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1 [The R.M.C. 803 session was called to order at 1030, 2 March  
2 2015.]

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

5 Major Jackson, congratulations. I know you pinned  
6 on.

7 ADDC [Maj JACKSON]: Thank you, sir.

8 LDC [MR. KAMMEN]: I was going to mention that on the  
9 record, that Captain Jackson is now Major Jackson.

10 MJ [Col SPATH]: Indeed. All right.

11 The written ruling is not in final form. The written  
12 ruling will go in as the next appellate exhibit in the 332  
13 series. I anticipate that will be published -- not published  
14 to the public until it goes through the review process, but it  
15 will be published reasonably soon because it's almost done.  
16 I'm going to go through my ruling in shorter form than the  
17 written version and without many of the citations.

18 The accused is charged with multiple offenses in  
19 violation of the Military Commissions Act of 2009. The  
20 defense filed AE 332 alleging the convening authority,  
21 Mr. Ary, unlawfully influenced the military judges of the  
22 military commission trial judiciary by having DEPSECDEF, the  
23 Honorable Robert O. Work, change paragraph 6-2 of the

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1 Regulation for Trial by Military Commissions to make military  
2 commissions the exclusive duty of the military judges assigned  
3 to the trial judiciary; and moreover directed they shall be  
4 issued assignment orders for duty at the venue where the  
5 military commissions are to be convened.

6           The defense in that motion requested the charges and  
7 specifications be dismissed with prejudice. In the  
8 alternative they requested abatement. The prosecution  
9 responded in AE 332A, and they argued that Change 1 is not an  
10 example of unlawful influence. The defense replied.  
11 Testimony and the motion was heard between 23 and 27 February  
12 2015.

13           The following facts were demonstrated by a  
14 preponderance of the evidence:

15           A, on 10 July 2014 Colonel James Pohl, Chief Judge  
16 Military Commissions Trial Judiciary, detailed me as the  
17 military judge in the case of United States v. al Nashiri.

18           B, on or about October 1, 2014 Mr. Ary was appointed  
19 as the convening authority for the military commissions. He  
20 also serves as the Director of the Office of the Convening  
21 Authority.

22           C, Mr. Ary believed his dual role of designated  
23 convening authority and director gave him the authority to and

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1 required him to both resource the trial judiciary and  
2 recommend changes in the military commission process to  
3 DEPSECDEF for implementation. In this instance the  
4 recommended changes -- Change 1, as I refer to it  
5 throughout -- impacted the assignment location and exclusivity  
6 of duty of the currently detailed commission trial judge or  
7 judges.

8           Soon after being appointed as the convening  
9 authority, Mr. Ary did an assessment of the adequacy of  
10 resources in the Office of the Chief Prosecutor, Office of the  
11 Chief Defense Counsel, and Office of the Trial Judiciary.  
12 During the assessment Mr. Ary became concerned with the pace  
13 of litigation in commission cases. As a result of his  
14 assessment, Mr. Ary concluded the pace of litigation in  
15 commission cases was too slow. He also identified resourcing  
16 issues.

17           Concerned with the pace of litigation and to improve  
18 the trial judges' availability for hearings, Mr. Ary  
19 formulated a concept of both making the trial of commissions  
20 cases the judges' full-time duty and moving them to  
21 Guantanamo Bay Naval Station. This concept became Change 1.

22           The final proposed and signed change to the  
23 Regulation for Trial by Military Commission consisted of two

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1 paragraphs. 6-2(a) states, "The Chief Trial Judge will detail  
2 a military judge for the military commissions trial judiciary  
3 when charges are referred. Once detailed, military  
4 commissions shall be the military judge's exclusive judicial  
5 duty until adjournment, final disposition of charges, recusal,  
6 replacement, or reassignment by the appropriate Judge Advocate  
7 General. A detailed military judge shall be issued assignment  
8 orders for duty at the venue where the military commissions  
9 are to be convened."

