 Isn't that the very issue with Change 1? We're going to move
21 three people down here to live here until these cases are
22 finished because the convening authority believed that would
23 increase the pace of litigation.

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1 ATC [LT MORRIS]: Well, very clearly that is not what the
2 record shows. It was about, if you look at Your Honor's
3 comments on Wednesday, I believe it is, and here's the quote,
4 to see whether or not in regards to pace of litigation -- this
5 is you speaking, reflecting on Mr. Ary's testimony.

6 I will tell the public this. Pace of litigation to
7 me means what Mr. Ary said, frankly ----

8 MJ [Col SPATH]: I agree with that.

9 ATC [LT MORRIS]: --- litigation has its own pace.

10 MJ [Col SPATH]: Mr. Ary said that. His change didn't
11 reflect that. I agree with what he testified to, pace of
12 litigation sets its own process. Prior to that change he was
13 engaged in discussions with his office and with the other
14 people around the table, the prosecution, the defense, about a
15 desire to increase the pace of litigation. That was in his
16 testimony.

17 He also testified that he thought the pace was too
18 slow. And his answer to that was to move three trial judges
19 down here, because that would effectively increase this pace
20 of litigation.

21 ATC [LT MORRIS]: Your Honor, his answer to that was to
22 effectively resource this military commission. And we need to
23 examine -- we need to examine this in Mr. Ary's words, which

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1 is is a holistic approach upon taking the role of convening
2 authority.

3 MJ [Col SPATH]: Counsel.

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

5 MJ [Col SPATH]: He didn't move the staff attorney down
6 here with me. He wasn't moving the court reporters down here
7 with me. He wasn't moving you all down here with me. He
8 wasn't moving them all down here with me. He wasn't moving
9 the interpreters down here with me.

10 So when I woke up on a day down here when court
11 wasn't in session and I thought oh, I could hold court here
12 today, do you know what would happen? The same thing that
13 happens right now. We would call D.C. and all of you would
14 get on an airplane, however long that process takes, then we
15 would all fly down here and I would be in the courtroom
16 waiting to go.

17 ATC [LT MORRIS]: He made a recommendation.

18 MJ [Col SPATH]: He did.

19 ATC [LT MORRIS]: Look at the landscape. We had the
20 DEPSECDEF in 2008 and continually saying that this case, these
21 military commission cases are important to the American people
22 and they should be a priority, and they should be staffed
23 accordingly, and they should be given the appropriate

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1 resources. And in response to that marching order, the
2 convening authority, the director of military commissions,
3 solicited input from all the parties involved.

4 He has a hanging memo from the trial judiciary ----

5 MJ [Col SPATH]: Let me be clear. I have no concerns with
6 the resourcing memos. I have no concerns. The fact that he
7 went out and talked to the defense community, trial community,
8 and the judiciary and he said what do you need, that makes --
9 that makes complete sense. And if you look in the
10 regulations, that is his role. Clearly delineated, that is
11 his role.

12 ATC [LT MORRIS]: And would Your Honor agree, as well --
13 and this is a quote directly from the trial judiciary
14 that's dated 2 July 2014, Bates 127707, this is to the
15 convening authority, "These structural changes must occur in
16 order for the trial judiciary to achieve mission success and
17 fully support the military commissions process in a timely
18 manner"?

19 MJ [Col SPATH]: Absolutely. Because when I got on board,
20 how many motions were we behind in this case? I believe it
21 numbered a few dozen. I think we were at 40 or 50 ----

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

23 MJ [Col SPATH]: ---- that we were behind. And part of

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1 the rationale for that, of course, is you're limited by the
2 staff attorneys who are helping you with preparing the
3 motions. So I agree with that completely. We have caught up
4 on those motions with no increased manning. But due to an
5 increased, frankly, energy level on this case, we have caught
6 up. We've come a long way back.

7 I'm focused, though, on the change. You have in the
8 e-mail traffic he went out and collected information on '13
9 and '14, calendar year and fiscal year, to figure out how many
10 days were on the record, how many hours were on the record,
11 and he did it close in time to when a trial judge had made a
12 comment that we've already talked about in here.

13 Does that appearance cause you any concern?

14 ATC [LT MORRIS]: What's better than speculation about
15 that is the questions and the testimony of Mr. Ary himself of
16 talking about why he did what he did. He came in with a
17 submission that there was going to be another courtroom that
18 was built in here, costs millions of dollars, and so
19 examining, you know, that request, that possible need to build
20 another courtroom, and here he is examining how are our
21 current resources being used?

22 He's not scrutinizing Your Honor and how Your Honor
23 is using this courtroom. What he's doing is looking at the

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1 facility itself, this courtroom and how it's being used in and
2 of itself and then saying is there a need -- when I ask for
3 these fundings, is there a need or a justification to spend
4 millions of dollars building another courtroom? Or what do
5 the hours of the use of this courtroom show me? Show to me
6 and that was that this courtroom was being used in fiscal year
7 2014 less than nine hours a month.

8 And Your Honor is right, and we're heartened and the
9 accused should be heartened and the American people should be
10 heartened at your hard work, the work to resolve the motions,
11 the work to take seriously the motions that were pending in
12 front of Your Honor. And in addition to that, to then use the
13 resources that have been provided to Your Honor, to use those
14 effectively. And on top of all of that ----

15 MJ [Col SPATH]: We're not talking about -- I agree with
16 much of what you're saying, but we're not talking about the
17 issue at hand. What possible purpose, sensible purpose was
18 there in moving three trial judges down here with no support
19 staff to affect the pace of litigation?

20 ATC [LT MORRIS]: It seems to me that it's common sense,
21 Your Honor, that when you have a DEPSECDEF and American
22 people ----

23 MJ [Col SPATH]: You seem to be alone in that because

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1 DEPSECDEF rescinded it.

2 ATC [LT MORRIS]: That makes the point even stronger, and
3 that is this. We're look at two things.

4 MJ [Col SPATH]: Who doesn't see how three judges down
5 here without staffing it appropriately could have affected --
6 he rescinded it quickly. I'm asking you truly how you think
7 me living here would affect the pace of litigation in an
8 appropriate way? Do you really think we'd move this case in
9 an appropriate way faster if I lived here?

10 ATC [LT MORRIS]: Your Honor, Mr. Ary testified ----

11 MJ [Col SPATH]: I asked you: Do you really think me
12 living here would increase the pace of litigation in this case
13 in an appropriate manner?

