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1 [The R.M.C. 803 session was called to order at 1626,
2 27 February 2015.]

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

6 Defense Counsel?

7 DDC [CDR MIZER]: Thank you, Judge. I'd like to start
8 with what I think we largely agree is the legal framework. I
9 would like to invite this court's attention to
10 Section 949b(2), which prohibits attempted unlawful influence.
11 And so we would submit that there has, in fact, been
12 attempted, actual unlawful influence, but I'm going to mainly
13 focus on the appearance of UCI that you discussed with trial
14 counsel.

15 And, Judge, I don't think I can stress enough
16 throughout this presentation that everything needs to be kept
17 within an eye toward beyond a reasonable doubt standard
18 because that's where we are. Judge, Lewis at page 415 says
19 that the appearance of UCI will exist where an objective,
20 disinterested observer, fully informed of all the facts and
21 circumstances, would harbor a significant doubt about the
22 fairness of the proceedings.

23 And then a little bit further on it says to find an

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1 appearance of unlawful command influence has been ameliorated
2 and made harmless beyond a reasonable doubt the government
3 must convince us that the disinterested public would now
4 believe -- it's not Lewis -- received a trial free from the
5 effect of unlawful command influence. And simply put, with
6 that exacting standard, Your Honor, and what has transpired in
7 this courtroom, I don't believe that the government can do
8 that.

9 Judge, I think where we would part ways, and I think
10 Your Honor did hit this on the head, is that good faith really
11 isn't relevant to anything except for how drastic of a remedy
12 that you take.

13 MJ [Col SPATH]: And you would agree with that, I assume?

14 DDC [CDR MIZER]: Yes, Judge.

15 MJ [Col SPATH]: As you do the assessment of remedies,
16 good faith does have a role in there.

17 DDC [CDR MIZER]: I think so, Judge. I think so. And the
18 Gore case, it's probably a good example, of that, you had a
19 disagreement on the facts in that case, where the two Navy
20 defense counsel come in and testify that their chief, who had
21 agreed to testify, said that his commanding officer had told
22 him not to do it, and also said, look, I didn't get this
23 anchor -- holding his collar device, I didn't get this anchor

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1 in 16 years -- I believe was the testimony there -- by bucking
2 the system.

3 And when they called the commander, again the
4 convening authority, an obvious witness in a UCI case
5 involving the convening authority, the commander said look, I
6 had no intent to restrict the witnesses of a court-martial.
7 You understand I signed a PTA, a pretrial agreement, with this
8 accused. I'm in Mississippi, the trial was taking place in
9 Jacksonville, and I thought that that finished it. And I
10 didn't want people coming out of my shop going on travel
11 orders because I've got work to do.

12 And so that was a legitimate purpose. And ultimately
13 the C.A.A.F. says, look, that's still UCI, and they affirmed
14 Judge Maxim in that case, dismissing the case with prejudice.
15 That's ultimately what happens in Gore.

16 And, Judge, I would also invite the court's attention
17 to the Salyer case, which we've referenced any number of times
18 this week. On page 425 it makes pretty clear that this is a
19 strict liability standard with respect to UCI. Where there is
20 evidence in the record of an effort to unseat a military judge
21 based on the trial counsel's animosity towards the military
22 judge, to secure a more favorable ruling -- and here's the
23 most important part -- or to cause -- to cause the assignment

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1 of an alternative military judge where the presiding military
2 judge is otherwise qualified to serve, an appearance of UCI is
3 raised. And so mens rea is at issue there. The appearance of
4 UCI is here, Judge. It's present in the courtroom.

5 And then secondarily, Judge, the last legal principle
6 that I want to keep -- have the court focus on ----

7 MJ [Col SPATH]: Let me ask: Do you believe Salyer stands
8 for the principle that no matter the rationale, if the effect
9 will be the removal of the trial judge, that causes UCI?
10 Salyer certainly were aggravating facts. They went out of
11 their way to target a particular judge and remove that judge.

12 No worry. And here it seems the convening authority
13 went out of his way to move the trial judges, kind of with no
14 real -- I don't want to say concern, because he sent the
15 e-mail we all know, we hope they stay, but understanding that
16 may impact the trial judges. The motivation seems different.
17 Fair?

18 DDC [CDR MIZER]: But, Judge, the motivation here, the
19 express motivation is to accelerate the pace of litigation.
20 That's what he said on paper, Judge, and we're going to talk
21 about what's different, what he said on paper and what his
22 staff said on paper and what he said when he took the witness
23 stand. And I think there's some important differences. And

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1 with the court's indulgences, I'll get to those in a moment.

2 But, look, I think that this is much more serious
3 than both Salyer and Lewis because you have a disagreement
4 with an individual trial judge, and here you have tinkering
5 with the independence of the judiciary. I mean, Weiss isn't
6 some new, last week new precedent from the Supreme Court. I
7 mean, it talks about the underpinnings of the fairness of
8 military justice. I mean, keeping the convening authority
9 away from the trial judiciary is rule number one from that
10 case.

11 I mean, you have essentially the convening authority
12 playing with the third rail of military justice and doing it
13 carelessly, I mean, not really talking to anyone, I mean, not
14 the JAGs, not the Chief Judge of the Trial Judiciary.

15 MJ [Col SPATH]: He did have an explanation for that. I
16 mean, we can second-guess the, well, it's not an ex parte
17 conversation to talk to your chief judge about an issue to do
18 with your trial judges. It would be to call him up to talk to
19 him about KSM. That's obvious. But he did have rationale for
20 what his thought process was.

21 DDC [CDR MIZER]: That's absolutely right, Judge, and it's
22 contradicted by -- I will get to that -- by Commander Kotval's
23 e-mail about what the real motivations were, Judge. So I

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1 think that that's one of the things you're looking at, the
2 remedy. We have to dig down into the facts but if I can set
3 the legal table first, I promise you I will get there. And if
4 you want me to get there right now I'll do it, Judge.

5 But I think the most important thing that I want to
6 get with the table setting here is the Khadr case,
7 717 F.Supp.2d, 1236, cited in our pleadings, but -- and it --
8 for the principle that Congress desired military commissions
9 to mirror firmly rooted court-martial practice to the maximum
10 extent possible. And the court expected that departures from
11 UCMJ would, quote -- they would expect to see, quote, "express
12 statement of such intent."

13 And you heard Mr. Ary testify he's operating in a
14 paralegal military justice system and he cites no statutory
15 authority for that. Judge, we asked him that question, and
16 the best he could say is I think it's in the 948 series. I
17 mean, you're tinkering with something that no military justice
18 practitioner would do. You'd think you would look at the
19 statute and see what authority you have to do that.