10           And then paragraph 6-2(b) stated, "A detailed  
11 military judge may perform such other duties as are assigned  
12 by or with the approval of the appropriate Judge Advocate  
13 General, provided that such other duties don't conflict with  
14 the judicial duties as detailed military judge for military  
15 commissions."

16           The pre-Change 1 version of paragraph 6-2 did not  
17 make military commission trials the exclusive judicial duty of  
18 military judges, and it did not require the issuance of  
19 assignment orders to detailed military judges to the venue  
20 where military commissions are to be convened.

21           Mr. Ary conferred with legal advisors assigned to his  
22 office concerning Change 1. Mr. Ary did not staff Change 1  
23 with The Judge Advocates General, hereafter TJAGs, of the

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1 various services. Mr. Ary did not staff Change 1 or discuss  
2 Change 1 with the Chief Trial Judge of the Military  
3 Commissions prior to its implementation.

4 Mr. Ary knew that Change 1, if approved and signed by  
5 DEPSECDEF, might impact currently detailed and assigned  
6 commission judges. By impact them, he understood they might  
7 not continue as currently detailed and assigned judges in a  
8 case they were currently working. He recognized there might  
9 also be an impact on the pool of commission judges nominated  
10 by service TJAGs. The only coordination of Change 1 outside  
11 the Office of the Convening Authority by Mr. Ary was with the  
12 DoD general counsel's office, specifically Mr. Steve Preston,  
13 the DoD general counsel.

14 Sometime prior to 21 November 2014, Mr. Ary directed  
15 Ms. Wilkins, Director, Office of the Court Administration,  
16 Office of Military Commission, to gather information on days  
17 on the record for FY 2013 and '14 for each of the currently  
18 referred commission cases. The reports attached to  
19 Ms. Wilkins' e-mail to Mr. Ary were organized by individual  
20 case and judge. When this information was ultimately  
21 submitted to DEPSECDEF, it was consolidated with no reference  
22 to individual judges. The information was used to support the  
23 proposed Change 1.

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1           On 21 November '14 Ms. Wilkins e-mailed Mr. Ary. The  
2 e-mail subject was "Hours and Numbers on the record." The  
3 attachment was On the Record 2014.xlsx, and the e-mail stated,  
4 quote, "Sir, per your request, please see the attached  
5 document. Sorry it took so long to get this information to  
6 you. It took longer than I had anticipated."

7           The spreadsheet On the Record 2014 contains the  
8 reports in AE 3320, Product 112, Bates numbers 127556-127559.  
9 The reports are broken out by individual case and individual  
10 judge. The spreadsheet provides information on hours of  
11 audio, page count for the transcript, and days on the record.

12           On 24 November 2014, Office of the Court  
13 Administration, followed up on the above reports by e-mail,  
14 stating, quote, "Ms. Wilkins asked me to adjust the numbers on  
15 the chart that she sent you this past Friday. These updates  
16 were to account for classified Military Commission Rule of  
17 Evidence 505(h) sessions held in the pending commissions  
18 cases."

19           On 9 December 2014 Mr. Ary personally approved an  
20 action memo that was forwarded to DEPSECDEF as evidenced by  
21 his initials. The action memo states in part, quote, "I  
22 believe the status quo does not support the pace of litigation  
23 necessary to bring these cases to a just conclusion. I

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1 believe we must realign resources and reposition the trial  
2 judiciary to make it a full-time onsite duty for the judges  
3 assigned to military commissions." It also states, "I believe  
4 these actions will accelerate the pace of litigation."

5           Finally, Mr. Ary recommended what ultimately became  
6 Change 1. On 9 December 2014 Mr. Ary personally approved an  
7 executive summary, also forwarded to DEPSECDEF. The executive  
8 summary starts with a conclusion of his assessment of the  
9 commission process and includes the statement, "I am convinced  
10 we must take action to realign resources and better position  
11 the commission to achieve the efficient, fair, and just  
12 administration of ongoing and future military commissions."