14 ATC [LT MORRIS]: And there's no desire by any parties,
15 including Mr. Ary, the neutral party in this, for it to be
16 anything but the pace of litigation that Your Honor set. You
17 know, the outcome of this litigation ----

18 MJ [Col SPATH]: My litigation calendar is already set.
19 My litigation calendar is set to December, and it's set around
20 other trials. So you know ----

21 ATC [LT MORRIS]: I would be glad, Your Honor, to ----

22 MJ [Col SPATH]: You know there's going to be holes when I
23 can't be in this courtroom. So, again, I'm asking you

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1 how ----

2 ATC [LT MORRIS]: It may go faster, Your Honor. It may go
3 slower, Your Honor. I don't know the answer to that question.

4 But what I do know is that a recommendation was made
5 by Mr. Ary, who now defense counsel is alleging unlawful
6 influence over that recommendation. And what I'm stating is
7 Biagase gives us very clear framework to proceed to look at is
8 there actual unlawful influence. And I'm saying that Your
9 Honor has represented on the record, and you said this to the
10 public -- hopefully they can pick this up -- I feel no
11 pressure to move this case forward inappropriately. And Your
12 Honor talked about the pressure you feel ----

13 MJ [Col SPATH]: I don't. I don't feel any pressure.

14 ATC [LT MORRIS]: And that, too, the government.

15 MJ [Col SPATH]: I haven't been moved to Guantanamo Bay,
16 Cuba.

17 ATC [LT MORRIS]: Well, then, what we're talking about
18 is ----

19 MJ [Col SPATH]: I may have been removed from the case.
20 There's so many facets of this that are at issue, and I don't
21 want to do them short shrift. I think this is incredibly
22 important. I can look at the public and you and say I felt no
23 pressure to move this case faster based on Mr. Ary, I'll move

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1 it appropriately.

2 It's the appearance to the public, an uninterested,
3 disinterested member of the public, because people with
4 interest will have feelings, as they should. So to move three
5 judges down here, to move this process forward, is part of it.
6 He took the action in his mind knowing it could eliminate a
7 currently detailed judge to the commission. He said that,
8 too, in his testimony, "I knew that was a risk. I looked at
9 his resourcing." That would be a con is what he explained.
10 That would be a con.

11 He went into an action knowing it might result in the
12 removal of the trial judge. Now, whether it could or not,
13 that's probably for more motions and a different set of law.
14 That's an interesting question based on how you remove
15 commissions judges. But that was his testimony, that he made
16 the recommendation knowing that the detailed trial judges may
17 be removed.

18 ATC [LT MORRIS]: Your Honor, he made a recommendation
19 through lawful and proper channels, and this is what I want to
20 emphasize. Your Honor made the suggestion that possibly you
21 could have been removed, and I hope that Your Honor is not
22 relying on a file in another case for that proffer in any ----

23 MJ [Col SPATH]: I'm relying on what Mr. Ary said.

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1 ATC [LT MORRIS]: Okay.

2 MJ [Col SPATH]: Mr. Ary said I went into it understanding
3 I might lose currently detailed judges. He said that. And
4 then when asked if that would be a pro or a con, he said that
5 would be a con.

6 ATC [LT MORRIS]: Right.

7 MJ [Col SPATH]: But he recommended an action knowing that
8 prospectively it would eliminate a judge.

9 So then that's where we get to the appearance issue.
10 How does that look to the public? Do some members of the
11 public think maybe Mr. Ary wants me to be taken off the case?
12 I know what his e-mail says. I understand. I have experience
13 and knowledge. I appreciate the e-mail. But, again, we have
14 the public perception.

15 ATC [LT MORRIS]: And the government acknowledges that we
16 have, as Your Honor has made a finding, that the government
17 has shown some evidence ----

18 MJ [Col SPATH]: The defense.

19 ATC [LT MORRIS]: I mean the defense, Your Honor, that we
20 need to beyond a reasonable doubt carry that burden, and we
21 shall do so.

22 But what's important initially is looking at two
23 actual facts, two predicate facts that defense counsel alleges

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1 and then that just common sense shows us, and that's Your
2 Honor's ability to be fair and impartial, that is Your Honor,
3 if he feels any pressure to achieve a result in this
4 courtroom.

5 And what we're stating at the outset -- before we
6 even tackle that burden, we're stating at the outset that both
7 of the facts, Your Honor, in any ability to be fair and
8 impartial is negated. And then the second thing, the change
9 isn't even around, the change has been rescinded. And as my
10 colleague, Colonel Moscati, said earlier today, that this
11 should have been a moot issue but for Your Honor talking about
12 the appearance issue. But in the actuality issue, the
13 predicate fact that this motion was brought under the
14 existence of the recommendation which then caused Change 1,
15 that's no longer a factor.

16 And what I would like to do before I get into the
17 very serious appearance part, I'd like to get into, Your
18 Honor, the remedies part. Because, you know, if we take this
19 through legally and we take through the burden that we have to
20 show beyond a reasonable doubt that there was an actual or the
21 apparent unlawful influence, that you would then have to
22 fashion a remedy.

23 And before I get into the apparent, I'd like to start

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1 there. I'd like to start with the remedy that is already
2 before Your Honor. We have from the DEPSECDEF saying Change 1
3 is rescinded. We have a factual pattern in another case which
4 is identical to this one, a different commission case, in
5 which, if you look at Colonel Pohl's ruling, he says that
6 examining different remedies, he says dismissal of charges is
7 not an appropriate remedy. He says that, you know, the remedy
8 basically must fit the action itself that one would find, and
9 he doesn't say actual unlawful influence, but if there's
10 apparent unlawful influence, and he says what is that remedy?
11 This is before Change 1 was rescinded. It is to rescind
12 Change 1. That has happened.

13 MJ [Col SPATH]: He did that without an evidentiary
14 hearing, we agree?

15 ATC [LT MORRIS]: That is correct, Your Honor.

16 MJ [Col SPATH]: He did not have an evidentiary hearing.

17 ATC [LT MORRIS]: Yes.

18 MJ [Col SPATH]: The ruling was clear he did not take
19 testimony, he did not have an evidentiary hearing, and he did
20 not take argument. He just did it on brief.

21 ATC [LT MORRIS]: That is correct. And, you know, we're
22 heartened that Your Honor allowed for an evidentiary hearing,
23 allowed for all the evidence to be flushed out. And what

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1 we're seeing is that if you were to -- and this is legally,
2 this is assuming arguendo, if you were to find that somehow
3 you needed to fashion a remedy -- I just want to put the
4 obvious in front of Your Honor -- that the remedy that a judge
5 in another case with the same fact pattern said would be to
6 rescind Change 1. Change 1 has been rescinded.