20 And essentially Congress has prohibited both unlawful
21 influence and interference with the scope of military judges'
22 duties in the Military Commissions Act. They borrowed
23 directly from the UCMJ. We do have modifications in the MCA,

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1 but not in this area, Judge. So Mr. Ary may have a point with
2 respect to other duties. I mean, we have an Office of Chief
3 Prosecutor, that's a distinction between the UCMJ and the MCA,
4 but it doesn't -- nothing in the statute places him atop the
5 trial judiciary or gives him any responsibilities with respect
6 to the trial judiciary.

7 And I think that's one of the frustrating things
8 about this practice is, I think Congress, at least in the
9 2009 Act tried -- and I won't say they succeeded, but they
10 tried to create something that resembled a fair judicial
11 system. And in many respects, and this is one area, you have
12 the regulation and both the rules trying to claw back some of
13 those provisions. And so you have the ----

14 MJ [Col SPATH]: The regulation does give him some direct
15 authority over the -- not authority, that's a bad word -- some
16 responsibilities, better word, over the trial judiciary. I
17 was talking to trial counsel about that.

18 DDC [CDR MIZER]: I don't disagree, Judge, but I'm saying
19 there's no statutory authority for that. My point is I think
20 Congress tries to create something that they believe is fair,
21 and then ultimately the convening authority, through
22 regulation, admittedly with the Deputy Secretary of Defense in
23 alliance in this effort, is essentially reinserting the

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1 convening authority into areas that he shouldn't be, that
2 Congress -- there's no express congressional intent that
3 Congress thought that the convening authority should have
4 anything to do with you or your trial judiciary.

5 I don't dispute the regulations, Judge, but the
6 regulations are what we're here about, and regulations can't
7 trump statutes, and that's fundamentally at the heart of this
8 debate that has been going on now for two months.

9 Judge, I want to go through the provisions,
10 specifically, so that you know -- I mean, we're kind of
11 glossing over and just drilling down on this issue of
12 essentially potentially causing the loss of a military judge,
13 but that's not the only violation that's here. I mean, we're
14 using the phrase UI, but if you actually go through and look
15 at every statutory provision that was violated, there are
16 numerous statutory provisions in the Military Commissions Act
17 that were violated, starting with 948j(f), prohibition on
18 evaluation of fitness by the convening authority. And it
19 says, "The convening authority of the military commission,
20 under this chapter, may not prepare or review any report
21 concerning the effectiveness, fitness, or efficiency of a
22 military judge detailed to a military commission."

23 MJ [Col SPATH]: Do you take that to be the efficiency

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1 reports, like an OPR?

2 DDC [CDR MIZER]: No, Judge, absolutely not. And the Mabe
3 case tells you that's not what that means. So the Mabe case,
4 Judge, as you recall, involves the Chief Judge writing a
5 memo -- it's now known as the grumblings and the mad memo --
6 writing a memo to the judge that actually is Captain Waits'
7 predecessor over in Naples, and saying, hey, the convening
8 authority are grumbling about the sentences that you're
9 getting. You know, I just want you to know that. We're all
10 trying to do a good job but watch your sentences. This is
11 essentially what's going on here, Judge.

12 You have the convening authority having Ms. Wilkins
13 prepare a report. He reviews the report; you know that from
14 the e-mail that you have at 127669, that's the Bates number.
15 And that's precisely what he can't do. And you have to have
16 the convening authority say, you know what, I should not have
17 been preparing reports -- I should not have been reviewing
18 reports. You haven't had his legal staff say, hey, wait a
19 second. On that point, why are we having this happen? And,
20 Judge, I think you have Mabe, but you also have the statute
21 itself, 949b(c), which is in the UCI section -- I'm focusing
22 first on the Article 26 corollaries. I'm sorry to jump
23 around.

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1 949b(c) is prohibition on consideration of actions on
2 commission and evaluation of fitness. So I would ask you to
3 compare those two sections because one is plainly in b(C), is
4 what I'm referencing to; the second is plainly written about
5 evaluation fitness reports, I believe OPRs for the Air Force,
6 Judge. That's what that section refers to. So when Congress
7 wants to write a section about actual fitness reports that are
8 going to be submitted for promotion, you'll see that language
9 in there, the last two, one and two. They know how to do it
10 and they didn't do it in 948j(f).

11 And, Judge, I would also point the court to Chief
12 Judge Baker's dissenting opinion -- and I'll give you a
13 dissenting opinion because this is hardly a controversial
14 legal principle, but it's 70 MJ 465 is the Fry case that you
15 have to avoid statutory interpretations that would render
16 another superfluous. And that's what this would be if you
17 have two statutory provisions that merely said you can't write
18 an evaluation. So you have both the Mabe case and the statute
19 itself in statutory canons of construction that say, look,
20 that's not how you can read this. I understand that's how the
21 government does it.

22 Judge, with respect to 948j(e), "Other duties,
23 military judges may perform such other duties as they're

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1 assigned to such officer by or with the approval of the Judge
2 Advocate General of the armed force of which such officer is a
3 member or designee of the JAG." So another statutory
4 provision violated by this regulation, because they are
5 asserting that the Deputy Secretary of Defense gets to
6 determine what your primary duties are.

7 948j(a) discusses detailing of a military judge. It
8 requires a military judge to be detailed. And the next
9 section, 948j(b) discusses eligibility and expressly
10 incorporates Article 26 UCMJ.

11 And I think on the first day when we were here on the
12 record I quoted Article 26(c), that a commissioned officer who
13 is certified to be qualified for duty as a military judge of a
14 general court-martial may perform such duties only when he is
15 assigned and directly responsible to the JAG.

16 MJ [Col SPATH]: And the Manual for Military Courts tracks
17 these sections verbatim.

18 DDC [CDR MIZER]: Yes, Judge.

19 MJ [Col SPATH]: I was looking through -- I was tracking,
20 as you probably are going to, the statute through the manual,
21 through the regulation, and on this, until 62 was authored,
22 they were in -- they were verbatim.

23 DDC [CDR MIZER]: That's right, Judge, and my entire point

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1 of this is Ary has no basis to say that he had a statutory
2 authority to do what he did, the recommendation to Mr. Work,
3 and Mr. Work had no statutory authority to take that action,
4 Judge. I mean, you have clear congressional intent.

5 MJ [Col SPATH]: Arguendo, right, that's true. We'll say
6 that for the sake of your presentation, didn't have the
7 authority.

8 DDC [CDR MIZER]: That's true.

9 MJ [Col SPATH]: Didn't have the authority. We do have
10 the rescission.

11 DDC [CDR MIZER]: Indeed we do.

12 MJ [Col SPATH]: I know we'll talk about that as you move
13 on.

14 DDC [CDR MIZER]: Certainly, Judge, I'm not going to stand
15 here and dispute that we do have a rescission.

16 And I would -- lastly, on the Article 26 -- or,
17 actually, it's Article 6, UCMJ says that the assignment of
18 JAG, and the language is, shall be made upon the
19 recommendation of TJAG. You have these individuals just
20 cutting out -- the very individuals that have the statutory
21 authority to send you and me to this island, and claiming that
22 a regulation somehow fosters or gives them that authority.