13           The executive summary details the days each  
14 commission was on the record in FY '14 and '13 along with  
15 actual hours on the record for each commission. The paragraph  
16 includes the statement, "In other words, during FY '14 the  
17 commissions as a whole averaged less than three days of  
18 hearings each month and an average of less than three and a  
19 half hours on the record for the days on which hearings were  
20 held. An analysis of the FY '13 hearing data yields a similar  
21 pattern." Additionally, quote, "If you approve my  
22 recommendation, which includes Change 1, I believe the pace of  
23 litigation will accelerate." The executive summary includes

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1 the recommendation that ultimately became Change 1.

2 On 7 January 2015 DEPSECDEF approved the  
3 recommendation of Mr. Ary as to Change 1. On 26 February '15  
4 DEPSECDEF rescinded Change 1 in response to the ruling on a  
5 similar motion in U.S. v. Khalid Shaikh Mohammad.

6 Mr. Ary did provide credible testimony before the  
7 commission. Detailing military judges -- and this is the law  
8 that applies to the motion, "A military judge presides over  
9 each military commissions case. The assignment of a military  
10 judge to a commission case is the act of detailing. A  
11 military judge shall be detailed to each military commission  
12 under this chapter, SECDEF shall prescribe regulations  
13 providing for the manner in which military judges are so  
14 detailed to military commissions."

15 10 U.S.C. 948j(e) requires consultation with the  
16 service TJAGs should a third party desire to assign other  
17 duties beyond presiding over a military commission to a  
18 commissioned military judge. A commissioned officer, as  
19 certified to be qualified for duty as a military judge of a  
20 military commission under this chapter, may perform such other  
21 duties as are assigned to such officer by or with the approval  
22 of the Judge Advocate of the armed force of which such officer  
23 is a member.

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1           10 U.S.C. 948j(f) makes it clear the convening  
2 authority cannot formally or informally comment on how  
3 commission judges preside over the case to which they're  
4 detailed. The convening authority of a military commission  
5 may not prepare or review any report concerning the  
6 effectiveness, fitness, or efficiency of the military judge  
7 detailed to the military commission which relates to the  
8 judge's performance of duty as a military judge.

9           In the Rules for Military Commissions, Secretary of  
10 Defense gave substance to the statute, "Secretary or his  
11 designee selects a chief trial judge from the pool of military  
12 judges certificated by the service TJAGs. Secretary of  
13 Defense or designee shall select a military judge from the  
14 pool to serve as the chief trial judge for the military  
15 commissions. A military judge shall be detailed to preside  
16 over each military commission by the chief trial judge from a  
17 pool of certified trial judges nominated for that purpose by  
18 the TJAGs of each military department. It is within the  
19 discretion of the chief trial judge to detail and remove trial  
20 judges from commission cases."

21           The Rule for Military Commission does not bestow this  
22 detailing or removal of authority to the convening authority,  
23 the DEPSECDEF, or even the service TJAGs. The United States

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1 Supreme Court in United States v. Weiss recognized the  
2 importance of this statutory scheme designed to protect the  
3 independence of military judges by shielding them from the  
4 authority of the convening officer.

5           Here the chief trial judge is responsible for the  
6 supervision and administration of the military's trial  
7 judiciary. The chief trial judge is the Secretary's sole  
8 designee for these matters. The convening authority, as  
9 Director, Office of the Convening Authority, has the  
10 responsibility to ensure the trial judiciary is properly  
11 staffed with a chief clerk of the trial judiciary and any  
12 additional staff necessary to perform the various support  
13 roles and duties necessary to maintain the proper and  
14 efficient administration of the trial judiciary, and to assign  
15 other personnel necessary to facilitate military commissions.

16           The convening authority's sole interaction with the  
17 trial judiciary is as a provider of resources, not a creator  
18 of requirements, not a supervisor of trial judges or staff,  
19 and most certainly not an entity that sets the pace of  
20 litigation.

21           This next section talks about unlawful influence.  
22 The 2009 Military Commissions Act prohibits actual or  
23 attempted unlawful influence. The Act prohibits such

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1 influence, regardless of source, and actually provides greater  
2 protection than the Uniform Code of Military Justice, which  
3 prohibits unlawful command influence. Although the 2009 MCA  
4 provision is more expansive than the UCMJ, extensive UCI  
5 litigation in military courts provides a useful framework to  
6 analyze the issue in front of us.