7 And I also want to put in front of Your Honor three
8 cases, and these are cases that speak exactly to remedies.
9 These are United States v. Reed, 65 MJ 487. This is a 2008
10 C.A.A.F. case. And this is where C.A.A.F. endorsed the
11 convening authority sending out a clarifying e-mail and
12 ultimately found no UCI. United States v. Griffin, 41 MJ 607,
13 and holding that the issuance a new memorandum excising the
14 reference that there be no place in the military for drug
15 users, again the judge saying that that was a proper remedy.
16 And the United States v. Sullivan, 26 MJ 442, and this was
17 endorsing the holding of officer calls in which the command
18 rescinding prior statements which criticized individuals who
19 testified for drug users. And one of the principles that
20 you'll find when you look at those three cases is that the
21 trial judges must tailor their remedies, the responses to the
22 situation at hand.

23 Now what I'm saying is that even though Colonel Pohl

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1 didn't have an evidentiary hearing, now with an evidentiary
2 hearing and assuming, arguendo, that there was a need to
3 fashion a remedy, there can be no better remedy than
4 rescinding the change itself, 1 and a 2, when we look at
5 memorandums being sent out or an e-mail be being sent out by
6 the commanding officer which says I may have chilled people
7 from testifying for the defense counsel. Now I want you to
8 know, please testify for the accused.

9 When you look at this memorandum by the DEPSECDEF,
10 the Deputy Secretary of Defense under the Secretary of Defense
11 sending a memorandum saying that we are going to guard against
12 even the appearance of unlawful influence and we're going to
13 change and rescind Change 1, this is a pretty powerful
14 statement that is now in front of Your Honor that has already
15 been enacted, that is already there, if Your Honor would have
16 to look at any possible remedy. It's a statement being made
17 at the highest levels. It's a statement that -- not only is
18 it a statement, but it's an action. Not only a message, but
19 it's an action, the two most powerful things that can be done
20 in fashioning a remedy for a finding of unlawful influence.

21 And, again, Your Honor, we have not conceded that
22 that will be the case and we're confident that when we look at
23 the appearance aspect next that Your Honor will find that the

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1 standard for who we are trying to look at, who is looking at
2 this case, who the appearance is for, Your Honor will find
3 that the government meets its burden beyond a reasonable
4 doubt.

5 Is it the people that are behind me, the family
6 members, Your Honor, of the victims, is that the standard of
7 what they think? Is it the NGOs or the media, is that what
8 they think, and that we would poll them and somehow see if
9 there's been apparent unlawful influence? Your Honor knows
10 that's absolutely not the case. We're given clarity, we're
11 given clear case law that talks about who these people are.

12 And it is the 2006 C.A.A.F. case of Lewis. It's a
13 disinterested observer aware of all the facts and
14 circumstances, would that person -- so here's a person that
15 knows all the facts, all the circumstances, all the testimony
16 of General Ary, the recommendations, why he did what he did,
17 when he did what he did, what he was doing as well when he did
18 what he did as far as resourcing. It's that person. And the
19 court in Lewis goes on to say would that person harbor a
20 significant doubt as to the fairness of the proceeding? And
21 so that's the person that I'm going to focus in on.

22 It's that individual. And I'm going to go through
23 the testimony and ask continually will that person harbor a

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1 significant doubt, and the overwhelming and the resounding
2 answer to each of the times that I asked that question will be
3 no; that the person that looks at all the actions of Mr. Ary,
4 the recommendations -- the recommendation that he made, the
5 action that was taken by the DEPSECDEF, the action within one
6 calendar day that was rescinded by the DEPSECDEF, will he have
7 a -- harbor a significant doubt as to the fairness of this
8 proceeding? And the answer to that is absolutely not.

9 I start with one of the most important parts of what
10 Mr. Ary testified to, almost categorizing it as the genesis of
11 this entire recommendation that happened. He talked about
12 taking office in early October, conducting a 60-day
13 assessment, as you would expect somebody to do in that role
14 and responsibility, to take stock of what's going on around
15 him, what's outstanding, what do I need to do to make this
16 process work. And one of the most important things that he
17 talked about is the 2 July 2014 memo. And we've talked about
18 this briefly, but I think this warrants significant
19 observation, because of Mr. Ary's testimony; that that 2 July
20 2014 memo, the Colonel Baime memo where he writes and says the
21 structural change is necessary in order for the trial
22 judiciary to achieve mission success and fully support the
23 mission commission process in a timely manner. What is the

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1 implication of that? There's an implication that it's not
2 being done in a timely manner, that there's a need for
3 resources. There's the very clear implication there, and it
4 is not one just shared by the trial judiciary. It was one
5 that was shared by everybody.

6 And so you've got this disinterested observer aware
7 of this, aware of the military commissions process. And is he
8 going to be thinking that, wow, everything was moving really
9 quickly up until this process happened and somehow that on the
10 opposite side of the recommendation and the rescinding of the
11 recommendation, that somehow there is going to be -- he's
12 going to be harboring a significant doubt as to the fairness
13 of this proceeding. And our answer to that would be
14 absolutely not.

15 We bring to Your Honor's attention the second small
16 data point that Mr. Ary testified, which is that he went
17 around and he met all the different parties, he greeted them,
18 shook their hands, asked about how they're doing. And in the
19 midst of all that he said listen, let me know what you need.
20 What do you need to make military commissions fair, just?
21 What do you need to make -- in the words of the trial
22 judiciary, what do you need to achieve mission success?

23 And one of the comments that was made by one of the

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1 staff of the trial judiciary was not being collocated with the
2 judges, was the challenge that it not being collocated with
3 the judges was a logistics order and structural challenge.

4 MJ [Col SPATH]: It was in D.C.

5 ATC [LT MORRIS]: It was in D.C.

6 MJ [Col SPATH]: That is a bit of a difference, because,
7 again, if that's an important data point for him, how is it
8 that the judges end up at Guantanamo and the staff attorney
9 stays in D.C.? That doesn't -- his recommendation doesn't fix
10 that issue.

11 ATC [LT MORRIS]: But there's no doubt that Mr. Ary, in
12 making his recommendation, was with a view towards -- within
13 what's proper towards helping the process as a whole, helping
14 effectuate mission success for the process as a whole.
15 Defense counsel can't do that without with abundant resources.
16 And so he looked at them and he said what do you need? And
17 they said we need additional attorneys. Here's eight, here's
18 funding for eight additional GS-15 civilian attorneys. And
19 I'll give you the rationale, he says, behind that so that
20 there is continuity in their contribution.

21 Then he goes to the office of the Chief Prosecutor,
22 he's going around, and with this Colonel Baime memo sitting on
23 his plate, and says what needs to be done? He's got,

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1 importantly, the possibility of needing to construct and build
2 another courtroom. And so he says, well, what -- what are the
3 numbers for what's going on there? How are the courtrooms
4 being used? And looking at all of these things here's the
5 things that I can resource and here's the things that are
6 outside of my control. And that is to effectuate a change to
7 the -- his boss, DEPSECDEF.