23 And then Article 37 -- what you have, Judge, here, is

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1 not only an effort to copy Article 37, but to bolster it. I
2 mean, what you won't find in Article 37 is that a convening
3 authority can unlawfully influence trial counsel. It's not
4 there. It is in 949b. And it's broader in that, I think.
5 Under the UCMJ the government might have an actual argument
6 that Mr. Work can't unlawfully influence a military
7 commission. You see that play out in the Hutchins case if you
8 want to take a look at that, which involved Secretary Mabus
9 making comments, but 949b -- Secretary of the Navy for the
10 record. 949b says no person subject to this chapter. So they
11 changed that language. No person subject to the UCMJ.
12 Congress broadens the Article 37 language and says no persons
13 subject to this chapter.

14 So Mr. Ary is correct to some extent to say that he's
15 operating in a paralegal military justice universe, but one
16 that more strongly condemns the actions that were taken here,
17 more strongly protects you and even protects the prosecution
18 and defense than would happen in a regular court-martial.

19 And then finally, Judge, I've mentioned 949b(2), that
20 no person may attempt to coerce or by any unauthorized means
21 influence the military commission.

22 Judge, I don't think that you can discount the
23 language that is in the final memo, the stated language which

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1 is "accelerate the pace of litigation." And if you go to the
2 executive summary, what was not intended to be revealed until
3 the discovery in this case is pace of litigation mentioned
4 four times in the executive summary.

5 And so you've got this dog whistle, Judge, as to what
6 the real motivation of this change is about. And at the very
7 least, Judge, I've used the metaphor, they fired a gun into
8 the occupied house. They took an incredibly reckless action
9 with respect to the judiciary. I can't even fathom what would
10 lead experienced military justice practitioners to take the
11 actions that they took in this case.

12 But, Judge, it's not just that. And if you look at
13 the e-mails and the draft memos, you have a pretty offensive
14 picture as to what was actually the motivation, not what was
15 said from the witness stand, because fortunately for us, the
16 documents don't lie, Judge. You can put them on, and I will
17 put some of them up here and point you to them.

18 Mr. Ary testified -- you know, and I guess the point
19 that I need to make before getting into this is that, you
20 know, there's a lot of effort by Mr. Ary to say look, I don't
21 know everything my staff's doing, I don't see all of the
22 drafts, and to try to distance himself from some of the
23 comments that are made in the e-mails and in the earlier draft

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1 versions of what became Change 1.

2 On page 5692 of the unauthenticated transcript -- I'd
3 like to say here the court reporters are amazing. I don't
4 think I ever had a court-martial or federal district case
5 where I could get the transcript the next day.

6 MJ [Col SPATH]: I will absolutely concur in that, by the
7 way. I've been doing this a long time, and the quality is
8 impressive in a short period of time.

9 DDC [CDR MIZER]: Agreed, sir. Agreed. On page 5692,
10 Mr. Ary testifies -- no, I don't believe that we addressed
11 that. We probably did. I mean, we talked about a lot of
12 things, whether it should be primary, sole, exclusive, whether
13 you -- we didn't. There are a variety of issues that we
14 addressed.

15 MJ [Col SPATH]: You said 5692?

16 DDC [CDR MIZER]: 5692, Judge. And I'd like to display to
17 you and then to the gallery, page 127542. And so you see this
18 is an e-mail between Ms. Adams, that OSD-CA Legal Advisors
19 listserv, and at the top of it you see, in response I've
20 changed "sole duty" back to "primary duty" for the military
21 judges and tweak some of the language in paragraph 6-2(a).

22 You have Mr. Ary testifying -- you know, he's trying
23 to distance himself from some of these e-mails, but here he is

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1 plucking, when he's allowed a chance to talk off the script,
2 if you will. I mean, it's entirely consistent -- he remembers
3 primary and sole exclusive duty was one of the changes that
4 was bouncing back and forth. So he's not entirely unaware of
5 these e-mails, Judge, and that's not consistent with his
6 ultimate testimony.

7 And, Judge, I mean, you said you don't leave common
8 sense at the door.

9 MJ [Col SPATH]: That's ---- I want to make sure -- that
10 e-mail is from Alyssa Adams, I believe.

11 DDC [CDR MIZER]: That's correct, Judge. That's exactly
12 right.

13 MJ [Col SPATH]: Okay.

14 DDC [CDR MIZER]: That's my point, he's not entirely
15 unaware of what his legal advisors are saying. That's a
16 specific thing to remember from a pretty specific e-mail.

17 MJ [Col SPATH]: The e-mail is from Alyssa Adams.

18 DDC [CDR MIZER]: Absolutely, Judge.

19 MJ [Col SPATH]: I think the AA at the bottom of this is
20 her, right?

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

22 MJ [Col SPATH]: I want to make sure I looked through this
23 chain. Certainly, the chain is interesting. It doesn't

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1 appear that he's in this chain. I know there were suggestions
2 and discussions in his office. He testified to that.

3 DDC [CDR MIZER]: What I'm trying to do, Judge, is from
4 that testimony link it to these conversations.

5 MJ [Col SPATH]: Okay.

6 DDC [CDR MIZER]: Because he's saying sole and primary,
7 and those are pretty unique words linked directly to that
8 draft and potentially to that e-mail that these conversations
9 are taking place.

10 And, Judge, look, I mean this convening authority
11 isn't running the First Marine Expeditionary Unit. He's not
12 the commanding officer of an aircraft carrier. His sole
13 responsibility is three criminal cases, and he has 80 people
14 to help him with those cases. And I understand that these are
15 serious cases, I understand that they are complex cases. But
16 the fact that he is distracted by other matters and isn't
17 involved with the legal staff, Judge, I question that. And
18 certainly this -- this e-mail is corroboration of his
19 involvement or -- and, really, frankly his close involvement
20 with these changes and with his staff, and he doesn't deny
21 that he regularly met with his staff in doing this.

22 And, Judge, if I could put up 127578.

23 MJ [Col SPATH]: Give me one second. Okay.

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1 DDC [CDR MIZER]: And this is Ms. Adams' ultimate legal
2 assessment at the top here, "Yes, he's influencing it, but
3 unauthorized, I think not."

4 And that follows, Judge, Commander Kotval's one and
5 two unsolicited e-mails referencing the specific statutory
6 provisions that we're relying on here today, that you've got
7 someone in the Office of the Convening Authority saying look,
8 this violates statute, what are you guys doing? And the legal
9 advisor, a very senior legal advisor in the Office of the
10 Convening Authority is saying absolutely not, charge ahead.