7           UCI is the improper use, attempted use, or perception  
8 of use of superior authority to interfere with a court-martial  
9 process. UCI is seen as the mortal enemy of military justice.  
10 Article 37 of the UCMJ was enacted by Congress to prohibit  
11 commanders and convening authorities from attempting to coerce  
12 or by any unauthorized means influence the action of a  
13 court-martial or any member thereof in reaching the findings  
14 or sentence in any case. UCI can manifest itself in a  
15 multitude of different situations and it can affect the  
16 various phases of the court-martial process.

17           Furthermore, the term "unlawful command influence"  
18 has been used broadly in our jurisprudence to cover a  
19 multitude of situations in which superiors have unlawfully  
20 controlled the actions of subordinates in the exercise of  
21 their duties under the UCMJ. Unlawful command influence can  
22 manifest itself in one of two ways, either actual unlawful  
23 command influence or apparent unlawful command influence.

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1           The Regulation for Trial by Military Commissions  
2 specifically warns against the appearance of unlawful  
3 influence. All persons should be sensitive to the existence  
4 or appearance of unlawful influence and should be vigilant and  
5 vigorous in their efforts to prevent it. So therefore even if  
6 there is no actual UCI or UI, there may still be apparent  
7 unlawful influence, and the military judge must take  
8 affirmative steps to ensure that both forms of potential  
9 unlawful command influence are eradicated from the court in  
10 question.

11           The appearance of unlawful command influence is as  
12 devastating to the military as the actual manipulation of a  
13 given trial. Thus, the resolution of an issue involving  
14 unlawful command influence, once it has been raised, is  
15 insufficient if it fails to take into full consideration even  
16 the mere appearance of unlawful command influence.

17           The question of whether there is apparent unlawful  
18 command influence is determined objectively. This objective  
19 test for apparent unlawful command influence is similar to  
20 tests that are applied in determining questions of implied  
21 bias of court members or in reviewing challenges to military  
22 judges for an appearance of a conflict of interest.

23           Specifically the court must focus on the perception

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1 of fairness in the military justice system as viewed through  
2 the eyes of a reasonable member of the public. The central  
3 question to ask is whether an objective, disinterested  
4 observer fully informed of all the facts and circumstances  
5 would harbor a significant doubt about the fairness of the  
6 proceedings.

7           In U.S. v. Biagase the United States Court of Appeals  
8 for the Armed Forces provides an analytical framework  
9 applicable to cases of unlawful command influence, and the  
10 court held the initial burden is on the defense to raise the  
11 issue. The burden is low, but it's more than mere allegation  
12 or speculation. The quantum of evidence required to meet this  
13 burden and thus raise the issue of unlawful command influence  
14 is some evidence. Elaborating on this rule, C.A.A.F. held the  
15 defense must show facts which, if true, would constitute  
16 unlawful command influence, and it must show that such  
17 evidence has a logical connection to the court-martial at  
18 issue in terms of potential to cause unfairness in the  
19 proceedings.

20           Again, if the defense shows some evidence of such  
21 facts, then the issue is raised. Once the issue has been  
22 raised, the burden shifts to the government. The government  
23 may show either there was no unlawful command influence or

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1 that any unlawful command influence would not taint the  
2 proceedings.

3           If the government elects to show there was no  
4 unlawful command influence, it may do so either by disproving  
5 the predicate facts on which the allegation of unlawful  
6 command influence is based or by persuading the judge that the  
7 facts do not constitute unlawful command influence. The  
8 government may choose not to disprove the existence of  
9 unlawful command influence, but instead prove that the  
10 unlawful influence will not affect the specific proceedings at  
11 issue. No matter which tactic the government chooses, the  
12 government's burden is beyond a reasonable doubt.