8 And there was a lot of conversation back and forth,
9 Your Honor, why didn't you consult the TJAGs? Why didn't you
10 consult the chief trial judge? And you heard him say he was
11 wary of going down the road of ex parte communication with the
12 chief trial judge. Why didn't you consult the TJAGs?

13 Could you imagine the potential appearance issues
14 that would have happened in a scenario like that, where TJAGs
15 were saying, well, why don't you like my current judge? Or
16 who knows the whole realm of things that would have happened?
17 But instead, under his duty, under his obligations, under
18 Regulation For Trial By Military Commission 2-4, this is for
19 the convening authority, it says, "In the performance of
20 assigned responsibilities and functions, the convening
21 authority for military commissions shall, quote, report
22 directly to the SECDEF of Defense or his designee." And it
23 doesn't say -- and for lack of a better visual, Your Honor,

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1 doesn't say put out a recommendation box and see what other
2 people think about it. It says reach up to the DEPSECDEF.

3 MJ [Col SPATH]: We all know -- I mean, we all know
4 actions in the Pentagon get staffed, frankly, to death.

5 ATC [LT MORRIS]: Understood.

6 MJ [Col SPATH]: Except for this one. Except for this
7 one.

8 ATC [LT MORRIS]: And what we know now, Your Honor, is for
9 this American observer, this person that is familiar with all
10 the facts, will they harbor a significant doubt for those
11 actions for him following what he was supposed to do, reach up
12 to his DEPSECDEF, one. But two, I would point Your Honor's
13 attention to the 26 February 2015 rescinded change --
14 rescission of change, the recommendation from Stephen W.
15 Preston.

16 So this observer that is aware of this that has,
17 let's say, lingering doubts as to this not being staffed
18 appropriately, he has lingering doubts that -- the doubts are
19 so significant that the next time, as defense counsel said,
20 they've shot -- there's a shot over the bow and that he will
21 go up again and do something similar, small or worse, that
22 this would be the source of the lingering doubts.

23 You see here, not only in the recommendation but the

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1 Deputy Secretary of Defense in his memorandum saying very
2 clearly that under the authorities of the Secretary's designee
3 to promulgate regulations governing military commissions, this
4 is the important part, "I hereby further direct the Office of
5 the Convening Authority to coordinate with the Office of the
6 General Counsel various DoD components, the Judge Advocate
7 General and the military commissions trial judiciary as
8 appropriate concerning whether amendments to the existing
9 regulation or additional regulations."

10 That's Your Honor. That's the trial judiciary. That
11 is all of these parties that now when you talk about the way
12 that things are normally staffed, and we ask ourselves the
13 question, would a member of the public disinterested, looking
14 at this, not only a rescission of the change but saying in the
15 future this is what you're going to do, would he harbor a
16 significant doubt? And the answer to that is absolutely not.
17 There's no reason for him to think that in the future that
18 changes or proposals to change of the regulation will do
19 anything different than what the convening authority's boss
20 said should be done.

21 MJ [Col SPATH]: I want to come to talk about that. I
22 want to first talk about where do you think his authority
23 comes from to alter the trial judiciary's location and

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1 definition of duties? Keeping in mind he made the
2 recommendation. I understand he didn't take the action; that
3 would have been problematic. But where in his
4 responsibilities is it detailed what he does for the trial
5 judiciary?

6 ATC [LT MORRIS]: I think that's an appropriate question
7 if you look at the question of him actually enacting the
8 change. But when we look at it in the realm of, if you'll let
9 me just ----

10 MJ [Col SPATH]: Well, the regulation gives him
11 responsibilities in relation to trial judiciary ----

12 ATC [LT MORRIS]: For the proper.

13 MJ [Col SPATH]: ---- A-6, correct?

14 ATC [LT MORRIS]: That is correct, for the proper -- and I
15 think, to answer your question, if you look at that section it
16 says for the proper and the efficient administration. If you
17 look at that language and you look at all of his ----

18 MJ [Col SPATH]: I'm looking at it. What it says, "Ensure
19 the trial judiciary is properly staffed with a chief clerk of
20 the trial judiciary," who's not here, "and any additional
21 staff necessary to perform the various support roles and
22 duties necessary to maintain the proper and efficient
23 administration of the trial judiciary, assign other personnel

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1 necessary," and it gives a list of people not including the
2 trial judges. And then it says, "To facilitate military
3 commissions" he could assign other people, security personnel,
4 bailiffs and clerks.

5 It doesn't say anything in here about affect the
6 detailing of a currently detailed trial judge. That's what
7 I'm going to keep coming back to on the appearance issue,
8 because you have a convening authority who, by his own
9 admission, said I recognized my proposal could result in the
10 removal of a currently detailed trial judge. I hoped it
11 wouldn't. I hoped they'd stay, but they might go away. And
12 he's the convening authority making this recommendation,
13 knowing that myself or the other two currently detailed trial
14 judges could have been removed from the case.

15 What about that appearance? Don't you believe that
16 causes any appearance issue when your convening authority is
17 taking that action?

18 ATC [LT MORRIS]: The important distinction, and I keep
19 coming back to this is, first of all, the difference between a
20 recommendation ----

21 MJ [Col SPATH]: But he's recommending it as the convening
22 authority. He is the convening authority. This isn't
23 somebody with a good idea who e-mails it to DEPSECDEF off the

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1 street. This isn't a service TJAGs who isn't a convening
2 authority. Frankly, it's not even the prosecutor who does it.
3 This is the convening authority.

4 ATC [LT MORRIS]: Correct.

5 MJ [Col SPATH]: Who has an idea that he recommends, that
6 he acknowledges may have resulted in the loss of currently
7 detailed trial judges to a commissions case. And what I'm
8 asking about is that appearance issue, does that give any
9 cause of concern?

10 ATC [LT MORRIS]: The convening authority making a
11 recommendation, Your Honor, first and foremost to taking a
12 look at military commissions as a whole ----

13 MJ [Col SPATH]: That's not his recommendation. His
14 recommendation is twofold, more funding and staffing, which
15 frankly isn't part of Change 1, and then move these three
16 judges and change the definition of their duties.

17 That's his recommendation for Change 1. He may have
18 been doing lots of other things. I am focused on this issue.

19 ATC [LT MORRIS]: I hope I can be then as sincere with
20 Your Honor as possible in the answer to that question, which
21 is you're talking about not just the American person that
22 hears about that. We're talk about, you know, the standard
23 that we just stated in Lewis, but the American person that

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1 hears about commission cases, that hears about the importance
2 that these cases are supposed to be -- and you heard Mr. Ary
3 said -- would think that they would at least have judges that
4 are solely assigned, that you would collocate the judges with
5 that venue. And I don't think that ----

6 MJ [Col SPATH]: If his recommendation -- frankly, this
7 would be easier to take for the appearance piece if his
8 recommendation was we're all moving. That's it, we're all
9 moving. I think there would still be problems, I think there
10 would still be some appearance issues that we would have to
11 talk about, but that is easier to take.