11 Now, Judge, we talked a little bit about what's in
12 the documents, but I want to talk to you also about what's not
13 in the documents. Judge, on page 5586 of the transcript
14 Mr. Ary testified -- testifies -- or testified, excuse me,
15 "But what I was also concerned, that since I was in the office
16 of the Secretary that it would be inappropriate to staff that
17 decision to the JAGs based on the findings in Salyer."

18 And, Judge, there's nothing, first of all, in Salyer
19 that says that if a convening authority needs a judge at his
20 base he can't call the Judge Advocate General of the Navy.
21 That's absolutely ridiculous. It's a preposterous reading of
22 that case. It flies in the face of common sense of how we
23 normally staff resources that you would sneak off to the

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1 DEPSECDEF's office and somehow effect a change.

2 But, Judge, if I could put up 127542.

3 MJ [Col SPATH]: No, no worry, I've got to get there
4 anyway.

5 DDC [CDR MIZER]: If I could publish that to Your Honor
6 and then to the gallery as well.

7 MJ [Col SPATH]: Okay.

8 DDC [CDR MIZER]: Here are the real issues, Judge. These
9 are the real conversations that are going on in the staff. We
10 need to put people on notice because of regulatory changes.
11 If so, would that give the defense time to file motions? If
12 so, the judges -- and we've been over this, Judge.

13 That's what's in the documents, right? When you read
14 all of those documents, not one mention of Salyer. What
15 they're really talking about is avoiding public comment,
16 avoiding public scrutiny, and that's what you need to consider
17 when you're going back and considering exactly what remedy
18 that you're going to fashion.

19 Judge, he also mentioned the SSCI Report. Also,
20 nowhere in the e-mails. And essentially what you have is the
21 witness takes the stand and says everything in the e-mails I
22 want to distance myself from. Let me tell you what the real
23 motivations of this change were, move the judges to

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1 Guantanamo, which literally makes no sense, Judge. If you
2 look at this, I mean, it's like saying I need to buy a car so
3 I'm going to go home and build a bed, and we're just to accept
4 that and move on.

5 And you can't, Judge, because you've got the dog
6 whistle of accelerate the pace of litigation. And you don't
7 have to look for it, it's in the change itself, it's behind
8 the paperwork of the change and it's consistent with these
9 documents. What's not there, Judge, is Salyer. What's not
10 there is the SSCI Report. What's not there is the third
11 courtroom.

12 And, Judge, the government had the burden -- has the
13 burden, and they could have put on evidence. And Mr. Ary
14 testified two days ago of what the true motivations of his
15 motivation to move you and the judges down to Guantanamo was,
16 and none of those e-mails have appeared. Where are they?
17 Beyond a reasonable doubt, Judge, is the standard. The burden
18 rests with them. Where are those e-mails? They're not here,
19 and I submit they don't exist.

20 What does exist, Judge, is 127551. If I could
21 publish this to Your Honor and then to ----

22 MJ [Col SPATH]: You may.

23 DDC [CDR MIZER]: ---- to the gallery?

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1 MJ [Col SPATH]: You may.

2 DDC [CDR MIZER]: Judge, what I'm really interested in on
3 this draft of 62 is towards the bottom of that paragraph it
4 says, "The collocation of the judges at the trial location,
5 the flexibility needed in organizing the docket, for example
6 trial weeks may be split between cases, all parties could
7 depart on the same chartered flight, the first half of the
8 trial week could be devoted to one case with the latter half
9 devoted to another, and then alternatively the judges may
10 decide on a different division of time."

11 So what do you have, Judge? Who's setting your trial
12 schedule? Within the convening authority, the legal advisors
13 are planning your trial week, and I'm a little bit upset that
14 they didn't include lunch breaks in their trial planning
15 there.

16 But, Judge, they're telling you that you're going to
17 be in the well of the courtroom for two, three days, then
18 maybe Judge Waits or Judge Pohl comes into the courtroom. And
19 that is not the province of the convening authority. And what
20 the judges want is listed as an alternative. I mean, that's
21 the plain language of this memo; the judges could decide on a
22 different division of time. This is what we propose, but
23 maybe the judges could do it. And then defense counsel, we're

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1 supposed to go meet with our clients when we're out of court.
2 And so you have the convening authority in -- way out of its
3 box. I mean, that's really what the point is here, Judge.

4 What you don't see in that memorandum, which again
5 discusses essentially hot-racking of the courtroom, and that's
6 a Navy expression where three sailors share one rack, you're
7 going to have two or three judges sharing one courtroom. Did
8 you hear Mr. Ary talk about one of the things that they're
9 discussing was three judges sharing one courtroom, Judge? Or
10 did he say that one of the primary reasons of the change was
11 that he was going to build a third courtroom? Also not in
12 those e-mails, Judge. What is in there is a discussion of one
13 courtroom and sharing that one resource.

14 Judge, it's important that as you look at the
15 evolution of memos, and I encourage you to look at the memos
16 side by side, lay them all out and they go from talking about
17 Captain Waits, then ultimately they get better, as you would
18 expect. But even the final product is talking about something
19 impermissible, accelerating the pace of litigation.

20 Judge, trial counsel talked about this 2 July 2014
21 memo from Colonel Baime that requested resources. We've been
22 litigating this for two months, and at 10:30, before Mr. Ary
23 was potentially going to testify at 12:00, we get four new

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1 documents that were the purported genesis of this action.
2 None of the government's pleadings cite any of those memos.
3 All of this, Judge, is post hoc rationalization for Mr. Ary's
4 attempt to accelerate the pace of litigation.

5 And, Judge, when I was -- I guess I would just ask
6 when you go back to deliberate -- and you certainly have to
7 take into consideration who Mr. Ary is. But if a defendant in
8 a court-martial had come in with 220 pages of inconsistent
9 documents and said none of that was my real motivation. What
10 my real motivations were is these three or four things that
11 aren't reflected in any of those documents, you should give
12 that the same weight here, Judge. You should -- and you
13 certainly have to take who he is into that credibility
14 determination.

15 We also called Mr. Little for that purpose. And
16 look, Mr. Little isn't the end-all-be-all of credibility, and
17 we didn't call him for that piece, because I called him
18 because I thought it would be another pebble in a pile, quite
19 literally a stack of evidence that is inconsistent with
20 Mr. Ary's testimony in this case.

21 And I was reminded as we were working on this case
22 about a client that I had in federal district court who had
23 taken some long guns in a home burglary. And I told him that

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1 they recorded his phone calls with his girlfriend and to not
2 talk about it on the phone at the Alexandria Detention Center.
3 So we went to a reverse proffer session the next day, and the
4 U.S. Attorney slides across the audio recording of him
5 discussing destroying the guns, and he leans over to me and
6 says, "Don't worry, I used the word irons."