13           If actual or apparent unlawful influence is found to  
14 exist, the military judge has broad discretion in crafting a  
15 remedy to remove the taint of unlawful command influence, and  
16 such remedy will not be reversed so long as the decision  
17 remains within that range. The judge may consider dismissal  
18 of charges when the accused would still be prejudiced despite  
19 remedial action or if no useful purpose would be served by  
20 continuing the proceedings. However, when an error can be  
21 rendered harmless, dismissal is not an appropriate remedy.  
22 Dismissal is a drastic remedy, and courts must look to see  
23 whether alternative remedies are available.

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1           Indeed, the court went on to say, "This court has  
2 recognized a military judge can intervene and protect a  
3 court-martial from the effects of unlawful command influence.  
4 The military judge should attempt to take proactive curative  
5 steps to remove the taint of unlawful command influence and  
6 ensure a fair trial."

7           C.A.A.F. has long recognized once unlawful influence  
8 is raised, it is incumbent on the military judge to act in the  
9 spirit of the UCMJ by avoiding even the appearance of evil in  
10 his courtroom and by establishing the confidence of the  
11 general public in the fairness of the proceedings.

12           Let me move on to the discussion. The purpose of  
13 Change 1 was to accelerate the pace of litigation, and it was  
14 specifically predicated upon analyzing judicial performance.  
15 Mr. Ary, although well intentioned, was concerned with  
16 influencing the process so that the various commission cases  
17 were concluded at an accelerated pace.

18           Decisions on continuances and pace of litigation are  
19 within the sole discretion of the trial judge. A judge is  
20 responsible for the control of his or her court and the trial  
21 proceedings. Proper case management during a trial is  
22 encompassed within that responsibility.

23           This is a complicated international terrorism case

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1 under a relatively new statutory scheme with an unprecedented  
2 amount of classified evidence. There are numerous factors  
3 that impact the pace of litigation, not one of which would be  
4 affected by relocating the trial judiciary.

5 In the face of what was Change 1, any legitimate  
6 denial of a delay requested by the defense immediately gives  
7 rise to an issue as to whether the military judge acted in the  
8 interests of justice, personal convenience, or an  
9 acknowledgment of the convening authority's belief that the  
10 pace of litigation is too slow. Even though the DEPSECDEF may  
11 not have intended for the military judge to adjust his trial  
12 schedule to limit any personal inconvenience caused by living  
13 at GTMO, his actions created the appearance of that intent.  
14 An objective, disinterested observer fully informed of all the  
15 facts and circumstances would harbor a significant doubt about  
16 the fairness of the proceeding.

17 The convening authority was aware the implementation  
18 of Change 1 could have the direct effect of removing an  
19 otherwise properly detailed military judge from presiding over  
20 a military commission case to which they were currently  
21 detailed. He also knew the change had the potential to  
22 actually impact the available pool of judges who were  
23 available to be detailed to these cases.

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1           The convening authority in his e-mail to the various  
2 service TJAGs expressed his desire that the currently detailed  
3 military judges would remain on their cases. However, this  
4 demonstrates the convening authority was well aware of the  
5 potential impacts of Change 1. There is no evidence these  
6 outcomes were made known to the general counsel or the  
7 DEPSECDEF.

8           The defense has demonstrated that the motivation  
9 behind Change 1 was to ensure that trial judges would move  
10 cases along faster. This is evidenced by the history behind  
11 the change, the supporting documentation gathered in  
12 finalizing the recommendation, and the final package that was  
13 sent to DEPSECDEF for his signature. The convening  
14 authority's role is well defined in relation to the military  
15 commission trial judiciary.

16           The Director, Office of Convening Authority is  
17 critical in relation to resourcing. Resourcing is defined and  
18 clearly does not include the ability to impact the location or  
19 duties of currently assigned or detailed commission trial  
20 judges. Mr. Ary's recommended Change 1 was outside of his  
21 role as the convening authority for commission cases. He  
22 clearly stepped into the arena of the Chief Trial Judge of the  
23 Military Commissions and the service TJAGs, and he did this

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1 without any coordination or discussion with any of them.  
2 Additionally, the language of Change 1 even conflicts with the  
3 language of the 2009 Military Commissions Act and the R.M.C.s  
4 related to the detailing of commission judges, Regulation for  
5 Military Commissions.