12 ATC [LT MORRIS]: But, you know, Your Honor, if Your
13 Honor ----

14 MJ [Col SPATH]: The three trial judges, keep in mind, and
15 that would ----

16 ATC [LT MORRIS]: And what would the trial judiciary then
17 be able to do? If they wished, they would, they could make a
18 request to move the entire trial judiciary staff to GTMO, we
19 heard him testify ----

20 MJ [Col SPATH]: Why would the convening authority ----

21 ATC [LT MORRIS]: ---- he would support that personnel.

22 MJ [Col SPATH]: Why wouldn't the convening authority
23 recommend it? If his concern is increasing the pace of

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1 litigation -- if his concern is the pace of litigation and so
2 he's going to affect that, why is his focus the trial
3 judiciary, when he's the convening authority and he has a
4 chief judge who he could have spoken to about it?

5 ATC [LT MORRIS]: He made a recommendation that if this
6 was a case of national importance, if he's being told ----

7 MJ [Col SPATH]: Counsel, I agree with you. I agree with
8 your.

9 ATC [LT MORRIS]: ---- but the resources behind that, but
10 what we can't do, Your Honor.

11 MJ [Col SPATH]: He didn't put the resources behind it.
12 He put the trial judiciary's detailed judges behind it. He
13 didn't say it's a case of national import, so instead of
14 flying everybody down there ----

15 ATC [LT MORRIS]: He didn't need to say that because that
16 was already in front of him. Those were his orders from his
17 boss that -- and longstanding orders, to not just him but to
18 everybody that these are cases that are important, support
19 them, support them importantly, support them with resources,
20 support them with money. So he ----

21 MJ [Col SPATH]: But remember, we have Change 1. That is
22 more than all of that. It's not resourcing. It's not money.
23 It's you will move there until the case is finished. So I'm

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1 asking about the appearance of that, just you guys, just you,
2 trial judiciary, nobody else.

3 ATC [LT MORRIS]: He's encouraging the collocation of the
4 venue itself, the forum all to be in the same place with the
5 thought that perhaps if -- take for example the Eastern
6 District of a state that has an increasing drug problem and
7 the Attorney General kept saying we take your drug problems
8 seriously, we're just not sending you any judges yet. We take
9 your drug problem really seriously but you'll have a part-time
10 judge, and so ----

11 MJ [Col SPATH]: And they would have to go to the
12 judiciary to get the judges. The Attorney General couldn't
13 affect where the Article III judges are assigned. This is the
14 convening authority of the commissions looked across the field
15 of participants and said you, trial judges, go there until
16 we're finished.

17 And what I'm asking is -- that is the appearance
18 piece. I recognize what was in the defense filing, and some
19 of it we didn't see in the testimony. I am not taking their
20 filing as fact. I'm taking what was testified to. And my
21 question is: For the public, don't you think that they would
22 wonder about a trial judge's decision who was ordered to GTMO
23 to live here till this finished?

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1 ATC [LT MORRIS]: What's the rest of that factual
2 scenario? In a change that was rescinded one calendar ----

3 MJ [Col SPATH]: Every delay the defense asked for, every
4 delay the defense asked for, for a trial judge who is living
5 here till we're finished, every time the judge denies that
6 delay -- appropriately, by the way, because we're talking
7 about appearance -- appropriately denies that delay -- of
8 course we're not going to delay it for that -- do you know
9 what the American public may be wondering? I bet that trial
10 judge wants to go home.

11 ATC [LT MORRIS]: Well, you know what the disinterested
12 observer ----

13 MJ [Col SPATH]: That is the disinterested observer who
14 understands all the facts. This isn't a disinterested
15 observer who -- because you were talking about who didn't
16 understand all the facts. You were talking about one who
17 doesn't understand we're not collocated with the judiciary.
18 It's a disinterested observer who knows all of the facts.

19 ATC [LT MORRIS]: And they would also know Your
20 Honor's ----

21 MJ [Col SPATH]: Only the trial judiciary moved here.
22 Only the trial judiciary were directed to stay here until the
23 cases are done. What I'm asking you is that observer, when

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1 the defense files a delay request and I say no, again,
2 completely right by the way. Let's assume that I would not
3 try to get myself to go home in the interest of justice, I
4 well understand that. But I'm asking about the disinterested
5 objective observer.

6 ATC [LT MORRIS]: I would find it beyond the reach of
7 common sense ----

8 MJ [Col SPATH]: Who knows all the facts.

9 ATC [LT MORRIS]: Who knows all the facts, well, then he
10 would know Your Honor's statement back in November on the
11 record on page 5289, Your Honor talking about the pace that
12 we're going. We have ----

13 MJ [Col SPATH]: That was before they told me to move here
14 even.

15 ATC [LT MORRIS]: Which is more significant, Your Honor,
16 because what we have is we have a baseline for Your Honor's
17 mindset for this case before you even knew that Change 1 was
18 coming. You have Your Honor saying some of this stuff it
19 seems you can resolve. We are not going to stop. This
20 process needs to move along. Your client wants it to move
21 along in some respects just because being dragged over here to
22 go through the process, it can't be fun.

23 MJ [Col SPATH]: But, Counsel, if Change 1 is in effect,

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1 every time I say that, I have to worry about the disinterested
2 member of the public. Before Change 1 ----

3 ATC [LT MORRIS]: So are we then talking about the one
4 calendar day of this disinterested, and we have frozen time in
5 asking about whether the disinterested member of the public
6 within the one calendar day that Change 1 was in effect,
7 whether they would harbor a significant doubt? Because that's
8 not the landscape that we're on.

9 MJ [Col SPATH]: It isn't, but it's the appearance issue
10 of that convening authority.

11 ATC [LT MORRIS]: Well, we then look to the cure -- the
12 cure that is in front of Your Honor. We look at the very
13 clear cure, which is the rescinding of Change 1. We look at
14 the DEPSECDEF and all the things that I've shared with you
15 before coming out and saying all these people shall be
16 consulted, including the trial judiciary who, obviously, Your
17 Honor is stating would have possibly had input on this one.

18 But what we need to scrutinize ----

19 MJ [Col SPATH]: I think what I'm looking for from the
20 trial team is an acknowledgment -- it's not some wild
21 hypothetical that we're talking remedies. Typically the
22 prosecution is not up talking remedies, frankly in any case,
23 but not so often in these cases, understandably.

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1 And I think it's important for the public to have the
2 understanding -- do you understand the appearance issues that
3 resulted from a convening authority stepping in and affecting
4 only a limited pool of the trial judiciary and not doing
5 anything else in Change 1?