7 And that's essentially what we have here, Judge, is
8 they start off talking about guns in the Captain Waits memo,
9 and they ultimately get to irons, and now they're talking
10 about resources. And that's the evolution of this unlawful
11 influence that they're now trying to after the fact
12 rationalize.

13 Judge, at page 5674 of the trial transcript, the
14 unauthenticated trial transcript, trial counsel had the
15 convening authority read a few of his memos into the record.
16 At about middle down, right before the third paragraph -- and
17 this is a memorandum dealing with declassification even,
18 Judge, "if it is possible to provide OMC and the litigants
19 with documents that would clarify the classification standards
20 in a way that would support an increased pace of litigation,
21 it would be helpful."

22 Judge, in things that don't even have to do with this
23 matter he is discussing pace of litigation, he's discussing it

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1 with the Chief Defense Counsel. I believe that Mr. Ary wakes
2 up thinking about the pace of litigation and goes to bed
3 thinking about it, Judge. And he can think about it, but what
4 he can't do is take steps to accelerate it, and that's exactly
5 what he successfully, for a period of several months,
6 accomplished in Change 6-2.

7 MJ [Col SPATH]: I don't agree with that. The litigation
8 pace did not change because none of us moved.

9 DDC [CDR MIZER]: Yes, Judge.

10 MJ [Col SPATH]: And I'm not sure that would increase the
11 pace of litigation anyway.

12 DDC [CDR MIZER]: Understood, Judge.

13 MJ [Col SPATH]: All three of us -- I know there's been
14 discussion about us not following orders. I didn't receive
15 PCS orders, so that's why I didn't do anything.

16 DDC [CDR MIZER]: Yes, Judge.

17 Look, the stated purpose of Change 1 was to
18 accelerate litigation essentially at all costs. It didn't
19 matter if we severed judges or not. And that's unlawful
20 influence, Judge. The reports on your efficiency are unlawful
21 influence. I think also that the documents at a very high
22 level of the Department of Defense constitute a reprimand, an
23 impermissible reprimand of a military judge here specifically,

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1 that you're not doing enough work. And it's a misleading
2 memo.

3 I mean, the convening authority has other arguments
4 or concerns at his disposal. And he chooses, because he's
5 trying to advance this policy, a really misleading metric as
6 to what's going on here at Guantanamo Bay. The litigation
7 isn't proceeding because the judges and the defense counsel
8 and the prosecutors only want to come into this courtroom
9 every so often. It makes no mention of all the work that both
10 sides are doing up in Washington, where we can actually be
11 productive.

12 And here, Judge, is where I think we have more than
13 established that there is unlawful influence, and we need to
14 talk about remedy. And I want to dwell on Lewis, if you'll
15 permit me for just a little bit. The Staff Judge Advocate,
16 there were requests to recuse that military judge. The Staff
17 Judge Advocate ultimately came in and engaged in pretty
18 outrageous conduct to force the recusal of that military
19 judge. Another military judge was detailed to the case. That
20 judge then came in and said I'm so offended by what took place
21 here, I can't be fair, I recuse myself. Marine Corp Colonel
22 Roger Harris then recused the entire Marine Corps judiciary as
23 a result of what took place in that case.

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1 And they found a Navy captain who ultimately sat on
2 the case, required a new SJA, a new convening authority. The
3 convening authority was disqualified in that case. And when
4 we went before the Navy Marine Corps Court of Criminal Appeals
5 the government made the same argument they're making here.
6 Look, we fixed everything. You got a fair trial, Lewis. And
7 Lewis was a pretty fair midlevel drug dealer that pleaded
8 guilty. And the argument that we made to the C.A.A.F. was,
9 look, it's not fixed because you allowed him to attack the
10 judiciary itself, Judge. And I think that's what makes this
11 so outrageous as far as UCI goes.

12 We're not talking about tampering with one or two
13 witnesses. You're going to the very heart of the military
14 justice system by, at best, a very reckless manner and I think
15 a very intentional manner, if you look at the documents, to
16 push these cases forward at all costs.

17 And, Judge, what I want to focus on, as you
18 deliberate, is footnote 4 of Lewis. It's at page 405 so 63 MJ
19 405. And ultimately when we went to the C.A.A.F. the
20 government came in and said there was no unlawful influence
21 here, and any unlawful influence that was there was cured by
22 what took place. And ultimately the C.A.A.F. in footnote 4
23 says, "The record before us does not indicate whether the

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1 unlawful influence in this case was the subject of any ethical
2 or disciplinary investigations or sanctions. Had that
3 occurred, they could have had an impact on the public's
4 perception and perhaps restored some confidence in the
5 military justice system."

6 And, Judge, as the government stands in the well here
7 today, they're still telling you they did nothing wrong. And
8 mind you, that has nothing to do with these prosecutors.
9 They're carrying the convening authority's water and they have
10 to dance with the one that brought them. But the convening
11 authority told you in his own words he'd do it again. I mean,
12 that's his testimony, Judge.

13 And so what do you have to do to convince the
14 convening authority? It's page 5652 and 53, where he denies
15 that it's unlawful influence. The question was, "Nothing
16 different, it's all good. Not a whiff of UCI in the air?"

17 And he said, "I don't believe so."

18 And the question was -- I just won't go through the
19 rest of that transcript, Judge, but I've identified where it
20 is, 5652 and 53.

21 You have an unrepentant convening authority and
22 nothing about the rescission of Change 2 should give you any
23 confidence that their concern is anything except the proper

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1 staffing of their next attempt at the influence of this
2 judiciary.

3 Judge, and then as I alluded to earlier, you have the
4 Deputy Secretary of Defense invading this courtroom for a
5 second time in the space of a week by rescinding the
6 regulation. Not saying hey, look, I just committed unlawful
7 influence, I'm terribly sorry. But he is again influencing
8 these proceedings by taking away the vehicle which you may
9 have done something about.

10 And so the Deputy Secretary of Defense, you have to
11 look at what they did very carefully here, Judge, because I
12 think they're trying to manipulate the ultimate outcome in
13 this case and not necessarily trying to insulate you from
14 unlawful influence.

15 Judge, Salyer also has a good quote which is, "The
16 actions at issue strike at the heart of what it means to have
17 an independent judiciary, and indeed a credible military
18 judiciary -- a credible military justice system," excuse me.
19 "Consequently, on the specific facts of this case, setting
20 aside the findings and sentence to allow retrial would leave
21 appellant where Lewis found himself from an objective
22 standpoint that the government has accomplished its desired
23 end and suffered no detriment or sanction for its actions."

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1 And that's precisely what you have, Judge. You have
2 an unrepentant convening authority, the message delivered to
3 you by trial counsel in this case. Nothing to see. They
4 can't even say that there is unlawful influence in this case,
5 Judge. And how can you say that? You've got to tell them
6 that, Judge, and you've got to do it clearly, and it's not a
7 lecture from the bench.