6           The recommendation, if approved, would have the very  
7 real potential to impact an outsider's view of the objectivity  
8 of the trial judiciary, future rulings and decisions made by  
9 any trial judge, whether it involved Change 1 or not, and the  
10 fairness of the overall system. Any objective outsider  
11 watching the process may well have concerns that an impacted  
12 trial judge is making decisions in a manner that would allow  
13 them to depart GTMO and return to their previously assigned  
14 duty locations. They would easily wonder if decisions were  
15 made in the interest of speed, rather than a just, fair  
16 outcome.

17           The convening authority's gathering data to document  
18 how much time a particular military judge spent on the record  
19 in a commission case to show his dedication to moving the pace  
20 of litigation forward at an acceptable level can be viewed as  
21 a commentary on the efficiency with which the military judge  
22 exercises one of his functions in the conduct of the  
23 proceedings.

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1           His gathering of data occurred at the same time  
2 another commission judge made a comment about having conflicts  
3 with his two jobs. While possibly coincidental, again, an  
4 objective observer would have concerns about the timing of  
5 these events. Whether purposeful or not, the timing of the  
6 request for reports and the issue in another commission case  
7 that had been highlighted by Mr. Ary's staff gives rise to a  
8 strong impression that Mr. Ary was requesting information  
9 specifically about commissions trial judges and their  
10 efficiency. This improper report or comment is compounded in  
11 reporting this data in a repackaged format to DEPSECDEF in the  
12 executive summary in support of the need for the change.

13           This action directly impacted the trial judiciary and  
14 directly impacted the appearance of the independence of that  
15 judiciary. In fact, any objective observer would wonder if  
16 this was a punitive measure taken against trial judges and if  
17 it would impact their substantive decisions in order to cause  
18 the relevant case to move more quickly to conclusion. This  
19 appearance issue is solidified as the trial judges were the  
20 only entities the convening authority recommended and  
21 DEPSECDEF directed to relocate.

22           In applying the Biagase analysis, the defense more  
23 than met its initial burden to show some evidence that the

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1 action of the convening authority and DEPSECDEF raised the  
2 issue of unlawful influence by attempting to accelerate the  
3 pace of litigation and creating the appearance of improper  
4 pressure on the military judge to adjust the pace of that  
5 litigation.

6           There is no dispute the convening authority  
7 formulated Change 1, did not staff Change 1 as proposed  
8 outside his circle of legal advisors in the Office of the  
9 Convening Authority and the general counsel, recommended the  
10 change to DEPSECDEF, and that DEPSECDEF approved Change 1. As  
11 discussed earlier, the actions would affect the proceedings as  
12 they were directed solely at the military judge in these  
13 proceedings in the exercise of his sole discretion in managing  
14 the pace of litigation.

15           So finding that Mr. Ary set out to impact the pace of  
16 litigation with a likely acknowledgment -- I'm sorry, with  
17 acknowledgment of a likely impact on detailed judges, we turn  
18 to see if the government presented any evidence to demonstrate  
19 no unlawful influence or that the actual attempted or apparent  
20 unlawful influence will not taint the proceedings, or the  
21 taint was removed by corrective action taken by the  
22 government.

23           The government chose to present no evidence when

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1 offered the opportunity to do so. The government called no  
2 witnesses and they offered no additional documentary evidence.  
3 The government did not marshall any evidence to disprove the  
4 facts or their consequences if implemented.

5           There is no doubt the action of the convening  
6 authority and his legal advisors at a minimum appeared to  
7 attempt to unlawfully influence the military judge in this  
8 proceeding.

9           The commission certainly doesn't understand how  
10 assigning a military judge at GTMO would make the litigation  
11 proceed at a faster pace. Hearings in this capital-referred  
12 case require the presence of counsel, including learned  
13 counsel, and a large number of support personnel, almost none  
14 of whom are or, in the case of the learned counsel, can be  
15 permanently assigned to GTMO.