6 ATC [LT MORRIS]: I really need to take issue with that
7 characterization. And the reason is because he testified at
8 length, he testified as to all the other things that he was
9 doing. And so I am confident that that disinterested person
10 that takes his recommendation, along with all of the other
11 actions that he was taking, and not only that, but you pull
12 back ----

13 MJ [Col SPATH]: There's no discussion in any memo about
14 moving any other party down here.

15 ATC [LT MORRIS]: Well ----

16 MJ [Col SPATH]: There's no discussion about moving
17 prosecutors or defense counsel. There's no discussion of
18 moving support staff, except there was some discussion from
19 him that hopefully in the future that will happen.

20 ATC [LT MORRIS]: That would be the province, Your Honor,
21 of the chief trial judge. He's in charge of scheduling. He's
22 in charge of administration and management of the trial
23 judiciary. So we'd have a ----

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1 MJ [Col SPATH]: He's doing that, and the convening
2 authority, frankly, made a determination that he could do it
3 better. He had a recommendation that would make it better,
4 that he didn't even talk to the chief trial judge about.

5 I'm ask about: Can we concede there's an appearance
6 issue? There's an appearance issue in what occurred despite
7 all good intent. And so we should talk remedies and focus on
8 that. Or do we really have to talk about absolutely no
9 appearance issue? Not possible. Because I've been through
10 these documents.

11 In November -- on November 21 he got the reports.
12 127554 is the Bates number. He got the reports he asked for.
13 That's clear from the e-mail traffic. Per your request. See
14 the attached document, and it was from Donna Wilkins to
15 Mr. Ary.

16 ATC [LT MORRIS]: If you look at that e-mail ----

17 MJ [Col SPATH]: Hold on.

18 ATC [LT MORRIS]: ---- it says in response to not judges.
19 But this is an important point ----

20 MJ [Col SPATH]: No, it isn't. The e-mail says per your
21 request please see the attached document. Sorry it took so
22 long to get the information. It took longer than I expected.
23 That's the extent of that e-mail.

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1 ATC [LT MORRIS]: In an identical e-mail ----

2 MJ [Col SPATH]: This was an e-mail that was sent to
3 Mr. Ary at 127554.

4 ATC [LT MORRIS]: You will not find an e-mail pinpointing
5 the convening authority reaching in and identifying specific
6 judges and wanting specific judges ----

7 MJ [Col SPATH]: That's not my question to you. I have
8 not finished yet. We're talking about appearance.

9 Here we have this e-mail clearly answering Mr. Ary's
10 question, it is to Mr. Ary, it is per your request, and it's
11 addressed to Mr. Ary, "Please see the attached document. The
12 attached document is, as you know, a breakout of trial
13 sessions by hour, page number, page count."

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

15 MJ [Col SPATH]: It relates only to the trial judges.

16 ATC [LT MORRIS]: And so we had him on the stand, and what
17 did we ask him ----

18 MJ [Col SPATH]: But we are talking appearance. I
19 understand what he said.

20 ATC [LT MORRIS]: But we cannot -- we cannot -- here's the
21 problem. We are trying to then take the appearance aspect but
22 remove Mr. Ary's testimony, which he then very clearly
23 defines, describes his intent, why this was happening, and we

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1 heard him say ----

2 MJ [Col SPATH]: His intent was to affect the pace of
3 litigation. That was part of his intent. His concern was the
4 pace of litigation was too slow. He said that. And his
5 intent was to get a permanently residing judiciary down here,
6 even if it means the currently assigned trial judges are off
7 the case.

8 ATC [LT MORRIS]: And that is taking what would be one
9 sliver, one interpretation, one percentage point in the
10 overall -- overall world of facts which ----

11 MJ [Col SPATH]: He went to the Deputy Secretary of
12 Defense ----

13 ATC [LT MORRIS]: His boss, Your Honor.

14 MJ [Col SPATH]: ---- with Change 1. He didn't go there
15 with we need this funding, he may be doing that.

16 ATC [LT MORRIS]: That is not accurate, Your Honor, if you
17 look at his recommendation.

18 MJ [Col SPATH]: It's right here.

19 ATC [LT MORRIS]: What does his second point say?

20 MJ [Col SPATH]: 127183, to, this is the memo he signed,
21 "I recommend you review the Regulation For Trial By Military
22 Commission. Based on my analysis I believe the status quo
23 does not support the pace of litigation necessary to bring

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1 these cases to conclusion." Those are his words.

2 Then he talks about two things that we -- to his
3 boss, reassign -- or realign, rather, resources and reposition
4 the trial judiciary -- that's the let's move them -- and his
5 end state is, "One, attached is the Regulation For Trial By
6 Military Commission which will move the judges to
7 Guantanamo Bay and make it their exclusive judicial duty."

8 Separate from that, through the general counsel he
9 has requested a validation for hiring of law clerks,
10 paralegals and court security officers and an office manager
11 all to support the judges.

12 ATC [LT MORRIS]: So even if the one document itself that
13 memorializes this recommendation, taking everything out of the
14 picture you see there this coordinated effort to resource ----

15 MJ [Col SPATH]: I don't see coordinated.

16 ATC [LT MORRIS]: It is certainly coordinated because it's
17 all happening at the same time. He is reaching out and
18 looking to properly resource, and look at other aspects, other
19 ways to properly position military commissions for -- in the
20 words of the trial judiciary, mission success.

21 MJ [Col SPATH]: In his words -- mission success is a
22 scary statement. In his words, I believe these actions will
23 accelerate ----

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1 ATC [LT MORRIS]: So then we ----

2 MJ [Col SPATH]: ---- accelerate the pace of litigation.

3 ATC [LT MORRIS]: But then we look at, Your Honor, all the
4 words of everybody that talked about ----

5 MJ [Col SPATH]: I have to look at his words. Here's all
6 I was looking for, truly, I was talking to you about a
7 concession that there is an appearance issue when the
8 convening authority steps in and affects the judiciary and
9 picks them out of all of the people with which he has some
10 control, resourcing control over the judiciary, we looked at
11 the regulation 2-3(6). All -- 2-3(a)6. All I'm asking is if
12 you can concede there is be an appearance issue when your
13 convening authority does that.

14 I'll add to those facts. The 21st when he got the
15 documents, do you know what happened on the 18th? The 18th is
16 when Colonel Waits -- or Captain Waits made the comment about
17 having a day job. So when I ask about appearance, all these
18 things don't happen in a vacuum. And this is your
19 disinterested observer who knows all of the facts. All of
20 this is going on.

21 And two weeks later Mr. Ary goes to DEPSECDEF and
22 says here's a fix. To accelerate litigation, move the judges,
23 make it their exclusive duty.