8 There's got to be a strong signal, and I think Lewis,
9 where the convening authority comes in or where the government
10 comes in, and that's why I point you to footnote 4, is the
11 C.A.A.F. ultimately says, had you JAGs done something about
12 this, we might not have dismissed this case. That's
13 footnote 4, Judge. It's a drastic remedy, and it's a remedy
14 that is within your discretion.

15 And the only two direct assaults on the judiciary are
16 Salyer and Lewis. What do you do when the convening authority
17 comes in and does this? And those cases should inform your
18 deliberations. Ultimately, Judge, a reasonable member of the
19 public would think that this court at this point is insulated
20 from the Deputy Secretary of Defense and the convening
21 authority.

22 And we didn't get into it with the JAGs, but I don't
23 know that the JAGs, the next time that they do this, aren't

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1 going to say, look, the main thing that I was concerned about
2 is you didn't sit down with me first. Sure you can move
3 Colonel Spath down to Guantanamo, or maybe General Burne will
4 say no and we lose Judge Spath from Guantanamo and we're going
5 to have to get into all of this again. We have no assurance
6 whatsoever that it's not going to happen. And a disinterested
7 member of the public wouldn't believe that Mr. al Nashiri can
8 now receive a fair trial from the effects of unlawful
9 influence.

10 And, Judge, you touched on something earlier -- and
11 I'm almost done -- with respect to continuances. Because
12 you're right, Judge, every time you deny a defense continuance
13 request that appearance is going to come up, and it's also
14 going to invade the appellate record here. Because it's no
15 longer an abuse of discretion standard, in my opinion, that
16 those are going to be judged by. It's going to be judged by
17 the appearance of unlawful influence and a beyond a reasonable
18 doubt standard.

19 I mean, quite literally the convening authority has
20 rolled a grenade into this courtroom and into this military
21 commission and I don't know that it's recoverable. I mean, if
22 the end result is that we just proceed to a trial that
23 ultimately is reversed because the government hasn't met its

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1 standard for unlawful influence, then no one is served by
2 that, Judge, absolutely no one.

3 And, Judge, I would leave you with a quote from
4 Campos then one final point. Campos is 42 MJ 253, and it
5 says, "Indeed even the appearance of unlawful command
6 influence is as devastating to the military justice system as
7 the actual manipulation of any given trial." And then the
8 court goes on to say, "Accordingly, we cannot countenance,
9 indeed we condemn the calculated carping to the judge's
10 judiciary superiors about his sentencing philosophy. Part of
11 the tradeoff in a system in which judges lack tenure and
12 professionally survive only by grace is special vigilance to
13 ensure judicial independence."

14 And, Judge, here I would submit that that has to
15 happen. The Judge Advocates General have certainly suggested
16 that they are not going to do it. The convening authority and
17 the Deputy Secretary of Defense have expressed an ability and
18 intent to accelerate the pace of litigation, invade your
19 province. They are in this courtroom, Judge. In fact, we've
20 burned an entire week litigating their actions.

21 And it's up to you to tell them no, Judge. And I
22 don't know a stronger way that you can do it than to dismiss
23 the case, Judge. And if you're not going to dismiss the case,

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1 at the very least you have to follow Lewis -- and there's any
2 number of cases where convening authorities have been
3 disqualified. You have to strike the convening authority, you
4 have to strike all of his legal advisors, much as you would in
5 a conspiracy case, Judge.

6 We need to get a walled-off legal system. And I
7 realize it's not easy to do, it's feasible to do. There's
8 nothing statutorily that prevents the convening authority --
9 or, excuse me, the Secretary of Defense from appointing a
10 separate convening authority. And if that's what we have to
11 do to cut out the carcinoma of military justice, then it has
12 to be done, Judge, because there's really nothing less than
13 that that can remove the public's appearance and give any
14 confidence. Again, that's not the remedy -- primary remedy
15 we're seeking but, at the very least, that's the baseline
16 we're seeking for both due process the special aspect of this
17 case and also the UI.

18 And I thank the court for its time.

19 MJ [Col SPATH]: Thank you.

20 Lieutenant Morris?

21 ATC [LT MORRIS]: Your Honor, it is remarkable that
22 defense counsel is asking as a remedy for these facts, they're
23 asking for dismissal of all the charges. Because they're

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1 asking for that, you know, it's imperative on me to at least
2 respond to that drastic request and point Your Honor to case
3 law that we've highlighted in our brief, 2006 C.A.A.F. case of
4 Harvey that talks about dismissal of all charges as being
5 drastic. You must look to see whether alternative remedies
6 are available.

7 Defense counsel brings up the Salyer case over and
8 over again. Unlike Salyer, Your Honor is still sitting on the
9 bench. Your Honor is still there. And as Your Honor aptly
10 said, that nothing has changed in this case. January 7 the
11 change was enacted. We had two weeks of hearings scheduled.
12 We are almost through the first week of that. In the meantime
13 defense counsel is unable -- been unable to highlight what has
14 changed. In Salyer and the other cases it's very easy to
15 identify and pinpoint what had changed. Not in this case.
16 They're unable to point to that.

17 Now, not unlike the rest of the week where this has
18 been fluid and there have been additional appellate exhibits,
19 I have just been notified that in Colonel Pohl's case -- and I
20 will show defense counsel this, but he has ordered in his case
21 that the rescission of Change 1 was an adequate cure for
22 anything or any harm that may have happened.

23 And I would, just to close the loop and I -- you

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1 know, I'm cautious in presenting that as an appellate exhibit
2 because each commission case is separate and we all agree with
3 that tenent, but at the same time the record already has, you
4 know, his initial ruling, and so to close that loop I would
5 ask that the record reflect his latest order. And that's
6 dated 27 February 2015. It was just handed to trial counsel.
7 And so I will show it to defense counsel and ask that it be
8 marked as an appellate exhibit.

9 Permission to approach, Your Honor?

10 MJ [Col SPATH]: You may. Thanks. It's going to be 332T.
11 And it's fair to complete the record because we do have the
12 abatement order. I do not take it as anyone telling me how to
13 deal with this or what to do at all.

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

15 Really, I don't know if Your Honor shares the shock
16 of the characterization and the weight that was put on these
17 e-mails of legal advisors, but to me it's shocking. It's
18 shocking to take the testimony that is in front of Your Honor,
19 the live VTC, almost realtime, but testimony of Mr. Ary
20 talking about why he did what he did. And for defense counsel
21 to get up here and try and emphasize the testimony of
22 nonactors, to try and emphasize the testimony of legal
23 advisors doing their job, doing their duty; and then to try

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1 and point out some inconsistency between what was being said
2 back and forth, as if Mr. Ary didn't say that, yeah, they had
3 roundtable discussions and they were discussing these matters.
4 And I think I heard Your Honor say that that wasn't -- that
5 you acknowledged that that -- or shared with defense counsel
6 that that wasn't an inconsistency that this was brought up.