16           Unless the intent is to make the military judge  
17 ignore his duty to exercise discretion under the law and  
18 instead move the case faster to shorten his stay at GTMO, the  
19 purported change will not and cannot have its intended effect.  
20 Moreover, any legitimate denial of delay requested by the  
21 defense immediately gives rise to an issue as to whether the  
22 military judge acted in the interest of justice or personal  
23 convenience.

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1           Though the convening authority, in developing the  
2 recommended course of action worked to obtain DEPSECDEF  
3 approval, and ultimately DEPSECDEF approving the change may  
4 not have intended for the military judge to adjust his trial  
5 schedule to limit his personal inconvenience caused by living  
6 at GTMO, these actions did create the appearance of such an  
7 intent. An objective disinterested observer fully informed of  
8 all the facts and circumstances would harbor a significant  
9 doubt about the fairness of the proceeding.

10           As to whether the influence was removed, the  
11 government points to the rescission of Change 1. This only  
12 removes part of the appearance of unlawful influence. With  
13 Change 1 removed, the specific effort to speed the pace of  
14 litigation has been removed. However, the actions of the  
15 convening authority outside of his appropriate field of action  
16 cast a cloud over the independence of the military commission  
17 trial judiciary.

18           The convening authority in this case believed he had  
19 the responsibility to recommend action to his superior,  
20 DEPSECDEF, that would affect the location, duty assignment of  
21 the detailed trial judge. He went about making such a  
22 recommendation knowing it might result in the loss of this  
23 trial judge assigned to this case. As an experienced military

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1 attorney, he should have known this was an unwarranted  
2 intrusion into the sole province of the trial judge. A  
3 disinterested member of the public may always wonder whether  
4 this convening authority meant to have this particular judge  
5 removed or if it was just an unintended consequence. No  
6 matter, it leaves doubt as to the independence of the military  
7 trial judiciary.

8           Remedy: As noted in Douglas, the military judge has  
9 broad discretion in crafting a remedy to remove the taint of  
10 unlawful influence. In crafting a remedy, the commission  
11 takes note of the 26 February 2015 action by DEPSECDEF to  
12 rescind Change 1. DEPSECDEF did also require any future  
13 proposed change to the regulation of rules to be staffed with  
14 the Office of the General Counsel, the various DoD components,  
15 the service TJAGs, and the trial judiciary as appropriate.

16           This does not remove some of the unlawful influence  
17 from this case; however, the commission also notes the  
18 convening authority testified if presented with similar facts  
19 again in the future he would act similarly. He believed his  
20 recommendation was appropriate and, thus, DEPSECDEF's action  
21 proper.

22           Dismissal with or without prejudice is a drastic  
23 remedy, and it's not appropriate at this juncture. Lesser

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1 measures can be taken to remove the taint of unlawful  
2 influence from this military commission. DEPSECDEF has taken  
3 some action to purge the taint of unlawful influence, and the  
4 commission does find the convening authority did not act in  
5 bad faith in making the recommendation to Change -- which  
6 became Change 1.

7           However, the actions of the convening authority and  
8 his legal staff are central to the cause of the unlawful  
9 influence. In order to purge this military commission of the  
10 possibility of future of unlawful actions, the current  
11 convening authority, Mr. Vaughn Ary, and his staff of legal  
12 advisors, Mr. Mark Toole, Ms. Alyssa Adams, Commander Raghav  
13 Kotval and Captain Matthew Rich, are disqualified from taking  
14 any future action in this case. They are disqualified from  
15 all decisions related to this case and from providing  
16 recommendations specific to this case from this point forward.

17           Similar to disqualifications of a convening authority  
18 in the traditional military justice scenario, Secretary of  
19 Defense or his designee will appoint a new convening authority  
20 who will seek legal advice from a legal staff outside the  
21 Office of Military Commission, Office of the Convening  
22 Authority.