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1 ATC [LT MORRIS]: You know, Your Honor, there would be a
2 concern of appearance if that fact happened in a vacuum. But
3 that disinterested observer would also have the benefit of not
4 just all of the e-mails surrounding that, to see if there was
5 any -- anything said in those e-mails as in regards to
6 motivation, but also had put him on the stand, examined him,
7 cross-examined him for as long as defense counsel wanted, and
8 at the end of that he comes out without the problem of
9 appearance because what there is is absolute absence of
10 anything that shows that the actions that he took were
11 anything other than motivated by what he said they were, and
12 that was the words that he said in his recommendation.

13 MJ [Col SPATH]: I think you're missing what I'm asking.
14 He did testify, and if I attribute all good faith to him, all
15 good faith -- that's why I started my questioning of even with
16 good faith you can engage in unlawful influence. Everything
17 he said on the stand is important, but you have to -- you have
18 to take part of what he said on the stand and put that into
19 this appearance issue.

20 He made a change understanding at the time -- he made
21 a recommendation for a change that he wanted as the convening
22 authority -- again, not somebody separate from this, made a
23 change knowing that an outcome could well be ----

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1 ATC [LT MORRIS]: The significant difference in your
2 hypothetical and that of every UCI case that we find, what we
3 have here is not him trying to effect that change, it's him
4 acknowledging ----

5 MJ [Col SPATH]: You're talking about ----

6 ATC [LT MORRIS]: ---- graciously ----

7 MJ [Col SPATH]: ---- actual impact. I'm talking about
8 the appearance. You have a convening authority concerned with
9 the pace of litigation. He said it; it's in here.

10 ATC [LT MORRIS]: But that's where, because we're in the
11 appearance realm, Your Honor, that's where we have to take
12 that statement surrounded by all the facts. If you took a
13 statement, that particular statement, and put it out there to
14 the disinterested observer, and all it was was combined with
15 Change 1, then the government would look at that and say okay,
16 I understand what he was saying.

17 MJ [Col SPATH]: If he was attempting to resource
18 appropriately all the other parts of the triad, the defense,
19 trial and judiciary. I agree with you. But at the same time
20 the only parties that he was impacting regarding where they
21 were going to live and the description of their duties was
22 focused on the trial judges. That -- that is accurate, isn't
23 it? There's no other recommendations ----

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1 ATC [LT MORRIS]: If we have ----

2 MJ [Col SPATH]: ---- other than resourcing and move the
3 trial judges. He didn't say to us, well, what I thought would
4 happen is I'd move the prosecutors down there four months
5 later and then I'd move the defense down there a few months
6 after that. He didn't say what I'm going to do is fix the
7 obvious informational issues we have down here on attempting
8 to review classified data that takes a lot of time, on
9 attempting to communicate from here that takes longer than
10 frankly it does when we're in D.C. We know that. He didn't
11 talk about any of that.

12 Resourcing and additional manning and moving a
13 limited pool of people, just the judiciary, was his
14 recommended change. And all I'm asking is -- again, I
15 recognize you're saying a disinterested observer ----

16 ATC [LT MORRIS]: Your Honor knows ----

17 MJ [Col SPATH]: You won't even concede ----

18 ATC [LT MORRIS]: We could have the fastest Internet in
19 the world here. We could have the best accommodations in the
20 world here.

21 MJ [Col SPATH]: I don't care about the accommodations.

22 ATC [LT MORRIS]: Certainly. But all I'm stating is all
23 the resources in the world, and that the convening authority

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1 as part of this looked at, examined and poured the necessary
2 money into all of those resources would not mean anything if
3 there wasn't the posture of military commissions of the trial
4 judiciary to coexist with the venue and the forum in which the
5 trials themselves are taking place.

6 MJ [Col SPATH]: In your judiciary are the trial judges
7 all collocated at the site of the trial?

8 ATC [LT MORRIS]: It depends on the significance of the
9 cases.

10 MJ [Col SPATH]: So if you have a significant case, you'd
11 move a trial judge to the location of the trial, PCS?

12 ATC [LT MORRIS]: Your Honor, in my first two years of
13 practice we did not have a trial judge that was at our base,
14 and that very significantly hampered our ability to do normal
15 things, like go on the record.

16 And after our case -- you asked me about my
17 experience. After our case status had an uptick and our
18 general courts-martial had an uptick, the next thing you know,
19 we got a commander from San Diego, and yes, it certainly had
20 an influence on our ability to go on the record.

21 So in my experience, if you move the trial judiciary,
22 if you make a recommendation, if you ----

23 MJ [Col SPATH]: You were collocated with that trial

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1 judiciary, true?

2 ATC [LT MORRIS]: So if the judges ----

3 MJ [Col SPATH]: Where are you collocated?

4 ATC [LT MORRIS]: If the judges were attached to this
5 venue and we're entering the state of trial which we know
6 we're entered into to which Mr. Ary testified to he thought
7 this was something that was going to happen inevitably anyway,
8 that we were going to be in a posture where we were going to
9 be here much longer. And it's happening under Your Honor's
10 watch, under Your Honor's scheduling ----

11 MJ [Col SPATH]: I was trying.

12 ATC [LT MORRIS]: ---- that we are here for two weeks at
13 this time. And, Your Honor, we haven't done that for a long
14 time. And we anticipate this uptick will happen more and
15 more. And so what you look at when you take all the pieces,
16 you see him make a recommendation to the person who has the
17 authority, who has been charged to take these cases seriously,
18 to make a recommendation to collocate the judges with this
19 venue.

20 And if Your Honor is talking about the one sliver,
21 the one possibility of which he and -- which he acknowledges
22 that it may have unintended effects, to think we can take
23 actions with as many people that are involved in this

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1 commission, that we can take an action which is lawful and
2 which is appropriate and we can take an action that won't have
3 any unintended consequences is naive.

4 But the question that we ask ourselves is, evaluating
5 the convening authority's actions in light of all the other
6 actions that he was taking would that disinterested observer
7 believe that these commissions -- would he harbor a
8 significant doubt that these commissions can no longer be
9 fair? And the answer is absolutely not.

10 Harbor a significant doubt. That strong language is
11 in there for a reason. And that is attached to the appearance
12 aspect under Biagase. Harbor a significant doubt that a
13 change that happened, a change that was rescinded one calendar
14 day later, that all of the parties involved -- I've lost count
15 of how many times defense counsel has talked about the
16 inefficiencies of being down here; that Your Honor, back in
17 our exchange, when we were talking about the issue of the
18 court reporters and defense counsel going and looking at those
19 transcripts, talking about we need to move this thing along,
20 we need to speed this up, Your Honor's marching orders then,
21 seeing that Your Honor ----

22 MJ [Col SPATH]: Those are mine controlling the pace of
23 litigation. That is me controlling the pace of litigation.

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1 ATC [LT MORRIS]: On top of that, it's also Mr. Ary
2 recognizing that that will always be the case. That was
3 always the case. And his intent in making the recommendation
4 was to never invade that sacred ground.