7 But guess what else his legal advisors were working
8 on, resourcing memos, looking at military commissions
9 holistically. To think that this was the only thing that was
10 going on in the military commissions office -- yes, it was one
11 thing. It was an important thing, important enough in his
12 mind to make a recommendation of.

13 But then to pinpoint one e-mail between legal
14 advisors and try and say that this is the unlawful influence
15 when it's not even the actor really is preposterous. It is
16 one -- one part of the optics, but to try to give it the same
17 optics as live in-person testimony doesn't even warrant common
18 sense or what we know to be in law the weight that we give
19 appropriate testimony.

20 I'll close with the discussions of 948j(f) and just
21 highlight for Your Honor that that comes out of -- you know,
22 Congress, when you look at them enacting 26(c) of the UCMJ,
23 they're concerned with the convening authority's directing,

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1 having an influence on judges and their ability to be fair and
2 impartial in reaching the sentences, the decisions that they
3 want. And so you have this wall against being able to comment
4 on their efficiency, being able to comment on what they're
5 doing, and if they're doing it well in the form of reports or
6 in any other form.

7 And what we see here and as Mabe says, this was
8 concentrating on officer fitness reports, not being used as a
9 conduit for command complaints against judge sentencing alone.
10 And that's not what we have here. We don't have a situation
11 where the convening authority is coming in and commenting on a
12 decision that you've made. Even though that was a predicate
13 fact that defense counsel initially alleged, we have had no
14 evidence of that. In fact, the evidence that is in front of
15 Your Honor is entirely the opposite. The evidence that the
16 convening authority, in making a change that he thought would
17 be best for everybody, in making a change that he thought
18 would be better for military commissions as a whole, certainly
19 hoped to not lose the exceptional experience that are on the
20 benches right now. It is the absolute opposite of why
21 Congress enacted these protections.

22 And for Your Honor, you know, to, you know, take all
23 of that into consideration, look at the convening authority's

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1 testimony and to, you know -- in considering the entirety of
2 it and to not try and give one highlighted section of one
3 e-mail of people that were not even here.

4 Defense had an opportunity to ask for these legal
5 advisors and after General Ary's -- or after Mr. Ary's
6 testimony, they did not ask for any of the legal advisors.
7 That was an option that was open to them. They didn't ask for
8 them, conceding that they were not relevant and necessary to
9 this, and then now in their final summation, they try and take
10 the words of these nonactors and make that be the source of
11 the unlawful influence. The facts of this case do not warrant
12 the characterization that defense counsel gave.

13 And a lot of his comments might have been appropriate
14 if this argument had happened yesterday. But where we're at
15 today, we're at a place where Change 1 has been rescinded.
16 We're at a place where no -- there's been no impact on this
17 commission. And we're confident, Your Honor, that the
18 observer that knows all of these facts, that heard the
19 testimony of General Ary, the live testimony, would not harbor
20 any significant doubt as to the fairness of this proceeding.

21 Thank you, Your Honor.

22 MJ [Col SPATH]: Thank you.

23 DDC [CDR MIZER]: Judge, I hope that you're not going to

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1 lose sight of who has the burden here. We had a burden of
2 production. The witnesses we didn't call, we didn't have to
3 call. We had to raise some inference of UCI. It was up to
4 them to call witnesses to disprove it, Judge, to essentially
5 say that it's not going to impact the public fairness. They
6 could have called the legal advisors; they could have called
7 Mr. Work; they could have called the JAGs to disprove and
8 reassure the public that this is, in fact, a full, fair and
9 transparent process. And I don't think that they have done
10 that, Judge, and I would leave it at that. Thank you.

11 MJ [Col SPATH]: Thank you. Thank you, both sides, for
12 your discussions on the unlawful influence motion.

13 General Martins?

14 CP [BG MARTINS]: Your Honor, as we have the burden and as
15 counsel at our colleagues' table has had two different
16 colleagues arguing, I was hoping I could rise as the chief
17 prosecutor and say something.

18 You said earlier we're all guardians of this, we have
19 to be vigilant. We're mindful of this, and my cocounsel
20 Lieutenant Morris ably, I believe, reiterated why good faith
21 was really here. Again and again, in spades with the public
22 official who has spent his life serving the country. Adult
23 life.

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1 I just want to make the point that with a trial judge
2 in another case admittedly -- not to influence your judgment
3 at all, but a trial judge in another case abating very
4 quickly, with you expressing your concern, and we've
5 documented it and seen it. In an action that was not
6 coordinated with the chief trial judge, we get that there is
7 an appearance issue and that you were moved to take actions
8 that you've taken. And I didn't want to let the moment pass
9 without stating that we all are guardians. The independence
10 of the judiciary is the heart of this.

11 You are the commission. I do want to point out that
12 there's a level of plausibility of the commission moving to a
13 place and bringing the court system with him or her on the
14 bench. And a line of thinking -- again, I wasn't privy to the
15 line of thinking, but a line of thinking that comes to mind
16 upon hearing all of this and hearing the testimony of Mr. Ary,
17 is if the only detailed person to the commission who's a
18 member of the commission -- that's you -- you are the
19 presiding official with the responsibility and authority to
20 regulate the time, place and manner of all these
21 proceedings -- were to come and say I need everybody down
22 here -- I mean, this is the line of thinking that I want to
23 just put in your head.

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1 I mean, Mr. Ary said yesterday if the chief trial
2 judge had come to me, the one who is responsible for the
3 supervision and the management of the trial judiciary and had
4 said I need the people down here, would you have supported it.
5 And he said in his testimony, yes. He is not the person who
6 assigns individuals within that sphere.

7 So I just put in your thought that the commission
8 being collocated with the venue -- in courts all around the
9 country, there's a courthouse that brings the litigants to it,
10 and when the judge states we're in session, law firms move
11 around the country, prosecutors, government lawyers move
12 around the country. And I just offer that again as another
13 aspect of the good faith thought, that that was here and that
14 may have been here, and again want to reiterate that we
15 understand, we get that, and we are all guardians and need to
16 be vigilant. Thank you.

17 MJ [Col SPATH]: I appreciate the -- I won't say
18 concession, but the acknowledgment of the appearance issue,
19 and I hope you know that that was the vein in which I was
20 questioning Lieutenant Morris. As you've been in the service
21 for a long time as well, and you know that that change was
22 staffed in a manner that is different than significant actions
23 that roll through the Pentagon are staffed, and frankly,

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1 probably is what caused somebody not to say wait a minute,
2 maybe somebody else should look at this, not you the convening
3 authority.