23           Furthermore, to ensure all taint from unlawful

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1 influence is expunged, the trial judge needs to affirmatively  
2 demonstrate there is no pressure to accelerate the pace of  
3 litigation or succumb to pressures of any convening authority.  
4 To demonstrate this, any potential evidentiary session this  
5 week is postponed until at least our next session on the  
6 record.

7           Additionally, the current scheduled April hearing in  
8 this case is truncated by one week. This is to further  
9 demonstrate the pace and timing of litigation is solely within  
10 my discretion and to demonstrate that this detailed trial  
11 judge feels no pressure to accelerate the pace of this  
12 litigation. It is imperative that no similar efforts be  
13 undertaken in the future to improperly influence the trial  
14 judiciary, as that will likely lead to a more drastic remedy  
15 in the future. So accordingly, AE 332 is granted in part and  
16 denied in part.

17           After working on and finalizing that ruling, I then  
18 worked on -- I don't have rulings to read to you, but I can  
19 give you at least some -- you're going to get written rulings  
20 that will confirm this with a couple other motions that are  
21 out there.

22           First, with regard to 205 -- I know we still have  
23 205, the large motion, outstanding. I don't have a ruling on

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1 that yet. I anticipate having a ruling on that reasonably  
2 soon, and I know it's been out there for a while, and for that  
3 I apologize. However, 205BB, a motion to reargue -- a motion  
4 to reargue, and 205EE, a motion to supplement additional  
5 pleadings, those are going to be denied. I anticipate you'll  
6 see those reasonably quickly, and then the ruling on 205 to  
7 follow.

8 Another one that you're going to see very soon is  
9 272D, a government reconsideration motion. I am not going to  
10 reconsider. The motion to reconsider is denied. If you have  
11 any questions about the order that's in place, you can talk to  
12 the trial judiciary staff, and they'll be happy to assist in  
13 what the order means, but I'm not going to reconsider that  
14 order. And, again, that written ruling should be on its way.  
15 I hope we get it done this week. We're working hard to get  
16 those rulings out in short order.

17 The unlawful influence motion took a lot of our time  
18 and a lot of effort, and the commissions have been the subject  
19 of other unlawful influence motions in the past, including the  
20 disqualification of a legal advisor in the past. I realize it  
21 was under an older Military Commissions Act. But I can't  
22 stress enough in any practice the importance of an independent  
23 judiciary and how improper it is for somebody to attempt to

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1 impact the judiciary, comment on the pace of litigation with a  
2 desire for it to go faster, and to take an action  
3 notwithstanding the fact it could result in my being relieved  
4 of my duties on this case because it gives the perception that  
5 the convening authority either doesn't want the person on the  
6 case or doesn't care if they leave the case, which is why the  
7 relief is formulated the way it's formulated.

8           We're going to break for lunch. My plan is to come  
9 back and begin to talk about the order we're going to take up  
10 the remaining motions on the docket. Over the weekend I had  
11 an e-mail through the trial judiciary. The defense wanted to  
12 start with 333. The government wants to start with 331 and  
13 the ones that impact how we're going to do the hearsay  
14 motions. Part of that was due to the timing of the  
15 evidentiary hearing at the end of the week, but we're not  
16 doing that at the end of the week. So we'll probably go in  
17 the order of the docket.

18           333 is going to require a closed session. And I'm  
19 going to try to do that this afternoon or early tomorrow so  
20 that we do everything on the record while everybody's here,  
21 and then we'll stop and try to do a closed session, like I  
22 said, either late today or early tomorrow. I'm going to give  
23 you all some time to gather your thoughts, work through the

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1 ruling. The written ruling hopefully will be published in the  
2 next few days, and I'd like to start at 1300 with the docket  
3 that we have before us.

4 Trial Counsel, any other matters to take up before we  
5 recess?

6 DCP [COL MOSCATI]: No, Your Honor.

7 MJ [Col SPATH]: Defense Counsel?

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

9 MJ [Col SPATH]: All right. I'll see you all at 1300.

10 We're in recess.

11 [The R.M.C. 803 session recessed at 1113, 2 March 2015.]

12 [END OF PAGE]

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