5 MJ [Col SPATH]: Should Mr. Ary though be commenting on
6 accelerating the pace of litigation?

7 ATC [LT MORRIS]: He, in his duty to his boss, made a
8 recommendation of how he saw, holistically, all of this
9 fitting together.

10 MJ [Col SPATH]: I understand. But it -- should the
11 convening authority, convening authority -- again not -- this
12 is not just anybody making a recommendation, this is the
13 convening authority. Should he be concerned with accelerating
14 the pace of litigation, or should he be concerned with
15 ensuring that we are properly resourced so that the trial
16 judiciary can deal with the pace of litigation?

17 ATC [LT MORRIS]: The two are sisters, Your Honor, and to
18 try to divorce the two is naive. To say that we all are not
19 on the same page, we all do not know that before Change 1
20 happened that there were inefficiencies and that things moved
21 slow and that just to get to court it was a day and a half
22 evolution and we had an 802 then we would start. And so you
23 have the convening authority ----

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1 MJ [Col SPATH]: But how has that changed? Again, this
2 doesn't change it, because when I wake up to the empty
3 courtroom, I can't just call your legal office and the defense
4 counsel across the street and go today's a good day to get on
5 the record. We ----

6 ATC [LT MORRIS]: But Your Honor, if you put your thumb up
7 and you said today's a good day to be on the record, you know
8 who would be here? The people to your left and the people to
9 your right, and I imagine the prosecution and the defense ----

10 MJ [Col SPATH]: You'd have to get on a plane.

11 ATC [LT MORRIS]: I'm certain that the convening authority
12 would support our accommodations and our lodgings here, as the
13 pace that is already increasing warrants.

14 MJ [Col SPATH]: I agree with you. My question is: Why
15 then would I not be getting on the same airplane? Why did he
16 single out -- and this is all appearance. This is all
17 appearance.

18 Alls I'm asking is, I would think the trial team
19 would concede this likely caused an appearance issue, made
20 more likely by the fact that DEPSECDEF in record time, for an
21 action through the Pentagon, rescinded it and said, hey, next
22 time we should probably staff that.

23 ATC [LT MORRIS]: Marching orders are out there, Your

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1 Honor.

2 MJ [Col SPATH]: Absolutely to the convening authority of
3 the commission. So the disinterested observer who is looking
4 at that convening authority, are they concerned? Do they
5 harbor doubts?

6 And alls I'm asking is if we agree there are some
7 concerns -- you were talking about it -- what are the
8 remedies? What remedies should I be looking at? That's where
9 good faith and bad faith make a big difference. That's where
10 intent and purpose make a big difference.

11 ATC [LT MORRIS]: After combing through all of the
12 material, after combing through all of the e-mails, after
13 hearing the convening authority talk about his rationale, a
14 public servant his entire life coming into the role of a
15 convening authority and taking stock of what's going on, what
16 needs there are, and looking at who his boss is and making a
17 recommendation to that boss, am I -- do I have any concern
18 that the person that is aware of all of those facts, after
19 he's been scrutinized on the stand, is going to harbor a
20 significant doubt as to fairness of this proceeding?
21 Absolutely not.

22 And to ask the government to concede that point is to
23 ask us to only look at the recommendation itself through the

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1 eyes of somebody that does not have all of those facts. And I
2 can say that I certainly have looked at all of the facts and
3 certainly am familiar with all of the facts and certainly was
4 in the same courtroom as everyone else and heard the convening
5 authority testify. And when you hear his rationale, that this
6 was about resourcing, this was in response to Colonel Baime's
7 memo and talking about we need to be positioned for mission
8 success, all of these things play into it.

9 And, you know, to talk about under the rules for
10 recollection -- under the Regulation For Trial By Military
11 Commission, talking about the proper and efficient
12 administration, the government's position is that taking all
13 of those facts, it was within his responsibilities and roles
14 not to enact the change but to make a recommendation.

15 And when we get to then discussing, and as we have
16 already discussed the remedy itself, we see that we are in a
17 landscape where Change 1 has been rescinded. We see that we
18 have a judge that has already given that consideration and
19 stated that that would be an appropriate remedy tailored to
20 this specific fact pattern. We see that the DEPSECDEF, Deputy
21 Secretary of Defense, Your Honor, has put out a memorandum not
22 only rescinding the remedy itself but providing additional
23 cures by saying in the future this is what we'll do.

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1 And all of those things together give the government,
2 for the actual allegations of unlawful influence, for the
3 appearance aspect of unlawful influence, for the, Your
4 Honor -- if you were to find that those were there and the
5 government did not prove beyond a reasonable doubt, taking all
6 the facts into consideration, needed to fashion a remedy, the
7 remedy has already happened, announced to this court today
8 that Change 1 was rescinded.

9 And beyond that, like I stated, we also have, to the
10 point of Commander Mizer what about in the future? We have
11 curative instructions for how this regulation or any
12 regulations will go about. And I'm sure that if there are
13 suggestions or proposals in the future, that the
14 recommendations that are now solicited will be voluminous and
15 be copious, and we'll cross that bridge when we come to it.

16 But at this point, when we're looking at this
17 allegation, the government's position is clear, and clearly
18 sees that Mr. Ary acted appropriately, that Mr. Ary acted with
19 good faith, that Mr. Ary acted holistically, that he examined
20 all of the items in front of him, both that were on his plate
21 coming in and both that he solicited, of saying how can I make
22 this work? And he has never once in any of his testimony, in
23 any of the e-mails, trampled on this sacred ground or given

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1 any indication that he had any desire to step on Your Honor's
2 prerogative or purview to set the schedule in this case and
3 those concerns and tenets as found in Vargas.

4 He clearly recognized those, and even in an abundance
5 of caution explained to Your Honor why he didn't staff it, why
6 he didn't do those things. That testimony is in front of that
7 disinterested observer. And the government still feels
8 strongly that that disinterested observer would not harbor a
9 significant doubt as to the fairness of this proceeding.

10 May I have just a moment, Your Honor?

11 MJ [Col SPATH]: You may. Thank you.

12 ATC [LT MORRIS]: Nothing further. Thank you, Your Honor.

13 MJ [Col SPATH]: Thank you very much.

14 DDC [CDR MIZER]: Your Honor, would it be possible to take
15 a five-minute health and comfort break?

16 MJ [Col SPATH]: We can make it ten, and I'll see you in
17 ten minutes. Commission's in recess.

18 [The R.M.C. 803 session recessed at 1613, 27 February 2015.]

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