4 There are just many other ways that that should have
5 happened. I assume you agree with that.

6 CP [BG MARTINS]: I do, although I don't -- he did say he
7 was concerned about going ex parte, creating a caucus of Judge
8 Advocates General on this idea. Again, you know the thought
9 that that could have itself been interpreted, hey, get out of
10 my turf.

11 He was -- I heard him being respectful, Your Honor,
12 of Judge Advocates General prerogatives under Article 6.
13 That's what I heard, and he wasn't going to be telling them
14 how to detail or undetail -- I mean assign or reassign.

15 MJ [Col SPATH]: I guess my question would be the same. I
16 asked there, though, the acknowledgment from the convening
17 authority that his action could cause the undetailing of a
18 currently detailed judge, going into it knowing I think I have
19 an idea I'm going to recommend, I'm going to increase the pace
20 of litigation -- and I recognize you all rightfully recognize,
21 not necessarily his bailwick, increasing the pace of
22 litigation -- or accelerating, sorry ----

23 But I want to focus on going into an action knowing

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1 that your action may result in the trial judge detailed to a
2 case being removed, should give pause to any trial
3 participant, if you're worried about independence of the
4 judiciary.

5 CP [BG MARTINS]: Your Honor, I've acknowledged the
6 concern, and the fact -- the very fact that it has troubled
7 another judge to abate, caused us to spend a week on this, you
8 know, I understand.

9 Again, on the staffing aspect, as an SJA, how many
10 times did you go to all the coordinating staff members on the
11 staff before you went in and talked to a commander about
12 military justice? Did you call the TJAGs? I wasn't in the
13 habit of doing it, having been an SJA for many years. There's
14 an aspect of advice -- could be bad advice sometimes or not
15 the best thought out, under time constraints and other things.

16 I just ask the standard to making a change within
17 your purview can't be perfection. I would submit rational
18 relationship to a legitimate government interest. And we've
19 now second-guessed it, scrutinized it, counsel spoke to
20 cross-examination, and you haven't found anything like bad
21 faith anywhere. And we get it. An intent to resource.

22 We're not members of the commission. We're counsel.
23 You're the member of the commission here. Move the commission

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1 to Guantanamo, start working on the checklist of -- I was
2 hearing start working on the checklist of problems and gigs
3 and eventually this will be a place where we can practice full
4 up. It's been rescinded, but I'm pointing out, again, good
5 faith and intent -- I see a lot of respect through all of the
6 actions there to honor the judiciary and make clear that we
7 need to pursue justice. Thank you.

8 MJ [Col SPATH]: Defense Counsel, I'll offer you the same
9 consideration, if your lead counsel wants a moment or if
10 anyone else wants a comment, I will give you the final word
11 because you do have the burden, Mr. Kammen.

12 LDC [MR. KAMMEN]: Well, I mean, we can go on and on and
13 on. So, I mean, this just strikes me sort of as classic
14 Guantanamo litigation where one side gets to argue until it's
15 not convenient for the government and then -- or one lawyer
16 gets to argue until all of a sudden we now have the General
17 coming in and ----

18 MJ [Col SPATH]: Let me just say this in fairness: What I
19 believe, and I will -- as I have said frequently today and I
20 say frequently about officers of the court, during defense
21 counsel's comments, fair comment, no acknowledgment from the
22 government of the appearance issue, and I think General
23 Martins was in response to footnote 4 saying there is

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1 acknowledgment of the appearance issue.

2 LDC [MR. KAMMEN]: At the very end, after one week, after
3 the convening authority said I did nothing wrong knowing about
4 the abatement, after the convening authority and after
5 Lieutenant Morris says for two hours we did nothing wrong,
6 only then do we have this perfunctory oh, yes, we now get it.
7 I suggest that that's what this is, a last gasp effort to
8 divert you from what you need to do, which at a minimum is
9 exclude and wall off the convening authority.

10 There is another facet to this -- and I don't want to
11 get down in the funding weeds, but he is responsible on a very
12 micro level for individual funding decisions. He can't be
13 trusted with those anymore because every time he denies
14 funding for a defense expert, we now have the issue: Is it
15 because he's mad at us because we challenged him?

16 The other issue is this: He handpicks the people
17 that he wants to kill Nashiri. This is a death penalty case,
18 and he handpicks from all over the world, right now the 37
19 people he thinks are best equipped to kill Mr. Nashiri. And
20 they dress it up with all this fancy language, but at least in
21 the prior iteration of the convening authority we've seen, I
22 want Major Jones, I don't want Captain Smith, I want this guy,
23 I want this guy.

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1 And he can't be trusted, not anymore. Whatever he
2 was entitled to before, he has sacrificed that, and he
3 sacrificed that with this order, he sacrificed it with the
4 staffing, and he sacrificed it when he stood up, sat there and
5 said, "I would do it again." And they will do it again. They
6 will do it more elegantly. They will do it more cleverly.
7 They will dress it up, but they will do it again. Because the
8 goal of certain aspects of the government is to have what
9 looks like a trial, but in fact is a death train with an
10 absolutely predictable result. Thank you.

11 MJ [Col SPATH]: Any final comments?

12 CP [BG MARTINS]: No, Your Honor, I will rest with my last
13 comments, and thank you for allowing me to profess them.

14 MJ [Col SPATH]: The road ahead, you all deserve a ruling.
15 I would like to think with some productive work over the
16 weekend that I can do that on Monday. That could change, so
17 I'm going to give myself a little bit of breathing room on
18 Monday as well.

19 What I would like to do, if it isn't going to work,
20 the staff attorney will let you know as we've done throughout
21 the week, through e-mail, is come on the record at 1030 and
22 I'll provide a ruling. We will supplement the record with a
23 written ruling, but as I do in trial courts I run, for motions

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1 that are important, I think it's important to give the ruling
2 so that everybody knows where they are. And I think it's
3 important for all the participants and the people involved in
4 the process to hear the ruling as opposed to find out about it
5 some number of days later on a website. So I'll do that.

6 And, again, if I can't get there, I don't feel any
7 time pressure on getting you two the ruling, we'll change
8 that, and you'll have an e-mail well ahead of time so that we
9 don't have any issues with moving people or the court. So
10 let's count on 1030.

11 The defense counsel asked for dismissal. If I grant
12 dismissal, that means we're not doing anything else next week.
13 If I don't grant dismissal and grant something else, we'll
14 stay and work on motions, and what we'll likely do is in the
15 afternoon on Monday we'll start working through them. But I
16 can't give you any guidance other than we're going to come on
17 the record at 1030, and I'll give you a ruling or I'll let you
18 know I can't get there yet.

19 Are there any other matters to take up before we
20 recess for the weekend? Trial Counsel?

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

22 MJ [Col SPATH]: Defense Counsel?

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

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1 MJ [Col SPATH]: I'll see you next week. Commission's in
2 recess.

3 [The R.M.C. 803 session recessed at 1739, 27 February 2015.]

4 [END OF PAGE]

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